9. Can private class actions enforce regulations?
   Do they? Should they?

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INTRODUCTION

Fifty years ago representative class actions—lawsuits in which one or a few persons or entities are permitted to litigate on behalf of large numbers of other claimants who are not before the court—were unique to the United States. Although many jurisdictions permitted parties with similar claims to petition the court to proceed jointly with regard to some or all issues, the notion that a party could independently come forward, claiming to represent similarly situated others ("the class") without the active consent of those others, was considered radical—a violation of due process or perhaps even human rights. In the view of many legal scholars and public officials, the right to pursue a remedy for personal injury, property damage, breach of contract, or violation of a constitutional right is akin to a property right and belongs to the injured individual. To allow someone else to claim a legal remedy on behalf of an injured party interferes with this property right and therefore individual autonomy.

Today, however, a growing number of countries provide by law for representative class actions. The trend began in Anglo-American countries with common law systems (e.g. Australia, Canada, Israel), and then spread to civil law regimes in Asia, Europe and South America. To date, more than three dozen countries, with political structures ranging from participatory democracies to one-party autocracies, and ideological perspectives ranging from neo-liberal to communist, have adopted some sort of representative class action procedure (see Table 9.1). Twenty-one of the 25 countries with the largest economies, as measured by GDP (International Monetary Fund, 2014), permit class actions for one or more types of claims. Most of these procedures have been adopted since the mid-1990s.

The global spread of representative class actions raises the question of whether they are capable of achieving their suggested purposes, among which the most important is the enforcement of economic regulations. This chapter focuses on the role of private class in enforcing regulations in the domain of employment and consumer protection, product safety, anti-trust, and securities law.¹ It marshals the available empirical evidence to address three related questions:

¹ This chapter deals solely with class actions brought by private actors. It excludes civil enforcement litigation, which is brought by public regulatory agencies such as the U.S. Securities and Exchange Commission and the Australian Securities and Investment Commission (ASIC), and "parents patriae" suits, which are brought by U.S. state attorneys general and are sometimes analogized to or confused with private class actions (Lemons, 2012).
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1. Can the modern class action, modeled after the U.S. Federal Rule 23, enforce economic regulations?
2. In the jurisdictions in which they have gained the most traction do class actions help enforce economic regulations, and, if so, under what circumstances?
3. Should public policy makers permit private class actions that have as their primary purpose enforcing economic regulations?

Table 9.1 Countries that have adopted a class action procedure for one or more types of legal claims

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The chapter proceeds as follows. Section II analyzes the global dimension of class actions and explores the reasons for their diffusion. Section III describes the key features of class actions and discusses how the formal design of class action procedures and the interaction of class action rules with other legal rules affect the potential of class actions to enforce economic regulations.² It demonstrates that there is significant variation across jurisdictions on these key features and legal rules. Section IV marshals the available empirical evidence on how class actions work in practice, which comes

² There is a vast theoretical literature on regulatory enforcement that straddles multiple disciplines, including economics, political science, psychology, and law. Most theorists agree that effective enforcement requires self-regulation by market actors, public enforcement by regulatory agencies and criminal prosecutors, and private litigation. Theorists, practitioners, and public policy makers disagree about the relative roles of different actors. Reviewing this literature is beyond the scope of this chapter.
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from the United States, Australia, and Israel. These data indicate the frequency of class action lawsuits over time and among jurisdictions, how they are disposed (e.g. settlement vs. adjudication), and their legal outcomes. The final section concludes that the available evidence is too incomplete to determine the general effectiveness of private class actions in regulating different sectors of the economy. The inadequacy of the evidence demonstrates that policy makers should be cautious about popular assertions about both the benefits and costs of class actions. The final section outlines the ingredients of an empirical research program on the uses and outcomes of private class actions. Until better data are available on the relative contribution of public and private mechanisms to the enforcement of economic regulation, I argue that we should craft regulatory policies that promote redundancy.

THE GLOBALIZATION OF CLASS ACTIONS

A number of scholars have cautioned against using the term “legal transplant” to describe the process of legal diffusion (Watson, 1974). Rather than give rise to abrupt legal change, as the term suggests, the migration of law generally occurs through a gradual process in which some features of the original law are dropped, while others are substantially modified to render them compatible with the legal system of the borrowing country (Graziadei, 2006). For late adopters, in light of the many mutations that occur along the way, the origin of a legal transplant may not be very important. Notwithstanding this general observation, the term appears to be an apt characterization of the spread of class actions: an exotic legal transplant brought into foreign jurisdictions in a fairly abrupt fashion and with full awareness of its provenance. References to the United States are rife in legislative debates about adopting class action procedures. The proposed procedures often are explicitly modeled on U.S. Federal Rule of Civil Procedure 23, and when deviations are proposed, often they also are modeled on amendments that have been (so far unsuccessfully) proposed in the United States.\(^3\) Class action opponents warn that adopting a class action procedure will lead their country down an undesirable path to frivolous litigation, entrepreneurial lawyering, and undue pressure on corporate decision making, all of which they associate with U.S. litigation. Class action supporters respond that they are not championing “American-style” class actions, but rather a version of the procedure that has been crafted carefully to capture the virtues of the U.S. class action without its perceived vices.

A number of explanations have been proposed for the diffusion of social policies generally, and legal norms and practice in particular, including coercion, economic and political competition, and social learning (Dobbins et al., 2007). There is still no systematic empirical investigation of the remarkable spread of the modern class action but a number of these factors appear to have been at work.

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\(^3\) For example, most jurisdictions that have recently adopted class actions require that class members affirmatively opt in to the class, rather than relying on dissident class members to opt out. Class action reformers in the United States have argued unsuccessfully for decades in favor of changing the U.S. rule to require opt-in.
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Historically, military conquests and imperialism were the sources of legal transplants. England, France, the United States and other nations imposed elements of their own legal regimes on their colonies. Over time, these new rules fused with indigenous norms to create new substantive, procedural, and evidentiary law. U.S. class action law derives from medieval English notions of group action, which were brought to the United States by English colonists (Hensler et al., 2000). However, England later abandoned the idea of representative group legal actions (Yeazell, 1987), and in recent years England has been the staunchest opponent of class actions in Europe. There is no contemporary example of a class action procedure being adopted as a result of military conquest or imperialist coercion.

Contemporary diffusion theorists have focused on less coercive mechanisms for the migration of political, social, and cultural norms from one nation to another (Dobbins et al., 2007). Some theorists focus on incentives created by external circumstances, for example when global financial institutions condition aid on the adoption of liberal economic policies, or when national policy makers in one country believe they must change their policies to match those of other countries so as not to lose out in economic competition. There are some clear examples of such mechanisms contributing to the diffusion of legal rules and practices. The World Bank promoted the spread of alternative dispute resolution procedures to Latin America (Dakolis, 1996). Investment arbitration owes its popularity to the inclusion of arbitration provisions in bilateral investment treaties that developing nations enter into in the hope of attracting foreign investment (Mascarenhas, 2014). Contrary dynamics, however, appear to be at work in the case of class actions. In recent years, the U.S. Chamber of Commerce has mounted an extensive campaign to discourage other countries from adopting class actions (Institute for Legal Reform, 2009, 2013). Global financial institutions and foreign investors are more likely to take their cues from the U.S. Chamber of Commerce than from civil society supporters of class actions. At the same time, competitive incentives in favor of class actions may also be at work. Although national decision makers are unlikely to view class actions as contributing generally to their economic competitiveness, some lawyers and judges have championed the adoption of class actions as a means of bringing more legal business to their courts (and hence legal practitioners), or at least not losing ground to neighboring countries' courts.4

Other theorists see diffusion of policies and practices, including legal norms, as a species of social learning that is not necessarily instrumentally driven. Over time, policies or practices may migrate from one country to another even when the latter has not clearly identified a problem requiring a new policy or when it has little evidence that the borrowed policy will solve its recognized problems. The geographic pattern of the spread of class action procedures suggests that “copy-cat” behavior is one

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4 As the U.S. Supreme Court has restricted securities litigation, some Canadian lawyers and judges have proposed that their provincial courts (all of which have adopted a class action procedure) take up the slack. Similarly, some UK legal practitioners have argued that England needs to adopt a class action procedure to compete with the Dutch courts, which have a uniquely expansive class action regime. England’s recently adopted class action procedure applies solely to anti-trust (competition) cases, while the Dutch procedure has been applied to a variety of claims.
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explanation of their diffusion. For example, all but one country in Northern Europe have adopted class action procedures although there is little reason to believe that this region of the world has a special need for group legal actions. Leaders of some developing nations may see class actions as an indicator of legal modernity. For example, Indonesia adopted a class action procedure as part of its 21st century legal reform program, although outsiders might think it unwise to initiate a court modernization campaign by adopting a complex and controversial procedure.

Diffusion of policies, including legal transplants, may also result from a rational, national decision-making process aimed at finding solutions to emergent problems. For example, the Netherlands adopted a uniquely consensual version of a class action to provide a mechanism for efficiently resolving a multitude of personal injury claims resulting from the use of DES, a pharmaceutical product known to cause cancer in daughters of women to whom it was prescribed during pregnancy (Tzankova and Scheurleer, 2009). The Dutch designers of the procedure have said they looked to the United States for a model of how (and how not) to design their procedure. The German parliament resisted arguments for adopting a class action procedure to address a flood of financial claims against its former national bank, instead adopting a non-representative group litigation regime modeled after an English procedure (Baetge, 2009).

Comparative law scholars have focused on the role of legal elites in promoting legal transplants. Lawyers may advocate for the adoption of other countries' legal rules for disinterested reasons. However, they also may champion legal transplants because the establishment of new procedures will enhance their own professional status and, as a corollary, their income (Dezalay and Garth, 1996). The globalization of the legal profession, reflected in the growth of graduate law programs targeting foreign lawyers, has introduced legal practitioners and judges from around the world to legal procedures different from those of their home countries. U.S. law schools attract thousands of graduate law students annually, many of whom learn about U.S. civil legal procedures, including class actions. When they return to their home countries, some of these lawyers may advocate for adopting class actions, either as a sign of modernity or as a solution to a perceived problem.

As class actions have spread, their proponents have identified a number of goals for representative group litigation. The most widely cited goal is efficient management of mass claims. By allowing one or more individuals or entities to act on behalf of similarly situated claimants, courts and parties can resolve a large number of claims arising out of the same legal and factual circumstances in a single action. Although some class action opponents argue that class actions are expensive and time consuming, when claims number in the thousands or more it is unlikely that the total cost of

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5 My global law seminar most recently included lawyers from Chile, Germany, Israel, Switzerland, Thailand, and New Zealand plus a Japanese judge and a Brazilian prosecutor. Switzerland and New Zealand are currently debating whether to adopt class actions, and Germany has adopted a group litigation procedure as its preferred alternative to a class action. The Brazilian prosecutor was pursuing research on reforming Brazil’s existing class action procedure. The Japanese judge was preparing himself to preside over class actions when Japan’s new class action law goes into effect.
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developing the law and facts in each individual case and adjudicating each case separately will be less than the cost of a single action, even a relatively complex one. The choice therefore is among managing the claims as an aggregate, consigning them to inefficient or lower-quality individual dispute resolution, or ignoring them altogether (Hensler, 2011, 2014). The class action is one mechanism for aggregate resolution, albeit not the only one.6

The second most widely cited goal of class actions is access to justice, particularly for claimants who have suffered economic losses as a result of illegal acts but whose losses are too small to warrant costly litigation. Small individual losses are the characteristic consequence of violations of consumer protection, anti-trust, and employment law but may also occur as a result of violations of securities law. Because in most jurisdictions individual litigation costs are substantial, individuals and small businesses that have lost hundreds or even thousands of dollars as a result of these sorts of corporate misbehavior have no option but to “lump it.” Although small relative to the transactions of institutions and affluent individuals, such sums are significant to many of those who suffer such losses. By bringing scale efficiencies to the dispute resolution process, class actions make litigation of small claims economically viable. In some jurisdictions, such as Australia and Canada, courts have explicitly recognized increasing access to courts for claimants with relatively small-value claims as a goal of class actions.7 Class action opponents in the United States who argue that class action procedures open the courthouse doors too wide are usually careful to say the availability of class actions encourages “frivolous” litigation (Beisner et al., 2009).

Improving access to the courts for claimants with small losses can be justified as a matter of fairness. Participants in the European debate on class actions have adopted the term “collective redress” to refer to the goal of ensuring access to dispute resolution, both court based and out-of-court, when mass harms produce many small-value claims. Framing access as “redress” focuses on the compensatory goal of legal dispute resolution. Many class action advocates, however, view ensuring court access for claimants with small—or even large—losses as a means of bolstering enforcement of economic regulations when public enforcement is absent or insufficient. The Supreme Court of Canada has identified deterrence as one of the goals of Canadian class actions.8 During debate in Australia’s parliament about adopting class actions, the then-Minister of Justice and Consumer Affairs asserted that the ability of shareholders to bring class actions “will be a great aid to the more formal regulators, such as the Australian Securities Commission.”9 Whether regulatory enforcement ought to be a goal of collective litigation (whatever the size of claimed losses) is central to controversy over the use of class action procedures in virtually every jurisdiction that

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6 Others include multi-district litigation in the United States, the English Group Litigation Order, and the Capital Market Model Case procedure in Germany (Hensler, Hodges & Tzankova, 2016).


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has considered adopting, expanding, or restricting their use (Hensler, Hodges, and Tzankova, 2016). In light of the importance of this objective to contemporary debates over class actions, the rest of this chapter examines the enforcement potential of private class actions.

CAN PRIVATE CLASS ACTIONS ENFORCE ECONOMIC REGULATIONS?

Formally speaking, class actions can help enforce economic regulations in two ways. Class actions can directly affect private actors' economic behavior by enjoining them from or directing them to pursue specific policies (legally termed injunctive or declaratory relief). In the United States, Rule 23(b)(2) provides for injunctive class actions. Many other jurisdictions that have adopted class actions restrict the remedies obtainable to injunctive and declaratory relief in all or most circumstances (Hensler, 2009).

Class actions can also regulate economic behavior indirectly by requiring market actors to pay damages for violating the law. The notion that damage class actions can deter misbehavior is a straightforward extension of the economic analysis of tort law (Calabresi, 1970; Shavell, 1987; Miller, 2013). Deterrence is a product of the likelihood that those who are injured by an employer’s, manufacturer’s, or service provider’s misbehavior will bring a lawsuit in the form of a class, the likelihood that the class will prevail by settlement or adjudication, and the value of the damages (if any) the defendant pays. From a deterrence perspective, whether the class members recoup their damages or whether the defendant pays an equivalent sum to others (e.g. in the form of cy pres remedies, discussed below) or indeed to class counsel is irrelevant (Connor, 2007). The goal is to incentivize economic actors to include the expected value of injuries or losses caused by their illegal behavior (including the legal expenses associated with recouping losses) in their calculus when deciding whether and how to design, produce, distribute, and market a product or service.

U.S. law is generally viewed as more supportive of private regulatory enforcement class actions than the rules and law of other jurisdictions. However, recent decisions by the U.S. Supreme Court have cut back sharply on the potential for regulatory enforcement via class actions in virtually all realms of economic behavior, including employment.

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10 Prior to recent U.S. Supreme Court decisions, injunctive class actions were the most common form of civil rights class actions on behalf of employees and customers seeking elimination of discriminatory practices. In Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011), the Court de-certified an employment discrimination class action brought by female employees of the retail giant. A divided court held that the claims did not satisfy the commonality requirements of Rule 23(a). At the same time, the justices unanimously held that 23(b)(2) could not be used to pursue the class members’ damages claims.

11 Traditionally, such suits have been referred to as “private attorneys general” suits (Coffee, 1983, 1986).

12 See, for example, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (de-certifying a class of female employees charging gender discrimination in promotion and pay). Taken together with previous decisions upholding contractual requirements to arbitrate a wide range of
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consumer transactions,\textsuperscript{13} anti-trust,\textsuperscript{14} and securities fraud.\textsuperscript{15} Although many commentators assume that mass personal injury claims such as product liability, toxic exposure, and catastrophic accident claims are routinely treated as class actions in the United States, U.S. federal courts have long disfavored certifying these as class actions.\textsuperscript{16}

The regulatory enforcement potential of all class action procedures depends primarily on five features:

- Their legal scope (What kinds of cases can be brought as class actions?)
- Their standing rules (Who can represent the class?)
- Whether the procedure is “opt-in” or “opt-out” (How is class membership determined?)
- The type of remedy available (What can successful class members obtain?)
- Legal financing rules (Who pays the legal costs of bringing class actions?)

Scope

In the United States class actions are “trans-substantive,” meaning that absent case-specific restrictions, they can be used to regulate diverse behaviors, including employment practices, consumer transactions, compliance with anti-trust (competition) and securities law, and other financial practices. In many other jurisdictions that have adopted class actions, however, class claims are authorized only for violations of particular statutes. Often authorization for a representative class action is included in the substantive statute, rather than in a separate procedural rule. Among common law jurisdictions, trans-substantive class action rules prevail, reflecting a general preference for trans-substantive procedures in Anglo-American legal regimes. However, in Latin America and Asia, most class action procedures apply only to securities fraud or consumer protection,\textsuperscript{17} while the picture in Northern and Western Europe is mixed. It is

\textsuperscript{13} AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).
\textsuperscript{14} Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013); Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).
\textsuperscript{16} See, for example, Amchem Prods. v. Windsor, 521 U.S. 591 (1997).
\textsuperscript{17} Indonesia is an exception to this pattern; there class actions have been used primarily in environmental damages and mass accident cases (Santosa, 2009).
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common for countries to adopt a limited-scope procedure and then, over time, if it is deemed successful, to broaden it to cover other areas of law (Hensler, 2009). For example, Israel first limited the scope of class actions through individual substantive statutes but later adopted a procedure that can be used for many different types of substantive claims, although it is not completely trans-substantive. Belgium and France, which long resisted the European trend towards class actions, both adopted class action procedures in 2014, but limited their application to consumer protection. Japan is another jurisdiction that had strong reservations about class actions; in 2013 it adopted a class action procedure for consumer protection cases.

Standing

In Australia, Canada, the United States, and certain other jurisdictions, an individual, non-governmental organization (NGO) or business entity may come forward and offer to represent a similarly situated group of individuals or organizations. The court may review the capacity of the party to adequately represent class members’ interests (including whether the party is “typical” of the class) but the representative need meet no other requirements. In other jurisdictions, only properly incorporated organizations (e.g. Italy), specially mandated associations (e.g. Taiwan), special-purpose foundations (e.g. the Netherlands), or a government official (e.g. Brazil, Denmark) have standing to represent a class in some or all circumstances. Limiting standing to represent a class to government officials or parties approved by government officials makes it less likely that a class action can go forward when public officials themselves would prefer not to enforce regulations against economic actors. In theory, government officials would base such decisions on legal analysis, perhaps tempered by cost–benefit considerations. In practice, the officials may be captured by the interests they are authorized to regulate. In such instances, a class action procedure that requires officials’ authorization to go forward is unlikely to contribute to regulatory enforcement (Hensler, 2009).

Opt-out vs. Opt-in

A highly controversial aspect of U.S. damage class actions is the opt-out rule that permits one or a few parties to represent a class of hundreds, thousands, or even millions without those class members first consenting to the action. The enormous potential size of some opt-out classes—and the related potential damages—increases defendants’ risk, which critics assert increases defendants’ likelihood of settling non-meritorious claims (popularly termed “blackmail settlements”). However, when individual losses are relatively modest, it is unlikely that many class members will invest the effort required to “opt in” to a class action. Other things equal, therefore, we would expect opt-in class actions to provide less deterrence in situations where defendants can garner large financial rewards from imposing small but illegal additional costs on individuals and businesses. Such individually small losses for class members accompanied by very large gains for corporations are characteristic of

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18 In the actions seeking only injunctive relief, not damages, U.S. law does not provide for opting out. The class is defined by counsel and approved by the judge.
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consumer suits and some anti-trust suits. Australia, Canada, and Israel permit opt-out class actions but most other countries require class members to proactively indicate their desire to participate in the class in all or most circumstances (Hensler, 2009: 15–16).

Damages

Economic actors who violate the law in the United States may be subject to statutory or common law damages. The risk of large damages, including punitive damages, is perceived as especially high in cases that are tried to jury, although outsized damages awarded by juries may be reduced by the trial judge or an appellate court. In the United States, the fact that a claim is filed in the form of a class action does not restrict damage enhancements such as statutory treble damages and common law punitive damages, and class representatives have the same right to jury trial as individual plaintiffs. The availability of exceptional damages plus the potential for a jury trial, means that the expected value of many U.S. damage class actions is huge. In theory, this potential should enhance the deterrent potential of class actions—in the view of corporate critics, far beyond the optimum. If class members can only obtain injunctive or declaratory relief, as is true in many other jurisdictions, injured individuals and entities may have less incentive to come forward and potential wrongdoers may decide that the expected value of a penalty for violating the law is too small to justify compliance (Huang, 2014: 14). The low rate of class action litigation in many countries that formally provide a class action procedure (e.g. Denmark, Norway, and Sweden) is widely attributed to the unavailability of monetary remedies. In most jurisdictions, punitive (exemplary) damages are never or rarely available in individual or collective litigation.

Legal Financing

The U.S. legal financing regime is very favorable to class action litigation. Except in cases where statutory fee shifting prevails, each side pays its own costs, eliminating any risk of adverse costs for class members. A lawyer is allowed—indeed, expected—to represent the class on a speculative basis. Because law firms must invest their own funds to maintain the class action and the firm will receive reimbursement of its expenses only if the litigation succeeds, the system favors resource-rich firms that have been successful in prior litigation. As a result, the class is likely to obtain better than average representation. If the class prevails, by settlement or trial, the judge will award counsel fees and expenses and all class members will pay a share of these, directly or indirectly. As a result, there is no financial disincentive for a class member to step forward and offer herself as a class representative. Critics of U.S. class actions argue

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19 For examples of statutory damage provisions in diverse domains of economic activity, see Huang (2014: n. 9).
20 U.S. class representatives may receive additional financial rewards to compensate them for their involvement in the litigation, but such incentives are deliberately modest so as to avoid a conflict of interest between the class representative and class members. See, for example, In re
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that the intersection of these legal financing rules with class action rules produces excessive numbers of class actions, many of which are “frivolous,” as well as settlements that reward class action lawyers far more than the settlement is worth to class members. Under U.S. law, when the class prevails, judges are charged with deciding what plaintiff counsel should receive for their time and expenses. Legal doctrine provides for two approaches to calculating fees: the “percent of fund” method, akin to the contingency fees plaintiffs agree to pay in ordinary personal injury litigation; and the “lodestar” method, which equals the product of attorney hours, typical hourly rates in the jurisdiction in which the class action was litigated (the “lodestar”), and a discretionary “multiplier” that may enhance (or reduce) the product to reflect the lawyer’s effort and the riskiness of the case.\(^{21}\)

Many other jurisdictions that have adopted class action procedures have legal financing regimes that are far less favorable to class litigation. In jurisdictions that require the losing party to pay the fees of the prevailing party, the risk of loss looms very large for representative plaintiffs, especially if they alone among the class members are responsible for costs and are required to post bond against the possibility of losing. In jurisdictions in which lawyers may not represent clients on a speculative basis (e.g. “no win, no fee”), representative plaintiffs must contract to pay the class counsel’s hourly fees and expenses as the case moves forward, as well as potential adverse costs (i.e. loser fees), a daunting proposition. If the representative plaintiff is an individual who contracts with a law firm to prosecute the class action while other class members get a “free ride,” it is more attractive for class members to hang back than to come forward to offer themselves as representative plaintiffs. In jurisdictions that grant standing only to associations, NGOs may not have sufficient resources to shoulder these costs and risks, and even those with adequate resources may decide not to sue in view of the potential, adverse reaction of their members if the class does not prevail. In these sorts of legal financing regimes, class actions are more likely to be under-utilized than over-utilized.\(^{22}\)

One response to the limitations imposed by legal financing rules has been third-party litigation financing. In Australia, where the notion of investing in commercial litigation seems to have first taken hold, litigation financiers contract with class members to pay class counsel and take on the risk of adverse costs in return for a share of any damages the class member may obtain. Although Australian law does not permit lawyers to charge fees calculated as a share of damages, the litigation financiers are not subject to such restrictions. These contracts between financiers and class members have transformed what is formally an opt-out class action regime into an opt-in regime, as the financier only offers support to those with whom it contracts (Cameron, 2016). “Closed


\(^{22}\) Interestingly in view of international criticism of U.S. class counsel fees, judges outside the United States generally do not review attorney fees in ordinary or class litigation, on the grounds that they are strictly governed by attorney-client contracts. Prohibitions or limitations on contingency fees or other speculative fee arrangements are imposed by the professional responsibility rules of national bars. Lawyers sometimes find ways around these restrictions, for example by charging modest hourly rates plus “success fees” when their clients prevail.
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classes” comprising only those who have contracted with the financial backers have been challenged but upheld by Australian courts as a necessary mechanism for overcoming the financial barrier to class litigation that would otherwise exist.23 In Europe, a different mechanism has emerged: corporations with competition claims assign their claims to a special-purpose financial entity that hires lawyers to represent it in a single action for the total value of those claims, obviating the need for a formal procedure for collective litigation (Geradin and Grelier, 2013). Third-party financing has emerged only recently in the United States, and financiers claim to be steering their investment away from class actions (Hensler, 2013a). Many financiers, however, contract directly with law firms that represent plaintiffs in mass litigation, both class actions and non-class aggregate litigation (Goral, forthcoming).

In addition to legal financing rules, other aspects of civil legal regimes may facilitate or hinder regulatory enforcement litigation, whether individual or in class form. Relaxed jurisdictional rules allow plaintiffs to choose friendlier fora and relaxed disclosure (“discovery”) rules make it more likely that plaintiffs will be able to obtain evidence to support their liability and damage claims. Longer statutory limitations give plaintiffs more time to uncover wrongdoing and file claims (Geradin and Grelier, 2013).24

DO CLASS ACTIONS ENFORCE ECONOMIC REGULATIONS?

To enforce economic regulations using class actions, class members or their representatives must identify instances of legal violations by economic actors, file suits to challenge the violations, and prevail either by winning a trial verdict or negotiating a settlement that forces a change in behavior or imposes financial costs on those actors (or both). If class actions are the only deterrent mechanism, and the goal is optimal deterrence, the costs imposed by class actions on defendants (including monetary remedies and legal expenses) should equal the costs imposed on class members by the defendants’ illegal behavior, adjusted upward in order to take into account the likelihood that victims will not file claims for all instances of similar violations.25 Higher costs than the adjusted amount will over-deter the targeted behavior and lower costs will under-deter the behavior. If public prosecution—criminal charges or civil enforcement actions—accompanies private class actions, and if victim compensation is irrelevant, then the optimal deterrence calculation arguably should also take into account the expected value of criminal and civil penalties (and the costs of defending

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24 For these reasons, Geradin and Grelier (2013) argue that the UK, Germany, and the Netherlands are attractive jurisdictions for plaintiffs seeking cartel damages.
25 Deterrence theorists might also support downward adjustments to reflect indirect costs of litigation, such as loss of market share and diminished stock values that often occur in the immediate aftermath of high-profile class litigation (Hensler, 2013b). The goal of optimal deterrence is for the economic actor to “internalize” the costs of its decisions and engage in the relevant behavior—e.g. manufacture and distribute the drug, contract with a worker or consumer, etc.—only when the benefits outweigh these costs.
Comparative law and regulation

against such actions); the damages assessed in private class actions should equal whatever fraction remains. It follows that assessing the contribution of private class actions to optimal deterrence requires data not only on class action claiming rates and outcomes but also on the likelihood and outcomes of criminal and civil enforcement actions. For each enforcement mechanism we need to know as well the accuracy of decisions to enforce—that is, the ratio of false negatives to false positives—and the relationship between the total sum of penalties, fines, and damages paid by the defendant and the costs that the defendant’s illegal behavior imposed on others. In addition, a full accounting of the contribution of private class actions to regulatory enforcement should include the value of information uncovered by private enforcement suits to public enforcers and the effect of private suits and the publicity attending them on public actors’ decisions to pursue enforcement actions.

The empirical data to perform this complex set of calculations do not exist for any jurisdiction that has adopted representative class actions, including the United States. In the absence of such data, anecdotal examples have been used by both critics and supporters of class actions in American reform debates. However, without data on the frequency of legal violations, the rates of private enforcement relative to violations via class actions and public enforcement via the criminal justice and civil enforcement regimes, and the direct and indirect outcomes of both, it is impossible presently to draw evidenced-based conclusions about the general utility of class actions in the United States or elsewhere for enforcing market regulations.

Rather than throw up our hands in despair at this sorry state of affairs, it should motivate us to develop an empirical research program capable of improving our understanding of private and public enforcement and the relationship between the two. In Section V, I suggest the outlines of such a program. It is unlikely, however, that even highly motivated and well-subsidized analysts will be able to come to firm conclusions any time soon. The questions of what contribution class actions actually make to regulatory enforcement and the circumstances under which class actions have a net benefit to society are likely to remain unanswered for a long time to come.26 As a result, in what has become a highly polarized policy debate, we should be cautious about accepting the assertions made by the participants in the debate about the net benefit of private class actions relative to public enforcement.

The remainder of this section presents the available data on the number and type of regulatory enforcement class actions, their outcomes, and the relationship between private class actions and public enforcement. Although these data do not answer the ultimate question regarding the net benefit of regulatory enforcement class actions, they do provide some insights into the ways that class action procedures are implemented on the ground. Each of the topical sub-sections begins with a summary of the findings,

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26 While the challenges are daunting, they are perhaps no less daunting than the situation we faced some 50 years ago in the United States with regard to the effectiveness of health care delivery. Today, although health policy analysts are far from knowing everything needed to make rational policy choices, they are able to provide policy makers with some evidence of what "works" and what does not, and what the costs and benefits are of major health interventions. Similar dedication to empirical research on the outcomes of public and private enforcement could contribute to more rational policy making.
which is followed by detailed information for the jurisdictions for which information is available.

**Frequency and Types of Class Actions**

In many jurisdictions that have adopted class actions, only a handful of cases have been filed (Hensler, 2009), at least in part for the reasons discussed previously in Section III. If policy makers in those jurisdictions intended for class actions to help regulate the economy, it is unlikely that the procedure is doing so. In a few jurisdictions, available data indicate more frequent use of the procedure. The only comprehensive national data are for Australia, compiled by Morabito (2009, 2010, 2014) under a grant from the Australian Research Council, and for Israel, compiled by Klement et al. (2014) for the Israeli courts.

Both Australia’s and Israel’s class action rules are quite similar to U.S. Federal Rule of Civil Procedure 23, although their legal financing rules are more restrictive than U.S. financing rules. Australia’s federal class action statute became effective in 1992; Israel’s general class action statute became effective in 2007. Less complete data are available for the United States, where the current version of the federal class action rule was adopted in 1966.

The Australian, Israeli, and U.S. data cover different time periods and are derived from different sources; as a result, they are not precisely comparable. Taken together, the data indicate that even jurisdictions with quite similar class action regimes may have quite different experiences with regard to the use of class actions. Australian class actions are as rare as the platypus, while in Israel the most recent per capita filing rate was higher than the per capita rate in the same year for all civil litigation in California state courts. Although economic class actions predominate in all three jurisdictions, the ratio of large-value cases (e.g. securities and other financial investment class actions) to smaller-value cases (e.g. consumer protection class actions) differs dramatically among them. Whether this difference reflects differences in legal financing rules, judicial interpretation of class action rules, or other factors is not clear; most likely, multiple factors are at work, including perhaps the maturity (or lack thereof) of the rule itself.

**Number of class action filings**

From 1992 to 2014, 329 class actions were filed in Australia’s federal courts, an average of about 15 class actions per year (Morabito, 2014: 2). The average number of annual filings was somewhat higher during the first half of the procedure’s life and

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27 Some states in Australia also authorize class actions. The data presented in this chapter relate solely to federal class actions, which far outnumber those brought under state law. Prior to Israel’s adoption of a general class action statute, class actions were authorized in several separate statutes. For a description of the Israeli statute, see Magen and Segal (2009).

28 In Australia as in the United States, a single event or alleged legal violation may result in multiple duplicative class action filings, which are usually consolidated by the court. Morabito (2014) reports that about 50 percent of Australian federal class actions were associated with other class action filings. These 165 lawsuits were a result of 52 disputes (Morabito, 2014: 3). Because Morabito reports most of his data on a filing basis, rather than on a dispute basis, I have used the total filing numbers in this chapter.
somewhat lower during the more recent half. The largest number of class actions filed in a single year was 31, in 1998, the seventh year of the procedure; the smallest was 4, in 2005, the 14th year of the procedure. The total number of filings in the most recent reporting year 2013–2014 was 19. From 1992 to 2008, annual class action filings amounted to about 1 percent of total annual civil case filings (Morabito, 2010: 16).  

Israel’s annual class action filings have increased dramatically, from 28 in 2007 to 820 in 2012, the last year for which data are available. In all, a total of 2004 class action lawsuits were filed over this period. Filings in each year have increased substantially, relative to the preceding year, suggesting that the latest number is a better indicator of present use of the class action process than an average computed over several years (Klement et al., 2014). 

There is no comprehensive database of U.S. class action complaints. Using a variety of incomplete data sources for the mid-2000s, Hensler estimated that there were approximately 6500 class action complaints filed in U.S. state and federal courts in 2005, about 1 per cent of all civil case filings (Hensler, 2010).  

Table 9.2 assembles these data, along with the total population and GDP of each country. These three jurisdictions share features that we would expect to facilitate class actions, including broad scope, less restrictive standing rules, availability of money damages, and opt-out provisions. The (estimated) rate of annual class action filings per thousand people in all three jurisdictions is very small, with Israel, perhaps surprisingly, in the lead.

### Table 9.2 Number of annual class action filings, with population and GDP

<table>
<thead>
<tr>
<th>Country</th>
<th>No. of class action filings (year)</th>
<th>Population</th>
<th>Per thousand</th>
<th>GDP (U.S. dollars)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>19 (2013)</td>
<td>23 million</td>
<td>0.01</td>
<td>1 trillion</td>
</tr>
<tr>
<td>(Morabito, 2014)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Israel</td>
<td>820 (2012)</td>
<td>7 million</td>
<td>0.12</td>
<td>209 billion</td>
</tr>
<tr>
<td>(Klement et al., 2014)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>United States</td>
<td>6500 (2005)</td>
<td>298 million</td>
<td>0.02</td>
<td>12 trillion</td>
</tr>
<tr>
<td>(Hensler, 2010)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*Note:* Per capita estimates are author’s.

### Composition of the class action caseload

Since in many jurisdictions citizens may bring class actions to challenge government policy as well as to seek redress from private economic actors, to understand what role class action litigation might be playing in regulating the economy we need to disaggregate total filings. Disaggregated court statistics are in even shorter supply than

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29 Morabito’s more recent 2014 report does not report the ratio of class action filings to total civil filings.
30 Hensler’s estimate is for non-duplicative filings.
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total filing data. Morabito devised a coding scheme to distinguish the class action filings in his comprehensive Australian database by type of claim. Israel's statute specifies the types of claims that may be brought as class actions, which yields disaggregated information. Hensler et al. (2000) disaggregated statistics from a data collection effort in 1995–1996 that relied on a combination of reported judicial decisions and a content analysis of mass media. Table 9.3 assembles these data. Because the distribution of Australian class action filings by case type differed substantially between the earlier and later periods and because neither of these periods is identical to the period for which there are Israeli and U.S. data, Table 9.3 reports Australian data for 1992–2003 and for 2003–2014 separately.31

Table 9.3 Composition of class action caseload in Australia, Israel, and the United States

<table>
<thead>
<tr>
<th>Type of claim</th>
<th>Australia</th>
<th>Israel</th>
<th>United States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Securities, investment &amp; other non-consumer financial(^b)</td>
<td>17%</td>
<td>30%</td>
<td>2%</td>
</tr>
<tr>
<td>Consumer</td>
<td>6%</td>
<td>13%</td>
<td>77%</td>
</tr>
<tr>
<td>Anti-trust</td>
<td>&lt;1%</td>
<td>2%</td>
<td>1%</td>
</tr>
<tr>
<td>Product, liability/mass torts</td>
<td>26%</td>
<td>8%</td>
<td>Procedure does not apply</td>
</tr>
<tr>
<td>Employment</td>
<td>27%</td>
<td>7%</td>
<td>3%</td>
</tr>
<tr>
<td>Civil rights(^c)</td>
<td>&lt;1%</td>
<td>3%</td>
<td>1%</td>
</tr>
<tr>
<td>(Other) claims against government</td>
<td>18%</td>
<td>1%</td>
<td>14%</td>
</tr>
<tr>
<td>Other</td>
<td>6%</td>
<td>11%</td>
<td>2%</td>
</tr>
<tr>
<td>Total</td>
<td>100%</td>
<td>100%</td>
<td>100%</td>
</tr>
</tbody>
</table>

Notes:
\(^a\)The court reporting years in Australia begin and end in March. The data shown are for non-overlapping periods.
\(^b\)The 48 securities class actions brought in Australia's federal courts from 1992–2014 included nine brought by the Australian Securities and Investments Commission (Welsh and Morabito, 2014: 48).
\(^c\)The Israeli civil rights claims were brought against private parties; the U.S. civil rights category includes both claims against private parties and claims against the government.

In all three jurisdictions, class actions pertaining to economic behavior predominate. Securities class actions and other investment class actions constituted almost 20 percent.

31 The court reporting years in Australia begin and end in March. The data shown in Table 9.3 are for non-overlapping periods.
of the cases in the early period in Australia and in the U.S. (which covers roughly the same time period), increasing to a full 30 percent in Australia in the later period. Morabito attributes the shift in distribution in the Australian filings towards securities and investment cases in the last decade to the rise of third-party litigation financing (Morabito, 2014: 10). By contrast, there have been few securities class actions in Israel. The larger fractions of consumer protection cases in Israel and the United States, relative to Australia, may reflect differences in expectations of fee awards among the three countries. Judges award fees in civil litigation in Israel, taking into account both actual expenditures and results achieved (Eisenberg et al., 2014). In the United States, judges award fees in class actions (although not in ordinary civil litigation), taking similar factors into account. Australian lawyers are permitted to charge “no win, no lose” fees, but cannot charge fees based on damages obtained for their clients. The legislated fee regime has been modified by the introduction of third-party litigation financing but, as noted by Morabito, the financiers prefer to invest in higher-value securities and investment lawsuits. One reason for the relative disinclination for third-party financiers to invest in consumer class actions is that the large number and wide dispersion of potential class members make it difficult to create “closed” classes of individuals who have each contracted with the financier to fund the action, in exchange for a share of their individual winnings.32

Is there an optimal number of regulatory enforcement class action filings, relative to population size or economic productivity, which we might use as a benchmark for evaluating the frequency and distribution of regulatory class actions in Australia, Israel, the United States, or other jurisdictions? Without information on the frequency of violations of different types of economic regulations, the absolute numbers of cases do not allow us to assess whether there is too much class action litigation, too little, or just the right amount, either generally or in specific substantive domains. This “missing denominator” problem bedevils all efforts to evaluate the frequency of civil lawsuits, both individual and collective. Whether optimal or not, the low rates of class action filings reported in all three jurisdictions belie assertions that class action procedures produce a “flood of litigation.”

The Question of Merit

In assessing the value of private class actions for enforcing economic regulations, we need to know both the rate of “false negatives”—violations that were justiciable but did not lead to litigation—and “false positives”—litigation that had no basis in law or facts. Because no one knows the number of violations of economic regulations that go unchallenged by litigation, there is no way to calculate false negatives associated with different legal regimes. But a primary criticism of private regulatory enforcement class actions is that a substantial fraction—perhaps even the overwhelming majority—are frivolous or spurious—that is, “false positives.” How to define frivolous litigation is a vexed question: one person’s frivolous claim is often another’s legitimate pursuit of a legal right to a remedy. Trial verdicts arguably provide a measure of merit, but in many

32 Email communication with John Walker, co-founder and former executive director of Bentham/IMF Australia.
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jurisdictions a majority of claims never reach trial. In common law jurisdictions, however, even though cases often do not go to trial, a significant fraction of civil lawsuits are resolved by judicial decision or judicially approved settlement before trial. In the absence of other information about a claim, how a case was disposed pre-trial may provide a measure of merit.

Data on how ordinary civil lawsuits are disposed are patchy in all jurisdictions. The United States and Australia are the only two jurisdictions for which there are publicly available data on the patterns of disposition in class actions. As discussed in more detail below, the distributions of class actions by disposition type are fairly similar for the two jurisdictions. A substantial fraction of class complaints are dropped or withdrawn by plaintiffs, and a substantial fraction are settled by negotiation between the class and defendants. When cases are not dropped or settled they are likely to be disposed of by pre-trial judicial decisions in favor of defendants. In Australia, but not in the United States (at least recently), a small fraction of cases are disposed by trial or post-trial verdict in favor of class members.

The distribution of class actions by disposition type belies the frequent assertion in the United States (and in debates over adopting class action procedures elsewhere) that all class actions settle because it is too risky for defendants to pursue them (i.e. “blackmail settlements”). In fact, in the United States, in several of the samples for which disposition-type data are available, most cases did not yield compensation or other relief for the class. In the last decade, Australian class actions have been more likely to produce remedies for the class. In both jurisdictions, the available data suggest that class actions comprising higher-value claims (e.g. securities class actions), which are more likely to be litigated by experienced and well-financed class counsel, are more likely to reach either a pre-trial court judgment or a settlement than class actions that typically comprise smaller-value claims. The latter are more likely to be dropped or to end with a settlement with an individual putative class representative, that is, not the class, effectively ending any class action exposure for the defendant.

Multiple stories about the effectiveness of regulatory enforcement class actions might be told about these data. If many class complaints that do not yield remedies for the class are non-meritorious, then there is no offsetting benefit for the costs they impose on defendants, and ultimately on consumers as well. But if a significant fraction of

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33 In the United States only a tiny fraction of civil lawsuits is tried to verdict (Galanter, 2004).
34 Using dismissal, summary judgment, and settlement rates as proxies for merit is contestable; in the United States, both legal scholars and practitioners have fiercely criticized the U.S. Supreme Court’s articulation of the legal standards for dismissal and summary judgment (Thomas, 2010), and many U.S. defendants—particularly class action defendants—claim that they are “blackmailed” into settling non-meritorious cases because of the risks associated with going to trial.
35 The fact that in the United States, the majority of putative class actions are not formally certified as class actions unless and until they are settled (and not when they are disposed by pre-trial judicial decision or voluntarily dismissed by the plaintiff) is the likely source of the perception that “all class actions settle.” Recent U.S. Supreme Court decisions requiring extensive evidentiary hearings prior to class certification—arguably shifting battles from the summary judgment stage to the certification decision—may change this pattern.
these unsuccessful class complaints were abandoned by class counsel because of insufficient resources or because of legal standards that systematically advantage defendants to the detriment of plaintiffs, then society may be deprived of the potential benefits of a private regulatory enforcement regime. The available data do not allow us to choose between these stories—or indeed other stories.

The United States

There is no comprehensive database on class action dispositions in the United States, but four studies of certain types of class actions, using diverse data sources, report on the disposition of the claims included in the respective studies. Table 9.4 presents these data. The first study, conducted by RAND, was a survey of state and federal consumer class actions against insurers, based on insurer records (Pace et al., 2007: xxii, Table 5.1). The second, conducted by the Federal Judicial Center, the research arm of the U.S. federal courts, was a study of diversity class actions filed in federal court (diversity jurisdiction refers to when federal, not state, courts have jurisdiction over certain types of cases because the parties are residents of different states), comprising contract and tort class actions, before the 2005 passage of the Class Action Fairness Act (CAFA) (Lee and Willging, 2008). The third study, conducted by the Mayer Brown law firm for the U.S. Chamber of Commerce using data from commercial litigation reporters, dealt with federal employment and consumer class actions filed in 2009 (Mayer Brown, 2013). The fourth study, conducted by Cornerstone Research using data compiled by the Stanford Securities Class Action Clearinghouse, pertains to federal securities class actions resolved between 1996 and 2010. These data, presented in the final two panels of Table 9.4, permit us to distinguish the patterns of disposition by whether the class representative was an individual or institutional investor (Cornerstone, 2013: Figs. 15–16).

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36 The data in Pace et al. (2007) are from a non-random survey of mostly large property-casualty insurers. Two-thirds of the suits involved consumer complaints arising out of automobile insurance policies.

37 The data in Lee and Willging (2008) are a random sample of CAFA-eligible putative class actions filed in federal court and not remanded to state court, prior to the passage of CAFA, which expanded federal court jurisdiction for these sorts of class actions. Diversity cases would include consumer protection and employment class actions, inter alia, but would not include securities or anti-trust (competition) class actions.

38 The data in Mayer Brown (2013) were compiled from two commercial litigation reporters that follow class litigation. The final sample excluded a small number of state court class actions. Of the final sample of 169 cases, 14 percent were still pending (Mayer Brown, 2013: 81) and those cases are excluded from the analysis in this chapter.

39 The data from Cornerstone (2013) are a subset of the total database compiled and maintained by the Stanford Securities Class Action Clearinghouse which includes 3641 federal securities class actions filed between January 1, 1996 and June 30, 2013, not all of which had been finally disposed. Ten percent of these cases had reached summary judgment, but not final disposition, at the time of the analysis and therefore were technically still pending. I have included them in Table 9.4 and placed them in the “dismissal or summary judgment” category even though it is possible that some of these would ultimately result in a different type of disposition. Dismissal rates vary over time. During the period 1996–2006 for which all or virtually all cases have been resolved the highest annual dismissal rate was 48 percent and the
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state courts, whose outcomes may differ significantly from federal class action outcomes. All of the data are from the 2000s, but the exact dates differ. This is an important caveat as U.S. class action jurisprudence evolved dramatically over this time period (Klonoff, 2013). All of these studies identified cases in which class action complaints were filed, typically termed “putative class actions.” Filing a class action complaint is the first step in the litigation process and does not assure that the lawsuit will ultimately be certified and resolved in class form.

Table 9.4  Distribution of U.S. class actions by disposition type, selected studies

<table>
<thead>
<tr>
<th>Source</th>
<th>Insurance consumer class actions (state &amp; federal)</th>
<th>Contract and tort class actions (federal)</th>
<th>Consumer &amp; employment class actions (federal)</th>
<th>Securities class actions with institutional investor lead plaintiffs (federal)</th>
<th>Securities class actions without institutional investor lead plaintiffs (federal)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Disposition type</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Voluntary dismissal</td>
<td>47a</td>
<td>55</td>
<td>35</td>
<td>2</td>
<td>9</td>
</tr>
<tr>
<td>Dismissal or summary judgment</td>
<td>37</td>
<td>29</td>
<td>31</td>
<td>43</td>
<td>41</td>
</tr>
<tr>
<td>Class settlement</td>
<td>12</td>
<td>13</td>
<td>33</td>
<td>55</td>
<td>50</td>
</tr>
<tr>
<td>Trial</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Other</td>
<td>3</td>
<td>4</td>
<td>0</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Sample size b</td>
<td>564</td>
<td>161</td>
<td>145</td>
<td>767</td>
<td>1720</td>
</tr>
</tbody>
</table>

Notes: a Because they relied on insurer records rather than court records, the Pace et al. study was able to distinguish cases that were resolved by individual settlements with putative class representatives and other voluntary dismissals. About 20 percent of the insurance consumer class actions were resolved by individual settlements.

b Sample sizes for all studies removed duplicative filings that are common in U.S. class action litigation.

Table 9.4 discloses sharp differences in the rates of different types of disposition across case types. As reflected in Table 9.4, aside from trial, a class action complaint can be resolved in three different ways. First, the case may be “voluntarily dismissed,”

lowest annual dismissal rate was 28 percent. The Clearinghouse does not report any settlements between individual plaintiffs and defendants; whether such outcomes do not occur or simply do not make their way into the database is unclear.
meaning that the plaintiffs dropped their claims. In some instances, this indicates that the parties agreed to settle out of court without any judicial intervention. In other instances, the plaintiffs simply decided not to go forward, which could reflect a reassessment of the value of their legal claim or a lack of resources. Court records never distinguish between these different reasons for voluntary dismissals. Secondly, the case can be judicially resolved pre-trial. A court may either dismiss the case because there is no plausible set of facts that would support the plaintiff’s legal claim (and therefore further litigation, including discovery, is not worthwhile) or it can grant summary judgment in favor of either the defendant or the plaintiff on the grounds that there is no material dispute over the facts (and therefore no need for a full-blown trial) and the party wins as a matter of law. Summary judgment motions may be brought by any party, usually after discovery has taken place, but have become a favored tool of defendants. Thirdly, the plaintiffs and defendants may negotiate a settlement, which must be approved by the court. Settlements may be treated as an indicator that the claim was meritorious enough that a defendant was unwilling to try its luck at trial.

Table 9.4 reveals that the samples in which small-value claims most likely predominated had higher rates of voluntary dismissals without a judicial disposition than the securities class action samples, which typically involve larger-value claims. There are different possible interpretations of this pattern. Perhaps the types of law firms that bring small-value claim class actions are poorer judges of the legal and factual strength of claims than the more specialized law firms that bring securities class actions, leading to higher rates of voluntary dismissal among the former, compared with the latter. Perhaps the firms that prosecute smaller-value claims give up more easily than securities class action firms because they have less financial wherewithal to persevere against deep pocket corporate defendants. Or perhaps firms that prosecute small-value claim class actions have a scatter-shot business strategy of filing many class suits in the hope that a few will succeed.

In contrast with voluntary dismissals, pre-trial judicial dispositions indicate how judges assessed the merit of class action complaints. Table 9.4 shows that pre-trial judicial disposition rates (which are generally granted in favor of the defendant) varied from about 30 percent for the samples in which small-value claims likely predominated to around 40 percent for the larger-value securities class actions. Putting aside voluntary dismissals, the federal consumer and employment class actions filed in 2009 and the securities class actions were about as likely to be resolved by a pre-trial judicial disposition as to be resolved by settlement. It is tempting to conclude that at least in these samples there were equal fractions of non-meritorious and meritorious claims although other factors may be at work.

40 There are also instances, not applicable here, in which a case may be dismissed “without prejudice,” which means that plaintiff may amend and resubmit the complaint. In some complex litigation, the initial complaint is amended multiple times as the litigation progresses. Other grounds for dismissal, again not relevant here, are cases in which the court does not have jurisdiction, the plaintiff fails to prosecute the case in a timely manner, or other technical matters stand in the way. Unless reversed on appeal, these dismissals generally terminate the claim, at least in the court that issued the dismissal.
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Australia
Morabito (2014) reports the distribution of class actions in Australia by disposition type for 1992–2003 and for 2003–2014 (see Table 9.5). There was a lower rate of voluntary dismissals (withdrawals by plaintiffs) and higher rates of both pre-trial adjudications in favor of defendants and settlements in the later period, compared with the earlier period. Recall that there was a shift in the composition of the class action caseload between these two periods: in the later period, the caseload included a larger fraction of security, investment, and other larger-value financial claims, compared with the earlier period (see Table 9.3). The shift in the distribution of disposition types may reflect this change in caseload composition: as we saw in the U.S. data (see Table 9.4), voluntary dismissals occur less frequently in class actions with higher-value claims.

Table 9.5 Distribution of Australian federal class actions by disposition type, 1992–2003 and 2003–2014 (Morabito, 2014)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>%</td>
<td>%</td>
</tr>
<tr>
<td>Voluntary dismissal (proceeding discontinued by class representative or discontinued as a class action)</td>
<td>23</td>
<td>16</td>
</tr>
<tr>
<td>Discontinued as a class action by the court</td>
<td>9</td>
<td>8</td>
</tr>
<tr>
<td>Pre-trial adjudication for defendant (application summarily dismissed)</td>
<td>9</td>
<td>14</td>
</tr>
<tr>
<td>Class settlement</td>
<td>40</td>
<td>56</td>
</tr>
<tr>
<td>Judicial decision favoring class at trial or post-trial</td>
<td>8</td>
<td>4</td>
</tr>
<tr>
<td>Other</td>
<td>11</td>
<td>2</td>
</tr>
<tr>
<td>Total number of cases</td>
<td>180</td>
<td>149</td>
</tr>
</tbody>
</table>

Notes:
- The court reporting years in Australia begin and end in March. The data shown are for non-overlapping periods.
- To facilitate comparisons with U.S. data, the categories in Morabito's report have been collapsed.
- In Australia, in contrast to the United States, there is no requirement for class certification. Pre-trial decisions favorable to defendants include withdrawal of class status from the litigation. This usually occurs in response to a defendant's motion challenging the plaintiffs' statutory right to proceed as a class.

Previous analyses by Morabito (2009) also found differences in the distribution of disposition type by court district (region) and by the law firm that represented the class. The settlement rate for class actions represented by Australia's two leading plaintiff class action firms (68 percent) was more than twice the rate for all other class actions (26 percent). None of the leading firms' cases were dismissed by the court (i.e. pre-trial adjudication for defendant), compared with almost a third of all other cases (Morabito, 2009: 34–35). These differences in rates of settlement and pre-trial dismissals may reflect both differences in expertise with regard to claims assessment and availability of adequate resources to vigorously prosecute class actions.
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Outcomes

To evaluate the deterrence potential of regulatory enforcement class actions, we need to know not only the rate of claiming, relative to violations, and the proportion of false negatives and false positives; but also the direct and indirect costs that class actions impose on defendants. In the United States, which is the only jurisdiction for which we have substantial data on costs, defendants can be expected to bear a number of different types of expenses. Direct costs include payments to class members when the class prevails at trial and when defendants negotiate settlements, plus defendants’ legal expenses for all cases, including those in which they prevail and those in which they negotiate settlements or lose at trial. (In loser-pay regimes, we would need to take fee shifts into account when calculating defendants’ legal expenses.) Direct costs also include the expense of class action notices (required for opt-out class actions) and the costs of distributing settlement funds, elements that are usually included in the aggregate settlement value approved by courts. In addition, some class action settlements include injunctive relief, namely court-ordered changes in policies and practices that may also impose costs on defendants. Some settlements also include cy pres remedies, a common law device that was originally developed to protect the beneficiaries of a common law trust but has in recent decades been extended to the members of a class in class action litigation. Examples of cy pres remedies are contributions to consumer education or automotive safety programs. (Sometimes cy pres remedies are paid in lieu of cash payments to class members, either because it would be too expensive to try to locate all class members or because some class members do not claim amounts owed them. In the latter case, the cy pres amount may equal the residual left in the fund.\footnote{Because cy pres remedies do not directly benefit class members and may have a tenuous relationship to the subject of the class action they are a subject of controversy. Marek v. Lane, 134 S. Ct. 8 (2013) (Statement by C.J. Roberts) (concurring with decision to deny certiorari but suggesting the U.S. Supreme Court should take up the legality of cy pres remedies in class actions in a future case). However, from an enforcement perspective, when cy pres remedies are funded by the settlement amounts that are unclaimed by class members, they assure that the actual deterrence value of the lawsuit equals the intended value.}) Indirect costs include reputational losses, which may affect market share, and effects on capital markets, which often respond dramatically to litigation events.

Given concern about the costs of litigation in all jurisdictions that adopt or consider adopting class action procedures, it is remarkable how little data there are on aggregate costs to defendants. Because in many modern legal regimes most lawsuits settle, and most jurisdictions regard settlements as a private matter between plaintiffs and defendants, it is usually difficult to obtain data on the outcomes of civil lawsuits. Class actions are an exception to this observation: because most jurisdictions that have adopted class actions require judges to approve settlements between the class and defendants after a public hearing, settlement provisions usually are a matter of public record. As a result of recent empirical scholarship in the United States relying on these public records, we know something about the distribution of aggregate settlement value in U.S. class actions, by type of case. Because under U.S. class action rules, judges
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award attorney fees, we also know the relationship between the amount of fees awarded by U.S. judges and aggregate settlement value. But how much defendants must actually pay to settle class action lawsuits often depends on the number of class members who ultimately collect what defendants have committed to pay, often termed the “take-up” rate. These data are rarely made public (Pace and Rubenstein, 2008: 23), although anecdotal data indicate that in some class actions very few class members come forward to collect their share of the settlement.

As a result, what we know about the costs imposed by class actions on defendants is woefully incomplete. The available data indicate that the aggregate values of judicially approved settlements vary substantially across different categories of claims (e.g. securities fraud vs. labor wage and hours), from just a few million dollars, to hundreds of millions or more. The billion dollar settlements that are most likely to be reported in the press are rare. Generally, the attorneys collect about 25 percent of class action settlements in the United States, although the percentage awarded declines as the settlement amount increases (Eisenberg and Miller, 2010). For very large classes, estimated individual remedies are relatively modest, suggesting that defendants set a cap on the total amount they are willing to pay to settle a class action and are not willing to increase it proportionately with the size of the class. Nonetheless, there are class actions where the estimated average individual remedy amounts to thousands or even tens of thousands of dollars.

As we would expect, the available information on take-up rates indicates that when proffered individual damages are very small, so too is the fraction of class members who come forward to claim them. When settlements include provisions to automatically pay out damages to eligible class members—for example, by crediting continuing customers’ accounts—the aggregate payout by defendants will equal the aggregate amount approved by the judge. When residual settlement amounts are distributed pro rata to class members who did claim or paid out in the form of cy pres remedies, defendants will also pay the formally approved amount. But absent such provisions the defendants may pay far less than the amount approved by the judge. Some settlements include injunctive relief as well as money damages, and some judges take injunctive relief into account when awarding attorney fees, but we lack systematic data on the proportion of cases that produce injunctive remedies and their value. In sum, we know that in some class actions, defendants pay less than the “advertised” settlement amount, but we do not have enough information to calculate the expected real value of class actions in general or of specific types of class actions. Finally, we know virtually nothing about what defendants pay their own counsel to contest and resolve class action litigation.

Approved settlement amounts
Using unpublished as well as published federal court opinions from 2005 and 2006 and other sources, Fitzpatrick has assembled the most comprehensive database of federal class action settlements to date, 564 in all (Fitzpatrick, 2010). The typical aggregate value of these federal class settlements, including attorney fee awards, was quite modest (a median of $5 million and a mean of $55 million over the two-year study period). Most settlements (89 percent) offered class members cash, sometimes along with other remedies; about one-quarter included declaratory or injunctive relief. Mean
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settlement values varied substantially across case types.\textsuperscript{42} Commercial, securities, and anti-trust class actions produced the highest values, with means of $112 million, $96 million, and $60 million respectively.\textsuperscript{43} Other types of class actions yielded more modest settlement amounts. Consumer and employment benefit class action settlements averaged $19 million and $14 million respectively. Labor and employment (wage and hour) and civil rights class actions each averaged about $9 million.

Attorney fee awards in these cases averaged about 25 percent of aggregate settlement amounts. These percentages did not vary substantially across case types. However, the percentage fee award was inversely correlated with the settlement value, dropping below 25 percent for settlements valued above $10 million. For settlements of $72.5 million or more, the average was 18 percent. For settlements of $1 billion or more (nine cases), the average attorney fee award was 13.7 percent of the total settlement value.\textsuperscript{44}

Data from small non-random samples of U.S. class actions also show variation in the aggregate value of class action settlements by type of case. In their study of state and federal consumer class actions against insurers, Pace et al. (2007) obtained aggregate settlement amounts for 36 cases. The median aggregate settlement amount (including attorney fees) was $2.6 million and the mean was $12.8 million, in line with the smaller-value federal class action settlements reported by Fitzpatrick.\textsuperscript{45} In their sample of 10 class actions, Hensler et al. (2000) found total settlement values ranging from $1.5 million (in a consumer dispute over cable fee charges) to $1 billion (in a property damage class action arising out of defective polybutylene pipes).

The only published data on the outcomes of Australian class actions are for 10 cases funded by third-party litigation financers. The average total settlement value of these class actions was A$31 million and the median was A$8 million (Morabito, 2010).

Amounts paid to class members

Mayer Brown collected actual outcome data on 40 federal consumer and employment class actions filed in 2009 and settled by September 1, 2013 (Mayer Brown, 2013: 7).\textsuperscript{46} Almost half (18) of these were so-called “claims made” settlements, meaning amounts not claimed by eligible class members were not paid by the defendants. The researchers could only obtain data on the claims rates for these 18 settlements in six cases. In one of these six—an ERISA pension-plan class action arising out of the Bernard Madoff Ponzi scheme—claimants stood to collect large sums; not surprisingly, virtually all of the class members submitted claims. In three of the remaining five cases, 1 percent or fewer of the class members claimed compensation; in the other two, the claiming rate

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\textsuperscript{42} Fitzpatrick (2010) reports settlement values \emph{including} attorney fee awards—that is, the total the defendant offered to pay to settle the class action.

\textsuperscript{43} Lande and Davis (2008: 892, Tab. 1) report higher medians and means for anti-trust settlements. However, their sample excluded settlements of less than $50 million.

\textsuperscript{44} Although Fitzpatrick’s (2010) method had a higher likelihood of including all federal class action settlements during the study period, his findings generally track Eisenberg and Miller (2010).

\textsuperscript{45} Pace et al. (2007: 53) note that these median and mean estimates reflect the fact that most settlements covered 1000 or more class members.

\textsuperscript{46} Although the study focused on consumer class actions the sample included employment class actions that arguably resemble consumer class actions in key respects.
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was about 10 percent.\(^{47}\) Thirteen of the 40 settlements provided for automatic distribution of compensation to class members. Such automatic distribution is feasible when the defendant can easily identify class members, such as employees, insurance or telecommunications subscribers, or others with whom defendants have contractual relationships. In two of the three automatic distribution settlements that Mayer Brown identified specifically as consumer class actions, class members received modest to substantial cash payments; in a third they received non-cash benefits of uncertain value (Mayer Brown, 2013: 12). The remaining nine class actions (almost a quarter of the total) settled for injunctive relief or *cy pres* remedies only.

In their study of consumer class actions against insurers, Pace et al. (2007) were able to determine distribution rates (including cash payments and credits to subscribers' accounts) for 43 percent of the settlements they identified (29 cases in all). The median distribution rate as a percentage of all class members was 15 percent, but because a few settlements had much higher take-up rates, the mean distribution rate was 45 percent. The researchers were able to determine the total payout, to all class members, in a slightly higher number of cases (57 percent of the settled cases, or 39 in all). They found that the median total payout was $500,000. In 10 percent of the settlements the total was $25,000 or less (Pace et al., 2007: 55).

In a study conducted by Hensler et al. (2000), outcome information was available for nine class actions. In six out of the nine cases, the class members had collected (or would likely collect) all or most of the settlement monies set aside for them. In the remaining three cases, the study estimated that class members collected only about 30 percent of the total funds. In one of those three cases, the amount not claimed by class members was paid by the defendant in the form of a *cy pres* award. As a consequence, defendants paid the full amount of the settlement approved by the court in seven of the nine cases. In the two remaining cases, Hensler and her co-authors estimated that the defendants paid approximately 60 percent and 23 percent of the approved settlement values respectively (Hensler et al., 2000: 425, Fig. 15.1, 436, Tab. 15.8).

In a separate study, Pace and Rubenstein (2008) found that in four out of six class action settlements class members were paid automatically. In the two remaining cases, 20 percent and 4 percent of the class members completed the claiming procedure respectively. However, in one of these cases, the settlement specified that unclaimed funds would be distributed to claimants on a *pro rata* basis, so the defendant ultimately paid the full negotiated amount; in the other, the defendant apparently paid a small fraction of the judicially approved value.

**Injunctive relief**

Empirical analysts generally have not attempted to place a dollar value on the declaratory and injunctive relief included in some U.S. class action settlements, although some judges have done so in response to requests from class counsel urging

\(^{47}\) Mayer Brown does not describe the substantive claims that gave rise to these class actions, nor the aggregate dollar value of the settlements approved by the court.
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that such relief be taken into account when awarding them fees. Many empiricists ignore declaratory and injunctive remedies altogether. To date, there has been no systematic effort to analyze declaratory and injunctive remedies in private class actions. However, descriptions of outcomes in a small number of non-randomly selected class actions suggest that some regulatory enforcement suits do result in changes in policies and practices. Examples of class actions that led to changes in employment or consumer-related practices include class actions brought by African-American employees against Texaco and Coca-Cola, and a class action brought by African-American customers against the Denny's restaurant chain. Lande and Davis (2008: 901–02) cite the following as significant non-monetary remedies in their sample of 40 federal anti-trust class action settlements: natural gas price reductions, elimination of restrictions on insurance policies, elimination of caps on salaries of college sports coaches, and changes in credit card transaction policies that allegedly resulted in

48 Fitzpatrick (2010) reports finding only a few instances of judges taking injunctive relief into account in calculating attorney fees. In their earlier study, Hensler et al. (2000) describe instances of such awards.

49 This inattention to declaratory and injunctive remedies contrasts sharply with the focus of previous scholars who viewed class actions as vehicles for social reform (Chayes, 1976; Davis, 1993; Fiss, 2009–2010). The contemporary disinterest in declaratory and injunctive remedies likely is a function of the empiricists' discipline: most are economists or lawyers trained in law and economics who are unfamiliar with the qualitative research approaches that are most appropriate for studying non-monetary remedies. The advent of electronic dockets and commercial databases that extract data from them makes this sort of analysis more feasible than it was previously.

50 Professor Margo Schlanger is in the course of compiling a database to support such analysis for civil rights litigation. However, her first published article relying on this database addresses public enforcement actions brought by the federal Equal Employment Opportunities Commission, not private class actions (Schlanger and Kim, 2013).

51 Roberts v. Texaco, Inc., 1997 U.S. Dist. LEXIS 23848 (S.D.N.Y. Mar. 21, 1997). The employees charged Texaco with discrimination in promotion and pay policies. In the settlement approved by the court, Texaco agreed to establish an independent task force to monitor anti-discrimination and diversity in employment practices and require diversity training, as well as to award a one-time 10 percent salary increase to current African-American employees, in addition to creating a $115 million cash fund (Roberts and White, 1999; Bernstein, Litowitz, Berger & Grossman, 2015).

52 Ingram v. Coca-Cola Co., 200 F.R.D. 685 (N.D. Ga. 2001). African-American employees charged Coca-Cola with discrimination in promotion and pay policies. In the settlement approved by the court, Coca-Cola agreed to reform its employment policies with regard to minorities and to establish an independent panel to monitor its hiring and promotion practices, as well as to create a $156 million fund to compensate employees who had been denied promotion. Media coverage highlighted Coke's agreement to accept whatever changes in employment policies regarding minorities the panel might recommend (Winter, 2000).

53 Dyson v. Flagstar Corp., 1996 U.S. Dist. LEXIS 22685 (D. Md. July 17, 1996). African-American customers sued Denny's and its parent Flagstar Corporation for discriminatory practices that included denials of service and derogatory remarks. In addition to establishing a $54 million cash fund to compensate complaining customers, the defendant agreed to change its practices and to hire an outside civil rights lawyer to monitor its compliance with the agreed upon changes, in accordance with a consent decree negotiated by public and private lawyers (Labaton, 1994).
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large cost savings for retailers. Five out of the ten class actions studied by Hensler and her co-authors resulted in significant changes to corporate policies, including consumer credit practices, product labeling, and product design. Two cases led to changes in state law (Hensler et al., 2000: 431–33). Mayer Brown reports that settlements in 9 of the 40 consumer and employment class actions it studied intensively included injunctive relief. Although it dismisses the value of this injunctive relief, which required changes to corporate marketing practices, others might differ in their assessment (Mayer Brown, 2013: 13–14).

Payments to defense counsel
In addition to paying plaintiff counsel fees and expenses, defendants must pay their own costs. As there is no legal requirement for them to disclose these costs, we know little about them. Hensler et al. were able to obtain information about defendants’ litigation costs in just 3 of the 10 class actions they studied intensively. The number varied dramatically, equaling class counsel fee awards in one case, about half of class counsel fees in another, and adding only a small percentage to total attorney costs in a third (Hensler et al., 2000: 440–41).

Indirect costs
Defendants’ indirect costs include effects on market share (for product and service providers and distributors) and effects on cost of capital. Calculating indirect costs is complicated so it is unsurprising that we have little systematic information about this component of defendants’ costs.54

Relationship of Private Class Actions to Public Enforcement
As might be expected of this contentious policy area, there is little agreement on whether private class actions operate as a useful complement to public enforcement. Some argue that private class actions add little of value to public enforcement of market regulations. They argue that in many instances class counsel bring actions when public regulators deemed or would deem no actionable violation took place, and that where public officials have undertaken regulatory activities class counsel simply ride the coattails of public officials, driving up the costs of enforcement without achieving commensurate benefits (Pace et al., 2007: 65). Some responsive regulation theorists portray private litigation focused on blame and monetary remedies as counter-productive action that undermines efforts by enlightened public regulators to persuade regulated entities to comply by invoking moral norms before moving up the regulatory "pyramid" to criminal and civil sanctions (Ayres and Braithwaite, 1992).

To understand the consequences of private class actions for public enforcement we need to know the prevalence of different combinations of public and private enforcement, whether and to what extent public officials, private class action attorneys, class representatives, and civil society coordinate their activities, and what outcomes they achieve working separately and together. Capturing these complex relations requires

54 For a review of the literature on indirect costs of mass tort litigation, which mostly proceeds in non-class aggregated form in the United States, see Hensler (2013b).
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synthesizing databases from different institutions and extensive qualitative research. Both are difficult to accomplish. In contrast with the skeptical view of class action critics, the available data present a more complex picture of the relationship between private class actions and public enforcement.

Welsh and Morabito (2014) compared private securities class actions with the ASIC enforcement actions for 1992–2012. During the period, they identified 48 securities class actions, of which 9 were filed by ASIC. In those 9 class actions, no private investor class actions were filed. The remaining 39 private class actions were divided roughly equally between suits where there was also some ASIC activity (18) and suits in which there was no public action other than the private class action (21). In 7 of the 18 private class actions where ASIC also took some action, the class failed to prevail, meaning class members received no compensation; however, ASIC obtained a variety of remedies, ranging from criminal prosecution to civil penalties to enforceable agreements with defendants that sometimes included compensation to investors.

In their study, Lande and Davis (2011) analysed the participation of public agencies in 40 settled private anti-trust class actions. They found that in a number of the class actions, the U.S. Department of Justice (DOJ) was involved either before, during, or after the private lawsuit was brought. In 13 of the 40 cases, the defendants were subject to criminal penalties and in 12 of the 40 cases defendants agreed to pay civil penalties to the DOJ (Lande and Davis, 2011: 343). The 40 settled class actions had a combined aggregate settlement value (including attorney fees and expenses) of about 22 billion in 2010 dollars. Arguing in favor of the deterrent value of private class actions, Lande and Davis (2011: 338) compare this with the much lower 7.7 billion (2010 dollars) in criminal fines levied by the DOJ during the same period. As they write, “the relationship between DOJ enforcement and private class actions is symbiotic” (Lande and Davis, 2012: 10).

A more critical view of private class actions can be found in the study by Pace and his co-authors (2007) on consumer class actions against insurance companies. They surveyed state insurance regulators and asked them to rank the claims brought in those actions by degree of relationship to the regulators’ scope of authority. Using these rankings, the researchers reported that the majority of the private suits overlapped with the public regulators’ scope of authority either substantially (22 percent) or moderately (59 percent) (Pace et al., 2007: 71). Notwithstanding the large percentage of claims that public regulators viewed as within their scope to regulate, they intervened in only 8 percent of the 622 class actions for which the researchers were able to collect this information. When public regulators were active in the private enforcement litigation along with class counsel, class-wide settlements were more likely to occur than in all other cases (Pace et al., 2007: 97). Based on this slim public involvement and the relative effectiveness of public involvement when it was present, the authors concluded that private litigation in the insurance area on the whole lacked merit and did not contribute to the enforcement of regulatory standards.
SHOULD PUBLIC POLICY MAKERS PERMIT PRIVATE CLASS ACTIONS FOR THE PURPOSE OF ENFORCING ECONOMIC REGULATIONS?

Faced with incomplete and inconsistent data on the effectiveness of private class actions for enforcing public regulations it is tempting to throw the private enforcement class action over the side of the metaphorical public policy boat. However, such a response ignores the general lack of systematic data (as compared with theory) on how well public enforcement regulates employer–worker relationships, consumer transactions, securities markets, and cartel behavior. Just as corporate lobbyists delight in reporting anecdotal data on the failure of some class actions to accomplish much, worker representatives and consumer, investor, and environmental advocates can point to spectacular failures of public enforcement: regulatory agencies captured by industry and crippled by purposeful under-funding by legislatures; individual regulators in thrall to the potential offered by revolving doors and sometimes suborned by monetary bribes and other gifts. Just as the formal and informal structural weaknesses of class action regimes leave them open to subversion by entrepreneurial plaintiff lawyers, the formal and informal structural weakness of legislatures and regulatory agencies leave them open to subversion by well-capitalized corporate lobbyists. Recent examples of such failures include the British Petroleum deep-water drilling catastrophe in the Mexican Gulf, the sub-prime loan crisis that led to the deepest global recession since the Great Depression of the 1930s, and the General Motors ignition switch defect. In each of these instances corporate self-regulation failed as public regulators looked away, either knowingly or unknowingly.

This concluding section proposes two complementary responses to the inadequate empirical evidence on the critical question of how to design effective regulatory enforcement and the appropriate role, within regulatory enforcement, for private class actions. First, it outlines a research agenda that can more successfully tackle the empirical investigation. Secondly, it argues that in the absence of more conclusive data, the design concept of redundancy should be used and systems of regulatory enforcement should be constructed around both public and private enforcement.

Building a Knowledge Base for Enforcing Private (and Public) Regulation

To date, the American and, increasingly, global debate over the role of private enforcement of economic regulations via class actions has rested on theory, ideology, and political interest. Evidence that would permit us to assess widely made assertions is scant and what evidence exists is ambiguous. If policy makers are to make evidence-based assessments of the relative contributions of private and public enforcement we need to develop objective data on who uses private class actions, for what purposes, and to what ends. In the recent past, assembling these data was difficult: courts lacked the infrastructure to collage information on lawsuits and the resources to develop such an infrastructure were lacking. However, in an era of “big data,” the argument that courts cannot publish such data are wearing thin. Modern legal systems are moving rapidly to require electronic filings and data entrepreneurs are becoming increasingly skillful in “scraping” data from public websites and creating detailed databases for
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analysis. Today, the challenge of building a knowledge base on private class actions is more a matter of will than resources.

The essential ingredients of a class action database are:

- Annual information on the number of putative class actions filed, by type of case (e.g. consumer protection, securities, anti-trust cartel), representative plaintiff (e.g. individual, financial institution, retail business, NGO, special-purpose foundation), and type of defendant (e.g. insurer, petroleum company, pharmaceutical, etc.). This information can be obtained directly from the complaint using search algorithms.
- Information on the date and type of disposition for each complaint. For instance, for the Australian and American jurisdictions discussed in this chapter, disposition would be broken down into the following categories: withdrawn or voluntarily dismissed, dismissed on substantive grounds (e.g. lack of jurisdiction, failure to state a plausible claim), summary judgment, tried to verdict, settlement.
- For each settlement approved by the court, information on aggregate value, total number of class members who claimed, total amount ultimately delivered to class members, and expenses to administer the settlement.
- For jurisdictions that require judicial approval of attorney fees, the total fees awarded to class counsel.
- For jurisdictions that require cost shifting, the total cost shift to prevailing defendants and plaintiffs.

The Idea of Redundancy

Currently there are insufficient data to perform the comparative cost-benefit analysis of public and private enforcement that would be necessary for a rational public policy maker to discard one approach in favor of the other in some or all circumstances. In the absence of better information, it makes more sense to build redundancy into systems for regulating economic behavior than to choose one mode of enforcement over another. Just as airplane manufacturers incorporate multiple redundant systems into airplanes in order to maximize safety, public policy makers should incorporate redundancy into regulatory systems by creating and preserving opportunities for private actors to enforce regulations alongside public enforcement.

Redundancy is the key design principle of modern complex technical systems (Downer, 2009). Understanding that individual elements of complex systems may fail in unanticipated ways, engineers have long adopted the principle that systems that contain redundant elements—"elements that work simultaneously but are capable of carrying the 'load' by themselves if required" (Downer, 2009: 4)—are necessary to ensure product safety. Early adherents of redundancy as a design principle focused on incorporating multiple identical elements into complex systems so that if and when one failed its twin (or triplet) could take over. However, as redundancy moved outside

\[55\] Much of what engineers now understand about redundancy design is derived from analysis of airplane crashes, space shuttle disasters, and also computer programming errors (Downer, 2009).
laboratory settings, engineers learned that simple replication was not a panacea for defective parts. Multiple identical elements created a need for an overarching system to manage the elements, and that managerial system might also fail. Moreover, multiple identical elements, when operated in the same conditions, might fail together, with the result that the posited tiny likelihood of all of the identical elements failing at the same time underestimated failure risk. With more experience, redundancy design evolved. Today, optimal redundancy is understood to require multiple independent elements that are functionally dissimilar. Designed by different engineering teams, deploying different physical principles, these independent elements are more likely to be able to take over critical system tasks, for example fly the plane, when other elements fail.\textsuperscript{56} Moreover, by combining information from multiple elements the system is more likely to be able to take appropriate action in response to measurement challenges.

Modern regulatory regimes are complex technical systems. Like hardware and software, they have many moving parts. Like airplanes, spacecraft, and deep-water drilling their safe and effective performance requires human action—and judgment—at critical stages. Like pilots, the public regulators are susceptible to distraction. Like aeronautical engineers, they are susceptible to “groupthink.” Like drilling engineers their incentives to assure safety may be offset by their need to meet tight deadlines under budget and performance pressure. Private class action litigation operates as an independent element of the regulatory regime in jurisdictions that have authorized them for enforcement as well as compensatory purposes. Like public enforcement, private enforcement can fail, but taken together the two systems make it much more likely that market actors will comply with economic regulation and that critical regulatory policies will take hold on the ground.

REFERENCES


\textsuperscript{56} The 2015 crash in the French alps of an airplane operated by Lufthansa’s regional subsidiary Germanwings, apparently as a result of the co-pilot’s decision to fly it into the ground, tragically demonstrated this redundancy principle. As has been true since the September 11 terrorist attacks, the airplane’s cockpit door was secured by a technically sophisticated lock to forestall an attempt by a passenger to take over the plane. As a result, the pilot—who had left the cockpit to use the restroom—was unable to return and take over the flight controls. The low tech response to the unlikely event of a crew member deliberately crashing a plane, which had previously been undertaken by American airlines, is to require a flight attendant to move into the cockpit to assure that there is never a time when there is only a single occupant there.
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