

INTERNATIONAL

Why Most Nations Do Not Have U.S.-Style Class Actions



BY ROBERT H. KLONOFF

Robert H. Klonoff is the Jordan D. Schnitzer Professor of Law at Lewis & Clark Law School, and was Dean of Lewis & Clark Law School from 2007–2014. Klonoff serves as a member of the United States Judicial Conference Advisory Committee on Civil Rules (appointed by Chief Justice John G. Roberts, Jr., in 2011; reappointed for second three-year term in May 2014). He previously served as an Associate Reporter for the American Law Institute's project, *PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION* (West 2010). He is the co-author of a leading textbook on class actions and the author of numerous articles on the subject. He has served as an attorney in more than 100 class action cases. Klonoff, a consulting editor on the *Class Action Litigation Report*, wishes to thank his research assistant, Jacob Abbott, for his outstanding assistance in the preparation of this article, as well as Professors Debra Bassett, Ed Brunet, Sam Issacharoff, and Rick Marcus for their useful comments. Klonoff can be reached at klonoff@lclark.edu.

Since the promulgation of the modern U.S. class action rule in 1966,¹ class actions have been a fixture in the United States. An estimated 7,500 new class actions are filed in the U.S. every year.²

Moreover, these actions frequently result in large settlements, in some cases involving billions of dollars.³ In recent years, numerous other countries have adopted class action procedures. In 2012, Oxford University Press published a lengthy treatise that surveys class action legislation and court cases in North and South America, Asia, Europe, and Africa.⁴ As that guide reveals, dozens of countries have adopted a class action mechanism, and numerous other countries are considering the adoption of some form of class action procedure.⁵ Yet, the number of actual class action cases brought outside the U.S. remains small.

¹ Federal Rule of Civil Procedure (“FED. R. CIV. P.”) 23.

² Deborah R. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306, 308 n.7 (2011).

³ See, e.g., *Newby v. Enron Corp.*, 586 F. Supp. 2d 732, 740–41 (S.D. Tex. 2008) (class settlement worth approximately \$7.2 billion in massive securities fraud); *In re Diet Drugs*, 553 F. Supp. 2d 442, 472 (E.D. Pa. 2008) (\$6.44 billion settlement of nationwide product liability claims against drug manufacturer); *In re Tyco Int’l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 256–57 (D.N.H. 2007) (class settlement of \$3.2 billion in securities fraud case).

⁴ *WORLD CLASS ACTIONS: A GUIDE TO GROUP AND REPRESENTATIVE ACTIONS AROUND THE GLOBE* (Paul G. Karlsgodt ed., 2012).

⁵ See *id.* at 56–530 (discussing class action and other aggregate procedures in more than 30 countries); see also Lindsey Gomez-Gray, *The Rise of Foreign Class Action Jurisprudence*, ABA Section of Litigation: Class Actions & Derivative Suits (Nov. 20, 2012), available at <http://apps.americanbar.org/litigation/committees/classactions/articles/fall2012-1112-rise-foreign-class-action-jurisprudence.html> (all web pages last visited May 3, 2015) (noting that more than 25 countries have class action procedures); Debra L. Bassett, *The Future of International Class Actions*, 18 Sw. J. INT’L L. 21, 22 (2011) (“Just ten years ago, about the only countries outside the United

Although precise numbers are difficult to ascertain for many countries, some statistics do exist. In particular, apart from Australia, Canada, and Israel, where the total number of class action cases is in the hundreds, most countries with class action procedures have seen only a handful of cases.⁶ Moreover, there are few reports of large class action judgments or settlements outside the U.S.⁷

What explains the dearth of class actions worldwide, in contrast to the explosion of class actions in the U.S.? In the author's view, there are three elements that explain the unique role of class actions in the U.S. No other country has all three elements, and many countries have *none* of the three elements.

First, U.S.-style class actions have an "opt-out" procedure, whereby class members are automatically part of the lawsuit unless they affirmatively opt out.⁸ In many other countries, class actions are opt-in procedures, whereby a class member is not part of the suit unless he or she affirmatively opts into the case.⁹

Second, in the United States, attorneys' fees and costs typically come from the judgment or settlement. Class representatives and class members generally have no responsibility to pay attorneys' fees—either to their attorney or to opposing counsel—in the event that the case is unsuccessful.¹⁰ Indeed, class members are rarely asked to reimburse class counsel even for counsel's out-of-pocket costs.¹¹ By contrast, most other countries do not allow such arrangements for fees and costs, and in many countries class members have to pay

States with class action procedures were Australia and Canada, and those were of relatively recent origin. [In 2011], . . . twenty-two countries have adopted some form of class actions, and six more countries have adopted some type of consolidated group proceeding instead of, or in addition to, class actions."].

⁶ According to one source, as of 2012, 245 class actions have been brought in Australia, 411 in Canada, and 750 in Israel. See Hensler, *Future of Mass Litigation*, *supra* note 2, at 309. By contrast, only 12 class actions have been brought in Indonesia, 5 in the Netherlands, and 12 in Sweden. See *id.* See also Giulia Principe, *Italian Class Actions: An Update*, at 4, available at <http://globalclassactions.stanford.edu/sites/default/files/documents/Italian%20Class%20Actions%20Principe.pdf> (estimating that only 15 class actions have been brought in the first few years of Italy's new class action law).

⁷ It is worth noting, however, as Professor Hensler points out, that some large settlements have occurred in the Netherlands under the 2005 Dutch Act on the Collective Settlement of Mass Claims (*Wet collectieve afwikkeling massaschade*), popularly known as "WCAM." See Hensler, *Future of Mass Litigation*, *supra* note 2, at 313 (listing six collective action settlements under WCAM from 2005–2010, ranging from \$5.77 million to \$1.37 billion). Nonetheless, this article's basic point still holds true: Large class action verdicts or settlements are rare outside the U.S.

⁸ See Part I, *infra*.

⁹ See Part III, *infra*.

¹⁰ See Part II, *infra*.

¹¹ See Part II, *infra*.

the fees not only of their own lawyers but those of opposing counsel in the event that the class loses.¹²

Third, the U.S. has a procedure whereby all federal court cases presenting at least one common question of fact can be consolidated for pretrial proceedings before a single judge.¹³ Virtually no other country has a comparable procedural device.¹⁴

This article addresses each of these three elements—comparing the U.S. system to systems in other countries that have class actions. It then illustrates the importance of each of these elements by discussing two recent high-profile U.S. class settlements: the British Petroleum *Deepwater Horizon* oil spill case,¹⁵ and the National Football League case alleging injuries to players from concussions.¹⁶ (The author served in both cases as an expert witness on class action and settlement issues.) As that discussion demonstrates, expansive settlements were possible in those cases as a result of the interplay of these three elements.¹⁷

I. Opt-Out Procedures

As noted above, in the U.S., most class actions are "opt-out" actions (or in some instances mandatory actions, thus generally barring opt-outs).¹⁸ This means

¹² See Part II, *infra*.

¹³ See Part III, *infra*.

¹⁴ See Part III, *infra*.

¹⁵ See *In re Deepwater Horizon*, 910 F. Supp. 2d 891 (E.D. La. 2012) (approving economic loss and property damage settlement); and *In re Deepwater Horizon*, 295 F.R.D. 112 (E.D. La. 2013) (approving medical benefits settlement).

¹⁶ See *In re NFL Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB (Doc. 6509) (E.D. Pa. Apr. 22, 2015) (approving class settlement).

¹⁷ To be sure, these three elements are not the only obstacles to more frequent class actions in countries outside the U.S. Other potential barriers include limitations on the substantive areas of law at issue and a view in many countries that responsibility for enforcing certain laws should be the exclusive domain of the state. See, e.g., Deborah R. Hensler, *The Globalization of Class Actions: An Overview*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 7, 14 (2009) (noting that in about half the countries with class actions, "the use of class actions is limited to securities, antitrust (anticompetition), consumer fraud, or constitutional rights claims or some designated mix thereof"); Antonio Gidi, *The Recognition of U.S. Class Action Judgments Abroad: The Case of Latin America*, 37 BROOK. J. INT'L L. 893, 938 n.163 (2012) ("some countries limit the class action applicability to specific areas of substantive law, like securities, antitrust, consumer, etc.") (citation omitted); Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179, 209 (2009) ("Both the strengths and the weaknesses of American collective procedures arise from the willingness to entrust a great deal of social regulation to private initiative and common law forms of adjudication.").

¹⁸ One subdivision of Rule 23, Rule 23(b)(3), specifically provides for opt-out class actions. See *Fed. R. Civ. P.* 23(b)(3), 23(c)(2)(B); ROBERT H. KLONOFF, *CLASS ACTIONS & OTHER MULTI-PARTY LITIGATION IN A NUTSHELL* (4th ed.) (West 2012) at 75, 95, 193, 201–202. Two other subdivisions of Rule 23, Rule 23(b)(1) and Rule 23(b)(2), provide for mandatory classes. Because

To request permission to reuse or share this document, please contact permissions@bna.com. In your request, be sure to include the following information: (1) your name, company, mailing address, email and telephone number; (2) name of the document and/or a link to the document PDF; (3) reason for request (what you want to do with the document); and (4) the approximate number of copies to be made or URL address (if posting to a website).

that when the court certifies a case as a class action, every person who falls within the class definition is automatically part of the class. To avoid being bound by the judgment in an opt-out action, a class member must affirmatively withdraw from the case in writing within the deadline set by the court.¹⁹ Normally, the opt-out must take place within a time specified by the court after the case has been certified as a class action.²⁰ If the parties simultaneously seek class certification and approval of a settlement (known as a “settlement class”²¹), then the class members will have information about the terms of the proposed settlement when deciding whether to opt out. On the other hand, if the court certifies the case as a class action but the settlement does not occur until after the period to opt out has expired, there is usually no additional opportunity for a class member to opt out.²²

It should be noted that there are some U.S. mass actions that, by statute, are “opt-in” actions (sometimes known as “collective actions”).²³ But in the absence of a specific statute providing for an opt-in procedure, a class action will be governed by Rule 23, which provides for opt-out (and in certain cases mandatory) class actions. A court lacks authority to structure a Rule 23 case as an opt-in action. As one federal court of appeals stated, “substantial legal authority supports the view that by adding the ‘opt out’ requirement to Rule 23 in the 1966 amendments, Congress *prohibited* ‘opt in’ provisions by implication.”²⁴ As a practical matter, an opt-out procedure means that the vast majority of class

class actions seeking money damages must usually be brought under (b)(3), *see* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2558 (2011), opt-out class actions comprise the majority of class action cases in the U.S. *See* ROBERT H. KLONOFF, EDWARD K. BILICH & SUZETTE M. MALVEAUX, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION: CASES AND MATERIALS 30 (3d ed.) (West 2012).

¹⁹ *See, e.g., In re Deepwater Horizon*, 910 F. Supp. 2d 891, 936 (E.D. La. 2012) (class members wishing to opt out of settlement were required to send written exclusion request as specified in the class notice to the Settlement Program Exclusions Department by a date certain).

²⁰ *See* Fed. R. Civ. P. 23(c)(2)(B)(v) (requiring notice to all class members who can be identified through reasonable effort in any class certified under Rule 23(b)(3) of, among other things, the fact that the “court will exclude from the class any member who requests exclusion”).

²¹ *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 618 (1997) (discussing settlement classes).

²² Rule 23 does give the court the option to grant a second opt-out when a case settles after the initial opt-out period has expired. *See* Fed. R. Civ. P. 23(e)(4) (providing that, for a settlement class action previously certified under Rule 23(b)(3), the court has discretion to “afford[] a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so”). That discretion, however, has not been widely exercised. *See, e.g.,* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.11, cmt. a, Reporters’ Notes (noting that cases granting a second opt-out right are “rare”).

²³ Under U.S. law, the bulk of opt-in collective actions are brought under the Fair Labor Standards Act of 1938 (“FLSA”), the Age Discrimination in Employment Act of 1967 (“ADEA”), or the Equal Pay Act of 1963. *See* FLSA, 29 U.S.C. § 216(b) (2000) (opt-in requirement); ADEA, 29 U.S.C. § 626(b) (2000) (establishing that ADEA is subject to opt-in provisions of 29 U.S.C. § 216(b)); EPA, 29 U.S.C. § 206(d) (2000) (same); *see also* *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1527 (2013) (using term “collective action” to describe an FLSA “suit brought on behalf of other employees”).

²⁴ *Kern v. Siemens Corp.*, 393 F.3d 120, 124 (2d Cir. 2004) (emphasis in original).

members will be bound by the judgment, given the reality that, in most cases, very few class members make the affirmative effort to opt out.²⁵ By contrast, in an opt-in class, the number of class members who affirmatively take the steps necessary to participate will inevitably be very small.²⁶

The opt-out device has been adopted in some countries outside the U.S., but many countries still have only an opt-in mechanism.²⁷ An opt-in procedure necessarily limits the ability of litigants to achieve global peace in a class action, and thus severely dilutes the utility of the device.

Not surprisingly, countries that *do* have an opt-out model similar to the U.S. have seen greater use of class actions to remedy group harms.²⁸

II. Compensation of Class Counsel

An important feature of U.S. class action law is that class counsel can litigate class actions without requiring class members to incur the risk of paying any fees in the event that the case is not successful. Under the “American Rule,” each party to a lawsuit is ordinarily responsible for its own attorneys’ fees and costs, absent a specific exception to the contrary.²⁹ Class members in U.S.

²⁵ *See, e.g.,* Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation*, 57 VAND. L. REV. 1529, 1532 (2004) (study of several thousand class action decisions from 1993 to 2003 finding that, on average, fewer than one percent of class members opt out).

²⁶ *See, e.g.,* Charlotte S. Alexander, *Would an Opt In Requirement Fix the Class Action Settlement? Evidence from the Fair Labor Standards Act*, 80 MISS. L.J. 443, 466 (2010) (study of FLSA collective actions finding median opt-in rate of 15 percent; *see also* Janet Walker, *Crossborder Class Actions: A View From Across the Border*, 2004 MICH. ST. L. REV. 755, 770 (“Requiring the members of a plaintiff class to opt-in to the class . . . necessarily results in a suit that is comprised of far fewer members than it might otherwise contain”).

²⁷ *See, e.g.,* Debra L. Bassett, *The Future of International Class Actions*, 18 SW. J. INT’L L. 21, 24 (2011) (“Countries have roughly split between adopting an opt-in versus an opt-out procedure.”) (citation omitted); Deborah R. Hensler, *The Globalization of Class Actions: An Overview*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 7, 16 (2009) (noting that countries are “divided almost equally” with respect to opt-out versus opt-in). Countries that have an opt-out procedure include Australia, Canada, Denmark, Indonesia, Israel, the Netherlands, Norway, and Portugal. *See id.*; S.I. Strong, *Cross-Border Collective Redress in the European Union: Constitutional Rights in the Face of the Brussels I Regulation*, 45 ARIZ. ST. L.J. 233, 246 (2013) (“four European Member States (Denmark, Norway, Portugal, and The Netherlands) have adopted domestic forms of collective redress that also provide some form of opt-out relief”). Countries that have an opt-in procedure include China, Finland, Germany, Italy, Russia, Spain, and Taiwan. *See, e.g.,* Gomez-Gray, *supra* note 5; Andrea Conzatti, *The Recognition of U.S. “Opt-Out” Class Actions in China*, 44 GEO. J. INT’L L. 641, 669–71 (2013) (noting that China has opt-in procedure); Manning Gilbert Warren, III, *The Prospects for Convergence of Collective Redress Remedies in the European Union*, 47 INT’L LAW. 325, 332 (2013) (noting that most European Union nations with class actions have an opt-in procedure).

²⁸ *See* Hensler, *Future of Mass Litigation*, *supra* note 2, at 308 (finding highest numbers of class actions brought outside the U.S. in Israel, Canada, and Australia—all of which have an opt-out mechanism for class proceedings).

²⁹ *See, e.g., Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975) (reaffirming “American Rule” and declining to create a new exception).

class actions are able to have their claims litigated without the risk of having to pay attorneys' fees or costs if the case is unsuccessful—in contrast to the practice in most other countries with class actions.³⁰ In short, in the U.S., class members are generally not obligated to pay anything unless the case is successful, and class members are usually so informed by class counsel.³¹

The authority to award “reasonable” attorneys' fees in U.S. class actions rests with the district court, subject to review for abuse of discretion.³² U.S. courts have developed two distinct approaches in setting fees in class actions: (1) the percentage-of-the-fund method, and (2) the lodestar method.³³ Under the percentage approach, class counsel's fees are determined with reference to the overall class recovery. In general, fees range from around 20 to 30 percent of the fund recovered from the defendant, with the percentage frequently smaller when the recovery is large.³⁴ Under the lodestar, the district court “ascertain[s] the number of hours reasonably billed to the class and then multiplies that figure by an

appropriate hourly rate.”³⁵ Following that initial computation, “the district court may, in its discretion, increase the lodestar by applying a multiplier based on other factors, such as the risk of the litigation and the performance of the attorneys.”³⁶

The benefits of the percentage approach include its relative ease of application (e.g., the court is not required to look at hourly time records), and its alignment of incentives between class counsel and the class members (both are interested in maximizing recovery for the class).³⁷ On the other hand, courts have noted advantages of the lodestar approach, including the point that it provides a closer approximation of the market for legal services by looking to “the prevailing market rates in the relevant community,” and that it is “objective, and thus cabins the discretion of trial judges.”³⁸ Most (but not all) courts have expressed a preference for the common fund method over the lodestar method when a common fund has been created (and there is no statute requiring the lodestar approach).³⁹

In any event, regardless of the precise mechanism used by a particular U.S. court, for present purposes, the key point is that in the U.S., class members are not expected to pay anything unless the suit is successful.

By contrast, in many countries, class members—or at least the class representatives—are required to fund the actions up front and must pay class counsel on an hourly basis regardless of whether the class wins or loses the case. One commentator explains that, outside the U.S., “losers in civil litigation are usually liable for a substantial portion of winners' reasonable attorney fees,” and “contingent fees—percentage or hourly—have been frowned upon, with the client at least in principle obligated to pay the lawyer the same rate no mat-

³⁰ See, e.g., Hensler, *Future of Mass Litigation*, *supra*, note 2, at 309 (“[I]n most [non-U.S.] jurisdictions, the class action procedure has been dropped into a legal financing regime that prohibits or limits conditional or contingent fee arrangements, provides no mechanism for cost sharing among members of an opt-out class, and requires fee shifting—with the result that, in some instances, a class representative must post a security bond against adverse costs and is at risk for paying those costs.”).

³¹ See, e.g., Rosen Law Firm, *Class Actions FAQ*, <http://www.rosenlegal.com/about-questions.html> (“Costs and Expenses of the lawsuit are usually advanced by the law firms prosecuting on behalf of the Class. Our firm works on a contingent fee basis. That means we will ask the court to grant us reimbursement of our out-of-pocket expenses and attorneys' fees—usually a percentage of the total recovery—only if we are successful.”); Robbins Geller Rudman & Dowd LLP, *Frequently Asked Questions*, <http://www.rgrdlaw.com/cases-questions.html> (“Q. What does it cost me to join a class action lawsuit?” “A. Generally, there is no out-of-pocket cost to any class member regardless of the outcome.”); Glancy Binkow & Goldberg LLP, *FAQ*, <https://www.glancylaw.com/contact/faq> (“What are the costs and expenses for me?” “Glancy Binkow & Goldberg almost always works on a contingent fee basis, where we advance all costs and expenses of the lawsuit. If we are successful, we will ask the Court to grant us reimbursement of those out-of-pocket costs and expenses plus attorneys' fees, which are usually a percentage of the recovery. If we are not successful in a contingent litigation, you owe us nothing.”).

³² See Fed. R. Civ. P. 23(h); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998) (district court's award of attorneys' fees in class settlement reviewed for abuse of discretion); *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 642 (5th Cir. 2012) (same).

³³ See, e.g., *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 47 (2d Cir. 2000).

³⁴ See, e.g., MCL 4TH § 14.121 (“[a]ttorney fees awarded under the percentage method are often between 25% and 30% of the fund”; however, in cases involving very large awards (i.e., those over \$100 million), “courts have often found considerably lower percentages of recovery to be appropriate”) (footnotes omitted); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 833 (2010) (analyzing 688 class action settlements in 2006–2007 and finding a mean of 25 percent and a median of 25.4 percent for the award of attorneys' fees); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1294 (11th Cir. 1999) (“The majority of common fund fee awards fall between 20% to 30% of the fund.”) (citation omitted).

³⁵ *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 47 (2d Cir. 2000) (citation omitted).

³⁶ *Id.* (citations and internal quotation marks omitted).

³⁷ See, e.g., Report of the Third Circuit Task Force, *Court Awarded Att'y Fees*, 108 F.R.D. 237, 258 (1985) (discussing advantages of the percentage approach); *In re AT&T Corp.*, 455 F.3d 160, 164 (3d Cir. 2006) (noting that “the percentage-of-recovery method is generally favored” in common fund cases “because it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure”) (citation and internal quotation marks omitted).

³⁸ *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 551–52 (2010) (citations omitted).

³⁹ See, e.g., *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993) (holding that “a percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases”); *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991) (same); *but see, e.g., McDaniel v. County of Schenectady*, 595 F.3d 411, 417 (2d Cir. 2010) (“Although we have acknowledged that ‘the trend in this Circuit is toward the percentage method,’ it remains the law in this Circuit that courts ‘may award attorneys' fees in common fund cases under either the ‘lodestar’ method or the ‘percentage of the fund’ method.”) (citation and internal quotation marks omitted). Some courts utilizing the common fund approach have also endorsed the use of a “cross-check,” whereby a court might, for example, calculate fees using the percentage method and then examine the resultant fee award in terms of an hourly rate. See, e.g., *In re Heartland Payment Systems, Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1073 (S.D. Tex. 2012) (“Using the percentage method, cross-checked by the lodestar method, reduces the risk that the amount of the fee award either overcompensates counsel in relation to the class benefits obtained or undercompensates counsel for their work.”).

ter whether success be great, small, or nil.”⁴⁰ Many countries, as a matter of ethics, prohibit lawyers from handling cases on a contingent-fee basis.⁴¹ A primary rationale for prohibiting contingent fee arrangements in many countries is a concern that an attorney whose pay depends upon the success of a case “might be tempted, for his own personal gain to inflame the damages, to suppress evidence, or even to suborn witnesses.”⁴²

Few, if any, class members have the resources—or incentive—to invest significant funds of their own to prosecute a case, even if there is a possibility that they can be reimbursed if they are successful. Moreover, the problem is even more acute if the individual class members must pay the fees of opposing counsel as well in the event of a loss—as required under the “loser pays” system that prevails in most countries.⁴³ The disincentive for class members to take on such a financial risk is especially great in small claims cases, such as consumer cases, where a class member’s entire recovery (if successful) might be well under \$1000. And the problem is particularly concerning when, as in many (if not most) countries, the class representatives must absorb all of the costs and cannot spread the costs among the class as a whole.⁴⁴ In short, in most countries, class actions impose huge risks upon class representatives or all class members—risks that most potential litigants are unwilling to incur.⁴⁵

⁴⁰ Thomas D. Rowe, Jr., *Shift Happens: Pressure on Foreign Attorney-Fee Paradigms From Class Actions*, 13 DUKE J. COMP. & INT’L L. 125, 128 (2003) (citations omitted). *Accord*, e.g., Linklaters Guide, *Collective Actions Across the Globe: A Review* (2011) at 2–19 (countries that restrict contingency fee agreements include Belgium, France, Germany (allowed only in individual cases), Hong Kong, The Netherlands, and Portugal; countries that allow contingency fees include the United Kingdom and Russia (in limited circumstances)); Debra L. Bassett, *The Future of International Class Actions*, 18 SW. J. INT’L L. 21, 23 (2011) (noting that “most countries prohibit or limit conditional or contingent fee agreements”) (footnote omitted); Manning Gilbert Warren, III, *The Prospects for Convergence of Collective Redress Remedies in the European Union*, 47 INT’L LAW. 325, 328–29 (2013) (“Contingency legal fees, the engine of the class action remedy in the United States, have been largely rejected by the EU’s Member States.”).

⁴¹ See, e.g., W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why is the United States the “Odd Man Out” in How it Pays its Lawyers?*, 16 ARIZ. J. INT’L & COMP. L. 361, 381 (1999) (describing a “deeply ingrained attitude of hostility toward the contingent fee” which “has made contingent fees illegal, unethical, or both in virtually all countries outside the U.S.”) (citations omitted).

⁴² Michael Zander, *Will the Revolution in the Funding of Civil Litigation in England Eventually Lead to Contingency Fees?*, 52 DEPAUL L. REV. 259, 261 (2002) (citation omitted).

⁴³ See, e.g., Rowe, *supra* note 40, at 128.

⁴⁴ *Id.* at 131–32 (outside the U.S., “[n]ot only would the loser-pays rule pose the threat of a class plaintiff’s being out of pocket for the other side’s large fees in the event of defeat; but a ban on no-win, no-pay contingent fees would keep the plaintiffs’ attorney from bearing the risk of no or small recovery and spreading that risk across multiple cases—thus imposing the risk of being liable for the probably large fees of class counsel upon individual clients who are less equipped and likely less disposed to take it on in the first place”).

⁴⁵ See, e.g., Donald N. Dewees, et al., *An Economic Analysis of Cost and Fee Rules for Class Actions*, 10 J. LEGAL STUD. 155, 157 (1981) (noting, in discussing England and Canada, that because of financial risks to the representative plaintiff, such a plaintiff “is never better off in economic terms bringing

III. Multidistrict Litigation

A third critical element of U.S. class actions—in particular, those litigated in federal court—is the ability of the judiciary to consolidate (for pretrial purposes) all of the actions before a single judge.⁴⁶ Specifically, the federal Multidistrict litigation (“MDL”) statute⁴⁷ allows “civil actions involving one or more common questions of fact” that were originally filed in different federal districts to be transferred to a single, designated judge “for coordinated or consolidated pretrial proceedings.”⁴⁸ The decision whether to transfer proceedings to a single judge is made by the Judicial Panel on Multidistrict Litigation (“JPML”), a special panel designated by the Chief Justice of the United States from among sitting federal trial and appellate judges.⁴⁹ The MDL statute is not limited to class actions, but MDL treatment is especially common when there are class action lawsuits.

The MDL statute instructs that transfer is for pretrial purposes only, and that “[e]ach action so transferred shall be remanded . . . at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated”⁵⁰ The practical reality, however, is that most cases settle before trial, and thus most individual MDL cases are never transferred back to the district where they originated but instead are resolved before the transferee judge.⁵¹

Virtually no other country has a procedure similar to the MDL device that exists in the U.S. The author’s own research revealed few such mechanisms outside the U.S. To confirm the research, the author sent an email on the Civil Procedure listserv—a listserv of more than 450 U.S. law professors who teach civil procedure. Only three other countries were cited by any professors on the listserv: Germany, England, and Wales.⁵² Indeed,

his action in class rather than individual form”) (footnote omitted) (emphasis in original).

⁴⁶ Today, most U.S. class actions are litigated in federal court. In 2005, Congress passed legislation that has had the effect of shifting to federal court cases that, in the past, would have been litigated in state court. Class Action Fairness Act of 2005 (“CAFA”), Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified as amended in scattered sections of 28 U.S.C.). See also Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. L. REV. 951, 971 n.84 (2014) (noting that CAFA “made federal courts the dominant forum for large-scale class actions in the United States”) (citation omitted).

⁴⁷ 28 U.S.C. § 1407.

⁴⁸ § 1407(a).

⁴⁹ § 1407(b).

⁵⁰ § 1407(a). See also *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 28 (1998) (holding that an MDL transferee district court does not have the authority to assign a transferred case to itself for trial).

⁵¹ See, e.g., Martin H. Redish & Julie M. Karaba, *One Size Doesn’t Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 128 (2015) (“Settlement is the fate of almost all cases that are part of an MDL. Approximately 97% of MDL cases terminate in transferee districts; thus, relatively few are remanded back to the districts in which they were originally filed.”).

⁵² Germany’s 2005 Capital Markets Model Case Act (Kapitalanleger-Musterverfahrensgesetz or the “KapMuG”) provides for the use of “model proceedings” in securities cases where multiple claims raise a common issue. See Rhonda Wasserman, *Transnational Class Actions and Interjurisdictional Preclusion*, 86 NOTRE DAME L. REV. 313, 364 (2011). The

even countries with legal systems very similar to the U.S. (Canada, for example) generally do not have an MDL-type procedure.⁵³ Without an MDL proceeding, class action and individual cases will proceed simultaneously before many judges, risking the possibility of duplicative or inconsistent rulings, and making overall coordination difficult, if not impossible. Thus, the lack of an MDL tool in most countries poses a serious impediment to the effective use of class actions.

IV. Examples of Interplay of Opt Out, Fee Recovery, and Multidistrict Litigation

While the opt-out, fee recovery, and MDL procedures are powerful individually, it is the combination of the three procedures that gives the U.S. class action its unique quality. This interplay is illustrated by two recent high-profile class action settlements.

A. British Petroleum Settlement

On April 20, 2010, an explosion and massive discharge of oil took place on the *Deepwater Horizon* oil drilling rig in the Gulf of Mexico, causing billions of dollars worth of economic and environmental harm. Numerous individual and putative class action lawsuits were subsequently filed in courts throughout the southern region of the United States. On August 10, 2010, the JPML centralized all federal lawsuits (except for securities and pension-related suits) before Judge Carl Barbier in the Eastern District of Louisiana.⁵⁴ The JPML found that the lawsuits, which included claims for both economic damages and personal injuries caused by the spill, “indisputably share[d] factual issues concerning the cause (or causes) of the Deepwater Horizon explosion/fire and the role, if any, that each defendant played in it.”⁵⁵ With respect to its selection of the particular judge, the JPML noted Judge Barbier’s “considerable MDL experience” in his 12 years on the bench, and commented that, “[w]ithout discounting the spill’s effects on other states, if there is a geographic and psy-

chological ‘center of gravity’ in this docket, then the Eastern District of Louisiana is closest to it.”⁵⁶

On December 21, 2012, after the parties had reached a tentative settlement, Judge Barbier granted class certification and settlement approval for a class action comprised of claims for economic loss and property damage,⁵⁷ and on January 11, 2013, the court similarly certified and approved a class settlement for claims alleging various personal injuries from the oil spill.⁵⁸ Through an intricate set of funds created to compensate various categories of claimants, the parties structured the settlement with the goal of providing full compensation for the class members’ injuries. (Such full compensation was in contrast to many settlements, in which a class accepts less than the entire amount it could have won at trial, in exchange for avoiding the risk of non-recovery.)

The economic loss and property damage settlement class was defined in terms of (1) geographic bounds, and (2) the nature of the claimants’ loss or damage caused by the oil spill.⁵⁹ “Generally, to be a class member, an individual within the geographic area must have lived, worked, or owned or leased property in the area between April 20, 2010, and April 16, 2012, and businesses must have conducted activities in the area during that same time frame.”⁶⁰ The settlement recognized six categories of damage, including various types of business loss and loss or damage to real property.⁶¹ Additionally, with one exception, there was no cap on the amounts that could be paid.⁶² Many damage categories were also “augmented” by a “Risk Transfer Premium,” a multiplier that was intended to “compensate[] class members for potential future loss, as well as pre-judgment interest, any risk of oil returning, any claims for consequential damages, inconvenience, aggravation, the lost value of money, compensation for emotional distress, liquidation of legal disputes about punitive damages, and other factors.”⁶³

The Medical Benefits class settlement included (1) compensation for specified physical conditions; (2) the periodic medical consultation program; (3) the “Gulf Region Health Outreach Program,” which was designed to help improve the healthcare system in the area affected by the spill; and (4) a “Back-End Litigation Option,” which was designed to preserve class members’

KapMuG was enacted on an experimental basis, and was set to expire in 2010, absent action by the German legislature. In 2012, the legislature extended the KapMuG to 2020. See, e.g., Stefaan Voet, *Cultural Dimensions of Group Litigation: The Belgian Case*, 41 GA. J. INT’L & COMP. L. 433, 438 (2013).

Along similar lines, the Group Litigation Order (“GLO”) mechanism—introduced in 1999 in England and Wales—enables the coordination of multiple individual claims that “give rise to common or related issues of fact or law.” Christopher Hodges, *England and Wales*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 105, 109 (2009) (quoting Rule). In such cases, a single judge is appointed to manage the cases, which may include appointing lead solicitors, ruling on issues and evidence related to the litigation, encouraging the parties to settle, and selecting individual cases for trial “as test or lead cases, resolution of which should illuminate resolution or settlement of many others.” *Id.*

⁵³ See Susan M. Sharko, Glenn M. Zakaib & Colin Loveday, *Global Strategies and Techniques for Defending Class Action Trials: Defending the Global Company in Multinational Litigation*, 77 DEF. COUNS. J. 295, 295 (2010) (noting lack of MDL-type procedure in Canada and Australia).

⁵⁴ *In re Deepwater Horizon*, 731 F. Supp. 2d 1352 (J.P.M.L. 2010).

⁵⁵ *Id.* at 1354.

⁵⁶ *Id.* at 1355.

⁵⁷ *In re Deepwater Horizon*, 910 F. Supp. 2d 891, 900 (E.D. La. 2012).

⁵⁸ *In re Deepwater Horizon*, 295 F.R.D. 112 (E.D. La. 2013) (settlement applied to numerous medical conditions but excluded various claims for death or serious bodily injury).

⁵⁹ *In re Deepwater Horizon*, 910 F. Supp. 2d 891, 903 (E.D. La. 2012).

⁶⁰ *Id.* (citation, alterations and internal quotation marks omitted).

⁶¹ *Id.*

⁶² One category, the Seafood Compensation Fund (a fund designed to compensate “Commercial Fishermen, Seafood Boat Captains, all other Seafood Crew, Oyster Leaseholders, and Seafood Vessel Owners . . . for economic loss claims relating to Seafood, including shrimp, oysters, finfish, blue crab, and other species”), had a cap of \$2.3 billion for all claims. *Id.* at 908.

⁶³ *Id.*

ability to sue BP for compensatory damages for latent injuries that might manifest in the future.⁶⁴

The U.S. Court of Appeals for the Fifth Circuit affirmed Judge Barbier's decision approving the settlement, and the U.S. Supreme Court declined to hear the case.⁶⁵ In both settlements, the vast majority of class members chose not to opt out.⁶⁶

BP itself has estimated the economic and medical benefits settlements to be worth \$7.8 billion.⁶⁷ The attorneys' fees have not been determined in the *Deepwater Horizon* litigation. Under the settlement, BP and plaintiffs' counsel have agreed that BP will not contest a request by plaintiffs for attorneys' fees and costs of up to \$600 million.⁶⁸ As noted above, however, despite the parties' agreement regarding fees, the decision to award fees (and the amount of fees) is up to the district court and will not be modified on appeal absent an abuse of discretion.⁶⁹

B. NFL Concussion Settlement

In *In re National Football League Players' Concussion Injury Litigation*, thousands of retired NFL players sued their former league, the NFL (an unincorporated association comprised of 32 member teams). Those players alleged that the NFL had failed to take reasonable actions to protect players from risks of brain injury caused by repeated blows to the head, and that it had failed to disclose what it knew about the risks of cognitive injury as a result of playing football.⁷⁰ The first such lawsuits were filed in 2011; within a few years, more than 5,000 former players had filed similar lawsuits.⁷¹

⁶⁴ *In re Deepwater Horizon*, 295 F.R.D. 112, 120 (E.D. La. 2013).

⁶⁵ *See In re Deepwater Horizon*, 739 F.3d 790 (5th Cir.), cert. denied, 135 S. Ct. 754 (2014).

⁶⁶ *See* 910 F. Supp. 2d 891, 915, 937 ("As of November 15, 2012, a total of 13,123 timely and procedurally valid opt-out requests have been submitted by potential Class Members" from economic and property damage settlement containing "tens of thousands of members, and likely far more"); 295 F.R.D. 112, 134, 150 (in Medical Benefits settlement, "[o]nly 1,747 persons have submitted requests to opt out" from a class of approximately 200,000).

⁶⁷ *See* BP Annual Report and Form 20-F (2011) at 163, available at http://www.bp.com/content/dam/bp/pdf/investors/BP_Annual_Report_and_Form_20F_2011.pdf ("BP estimates the cost of the proposed settlement would be approximately \$7.8 billion").

⁶⁸ *See* Ex. 27 to *Deepwater Horizon* Economic and Property Damages Settlement Agreement as Amended Dated April 18, 2012, and Ex. 19 to *Deepwater Horizon* Medical Benefits Settlement Agreement Dated April 18, 2012, Case No. 2:10-md-02179-CJB-SS, at 2, available at http://www.deepwaterhorizonsettlements.com/Documents/Economic%20SA/Ex27_Fees_and_Costs.pdf ("the BP Parties agree not to contest a joint request by Economic Class Counsel and Medical Benefits Class Counsel . . . for, nor oppose an award by the Court for, a maximum award of \$600,000,000 . . . as a payment of all common benefit and/or Rule 23(h) attorneys' fees, costs and expenses incurred at any time, whether before or after the date hereof, for the common benefit of members of the Economic Class and the Medical Class").

⁶⁹ *See* note 32, *supra*.

⁷⁰ *See In re NFL Players' Concussion Injury Litig.*, 301 F.R.D. 191, 195 (E.D. Pa. 2014) (preliminarily approving class settlement).

⁷¹ *See id.*

The lawsuits were consolidated under the MDL statute⁷² and transferred to Judge Anita Brody of the Eastern District of Pennsylvania. The JPML noted that Judge Brody "has the experience to guide this litigation on a prudent course," that six of the consolidated actions were already pending before Judge Brody, and that "the majority of the parties support centralization in that district."⁷³

Following centralization, the parties engaged in negotiations as well as motion practice on several legal issues. Most significantly, the district court received briefing and heard oral argument on a potentially dispositive argument by the NFL that the suits were barred as a matter of law under a doctrine known as "federal preemption";⁷⁴ however, the court deferred its ruling and instead directed the parties to engage in mediation before a retired federal district judge selected by the court.⁷⁵

On January 6, 2014, the parties presented the court with a proposed settlement. The primary components of the settlement were (1) a \$75 million Baseline Assessment Program to use as a basis to monitor retired players for possible future brain injuries; (2) a \$675 million monetary award fund to compensate players diagnosed with serious neurocognitive impairments, such as Alzheimer's Disease, Parkinson's Disease, and Amyotrophic Lateral Sclerosis (also known as Lou Gehrig's Disease); and (3) a \$10 million education fund to promote football safety and injury prevention. Individual awards to plaintiffs under the \$675 million fund were capped at \$5 million for the most serious injuries, with reductions for, among other things, the retired player's age at diagnosis and having played fewer than five years in the NFL.⁷⁶

The court denied preliminary approval of the initial proposal. It noted its "concern as to the adequacy of the proposed \$675 million Monetary Award Fund in light of the 65-year lifespan of the Monetary Award Fund, the settlement class size of more than 20,000 members, and the potential magnitude of the awards."⁷⁷

The parties went back to the negotiating table, returning to court in June 2014 with a revised settlement proposal. Most significantly, while preserving the general settlement structure, the revised settlement did away with the fixed \$675 million cap on plaintiffs' cumulative recovery, providing instead that "the NFL Parties must pay all valid claims for the next 65 years."⁷⁸ The NFL also agreed not to oppose plaintiffs' request for fees and costs up to \$112,500,000.⁷⁹ The court granted preliminary approval, and notice was sent to

⁷² *See* Part III, *supra*.

⁷³ *In re NFL Players' Concussion Injury Litig.*, 842 F. Supp. 2d 1378, 1379 (J.P.M.L. 2012).

⁷⁴ In general terms, the federal preemption doctrine means that when there is a conflict between state and federal law, the federal law "preempts" the conflicting state law. Here, the NFL argued that plaintiffs' tort claims, which were based on state law, were preempted by federal labor law, and should therefore be dismissed.

⁷⁵ *See In re NFL Players' Concussion Injury Litig.*, 961 F. Supp. 2d 708, 710-11 (E.D. Pa. 2014).

⁷⁶ *In re NFL Players' Concussion Injury Litig.*, 301 F.R.D. 191, 195-97 (E.D. Pa. 2014) (describing settlement terms).

⁷⁷ *Id.* at 195.

⁷⁸ *Id.*

⁷⁹ *See* Class Action Settlement Agreement as of June 25, 2014, No. 2:12-md-02323-AB, § 21.1.

the class describing the terms of the proposed settlement. There were relatively few opt-outs.⁸⁰

The court presided over a fairness hearing in November 2014, and later issued an order asking that additional changes be made to the settlement.⁸¹ On April 22, 2015, the court approved the amended settlement agreement in a 132-page opinion.⁸² The decision is likely to be contested on appeal by one or more class

⁸⁰ See Second Opt Out Report Submitted by the Claims Administrator, No. 2:12-md-02323-AB, Doc. 6424 (filed 11/13/14) (E.D. Pa.) at 2 (reporting total of 225 timely opt-out requests filed).

⁸¹ *In re NFL Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB (Doc. 6479) (E.D. Pa. Feb. 2, 2015).

⁸² See *In re NFL Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB (Doc. 6509) (E.D. Pa. Apr. 22, 2015) (approving class settlement).

members who objected to the settlement.⁸³ To date, the court has made no award of attorneys' fees.

V. Conclusion

Three features of the U.S. legal system—MDL, opt-out, and methodology for determining attorneys' fees—are important to the resolution of cases on a classwide basis.

The British Petroleum and NFL cases illustrate how those features can work together to resolve complicated litigation. The absence of those procedures, by contrast, will mean that in most countries, class actions will exist only on paper (through legislation) and not in reality.

⁸³ See, e.g., Ken Belson, *N.F.L. Concussion Settlement Is Given Final Approval*, N.Y. TIMES, Apr. 22, 2015 (noting that the case is "widely expected" to be appealed to a higher court).