



2-1-2011

# Transnational Class Actions and Interjurisdictional Preclusion

Rhonda Wasserman

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>

## Recommended Citation

Rhonda Wasserman, *Transnational Class Actions and Interjurisdictional Preclusion*, 86 Notre Dame L. Rev. 313 (2013).

Available at: <http://scholarship.law.nd.edu/ndlr/vol86/iss1/6>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

# TRANSNATIONAL CLASS ACTIONS AND INTERJURISDICTIONAL PRECLUSION

*Rhonda Wasserman\**

## INTRODUCTION

As global markets have expanded and transborder disputes have multiplied, American courts have been pressed to certify transnational class actions—i.e., class actions brought on behalf of large numbers of foreign citizens or against foreign defendants.<sup>1</sup> The Supreme Court's

---

© 2011 The University of Notre Dame. Individuals and nonprofit institutions may reproduce and distribute copies of this Article in any format, at or below cost, for educational purposes, so long as each copy identifies the authors, provides a citation to the Notre Dame Law Review, and includes this provision and copyright notice.

\* Professor of Law, University of Pittsburgh School of Law. A.B., Cornell University; J.D., Yale Law School. I would like to thank Ron Brand, Vivian Curran, Sam Issacharoff, Justine Stefanelli, and Patrick Woolley for their helpful suggestions and comments on an earlier draft of this Article. I am grateful to Emma Finney, Nate Gruz, Tim Stienstraw, and Lauren Williams for their diligent research assistance and to Linda Tashbook for her invaluable help. I served on the Advisory Board for the Judgments Project undertaken by the British Institute of International and Comparative Law described in Part II.A of this Article. In addition, I provided assistance to Justine Stefanelli, the Project Research Fellow and the National Rapporteur for the United States, in preparing the Report of the United States submitted in connection with the Judgments Project.

1 See, e.g., *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010) (rejecting the application of U.S. securities law in a putative class action filed by Australian shareholders against an Australian bank); *In re Royal Dutch/Shell Transp. Sec. Litig.*, 522 F. Supp. 2d 712, 721–24 (D.N.J. 2007) (holding that the court lacked subject matter jurisdiction over the securities claim because the oil company did not engage in sufficient conduct within the United States); see also Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 14, 38–41 (2007) (noting the increasing rate at which transnational cases are being filed); Steven S. Kaufhold, *International Securities Class Actions: The World's Investors Come to U.S. Courts*, CADS REP. (ABA Section of Litig., Class Action & Derivative Suit Comm., Chicago, Ill.), Winter 2009, at 1, 12 (same). According to one recent account, the number of securities class actions filed in American courts against private foreign issuers nearly doubled between 2006 and 2007 and “two of the ten largest securities class action settlements in history have been paid by foreign issuers to settle claims in U.S. courts.” *Id.*

recent decision in *Morrison v. National Australia Bank Ltd.*<sup>2</sup> is likely to reduce the number of “foreign-cubed” or “f-cubed” securities fraud class actions filed in the United States, at least in the short term.<sup>3</sup> But *Morrison* is unlikely to inhibit the filing of transnational class actions involving securities listed on domestic stock exchanges, transnational class actions raising claims that arise under federal laws that apply extraterritorially, or transnational class actions against defendants whose conduct within the United States is the “focus” of Congressional concern. In short, even after *Morrison*, class counsel are likely to keep filing transnational class actions and defense counsel are likely to keep opposing them.

Defendants in transnational class actions often oppose certification by arguing that the superiority prong of Rule 23(b)(3) is not satisfied.<sup>4</sup> In particular, defendants argue that a class action is not

---

2 130 S. Ct. 2869.

3 “Foreign-cubed” or “f-cubed” class actions are class actions against a *foreign issuer* of securities by a plaintiff class including *foreign investors* who purchased securities on a *foreign exchange*. See Buxbaum, *supra* note 1, at 17; Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 465, 472–75; Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 33 n.147 (2009). *Morrison* held that section 10(b) of the Securities Exchange Act applies only to “transactions in securities listed on domestic exchanges, and domestic transactions in other securities.” *Morrison*, 130 S. Ct. at 2874. *Morrison* is expected to dramatically reduce the number of f-cubed class actions filed in federal courts in the United States. See Luke Green, *Morrison v. National Australia Bank—The Dawn of a New Age?*, RISKMETRICS GROUP INSIGHT (June 25, 2010, 5:54 PM), <http://blog.riskmetrics.com/slw/2010/06/morrison-v-national-australia-bank—the-dawn-of-a-new-age.html> (viewing *Morrison* as “a clear precedent that drastically reins in the extraterritorial reach of US securities fraud laws”). Section 929Y of the recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act directs the Securities and Exchange Commission to study whether private rights of action under section 10(b) should be extended to cover “(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.” Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929Y, 124 Stat. 1376, 1871 (2010) (to be codified at 15 U.S.C. § 78o). Depending upon the results of the study, Congress may legislatively overrule *Morrison*, which “could mean . . . a reversion back to the pre-*Morrison* era of large multi-national class action litigation.” Luke Green, *Post-Morrison Legislative Developments*, RISKMETRICS GROUP INSIGHT (July 12, 2010, 2:12 PM), <http://blog.riskmetrics.com/slw/2010/07/as-discussed-in-our-previous.html>.

4 The superiority prong of Rule 23(b)(3) permits maintenance of a class action only if “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” FED. R. CIV. P. 23(b)(3). For the argument that “the binding effect of judgments should not be addressed as part of the superiority inquiry

superior to alternative means of dispute resolution because European courts will not recognize or accord preclusive effect to an American class action judgment in the defendant's favor. Thus, defendants fear repetitive litigation on the same claim in foreign courts even if they were to prevail in an American court.<sup>5</sup>

In considering this argument against certification, American courts often use judgment recognition and preclusion terminology interchangeably. They discuss the "'possibility' that a foreign court may not recognize a judgment"<sup>6</sup> and the fear that an American class action judgment "might not be given preclusive effect in foreign courts"<sup>7</sup> as though recognition and preclusion analyses are identical. But they are not.

---

of Rule 23(b)," see Matthew H. Jasilli, Note, *A Rat Res? Questioning the Value of Res Judicata in Rule 23(b)(3) Superiority Inquiries for Foreign Cubed Class Action Securities Litigations*, 48 COLUM. J. TRANSNAT'L L. 114, 118–19 (2009).

5 See, e.g., *In re Vivendi Universal*, S.A. Sec. Litig., 242 F.R.D. 76, 92 (S.D.N.Y. 2007) (discussing the litigant's fear of relitigating the same claim in foreign courts even if it prevailed in the American courts), *reconsideration denied*, No. 02 Civ. 5571(RJH) (HBP), 2009 WL 855799, at \*3 (S.D.N.Y. Mar. 31, 2009) ("The Court acknowledges the possibility that some French class members—those who do not receive actual notice of this action—may not be absolutely precluded from relitigating their claims. Yet this possibility is just that."); *Tracinda Corp. v. DaimlerChrysler AG* (*In re DaimlerChrysler AG Sec. Litig.*), 216 F.R.D. 291, 301 (D. Del. 2003) (discussing the litigant's fear of relitigating the same claim in foreign courts even if it prevailed in the American courts); *Cromer Fin. Ltd. v. Berger*, 205 F.R.D. 113, 134–36 (S.D.N.Y. 2001) (same); *Ansari v. N.Y. Univ.*, 179 F.R.D. 112, 116–17 (S.D.N.Y. 1998) (same); *CL-Alexanders Laing & Cruickshank v. Goldfeld*, 127 F.R.D. 454, 459–60 (S.D.N.Y. 1989) (same); see also Rachael Mulheron, *The Case for an Opt-Out Class Action for European Member States: A Legal and Empirical Analysis*, 15 COLUM. J. EUR. L. 409, 445–46 (2009) (same). In grappling with these transnational class actions, American courts have had to address a host of other interesting and difficult issues, including the availability of federal subject matter jurisdiction, see *In re Royal Dutch/Shell*, 522 F. Supp. 2d at 717–24; *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 346, 366–97 (S.D.N.Y. 2005). But see *Morrison*, 130 S. Ct. at 2877 (holding that the extraterritorial reach of a federal statute is a merits question, not a jurisdictional one); the amenability of foreign defendants to personal jurisdiction in the United States, see *In re Alstom*, 406 F. Supp. 2d at 397–401; *Cromer Fin. Ltd.*, 205 F.R.D. at 126; *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 489–91 (S.D.N.Y. 2001); the management quandaries that may arise in transnational litigation involving large numbers of non-English speaking class members, see *In re DaimlerChrysler*, 216 F.R.D. at 301; and the appropriateness of naming a foreign investor as the lead plaintiff under the Private Securities Litigation Reform Act, see *In re Parmalat Sec. Litig.*, 376 F. Supp. 2d 472, 493–503 (S.D.N.Y. 2005); *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 219 F.R.D. 343, 352–53 (D. Md. 2003); *In re Cable & Wireless, PLC, Sec. Litig.*, 217 F.R.D. 372, 376–77 (E.D. Va. 2003).

6 *Cromer Fin. Ltd.*, 205 F.R.D. at 135 (quoting *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 996 (2d Cir. 1975)).

7 *Id.* at 134.

American courts are conflating what should be a two-step analysis into one. They should be asking, first, would the foreign court *recognize* the American class action judgment? And second, if it would, what *preclusive effect*, if any, would the American class action judgment have in the foreign court? Instead, while employing both recognition and preclusion terminology, the American courts typically focus only on the former question, examining only whether the foreign court would decline to recognize the American class action judgment because it violates “international public policy.”<sup>8</sup> The American courts rarely, if ever, consider the second step: the preclusive effect, if any, that an American class action judgment would receive if it were recognized abroad. The failure to address this second step is problematic because even if a foreign court were to recognize an American class action judgment, the defendant could face a risk of relitigation if the judgment were not accorded robust preclusive effect.

This Article seeks to analyze the missing second step—the preclusive effect of an American class action judgment—drawing heavily on a project by the British Institute of International and Comparative Law (BIICL) undertaken to assess the preclusive effects of judgments under the national laws of a select group of European countries.<sup>9</sup> Even in Europe, where the Brussels/Lugano Regime governs the recognition and enforcement of Member State judgments in civil and commercial matters,<sup>10</sup> little attention has been paid to the question of the preclusive effects to be afforded to such judgments.<sup>11</sup>

---

8 See *In re Vivendi Universal*, 2009 WL 855799, at \*3; see also *In re Vivendi Universal*, 242 F.R.D. at 96, 100 (asking whether the American judgment would “contravene French concepts of international public policy” and “infringe principles of universal justice” (quoting Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., May 25, 1948, Bull. civ. I, No. 19 (Fr.)); *In re DaimlerChrysler*, 216 F.R.D. at 301 (addressing the defendants’ contention “that there is a significant likelihood that foreign courts will not recognize and enforce a United States judgment”); *Cromer Fin. Ltd.*, 205 F.R.D. at 135 (focusing on expert opinions that debated whether American class actions would be recognized in England and Switzerland or whether a public policy or *ordre public* exception would apply); *CL-Alexanders Laing*, 127 F.R.D. at 459–60 (considering an affidavit submitted by a British barrister, which addressed whether a British court will recognize a judgment rendered in a U.S. “opt-out” class action); Andrea Pinna, *Recognition and Res Judicata of US Class Action Judgments in European Legal Systems*, 1 ERASMUS L. REV. 31, 34–39 (2008) (Neth.) (purporting to address whether European courts “could refuse *Res Judicata* effect to [an American] class action judgment,” but actually analyzing the reasons why European courts decline to recognize American class action judgments).

9 See *infra* note 67 and accompanying text.

10 See *infra* note 69.

11 See *infra* note 71 and accompanying text.

The Article is divided into three Parts. Part I examines the preclusive effects of class action judgments in U.S. courts. A defendant who raises the risk of repetitive litigation abroad to oppose certification of a transnational class action at home assumes that, in a purely domestic case, a class action judgment in its favor would shield it from duplicative individual suits by absent class members in American courts. Accordingly, the defendant argues that the American court should not certify a transnational class unless its judgment would be accorded the same preclusive effects abroad.<sup>12</sup> Part I assesses the accuracy of the defendant's assumption regarding the nature and scope of the protection that American preclusion law affords successful class action defendants. As we will see, while American preclusion doctrine provides defendants with meaningful protection against repetitive individual suits following a class action victory, it does not guarantee defendants protection from *all* follow-up litigation that individual class members may bring.

With the American preclusion landscape as background, Part II of the Article assesses the magnitude of the risk that an American class action judgment will not be accorded preclusive effect in Europe. As noted above, this inquiry is distinct from, and logically follows resolution of, the recognition issue. Subpart A of Part II introduces BIICL and its Judgments Project, upon which the Article draws. Subpart B analyzes important basic differences between American preclusion doctrine, on the one hand, and the preclusion doctrines of the participating European countries, on the other. Subpart C then considers the extent to which the participating European countries permit class actions or other forms of group litigation in their own courts and the extent to which their *domestic* class action or group litigation judgments are accorded preclusive effect in the courts of the rendering country. Subpart D of Part II considers the extent to which these European countries accord preclusive effect to the class action or group litigation judgments of other countries.

Finally, drawing upon the data gathered in Part II, Part III of the Article seeks to draw tentative conclusions regarding the risk that American class action judgments will not be accorded the same preclusive effects in European courts that they would receive in American courts. Part III also makes recommendations for further study.

---

12 See Pinna, *supra* note 8, at 38 (expressing concern that foreign class members might bring new claims in a foreign court against a defendant that prevailed against the class in the United States).

## I. THE PRECLUSIVE EFFECTS OF CLASS ACTION JUDGMENTS IN U.S. COURTS

### A. *Claim Preclusive Effects of Class Action Judgments*

Defendants in transnational class actions pending in American courts often oppose class certification by arguing that class action judgments will not be given preclusive effect abroad.<sup>13</sup> The unspoken assumption is that the preclusive effects of class action judgments provide defendants in American courts with robust protection against repetitive individual lawsuits by absent class members seeking to relitigate the claim adjudicated or settled in the class action. The first order of business, then, is to assess the accuracy of this assumption and to gauge the extent to which a judgment rendered against a plaintiff class precludes absent class members from pursuing the same claim against the same defendant.<sup>14</sup>

Outside the class action context, a valid and final judgment in the defendant's favor extinguishes the plaintiff's entire claim and bars a subsequent action by the same plaintiff against the same defendant on the same claim.<sup>15</sup> According to the *Restatement (Second) of Judgments*:

(1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . , the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

(2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a conve-

---

<sup>13</sup> See, e.g., *In re Vivendi Universal*, 2009 WL 855799, at \*3; *In re Vivendi Universal*, 242 F.R.D. at 92; *CL-Alexanders Laing*, 127 F.R.D. at 459–60.

<sup>14</sup> A comprehensive treatment of this complicated and fascinating issue is beyond the scope of this Article. For an excellent theoretical analysis of preclusion and intraclass conflicts of interest, see Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717 (2005). For an excellent, more practically oriented discussion with helpful illustrations, see 7AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE § 1789 (3d ed. 2005); 18A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4455 (2d ed. 2002). For a discussion of the unique preclusion issues that arise when successive class actions are brought, see Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 484–97 (2000).

<sup>15</sup> RESTATEMENT (SECOND) OF JUDGMENTS §§ 17(2), 19 (1982).

nient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.<sup>16</sup>

Under this transactional test, a judgment's claim preclusive effect will bar a second action by the same plaintiff as long as the facts underlying the claims are the same, even if the legal theory relied upon, the evidence offered, or the relief sought is different.<sup>17</sup> This ban on claim splitting would, for example, preclude an individual who lost an employment discrimination action in which she sought injunctive relief from suing her employer a second time for the same discriminatory conduct even if the second suit sought money damages or pursued a different legal theory.<sup>18</sup>

Claim preclusion affords a prevailing class action defendant meaningful protection from follow-up suits by absent class members. As the Supreme Court stated in the leading case of *Cooper v. Federal Reserve Bank*,<sup>19</sup> "a judgment in a properly entertained class action is binding on class members in any subsequent litigation. . . . A judgment in favor of the defendant extinguishes the claim, barring a subsequent action on that claim."<sup>20</sup> In *Cooper*, the class representatives

---

16 *Id.* § 24.

17 *See id.* § 24 cmt. a; *see also, e.g.*, *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) ("A final judgment on the merits . . . precludes the parties . . . from relitigating issues that were or could have been raised in that action." (citing *Comm'r v. Sunnen*, 333 U.S. 591, 597 (1948))); *Hatch v. Boulder Town Council*, 471 F.3d 1142, 1146, 1148–53 (10th Cir. 2006) (clarifying and applying the *Restatement's* transactional test); *Havercombe v. Dep't of Educ.*, 250 F.3d 1, 3–9 (1st Cir. 2001) (same); *Maharaj v. BankAmerica Corp.*, 128 F.3d 94, 97 (2d Cir. 1997) (applying the *Restatement's* transactional test and adding that "when the second action concerns a transaction occurring after the commencement of the prior litigation, claim preclusion generally does not come into play" (citing *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1464 (2d Cir. 1996))).

18 *See, e.g.*, *Manego v. Orleans Bd. of Trade*, 773 F.2d 1, 5–7 (1st Cir. 1985) (holding that the judgment in an action alleging race discrimination in the denial of business licenses precluded a second suit alleging an antitrust conspiracy to deny the same licenses); *Kabes v. Sch. Dist.*, 387 F. Supp. 2d 955, 966–67 (W.D. Wis. 2005) (holding that the judgment in a suit seeking reinstatement precluded a second suit seeking money damages for the same transfer); *Metzenbaum v. John Carroll Univ.*, 987 F. Supp. 610, 614–15 (N.D. Ohio 1997) (holding that the dismissal with prejudice of a claim for employment discrimination seeking only injunctive relief precluded a second claim alleging discrimination seeking different relief).

19 467 U.S. 867 (1984); *see also* Wasserman, *supra* note 14, at 489–90 (outlining the *Cooper* Court's discussion of the preclusive effects of a class action judgment); Wolff, *supra* note 14, at 724–31 (analyzing *Cooper* and concluding that it "is a Title VII opinion, not an opinion about the preclusive effects of class action judgments").

20 *Cooper*, 467 U.S. at 874 (citing, *inter alia*, *FED. R. CIV. P.* 23(c)(3); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); *RESTATEMENT (SECOND) OF JUDGMENTS* § 41(1)(e)).

alleged that the defendant bank had engaged in a pattern of racial discrimination.<sup>21</sup> The district court found that the bank had discriminated against employees in pay grades four and five, but otherwise found insufficient evidence of a pattern of discrimination to justify relief.<sup>22</sup> Individual employees in pay grades above five, who had been absent class members, then filed individual suits against the bank, alleging racial discrimination.<sup>23</sup> The defendant argued that the plaintiffs were bound by the determination that there was no discrimination in their pay grades.<sup>24</sup>

In explaining the preclusive effects of the class action judgment, the Court explained that the judgment in *Cooper*

(1) bar[red] the class members from bringing another class action against the Bank alleging a pattern or practice of discrimination for the relevant time period and (2) preclude[d] the class members in any other litigation with the Bank from relitigating the question whether the Bank engaged in a pattern and practice of discrimination against black employees during the relevant time period.<sup>25</sup>

Thus, the judgment precluded the absent class members from relitigating the same claim, narrowly defined, and the same issues that had been presented in the class action.

But while a judgment in an *individual* action will preclude a plaintiff from suing the same defendant a second time for the same conduct, even if the follow-up suit seeks a different remedy or presents a different theory, the Supreme Court in *Cooper* and many American courts have tempered the claim preclusive effects of class action judgments to facilitate the prosecution of class actions on behalf of narrowly defined classes, pursuing only those portions of potential claims that are shared by the group.<sup>26</sup>

---

21 *Id.* at 869–70.

22 *Id.* at 871–72.

23 *Id.* at 869–70.

24 *Id.* at 872–73.

25 *Id.* at 880.

26 *See id.* at 874–81; 18A WRIGHT, MILLER & COOPER, *supra* note 14, § 4455, at 459, 461; *see also* Wolff, *supra* note 14, at 722 (“[I]f the doctrines of claim and issue preclusion that are associated with individual litigation were to apply unaltered to class proceedings, the preclusion inquiry would sometimes reveal significant obstacles to class certification . . .”). Some American courts have concluded that certain class actions should not be, or should not have been, certified given the perceived risk that a later court might accord preclusive effect to the class action judgment and thereby preclude follow-up claims by absent class members. *See, e.g., In re Methyl Tertiary Butyl Ether (“MTBE”) Prods. Liab. Litig.*, 209 F.R.D. 323, 340 (S.D.N.Y. 2002) (declining to certify a products liability class action seeking only injunctive relief because of the “risk that subsequent courts would preclude absent class members from bringing per-

To understand how and why the *Cooper* Court adapted claim preclusion doctrine for class actions, it is helpful first to examine the Court's treatment of issue preclusion. The *Cooper* Court distinguished between a class-wide practice, on the one hand, and the distinct issue of individual discrimination raised in the subsequent actions, on the other.<sup>27</sup> It emphasized "that the rejection of a claim of classwide discrimination does not warrant the conclusion that no member of the class could have a valid individual claim."<sup>28</sup> Because the *issues* underlying the class's pattern claim and the individual plaintiffs' discrimination claims were different, issue preclusion did not bar litigation of the distinct issues.<sup>29</sup>

Without explicitly addressing the general ban on claim splitting, the *Cooper* Court permitted the absent class members to pursue individual *claims* of discrimination even though those claims were transactionally related to the pattern claims adjudicated in the class action.<sup>30</sup>

---

sonal injury claims"); *Thompson v. Am. Tobacco Co.*, 189 F.R.D. 544, 550–51 (D. Minn. 1999) (questioning the adequacy of representation afforded by a representative who brought only fraud claims against the cigarette manufacturers and sought to reserve personal injury claims for individual litigation and noting that "[a] subsequent court may very well find that individual injury and damage claims should have been litigated in this lawsuit"); *Zachery v. Texaco Exploration & Prod., Inc.*, 185 F.R.D. 230, 242–45 (W.D. Tex. 1999) (declining to certify a class alleging a pattern and practice of discrimination because of "the very high risk of a preclusive effect of [a] class action judgment" on the absent class members' damages claims for intentional discrimination); *Citizens Ins. Co. of Am. v. Daccach*, 217 S.W.3d 430, 453–55 (Tex. 2007) (declining to read *Cooper* as "an exception from res judicata principles for claims abandoned as unsuitable for class treatment"). For a critique of this "posture of vague powerlessness toward preclusion problems," see Wolff, *supra* note 14, at 744–46, 776. For criticism of the Texas Supreme Court's decision in *Daccach*, see Steve Gardner, *Texas Supreme Court: Putting the Squeeze on Class Actions?*, CONSUMER L. & POL'Y BLOG (Mar. 5, 2007, 2:35 PM), [http://pubcit.typepad.com/clpblog/2007/03/texas\\_supreme\\_c.html](http://pubcit.typepad.com/clpblog/2007/03/texas_supreme_c.html).

27 See *Cooper*, 467 U.S. at 876–78; 18A WRIGHT, MILLER & COOPER, *supra* note 14, § 4455, at 460–61; Wasserman, *supra* note 14, at 489.

28 *Cooper*, 467 U.S. at 878.

29 *Accord* *Hiser v. Franklin*, 94 F.3d 1287, 1290–94 (9th Cir. 1996) (holding that the plaintiff's claims were not barred by issue preclusion because the issue was never adjudicated when it was raised in the class action).

30 See *Cooper*, 467 U.S. at 880–84; see also, e.g., *Muñoz v. Orr*, 200 F.3d 291, 307 (5th Cir. 2000) ("[T]hat the failure of proof on the class claim does not bar all individual class members from bringing their own suits, provided that they do not base their claims solely on issues already adjudicated in this action and that they can show individualized proof of discrimination." (citing *Cooper*, 467 U.S. at 880)); *Isby v. Wright*, 104 F.3d 362, 1996 WL 735595, at \*1 (7th Cir. 1996) (unpublished table decision) (stating that the court would entertain the individual damages claims of class members where the class action had sought only injunctive relief); *In re Jackson Lockdown/MCO Cases*, 568 F. Supp. 869, 890–93 (E.D. Mich. 1983) (permitting indi-

Thus, it implicitly assumed that claim preclusion did not bar the absent class members' individual claims, thereby adopting a gloss on the doctrine of claim preclusion for class actions.<sup>31</sup>

Professors Wright, Miller, and Cooper have elaborated on this class action gloss:

The basic effort to limit class adjudication as close as possible to matters common to members of the class frequently requires that nonparticipating members of the class remain free to pursue individual actions that would be merged or barred by claim preclusion had a prior individual action been brought for the relief demanded in the class action. . . . [Cooper and o]ther cases provide equally clear illustrations of the need to adjust claim-preclusion rules to distinguish between the rules that apply to individual actions and the rules that apply to class actions. So an individual who has suffered particular injury as a result of practices enjoined in a class action should remain free to seek a damages remedy even though claim preclusion would defeat a second action had the first action been an individual suit for the same injunctive relief.<sup>32</sup>

Similarly, if a class action is defined narrowly to pursue only specific remedies or to press only certain theories or to litigate only designated issues, "individual actions remain available to pursue any other questions that were expressly excluded from the class action."<sup>33</sup>

---

vidual class members to pursue damages claims following a class action that had sought only declaratory and injunctive relief); Jahn *ex rel.* Jahn v. ORCR, Inc., 92 P.3d 984, 985 (Colo. 2004) (en banc) ("[T]he doctrine of claim preclusion does not bar unnamed members of a class seeking injunctive relief . . . from bringing claims for damages in subsequent litigation."); *cf.* Wolff, *supra* note 14, at 727 (noting "some tension between the Court's assertion that 'basic principles of res judicata (merger and bar or claim preclusion) . . . apply' in a class action and the actual holding of the case" (alteration in original) (quoting *Cooper*, 467 U.S. at 874)).

31 See Wasserman, *supra* note 14, at 490 (using the phrase "class action gloss").

32 18A WRIGHT, MILLER & COOPER, *supra* note 14, § 4455, at 461–62; *see also* Wolff, *supra* note 14, at 742 ("Most F2 courts [are willing] to entertain individual claims that could not have been litigated on a classwide basis in an earlier proceeding.").

33 18A WRIGHT, MILLER & COOPER, *supra* note 14, § 4455, at 465–66 (footnote omitted); *see also* Bishop v. Gainer, 272 F.3d 1009, 1017–20 (7th Cir. 2001) (concluding that where the certification order made clear that class-wide monetary relief was not contemplated, "no order in this case prevents a claim" by absent class members for back pay); *Hiser*, 94 F.3d at 1291–92 (recognizing that "a class action suit seeking only declaratory and injunctive relief does not bar subsequent individual damage claims by class members, even if based on the same events" and adding that a follow-up class action alleging a distinct access to court claim was not precluded by the prior class action judgment because it arose out of "a different set of operative facts"); *cf.* Reppert v. Marvin Lumber & Cedar Co., 359 F.3d 53, 56–58 (1st Cir. 2004) (concluding that a judgment approving the settlement of a nationwide class action for money damages precluded an individual action alleging the same product defect even

Courts certifying class actions may consider the potential preclusive effects of their judgments and explicitly seek to constrain them to suit the needs of the particular proceeding.<sup>34</sup>

A variety of factors counsel in favor of the class action gloss or limited preclusive effects for class action judgments. First, while it may be efficient to bring a class action seeking class-wide relief—to seek an injunction against a pattern of discrimination, for example—in some cases it may not be efficient or even possible to pursue other forms of relief, such as money damages, in the context of a class action.<sup>35</sup> If the judgment in a class action that pursued only injunctive relief were to preclude follow-up individual damage actions arising out of the same transaction or series of connected transactions, then the class members might feel compelled to intervene in the class

---

though the individual plaintiff raised a different legal theory); RESTATEMENT (SECOND) OF JUDGMENTS § 42 cmt. c (1982) (“[T]he representative of a class is constituted with reference to specific litigation and has authority only as to matters pertinent to it.”); *id.* § 42 illus. 4 (concluding that a judgment against a class that had alleged racial discrimination in employment would not preclude an individual action alleging sex discrimination).

34 See Wolff, *supra* note 14, at 764–66, 770–76; see also RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(b) (“[T]he general rule [against claim splitting] does not apply to extinguish the claim [if] . . . [t]he court in the first action has expressly reserved the plaintiff’s right to maintain the second action.”). Professor Wolff writes in terms of the “constraints” that a rendering court may impose upon the preclusive effects of a class action judgment. See Wolff, *supra* note 14, at 720–76.

35 See, e.g., *Bogard v. Cook*, 586 F.2d 399, 409 (5th Cir. 1978) (declining to preclude individual damage suits and citing the “lack of common questions of fact as to many of those claims, and the unmanageability of the suit had they been included”). Rule 23(b)(3) permits certification only if “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members.” FED. R. CIV. P. 23(b)(3). Courts have denied certification where individual issues, such as reliance, assumption of risk, length of exposure, or damages, predominate over the common questions. See, e.g., *Grovatt v. St. Jude Med., Inc. (In re St. Jude Med., Inc.)*, 522 F.3d 836, 838–42 (8th Cir. 2008) (reversing a certification order in a class action seeking damages and medical monitoring because the individual issues of causation and reliance predominated); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 190 (3d Cir. 2001) (affirming denial of class certification where “ascertaining which class members have sustained injury means individual issues predominate over common ones”); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996) (“[A] fraud class action cannot be certified when individual reliance will be an issue.”); see also Wasserman, *supra* note 14, at 490 (“Because ‘individual’ claims would present many individual issues, it would be difficult or impossible to raise them in the context of the class action while still satisfying the predominance requirement of Rule 23(b)(3) or the more stringent requirements of (b)(1) or (b)(2).”).

action to pursue their damage claims, thereby frustrating the purpose of Rule 23.<sup>36</sup>

Second, due process may require a more constrained approach to preclusion in the class action context. Rule 23 does not guarantee absent class members in class actions certified under Rule 23(b)(1) or (b)(2) notice or the opportunity to opt out.<sup>37</sup> Yet the Supreme Court has recognized that a court may “bind an absent plaintiff concerning a claim for money damages” only if it “provide[s] minimal procedural due process protection,” including (1) “notice plus an opportunity to be heard and participate in the litigation”; (2) “an opportunity to remove himself [or herself] from the class by executing and returning an ‘opt out’ . . . form”; and (3) “at all times adequate[ ] represent[ation].”<sup>38</sup> Thus, it may be unconstitutional to preclude individual damage claims unless the absent class members (or at least those lacking minimum contacts with the forum state) were afforded notice and an opportunity to opt out of the class action.<sup>39</sup> Since class members in (b)(1) and (b)(2) class actions are often denied notice and the opportunity to opt out, courts apply the class action gloss and

---

36 See, e.g., *Cooper v. Fed. Reserve Bank*, 467 U.S. 867, 880 (1984) (stating that if the class action judgment precluded individual claims for money damages, “it would be tantamount to requiring that every member of the class be permitted to intervene to litigate the merits of his [or her] individual claim,” thereby frustrating the purposes of Rule 23); *Jahn ex rel. Jahn v. ORCR, Inc.*, 92 P.3d 984, 992 (Colo. 2004) (en banc) (“C.R.C.P. 23(b)(2) . . . does not preclude unnamed class members from bringing subsequent actions for damages.”); see also Wasserman, *supra* note 14, at 489 (noting that preclusion of individual damages claims would be at odds with the purposes of Rule 23).

37 In class actions certified under Rule 23(b)(1) or (b)(2), “the court may direct appropriate notice to the class.” FED. R. CIV. P. 23(c)(2)(A). In class actions certified under Rule 23(b)(3), on the other hand, “the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort,” including notice “that the court will exclude from the class any member who requests exclusion.” FED. R. CIV. P. 23(c)(2)(B)(v).

38 *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 811–12 (1985) (citing *Hansberry v. Lee*, 311 U.S. 32, 42–43, 45 (1940)).

39 See, e.g., *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992) (stating that due process requires an opportunity to opt out if monetary claims are involved); *Gates v. Towery*, 456 F. Supp. 2d 953, 963 (N.D. Ill. 2006) (“Absent class members seeking non-incident money damages may only be barred by *res judicata* if they have been afforded notice and an opportunity to opt out . . .” (citing *Jefferson v. Ingersoll Int’l Inc.*, 195 F.3d 894, 897 (7th Cir. 1999); *Tice v. Am. Airlines*, 162 F.3d 966, 972 (7th Cir. 1998); *Crowder v. Lash*, 687 F.2d 966, 1008 (7th Cir. 1982))). Professor Bassett argues that it may violate due process to bind absent class members unless they affirmatively opt in. See Debra Lyn Bassett, *Just Go Away: Representation, Due Process, and Preclusion in Class Actions*, 2009 BYU L. REV. 1079, 1118–25.

decline to preclude individual follow-up actions seeking money damages.<sup>40</sup>

Third and related, the class representative's authority to represent the absentees is limited: "[t]he most fundamental principles underlying class actions limit the powers of the representative parties to the claims they possess in common with other members of the class."<sup>41</sup> If absent class members have claims or suffer damages that were not pursued in the class action, courts decline to preclude the absentees from pressing those claims or seeking that relief in a follow-up action because the class representative's authority was circumscribed and she would not have adequately represented claimants on matters she did not purport to pursue.<sup>42</sup> Thus, strong policy considerations counsel in favor of the class action gloss, which limits the preclusive effects of class action judgments.

### B. *Claim Preclusive Effects of Class Action Settlements*

If the claim preclusive effects of class action judgments do not fully protect American defendants from individual follow-up lawsuits, it is important to note that class action *settlements* (rather than litigated judgments) afford significantly greater protection from relitigation. In particular, American courts often approve and enforce settlements that release defendants from liability not only for the claims alleged in the class action complaint, but also for related claims that were not specifically pleaded.<sup>43</sup> The Second Circuit Court of Appeals initially

---

40 See, e.g., *Frank v. United Airlines, Inc.*, 216 F.3d 845, 851–52 (9th Cir. 2000) (stating that the damages claims of the class were not precluded where class members in the prior action had not been afforded adequate notice or an opportunity to opt out); *Hiser v. Franklin*, 94 F.3d 1287, 1291–92 (9th Cir. 1996) (citing due process concerns in light of the lack of “clear warning that individual claims may be lost”); *Brown*, 982 F.2d at 392 (“Because Brown had no opportunity to opt out . . . there would be a violation of minimal due process if [his] damage claims were held barred by *res judicata*.”); see also 18A WRIGHT, MILLER & COOPER, *supra* note 14, § 4455, at 468–71 (discussing the circumstances in which “[n]otice requirements peculiar to class actions may . . . defeat preclusion”).

41 *Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 660 F.2d 9, 16 (2d Cir. 1981); see also *Bailey v. Patterson*, 369 U.S. 31, 32–33 (1962) (per curiam) (“[Would-be class representatives] cannot represent a class of whom they are not a part.” (citing *McCabe v. Atchison, T.S.F.R. Co.*, 235 U.S. 151, 162–63 (1914))).

42 18A WRIGHT, MILLER & COOPER, *supra* note 14, § 4455, at 459; see *supra* note 33 (regarding RESTATEMENT (SECOND) OF JUDGMENTS § 42); see also Wolff, *supra* note 14, at 731–32, 774–75 (discussing the potential for conflicts of interest within a potential class).

43 See, e.g., *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 107 (2d Cir. 2005) (“[C]lass action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the

expressed skepticism about this practice, stating, “If a judgment after trial cannot extinguish claims not asserted in the class action complaint, a judgment approving a settlement in such an action ordinarily should not be able to do so either.”<sup>44</sup> But recognizing that class actions will not settle unless the defendant can secure broad protection from related lawsuits,<sup>45</sup> even the Second Circuit has permitted the “release of a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class action”<sup>46</sup> as long as “the released claims [were] adequately represented prior to settlement.”<sup>47</sup> Other courts, too, have approved class

---

‘identical factual predicate’ as the settled conduct.” (quoting *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982)); *Bernadelli v. Gen. Am. Life Ins. Co.* (*In re Gen. Am. Life Ins. Co. Sales Practices Litig.*), 357 F.3d 800, 805 (8th Cir. 2004) (“There is no impropriety in including in a settlement a description of claims that is somewhat broader than those that have been specifically pleaded. In fact, most settling defendants insist on this.”); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1287 (9th Cir. 1992) (“[A] federal court may release not only those claims alleged in the complaint, but also a claim ‘based on the identical factual predicate . . . .’” (quoting *TBK Partners, Ltd.*, 675 F.2d at 460)); *TBK Partners, Ltd.*, 675 F.2d at 460 (“[A] court may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class action.”).

44 *Nat’l Super Spuds*, 660 F.2d at 18 (rejecting a settlement that would have impaired the prosecution of claims not asserted by the class and not resting upon the identical factual predicate); see also *Zomber v. Christies, Inc.* (*In re Auction Houses Antitrust Litig.*), 42 Fed. App’x 511, 519 (2d Cir. 2002) (“[S]ince *Super Spuds*, we have never affirmed the approval of a class action settlement which included the uncompensated impairment of non-class claims unless the non-class claims were based on the identical factual predicate as the class claims.” (citing *Weinberger v. Kendrick*, 698 F.2d 61, 77 (2d Cir. 1982); *TBK Partners, Ltd.*, 675 F.2d at 460–61).

45 See, e.g., *Wal-Mart Stores, Inc.*, 396 F.3d at 107 n.13 (discussing several circuit court opinions that weigh the merits of the identical factual predicate doctrine); Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179, 206–07 (2009); Nagareda, *supra* note 3, at 11–13.

46 *TBK Partners, Ltd.*, 675 F.2d at 460; see also *Wal-Mart Stores, Inc.*, 396 F.3d at 107 (“[C]lass action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the ‘identical factual predicate’ as the settled conduct.” (quoting *TBK Partners, Ltd.*, 675 F.2d at 460)); *Nat’l Super Spuds*, 660 F.2d at 18 n.7 (“[A]ssum[ing] that a settlement could properly be framed so as to prevent class members from subsequently asserting claims relying on a legal theory different from that relied upon in the class action complaint but depending upon the very same set of facts.”).

47 *Wal-Mart Stores, Inc.*, 396 F.3d at 106. The Second Circuit has rejected settlements that purport to release claims that “depend not only upon a different legal theory but upon proof of further facts.” *Nat’l Super Spuds*, 660 F.2d at 18 n.7; see also *In re Auction Houses Antitrust Litig.*, 42 Fed. App’x at 519 (rejecting a settlement that

action settlements that released claims not presented in the class action as long as the claims arose out of the same factual predicate.<sup>48</sup> Some courts, including the U.S. Supreme Court,<sup>49</sup> have even approved or enforced settlements that released claims that could not have been brought in the F1 court because that court lacked subject matter jurisdiction to entertain them (or for other reasons).<sup>50</sup>

To summarize, then, in class actions that are litigated to judgment, the class action gloss may permit absent class members to pursue some transactionally related individual actions notwithstanding a judgment against the class. But in the substantial majority of certified class actions that settle,<sup>51</sup> the judicially approved settlement agree-

---

would have impaired the prosecution of claims not asserted by the class and not resting upon the identical factual predicate).

48 See, e.g., *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 748 (9th Cir. 2006) (“[R]elease encompasses Plaintiffs’ claims if they arise from an identical factual predicate as the claims asserted by the . . . class.”); *In re Gen. Am. Life Ins. Co.*, 357 F.3d at 803–05 (concluding that an absent class member who had not opted out was barred from suing the insurer for a particular billing practice where the class action release and notice thereof covered all “policy charges” and “premium charges”); *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 366 (3d Cir. 2001) (“[A] judgment pursuant to a class settlement can bar later claims based on the allegations underlying the claims in the settled class action. This is true even though the precluded claim was not presented, and could not have been presented, in the class action itself.” (citing *TBK Partners, Ltd.*, 675 F.2d at 460)).

49 See *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 375–79 (1996) (concluding that a Delaware court would afford preclusive effect to a class action settlement judgment that purported to release claims that could not have been adjudicated by the state court because they were within the federal courts’ exclusive jurisdiction).

50 See, e.g., *Grimes v. Vitalink Commc’ns Corp.*, 17 F.3d 1553, 1564 (3d Cir. 1994) (“[A] state court has the power to enter a settlement negotiated by the parties as a judgment which releases exclusive federal claims that the state court could not itself entertain.”); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1287 (9th Cir. 1992) (“[A] federal court may release not only those claims alleged in the complaint, but also a claim ‘based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class action.’” (quoting *TBK Partners, Ltd.*, 675 F.2d at 460)); cf. *In re Lease Oil Antitrust Litig. (No. II)*, 200 F.3d 317, 321 (5th Cir. 2000) (stating that Alabama law “require[s] jurisdictional competency as a condition to the preclusive bite of res judicata” and holding that a state court judgment approving a settlement that purported to release claims within the federal courts’ exclusive jurisdiction would not preclude the federal claims).

51 A significant majority of certified class actions are settled rather than tried. See EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., *IMPACT OF THE CLASS ACTION FAIRNESS ACT ON THE FEDERAL COURTS 2* (2008), available at [http://www.fjc.gov/public/pdf.nsf/lookup/cafa1108.pdf/\\$file/cafa1108.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/cafa1108.pdf/$file/cafa1108.pdf) (finding, in a sample of diversity class actions filed before enactment of the Class Action Fairness Act, that “all class actions in which a class was certified, whether for litigation or settle-

ment may be crafted to provide the defendant with significant protection from follow-up claims by individual absent class members.

### C. *Issue Preclusive Effects of Class Action Judgments*

Even if the class action gloss permits absent class members to pursue some transactionally-related individual actions, the defendant may be able to preserve its victory by invoking issue preclusion to bind the absentees by findings on particular issues decided against the class. Ordinarily, a valid and final judgment precludes relitigation by the parties of any *issue* that was actually litigated and decided, even if the second litigation presents a different claim.<sup>52</sup> Absent class members who decline to opt out of the class action typically are treated as “parties” for these purposes, whether the class wins or loses.<sup>53</sup> If the class is unsuccessful, then the class action judgment bars absent class members who did not opt out from seeking to relitigate “any issue actually litigated and determined, if its determination was essential to that judgment.”<sup>54</sup> As Wright, Miller, and Kane put it, “[t]he obvious implication of Rule 23(c)(3)<sup>55</sup> is that anyone properly listed in the judg-

---

ment purposes, ended with class settlements”); Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 647 (2006) (stating that “almost all certified class actions settle,” including most class actions that are certified for trial and litigation); Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 180 (1996) (showing that in the four federal district courts examined, certified class actions were resolved by court-approved settlement in 62%, 100%, 71%, and 88% respectively).

52 See RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) (“When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.”).

53 See *id.*

54 *Cooper v. Fed. Reserve Bank*, 467 U.S. 867, 874 (1984); see also, e.g., *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 769 (7th Cir. 2003) (stating that absent class members were bound by the determination that a national class action was not tenable); *Isby v. Wright*, 104 F.3d 362, 1996 WL 735595, at \*1 (7th Cir. 1996) (unpublished table decision) (stating that a class member in an action that challenged prison policies “may not relitigate the same issues” in his individual action for damages); *McCormack v. Abbott Labs.*, 617 F. Supp. 1521, 1523 (D. Mass. 1985) (“[A]ll rulings of substantive law made [in a class action] between class certification and decertification are binding on plaintiff as a class member and may not be relitigated in the instant case.”); Wolff, *supra* note 14, at 737 (“An unfavorable result in the equitable proceeding . . . threatens to preclude class members from litigating their damages claims in individual suits.”).

55 Rule 23(c)(3) requires that the judgment in a 23(b)(1) or (b)(2) class “describes those whom the court finds to be class members” and the judgment in a 23(b)(3) class describes those to whom notice was directed who have not opted out

ment should be bound by it absent some special reason for not doing so.”<sup>56</sup> Thus, even if individual class members remain free to pursue individual claims for relief that were not presented in the class action, they nevertheless may be bound by determinations made against the class on *issues* necessary to support the judgment against the class. As Professor Wolff explains, American courts are “fairly consistent in their reactions, generally rejecting expansive claim preclusion defenses but entertaining issue preclusion arguments more seriously.”<sup>57</sup>

But even if courts are more inclined to apply issue preclusion than claim preclusion to bind absent class members by judgments against the class, issue preclusion is of limited utility to defendants in the substantial majority of class actions that are settled rather than tried.<sup>58</sup> A class action may be settled or voluntarily dismissed only with the court’s approval, and for the settlement to be binding on the class members, the court must find that it is “fair, reasonable, and adequate.”<sup>59</sup> In making this determination, however, the court does not adjudicate the issues raised in the class action complaint on the merits.<sup>60</sup> Yet a standard requirement of issue preclusion is that the issue was “actually litigated and determined by a valid and final judg-

---

and “whom the court finds to be class members.” FED. R. CIV. P. 23(c)(3). The certifying court’s Rule 23(c)(3) descriptions should aid the F2 court that is ultimately called upon to determine the binding effect of the class action judgment. See 7AA WRIGHT, MILLER & KANE, *supra* note 14, § 1789, at 556.

56 7AA WRIGHT, MILLER & KANE, *supra* note 14, § 1789, at 553. On the other hand, class members who opt out of a class action are not bound by the class action judgment. See *id.* § 4455, at 457. Therefore, if an absent class member opts out and then files an individual suit raising an issue that was decided against the class, the defendant may not invoke issue preclusion to bar the opt-out plaintiff from relitigating the issue. See, e.g., *In re Bridgestone/Firestone*, 333 F.3d at 769; *In re Corrugated Container Antitrust Litig.*, 756 F.2d 411, 418 (5th Cir. 1985); see also AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.07 cmt. g (2010) (“[I]ndividual claimants who exit receive neither the benefit nor the detriment of the preclusive effect exerted by the judgment in the class action.”). It may well be, as Professor Wolff argues, that permitting issue preclusion in cases where only some class members have high-value damage claims would exacerbate intraclass conflicts. See Wolff, *supra* note 14, at 774–76. He suggests that F1 courts in such cases need to consider entering an order that any judgment in the class action would have no preclusive effect “beyond the final resolution of the claims actually raised therein.” *Id.* at 776.

57 Wolff, *supra* note 14, at 741.

58 See *supra* note 51.

59 FED. R. CIV. P. 23(e)(2).

60 See 18A WRIGHT, MILLER & COOPER, *supra* note 14, § 4443, at 257.

ment.”<sup>61</sup> As a comment to the *Restatement (Second) of Judgments* makes clear, “[i]n the case of a judgment entered by . . . consent . . . , none of the issues is actually litigated.”<sup>62</sup> Thus, ordinarily a judicially approved settlement has no issue preclusive effect.<sup>63</sup>

Another comment to the *Restatement* goes on to note that a judgment entered by consent “may be conclusive . . . with respect to one or more issues, if the parties have entered an agreement manifesting such an intention.”<sup>64</sup> But Wright, Miller, and Cooper posit that “consent agreements ordinarily are intended to preclude any further litigation on the claim presented but are not intended to preclude further litigation on any of the issues presented. Thus consent judgments ordinarily support claim preclusion but not issue preclusion.”<sup>65</sup>

In sum, when a class action is resolved by a trial on the merits, the judgment likely will have issue preclusive effect, but its claim preclusive effect will be tempered by the class action gloss. On the other hand, in the substantial majority of certified class actions that settle, the judgment approving the settlement will have limited, if any, issue preclusive effect, but it will provide robust protection against the prosecution of individual follow-up suits arising out of the same factual predicate as the claims raised in the class action. In follow-up actions, absent class members may be able to avoid the preclusive effects of

---

61 RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982); *see also id.* § 27 cmt. d (stating that an issue is “actually litigated” when it is “properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined”).

62 *Id.* § 27 cmt. e; *accord* 18A WRIGHT, MILLER & COOPER, *supra* note 14, § 4443, at 256–57 (“[T]he central characteristic of a consent judgment is that the court has not actually resolved the substance of the issues presented.”).

63 *See, e.g.*, *Arizona v. California*, 530 U.S. 392, 414 (2000) (“[S]ettlements ordinarily occasion no *issue preclusion* . . . , unless it is clear . . . that the parties intend their agreement to have such an effect.”); *Am. Home Assurance Co. v. Chevron, USA, Inc.*, 400 F.3d 265, 272 (5th Cir. 2005); *Richardson v. Ala. State Bd. of Educ.*, 935 F.2d 1240, 1245–46 (11th Cir. 1991).

64 RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. e; *accord* 18A WRIGHT, MILLER & COOPER, *supra* note 14, § 4443, at 262 (“[P]reclusive effects [of consent decrees] should be measured by the intent of the parties.” (footnote omitted)); *cf. In re Halpern*, 810 F.2d 1061, 1064 (11th Cir. 1987) (applying issue preclusion where “the parties intended that the consent judgment operate as a final adjudication of the factual issues contained therein”).

65 *See* 18A WRIGHT, MILLER & COOPER, *supra* note 14, § 4443, at 265 (discussing *United States v. Int’l Bldg. Co.*, 345 U.S. 502, 505–06 (1953)). Where, however, class members appear before the F1 court, objecting to the settlement and questioning whether or not it releases related claims pending elsewhere, they are bound, as a matter of issue preclusion, by the F1 court’s determination that the claims are released. *See, e.g.*, *Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 745–47 (9th Cir. 2006).

class action judgments if they are able to establish that the notice provided was inadequate or that they were not adequately represented in the class action.<sup>66</sup> But, even if class action defendants in American courts are not fully protected from follow-up individual suits, preclusion doctrine affords them meaningful protections.

Now that we have gained a better understanding of the protections that American preclusion law affords class action defendants, we turn to the preclusion law of the participating European countries to gauge the risk that American class action judgments will not preclude repetitive litigation abroad. A project of the British Institute of International and Comparative Law (BIICL) casts significant light on this issue.

## II. THE PRECLUSIVE EFFECTS OF GROUP LITIGATION JUDGMENTS IN EUROPE

### A. *BIICL and Its Judgments Project*

BIICL is a premier research center, located in London, which promotes the understanding, development, and practical application of international and comparative law through its research projects, publications, programs, training, and advisory activities.<sup>67</sup> In April 2007, BIICL undertook a project, commissioned by the European Commission (EC), entitled “The Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, *Res Judicata* and Abuse of Process” (“BIICL Judgments Project” or the “Pro-

---

66 See, e.g., *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940); see also Nagareda, *supra* note 3, at 17–19, 43–48 (decrying the use of the imprecise phrase “adequate representation at all times,” which embraces both structural and performance defects); Wasserman, *supra* note 14, at 494–97 (discussing the willingness of the courts to allow parties to relitigate the issue of adequacy). There is widespread debate on whether a judgment may be collaterally attacked for inadequacy of representation if the rendering court already found that the representation was adequate. Compare *In re Diet Drugs Prods. Liab. Litig.*, 431 F.3d 141, 146 (3d Cir. 2005) (holding that no collateral review is available when class members have already received a “full and fair hearing”), with *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 257–59 (2d Cir. 2001) (permitting collateral attack by the plaintiffs who sought “only to prevent the prior settlement from operating as *res judicata* to their claims”), *aff’d by an equally divided Court*, 539 U.S. 111 (2003). This debate is beyond the scope of this Article.

67 See Robert McCorquodale, *Director’s Foreword*, BRITISH INST. OF INT’L & COMP. L., <http://www.biicl.org/director> (last visited Nov. 29, 2010); see also JACOB VAN DE VELDEN & JUSTINE STEFANELLI, BRITISH INST. OF INT’L & COMP. LAW, *COMPARATIVE REPORT: THE EFFECT IN THE EUROPEAN COMMUNITY OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS: RECOGNITION, RES JUDICATA AND ABUSE OF PROCESS 5* (2008) [hereinafter BIICL REPORT], available at [http://www.biicl.org/files/4608\\_comparative\\_report\\_-\\_jls\\_2006\\_fpc\\_21\\_-\\_final.pdf](http://www.biicl.org/files/4608_comparative_report_-_jls_2006_fpc_21_-_final.pdf) (providing an overview of the BIICL).

ject”).<sup>68</sup> In proposing the study, BIICL noted that while the Brussels/Lugano Regime<sup>69</sup> calls for mutual recognition of Member State judgments “without any special procedure being required,”<sup>70</sup> the focus of attention in the European Union has been on the *enforcement* of judg-

---

68 BRITISH INST. OF INT’L & COMP. LAW, *THE EFFECT IN THE EUROPEAN COMMUNITY OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS: RECOGNITIONS, Res Judicata and Abuse of Process* (2008) [hereinafter DESCRIPTION OF THE BIICL JUDGMENTS PROJECT], available at [http://www.biiicl.org/files/2974\\_description\\_of\\_the\\_project.pdf](http://www.biiicl.org/files/2974_description_of_the_project.pdf). For a more complete description of the project, see BIICL REPORT, *supra* note 67, at 5–9.

69 The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, *as amended*, 1998 O.J. (L 27) 1 [hereinafter Brussels Convention], was signed by France, Germany, Belgium, the Netherlands, Luxembourg, and Italy in 1968 and came into force in those countries in 1973. See JUSTIN NEWTON, *THE UNIFORM INTERPRETATION OF THE BRUSSELS AND LUGANO CONVENTIONS* 6 (2002). Formal alterations to the Convention occurred upon the accession of Denmark, Ireland, the United Kingdom, Greece, Spain, Portugal, Austria, Sweden, and Finland. See *id.*; BIICL REPORT, *supra* note 67, at 36. The Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, *as amended*, 1998 O.J. (L 319) 9 [hereinafter Lugano Convention], was signed in 1988 and came into force in 1992, linking the parties to the Brussels Convention with certain member states of the European Free Trade Association, including Iceland, Norway, and Switzerland. See NEWTON, *supra*, at 9; BIICL REPORT, *supra* note 67, at 37. Poland later acceded to the Lugano Convention. See NEWTON, *supra*, at 9. Council Regulation 44/2001, 2000 O.J. (L 12) 1 (EC) [hereinafter Brussels Regulation], has largely supplanted and modernized the Brussels Convention. See NEWTON, *supra*, at 17–21; BIICL REPORT, *supra* note 67, at 36. A revised Lugano II Convention, Oct. 30, 2007, 2007 O.J. (L 339) 3 [hereinafter Lugano II Convention], was signed in 2007 and ratified by the European Community in May 2009. It entered into force between the European Community and Norway in January 2010 and will extend the reach of the Brussels/Lugano Regime to eleven new European Union Member States. See Beat Schönenberger, *Revision of the Lugano Convention*, SWISS FED. DEP’T JUST. & POLICE, [http://www.ejpd.admin.ch/ejpd/en/home/themen/wirtschaft/ref\\_internationales\\_privatrecht/ref\\_lugano\\_uebereinkommen/ref\\_0.html](http://www.ejpd.admin.ch/ejpd/en/home/themen/wirtschaft/ref_internationales_privatrecht/ref_lugano_uebereinkommen/ref_0.html) (last visited Nov. 29, 2010). The term “Brussels/Lugano Regime” refers to the system for the recognition and enforcement of judgments implemented by the Brussels Regulation and these Conventions. The term “Member States” herein refers to members of the European Union and to Switzerland, which, while not a member of the European Union, is a Contracting State to the Lugano Convention. See BIICL REPORT, *supra* note 67, at 37.

70 Brussels Regulation, *supra* note 69, art. 33(1), 2000 O.J. (L 12) at 19 (“A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.”); Lugano Convention, *supra* note 69, art. 26, 1998 O.J. (L 319) (“[A] judgment given in a Contracting State shall be recognized in the other Contracting States without any special procedures being required.”); Lugano II Convention, *supra* note 69, art. 33(1), 2007 O.J. (L 339) (“[A] judgment given in a State bound by this Convention shall be recognised in the other States bound by this Convention without any special procedure being required.”).

ments rather than on their preclusive effects.<sup>71</sup> The Project undertook to “redress that balance,” to ascertain the extent to which foreign judgments are given preclusive effect, and to determine whether there are any “obstacles to the free movement of judgments in the EC, and (in turn) the proper functioning of the internal market, and whether such obstacles may be effectively addressed through the development of EC-wide rules in this area.”<sup>72</sup>

BIICL recognized that it first needed a clear understanding of the preclusive effects of *domestic* judgments in the national courts of the participating European countries.<sup>73</sup> Accordingly, BIICL retained national rapporteurs to prepare reports on the preclusive effects of judgments in seven European Union (EU) Member States (the United Kingdom (England and Wales), the Netherlands, Germany, France, Romania, Spain, and Sweden) and two states that are not part of the European Union (Switzerland and the United States).<sup>74</sup> BIICL prepared an extensive questionnaire that each national rapporteur was to follow in preparing a national report. The questionnaire completed by the national rapporteurs for the EU Member States and Switzerland (collectively referred to as the “participating European countries”) elicited information on the binding character of judgments and the types of judgments that are capable of having preclusive effects, domestic claim preclusion doctrine, domestic issue preclusion doctrine, domestic doctrine on “wider preclusive effects,”<sup>75</sup>

---

71 See BIICL REPORT, *supra* note 67, at 5.

72 DESCRIPTION OF THE BIICL JUDGMENTS PROJECT, *supra* note 68, at 2. The BIICL Report described the Project’s objectives somewhat more narrowly:

[T]he study does not consider whether disparities between the Member State rules create any impediment to the functioning of the principle of mutual recognition, nor does it analyse whether any EC-wide solution to such problems is desirable and viable. Its main objective is rather to provide the necessary substantive basis for the . . . discussion of how litigants can be protected, the consistency of legal orders maintained, and civil justice resource economy ensured by ensuring the finality and effectiveness of judgments throughout the EU.

BIICL REPORT, *supra* note 67, at 6.

73 BIICL REPORT, *supra* note 67, at 6.

74 Switzerland was included in part because it permitted “insight into the implementation in practice of the Lugano Convention.” *Id.* The United States was included because it “allow[ed] the drawing of informative and constructive parallels between the legal systems of the EU and the US.” *Id.* The original plans for the BIICL Judgments Project contemplated a report to be prepared by a national rapporteur for Poland, but no reference to a Polish report was made in the BIICL Report. *See id.*

75 The phrase “wider preclusive effects” refers to preclusion rules other than claim or issue preclusion: “[T]hese wider preclusive effects (where they exist) are

the preclusive effects of Member State judgments within the Brussels/Lugano Regime, and the preclusive effects of judgments of countries that are neither Member States nor Contracting States to the Lugano Convention, referred to as “third states.”<sup>76</sup> The questionnaire completed by the national rapporteur for the United States was necessarily somewhat different, omitting questions about the treatment of Member State judgments and instead soliciting information on the preclusive effects of sister state judgments and judgments of foreign countries.<sup>77</sup> Among a host of other issues, the questionnaires sought to determine whether, under each country’s domestic preclusion law, judgments rendered in class actions or representative actions have preclusive effects that extend to absent class members.<sup>78</sup>

Following completion of the national reports, BIICL prepared a comparative table that summarized and compared the national reports.<sup>79</sup> After receiving feedback on the comparative table from the national rapporteurs, BIICL then prepared a comparative report (“Report” or “BIICL Report”) summarizing the Project’s findings, which it submitted to the European Commission in late April 2008.<sup>80</sup> The Report, prepared by Jacob van de Velden<sup>81</sup> and Justine Stefanelli,<sup>82</sup> identified both the similarities and differences among the pre-

---

generally considered not to derive from the effect of a judgment, but rather from the conduct of parties prior to, during and following proceedings.” *Id.* The concept of wider preclusive effects will be addressed *infra* Part II.B.2.

76 See BRITISH INST. OF INT’L & COMP. LAW, QUESTIONNAIRE: THE EFFECT IN THE EUROPEAN COMMUNITY OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (2006) [hereinafter QUESTIONNAIRE] (on file with the author); see also BIICL REPORT, *supra* note 67, at 7 (discussing the structure of the study).

77 See UNITED STATES QUESTIONNAIRE: THE EFFECT IN THE EUROPEAN COMMUNITY OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS: RECOGNITION, *Res Judicata*, and Abuse of Process (2007) [hereinafter UNITED STATES QUESTIONNAIRE] (on file with the author).

78 QUESTIONNAIRE, *supra* note 76, at III.B.9, III.C.7, III.D.7; UNITED STATES QUESTIONNAIRE, *supra* note 77, at II.A.8, II.B.8, II.C.8.

79 BRITISH INST. OF INT’L & COMP. LAW, COMPARATIVE TABLE: THE EFFECT OF RECOGNITION OF JUDGMENTS (2008) [hereinafter BIICL COMPARATIVE TABLE] (on file with author).

80 See BIICL REPORT, *supra* note 67, at 7–8 (describing the implementation of the study).

81 Jacob van de Velden is an assistant professor at the University of Groningen in the Netherlands. While Director of the Private International Law Programme at BIICL, he served as the Project Director for the BIICL Judgments Project and as the national rapporteur for the Netherlands.

82 Justine Stefanelli is a Research Fellow at BIICL. She served as the Project Research Fellow for the BIICL Judgments Project and as the national rapporteur for the United States. Ms. Stefanelli, whom I had the pleasure of teaching in 2003 and 2004, is a graduate of the University of Pittsburgh School of Law.

clusion doctrines of the countries surveyed and their willingness to extend preclusive effect to foreign judgments.<sup>83</sup>

Since the ultimate objective of the Article is to assess the magnitude of the risk that American class action judgments will have limited or no preclusive effect in Europe, we will focus on those aspects of the Report that relate to the preclusive effect of class action or group litigation judgments. First, though, we must examine salient differences between the preclusion doctrine widely prevailing in the United States, on the one hand, and the doctrines employed by courts in the participating European countries, on the other. Just as the preclusion doctrines of individual American states differ from one another in meaningful ways—for example, some states reject the mutuality requirement, while others retain it—so, too, do the preclusion doctrines of the participating European countries differ from one another and from “standard” American preclusion doctrine. It is to these differences that we now turn.

### *B. Salient Differences Between European and American Preclusion Doctrine*

#### 1. Scope of the Claim

Pursuant to the doctrine of claim preclusion, a valid and final judgment bars parties to the litigation from relitigating the same claim in a collateral proceeding.<sup>84</sup> While all nine countries surveyed in the BIICL Judgments Project accord claim preclusive effect to judgments,<sup>85</sup> they do not employ a shared definition of the scope of the claim or the claim preclusive effect.

In determining whether the claim presented in two lawsuits is the same, many American courts apply a transactional test.<sup>86</sup> England and Wales and the Netherlands, like the United States, deem claims to be the same as long as “there is an identity of the factual cause of

---

83 See BIICL REPORT, *supra* note 67.

84 See RESTATEMENT (SECOND) OF JUDGMENTS §§ 18–20 (1982). The *Restatement (Second) of Judgments* eschews the term “on the merits,” *id.* § 19 cmt. a, but acknowledges exceptions to the general claim preclusion rule for certain judgments, such as dismissals for lack of jurisdiction or improper venue or for voluntary dismissals without prejudice, *id.* § 20.

85 See BIICL REPORT, *supra* note 67, at 15 & n.33.

86 See *supra* note 16; see also RESTATEMENT (SECOND) OF JUDGMENTS § 24 (“[T]he claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.”).

action.”<sup>87</sup> The Dutch Report provides, for example, that “[p]arties are bound by a court’s finding on the claim in a previous judgment, even if they are able to present new facts or evidence after the first judgment acquired *res judicata* status, and even if a different legal cause of action is put forward in the second proceedings.”<sup>88</sup> Similarly, the Report of England and Wales provides that “a ‘cause of action’ should be seen as being no more than the set of facts which entitles the claimant to seek a particular remedy against the defendant. The remedy itself, and the legal basis for it, thus provide no part of the ‘cause of action’ for these purposes.”<sup>89</sup> Moreover, a valid and final judgment

precludes re-litigation of a cause of action not only with respect to points actually decided, expressly or by necessary inference, but also points which might have been but were not raised and decided in the earlier proceedings for the purpose of establishing or refuting the existence of the cause of action.<sup>90</sup>

It appears that Spain, too, focuses on the underlying facts in determining whether or not claim preclusion applies.<sup>91</sup> In fact, “in a situation

87 BIICL REPORT, *supra* note 67, at 16; *see also* ANDREW DICKINSON, BRITISH INST. OF INT’L & COMP. LAW, THE EFFECT IN THE EUROPEAN COMMUNITY OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS: RECOGNITION, *RES JUDICATA* AND ABUSE OF PROCESS: ENGLAND AND WALES 21 (2008) [hereinafter REPORT OF ENGLAND AND WALES] (on file with author) (“To determine whether a second action involves the ‘same cause of action’ as the first, the Court inquires whether the same set of facts which entitled the claimant to an action in the first action underlie the second action.”); JUSTINE N. STEFANELLI, BRITISH INST. OF INT’L & COMP. LAW, THE EFFECT IN THE EUROPEAN COMMUNITY OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS: RECOGNITION, *RES JUDICATA* AND ABUSE OF PROCESS: UNITED STATES 19 (2008) [hereinafter REPORT OF THE UNITED STATES] (on file with author) (describing the *Second Restatement’s* transactional test); JACOB VAN DE VELDEN, BRITISH INST. OF INT’L & COMP. LAW, THE EFFECT IN THE EUROPEAN COMMUNITY OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS: RECOGNITION, *RES JUDICATA* AND ABUSE OF PROCESS: THE NETHERLANDS 42 (2008) [hereinafter REPORT OF THE NETHERLANDS] (on file with author) (“The requirement for having the same claim . . . concerns the identity of the *factual cause of action* of the relief claimed. It does not refer to the *legal cause of action*, nor to the type of relief claimed.”).

88 REPORT OF THE NETHERLANDS, *supra* note 87, at 37.

89 REPORT OF ENGLAND AND WALES, *supra* note 87, at 22.

90 *Id.* at 24 (describing “cause of action estoppel”).

91 *See* ALEGRÍA BORRÁS RODRIGUEZ & ESTHER RIVERA, BRITISH INST. OF INT’L & COMP. LAW, THE EFFECT IN THE EUROPEAN COMMUNITY OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS: RECOGNITION, *RES JUDICATA* AND ABUSE OF PROCESS: SPAIN 28 (2008) [hereinafter REPORT OF SPAIN] (on file with author) (stating that courts “should compare the essential facts or title which underlie the basis of the claim to determine if the same cause of action is in issue. . . . [A]ll facts making up the claim which it was possible to argue up to the last moment of preclusion and declarations as to the existence of legal relations are covered.”).

where a claim could have been based on various sets of facts, then, even if the Claimant only opts for one of them, all claims based on all [permutations] of the facts are covered.”<sup>92</sup>

Germany and Switzerland, on the other hand, “require[ ] an identity of the factual cause of action *and* the relief claimed.”<sup>93</sup> As the Report of Germany puts it, “the binding effects of German judgments extends only to the procedural claims (*Streitgegenstand*) [i.e., the demand] which the parties lay before the court to decide, not to those claims which could have been raised or which may have arisen out of the same transaction or occurrence.”<sup>94</sup> Thus, if a plaintiff involved in a car accident sues only for damages for personal injury (and not for property damage) or only for damages for certain personal injuries, she will not be barred from later seeking damages for property damage or even for the remaining personal injuries.<sup>95</sup> Similarly, in Switzerland, the claim is limited by the amount claimed in the prayer for relief.<sup>96</sup> According to the Report of Switzerland, “[t]his view leads to a rather narrow concept of identical claims.”<sup>97</sup> Although narrower than the general transactional approach applied by many American juris-

---

92 *Id.*

93 BIICL REPORT, *supra* note 67, at 16; *see also* CHRISTIAN A. HEINZE, BRITISH INST. OF INT’L & COMP. LAW, THE EFFECT IN THE EUROPEAN COMMUNITY OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS: RECOGNITION, *RES JUDICATA* AND ABUSE OF PROCESS: GERMANY 28 (2008) [hereinafter REPORT OF GERMANY] (on file with author) (“The preclusive effects of judgments is limited to . . . : (1) the specific request for relief sought by the Claimant . . . and (2) the essential facts which the Claimant would have established to obtain the relief in default of the Defendant’s appearance . . . .”); PAUL OBERHAMMER & URS H. HOFFMAN-NOWOTNY, BRITISH INST. OF INT’L & COMP. LAW, THE EFFECT IN THE EUROPEAN COMMUNITY OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS: RECOGNITION, *RES JUDICATA* AND ABUSE OF PROCESS: SWITZERLAND 16 (2008) [hereinafter REPORT OF SWITZERLAND] (on file with author) (“[T]he prevailing theory among scholars is to consider the prayers for relief . . . along with the factual circumstances . . . from which the claimed rights emerge . . . .”); *id.* at 17 (stating that the Federal Supreme Court has opined that “identical claims must be assumed, if the claimant brings the same action ‘based on the same legal grounds’ . . . and the same factual circumstances before the courts for a second time” (citing Bundesgericht [BGer] [Federal Supreme Court] Oct. 5, 2006, 5C.78/2006 (Switz.); BGer Nov. 17, 2004, 4C.314/2004 (Switz.); BGer Jan. 22, 2003, 4C.138/2002 (Switz.); BGer Jan. 15, 1997, 123 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 16, 18 (Switz.); BGer Nov. 3, 1995, 121 BGE III 474, 477 (Switz.))).

94 REPORT OF GERMANY, *supra* note 93, at 18 (citing PETER L. MURRAY & ROLF STÜRNER, GERMAN CIVIL JUSTICE 357 (2004)).

95 *See id.* at 21.

96 REPORT OF SWITZERLAND, *supra* note 93, at 18 & n.170 (citing BGer Nov. 15, 2000, 4C.233/2000 (Switz.)).

97 *Id.* at 18. The Federal Supreme Court of Switzerland has not yet decided whether “the same claim is further limited by the substantive legal basis.” *Id.* at 16.

dictions, the German and Swiss approach appears consistent with the class action gloss on claim preclusion doctrine adopted by many American courts (regarding the claim preclusive effect of class actions that are litigated to judgment, rather than settled).<sup>98</sup>

Like Switzerland and Germany, Swedish preclusion doctrine focuses on the remedy sought. A Swedish judgment precludes relitigation of “all circumstances which can be alleged as support for the same *remedies* regardless of whether they are alleged.”<sup>99</sup> Thus, a suit seeking to invalidate a will because only one witness was present would preclude a second suit seeking to invalidate the will because the testator was mentally ill. Since both actions seek the same remedy—invalidation of the will—the judgment in the first suit would preclude the second action.<sup>100</sup>

France and Romania not only require an identity of the relief claimed, but also “an identity of the *legal* cause of action.”<sup>101</sup> For example, where a plaintiff filed one claim for restitution of land and a second claim based on a contractual provision, the Romanian Court of Appeal held that claim preclusion did not apply because the claims did not have “the same legal basis.”<sup>102</sup> France, too, traditionally accorded a judgment claim preclusive effect only if the second action involved the “same legal grounds” as the first.<sup>103</sup> Thus, under the

---

98 See *supra* Part I.A.

99 LARS HEUMAN ET AL., BRITISH INST. OF INT’L & COMP. LAW, THE EFFECT IN THE EUROPEAN COMMUNITY OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS: RECOGNITION, *RES JUDICATA* AND ABUSE OF PROCESS: SWEDEN 18–19 (2008) [hereinafter REPORT OF SWEDEN] (on file with author) (emphasis added).

100 See *id.*

101 BIICL REPORT, *supra* note 67, at 16; see also EMMANUEL JEULAND, BRITISH INST. OF INT’L & COMP. LAW, THE EFFECT IN THE EUROPEAN COMMUNITY OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS: RECOGNITION, *RES JUDICATA* AND ABUSE OF PROCESS: FRANCE 22 (2008) [hereinafter REPORT OF FRANCE] (on file with author) (“It is necessary that the thing claimed be the same [and] that the claim be based on the same grounds . . .” (quoting CODE CIVIL [C. CIV.] art. 1351 (Fr.))); NOREL ROSNER, BRITISH INST. OF INT’L & COMP. L., THE EFFECT IN THE EUROPEAN COMMUNITY OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS: RECOGNITION, *RES JUDICATA* AND ABUSE OF PROCESS: ROMANIA 14 (2008) [hereinafter REPORT OF ROMANIA] (on file with author) (“[I]t must be shown that litigation has the same object (the court looks to the substance and not the form of the action), is based on the same cause of action, that is the same legal basis . . .”).

102 REPORT OF ROMANIA, *supra* note 101, at 14 & n.43 (citing CA Iasi [Court of Appeal Iasi] 11960/1999 JURISPRUDENTA PE ANUL 187 (Rom.)).

103 See REPORT OF FRANCE, *supra* note 101, at 22 (describing the “triple identity test” codified in C. CIV. art. 1351 (Fr.), available in English at <http://195.83.177.9/code/liste.phtml?lang=uk&c=22&r=486#art4419> (search “keyword” for “triple identity test”; then follow search result “art. 1351” hyperlink)). The triple identity test, which requires the same parties, the same relief, and the same legal grounds, “has, of late,

traditional French view, “if a first judgment denied damages for personal fault . . . , it was possible to bring a new claim on the ground of product liability.”<sup>104</sup> This approach affords a losing plaintiff the opportunity to pursue a different theory of recovery in a second action for what would be considered the same claim under a transactional approach.

Recent decisions by the French Court of Cassation suggest that French claim preclusion doctrine may now define the scope of the claim more broadly, requiring the plaintiff to present all grounds for relief in the first court or lose the opportunity to pursue them in subsequent litigation.<sup>105</sup> This recent line of cases brings French preclusion law closer in line with German law.<sup>106</sup>

To the extent that some of the participating European countries define the scope of the claim more narrowly than American courts do or accord judgments less robust claim preclusive effect than American courts do, they appear to support defendants’ arguments against certification of transnational class actions. But, given the class action gloss, which limits the claim preclusive effect of class action judgments in American courts, and the small number of American class actions that actually are litigated to judgment, the force of these arguments should not be overstated. Moreover, the willingness of some foreign courts to accord judgments “wider preclusive effects” renders the differences between American and European claim preclusion doctrine even less significant.

## 2. Wider Preclusive Effects

Even if a country’s law defines the scope of the claim narrowly and therefore limits a judgment’s claim preclusive effects, it nevertheless may prevent parties from raising claims or defenses in a second action that “should” have been raised in the first action by according the judgment “wider preclusive effects.”<sup>107</sup> For example, England and

---

not been strictly adhered to, and instead, there is a growing trend which focuses on the general concept of the first set of proceedings as a whole.” *Id.*

104 *Id.* at 24.

105 *See id.* at 22–25 (citing Cass. ass. plén., July 7, 2006, D. 2006, 2135 note Weiller (Fr.); Cass. com., Feb. 20, 2007, Procédures 2007, 128, note Perrot (Fr.); Cass. 3e civ., Feb. 13, 2008, JCP 2008 IV 142 (Fr.)).

106 *See id.* at 25.

107 BIICL REPORT, *supra* note 67, at 34–35. The Questionnaire defines wider preclusive effects of judgments as any preclusive effects that cannot be characterized as claim preclusive or issue preclusive effects. QUESTIONNAIRE, *supra* note 76, at 8. It bars the raising of related claims or the relitigation of issues “on the basis of procedural fairness or abuse of process.” *Id.*

Wales, the Netherlands, Romania, and Spain employ the doctrine of abuse of process, which “considers it an abuse for a party to raise a claim or defence that should have been raised in the first action.”<sup>108</sup> Where an abuse is alleged, the court may preclude relitigation of the claim or issue that should have been raised in the first action.<sup>109</sup> Thus, the doctrine of “wider preclusive effects” supplements the claim preclusive effect of a judgment.

In at least one case, *Ashmore v. British Coal Corp.*,<sup>110</sup> the English Court of Appeal extended wider preclusive effects to nonparties. There, over a thousand female canteen workers contended that they had been discriminated against on the basis of sex and filed claims with the Industrial Tribunal. The tribunal ordered the trial of twelve sample cases and stayed the remaining claims. The chair of the tribunal explicitly stated that “[t]hese would not be test cases, the decision on any of the cases would not be binding upon the applicants . . . in any other cases.”<sup>111</sup> Following a hearing, the plaintiffs in the sample cases lost.<sup>112</sup>

Later, another of the claimants sought to have the stay lifted so she could present her claim.<sup>113</sup> The Industrial Tribunal struck her claim on the ground that it was “vexatious” and an abuse of process.<sup>114</sup> On appeal, the Court of Appeal rejected the argument that she had an “absolute right” to present her claim unless she was bound by claim or issue preclusion or unless she agreed to be bound by the findings in the sample case. Instead, it accepted the defendant’s argument that

where sample cases have been chosen so that the tribunal can investigate all the relevant evidence as fully as possible, and findings have been made on that evidence, it is contrary to the interests of justice and public policy to allow those same issues to be litigated again, unless there is fresh evidence which justifies re-opening the issue.<sup>115</sup>

---

108 BIICL REPORT, *supra* note 67, at 34.

109 *See id.*; *see also* REPORT OF ENGLAND AND WALES, *supra* note 87, at 41 (citing *Johnson v. Gore Wood & Co.*, [2002] 2 A.C. 1 (Eng.); *Henderson v. Henderson*, (1843) 67 Eng. Rep. 313 (Ch.); 3 Hare 100 (Eng.)); REPORT OF SPAIN, *supra* note 91, at 60 (“[W]here a claim may be based on different facts or legal arguments all of which are know [sic] of at the time the claim is brought, then all must be argued at that time, since the Claimant will not be entitled to reserve arguments and then raise them in later proceedings.”).

110 [1990] 2 Q.B. 338 (C.A.) (Eng.).

111 *Id.* at 346 (quoting the Chair’s decision).

112 *Id.* at 346–47.

113 *Id.* at 347.

114 *Id.*

115 *Id.* at 348–49.

If this particular claimant remained free to pursue her individual claim, the court reasoned, then so did the hundreds of other claimants; but individual trials of their claims would have frustrated the point of the sample cases.<sup>116</sup> To the extent that the English Court of Appeal bound nonparties who were not formally represented in the sample cases by the judgment(s) rendered therein, it applied the doctrine of wider preclusive effects to bind a *broader* set of absentees than would be subject to claim preclusion under American law.<sup>117</sup> More generally, the doctrine of wider preclusive effects appears malleable enough to permit courts in the Netherlands, Romania, and Spain, as well as England, to bar the relitigation of claims that are sufficiently closely related to the claims pursued in the F1 court that the F2 court concludes they “should have been brought” in F1. Thus, the “wider preclusive effects” that judgments have in at least some of the participating European countries may approximate the claim preclusive effect of American judgments and undercut defendants’ arguments against certification of transnational class actions in American courts.

### 3. Settlements as Judgments

Given the significant role that court-approved settlements play in the resolution of class actions filed in American courts and in the preclusion of subsequent litigation on the settled (and related) claims,<sup>118</sup> it is interesting to note that not all of the participating European countries accord preclusive effect to settlements and consent judgments. While England and Wales,<sup>119</sup> Sweden,<sup>120</sup> and Switzerland<sup>121</sup>

---

116 *Id.* at 349. The court conceded that if there were fresh evidence that “should entirely change the aspect of the case,” then the court should hear the claim that otherwise would have been an abuse of process. *Id.* at 354 (citing *McIlkenny v. Chief Constable of W. Midlands*, [1980] Q.B. 283 at 334 (Eng.); *Phosphate Sewage Co. v. Molleson*, (1879) 4 App. Cas. 801 (H.L.) at 814 (Eng.)).

117 *Cf.* *Taylor v. Sturgell*, 553 U.S. 880, 884–85 (2008) (disapproving of the doctrine of virtual representation); *Martin v. Wilks*, 490 U.S. 755, 763 (1989) (“[A] party seeking a judgment binding on another cannot obligate that person to intervene; he must be joined.” (citing *Zenith Radio Corp. v. Hazeltine Res., Inc.*, 395 U.S. 100, 110 (1969))).

118 *See supra* Part I.B.

119 *See* REPORT OF ENGLAND AND WALES, *supra* note 87, at 16–18 (noting that an “agreement of the parties without any determination by a court” is not a judicial decision entitled to preclusive effects, but adding that “the position will be different if the court . . . has formally dismissed a claim following its withdrawal” (citing, *inter alia*, *In re S. Am. & Mex. Co.*, [1895] 1 Ch. 37 (CA) at 45 (Eng.) (“[A] judgment by consent or by default raises an estoppel just in the same way as a judgment after the Court has exercised a judicial discretion in the matter.”); *The Kronprinz*, [1887] 12 A.C. 256 (H.L.) (Eng.)); *see also* PETER B. BARNETT, *RES JUDICATA, ESTOPPEL, AND FOREIGN*

all treat judicially approved settlements as judgments capable of having preclusive effects, many of the other participating countries do not. For example, in Germany there are no consent judgments,<sup>122</sup> and “[s]ettlements, whether made of record or not, have no *res judicata* effect.”<sup>123</sup> In the Netherlands, court-approved settlements and other judgments rendered in noncontentious proceedings lack preclusive effect, although they are contractually binding.<sup>124</sup> In Spain, too, when the court approves a settlement, making no independent ruling on the merits, its order has no substantive preclusive effects.<sup>125</sup> Similarly, the Report of France notes that a judicial contract (*contrat judiciaire*) is “an enforceable act of the judge which takes into account an agreement between parties. But it has the nature of a contract and may not be reviewed as a judgment.”<sup>126</sup> The French report goes on to suggest that judicially approved settlements also lack

---

JUDGMENTS ¶ 1.26, at 14 (2001) (“A judgment or order by consent, although based foremost on the parties’ agreement or settlement, is capable of operating as a *res judicata* once the judicial tribunal gives judicial sanction and coercive authority to the consent agreement or settlement.”).

120 See REPORT OF SWEDEN, *supra* note 99, at 11 (“[T]he court may confirm the settlement in a judgment where requested by both parties. Such a judgment has legal force and may be enforced to the extent that it imposes obligations on the parties.” (footnote omitted) (citing RÄTTEGANESBALKEN [RB] [Code of Civil Procedure] 17:6 (Swed.))).

121 See REPORT OF SWITZERLAND, *supra* note 93, at 11 (“Several Cantonal Codes of Civil Procedure treat judgments that terminate the proceedings based on parties’ consent (*Sachentscheidsurrogate*) as equal to a *Sachentscheid* [i.e., final determination on the merits] with regard to preclusive effects.”). The Federal Supreme Court has not definitively resolved whether court-approved settlements have preclusive effect under federal law. See *id.*

122 See REPORT OF GERMANY, *supra* note 93, at 17 (citing MURRAY & STÜRNER, *supra* note 94, at 356).

123 *Id.* (citing MURRAY & STÜRNER, *supra* note 94, at 356). The Report of Germany goes on to note that “[s]ettlements can . . . be raised in later litigation as having altered the position in substantive law, but this is an effect different to *res judicata*.” *Id.*; accord MURRAY & STÜRNER, *supra* note 94, at 356 (“A prior settlement may be raised as an accord and satisfaction in later litigation. However, it is not considered a judgment and the rules of *res adjudicata* do not apply.”).

124 See REPORT OF THE NETHERLANDS, *supra* note 87, at 31–32, 48; see also *id.* at 55 (noting that court-approved settlements are contractually binding).

125 See REPORT OF SPAIN, *supra* note 91, at 40 (“[I]n cases of a settlement between the parties (*transacción*), the court issues an order (*Auto*) recording it. These judicial decisions do not have substantive *res iudicata* effects, preventing later proceedings. Therefore, in fresh proceedings, the allegation of the existence of the settlement will not put an end to the proceedings. Nevertheless, the court will issue the new decision taking into account the content of the aforementioned settlement.” (footnote omitted)).

126 REPORT OF FRANCE, *supra* note 101, at 20.

res judicata effect, although it appears that the law in this area is less than clear.<sup>127</sup>

The hesitancy of European courts to grant preclusive effect to settlements is reflected in both the Brussels/Lugano Regime and in the Hague Convention on Choice of Court Agreements. The provisions of the Brussels/Lugano Regime governing recognition of Member State judgments do not apply to court-approved settlements because settlements are treated as private contracts rather than judgments even if they are reached in court and bring the legal proceedings to a conclusion.<sup>128</sup> While settlements do not qualify as judgments under Article 32 of the Brussels Regulations and, therefore, are not entitled to recognition (or preclusive effects) under Article 33, they nevertheless may be enforceable under Article 58, which provides that court-approved settlements that are enforceable in the rendering state “shall be enforceable in the State addressed under the same conditions as authentic instruments,” such as notarial deeds.<sup>129</sup>

Similarly, while the Hague Convention on Choice of Court Agreements provides for the enforcement of judicial settlements (*transactions judiciaires*),<sup>130</sup> it does not accord them preclusive effect “mainly because the effects of settlements are so different in different legal systems.”<sup>131</sup> The Explanatory Report to the Hague Convention

---

127 See *id.*

128 See ADRIAN BRIGGS & PETER REES, CIVIL JURISDICTION AND JUDGMENTS 521 (4th ed. 2005); BURKHARD HESS ET AL., THE BRUSSELS I REGULATION 44/2001, at 160 (2008); BIICL REPORT, *supra* note 67, at 43. In order for a decision to qualify as a “judgment” under Article 32 of the Brussels Regulation, the court of a Member State must have decided *on its own authority* the issues between the parties. See BIICL REPORT, *supra* note 67, at 42–43 (citing Case C-414/92, *Solo Kleinmotoren v. Boch*, 1994 E.C.R. I-2237). According to the European Court of Justice, “That condition is not fulfilled in the case of a settlement, even if it was reached in a court of a Contracting State and brings legal proceedings to an end. Settlements in court are essentially contractual . . .” *Solo Kleinmotoren*, 1994 E.C.R. I-2237, ¶ 18.

129 See BRIGGS & REES, *supra* note 128, at 521; EUROPEAN COMMENTARIES ON PRIVATE INTERNATIONAL LAW: BRUSSELS I REGULATION 692 (Ulrich Magnus & Peter Mankowski eds., 2007); HESS ET AL., *supra* note 128, at 159; PETER STONE, CIVIL JURISDICTION AND JUDGMENTS IN EUROPE 154–55 (1998). Article 57 in turn provides that “[a] document which has been formally drawn up or registered as an authentic instrument and is enforceable in one [Member] State shall, in another [Member] State, be declared enforceable.” Brussels Regulation, *supra* note 69, art. 57. The Heidelberg Report on the Brussels Regulation notes the sparsity of case law in relation to settlements. See HESS ET AL., *supra* note 128, at 160.

130 Convention on Choice of Court Agreements, art. 12, June 30, 2005, 44 I.L.M. 1294, available at <http://www.hcch.net/upload/conventions/txt37en.pdf>.

131 TREVOR HARTLEY & MASATO DOGAUCHI, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, EXPLANATORY REPORT ¶ 209, at 61 (2005), available at <http://www.hcch.net/upload/expl37e.pdf>.

explains the consequence of enforcing settlements while simultaneously denying them recognition and preclusive effect:

Assume that A and B conclude a contract with an exclusive choice of court clause in favour of the courts of State X. Subsequently, A sues B before a court in that State for 1000 euros, a sum which he claims is due under the contract. The parties then enter into a judicial settlement under which B agrees to pay A 800 euros, State X being a State where this may be done.

If B fails to pay, A may bring proceedings to enforce the settlement in State Y, another Contracting State. Such proceedings will be covered by Article 12 of the Convention. Assume, however, that B pays the money in compliance with the settlement without any need for enforcement proceedings. If A nevertheless brings a new action for the remaining 200 euros before the courts of State Y, *B cannot ask the court to recognise the settlement under the Convention as a procedural defence to the claim (which would make the claim inadmissible in some legal systems)*. The Convention does not provide for this, mainly because the effects of settlements are so different in different legal systems.<sup>132</sup>

If settlements in some or many European countries are enforceable as contracts but do not preclude subsequent litigation between the parties, then it is possible that foreign defendants who settle class actions filed against them in the United States may not receive in Europe the protection from relitigation that they would receive at home. This is a significant issue that merits additional research.

#### 4. Issue Preclusion

In about half of the countries surveyed—England and Wales, the Netherlands, Spain, and the United States—judgments have issue preclusive effect.<sup>133</sup> In the other countries, however—Germany, France, Romania, Sweden, and Switzerland—judgments have no issue

---

132 *Id.* ¶¶ 207–208, at 59–60 (emphasis added).

133 See BIICL REPORT, *supra* note 67, at 27 n.149. In fact, in England and Wales, nonparties who had a right to intervene in proceedings that effectively would have determined their rights and obligations but chose not to intervene are bound by the judgment. See REPORT OF ENGLAND AND WALES, *supra* note 87, at 34 (citing *House of Spring Gardens Ltd. v. Waite*, [1991] 1 Q.B. 241 at 252–53 (Eng.)); BIICL REPORT, *supra* note 67, at 33 n.196 (citing *Wytcherley v. Andrews*, [1871] 2 L.R.P. & D. 327 at 328 (Eng.)); cf. *Martin v. Wilks*, 490 U.S. 755, 765 (1989) (“Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree.”).

preclusive effect.<sup>134</sup> When coupled with the narrow definition of the claim for purposes of claim preclusion employed in these countries and the failure to accord settlements claim preclusive effect, this lack of issue preclusive effect may leave parties with a fair bit of room to relitigate matters already adjudicated by changing the theory upon which they sue or by seeking different relief.

## 5. Parties Bound

While differences regarding claim preclusion, wider preclusive effects, the binding effects of settlements, and issue preclusion are all quite salient, what may be most relevant here is the willingness (or not) of the participating European countries to bind persons who were not formally named as parties to the prior litigation. The participating European countries uniformly limit the claim preclusive effect of a judgment to the parties to the proceedings,<sup>135</sup> but not all of them define the “parties to the proceedings” identically.<sup>136</sup> All of the participating European countries bind persons named as parties to the first action<sup>137</sup> and their legal successors.<sup>138</sup> Some countries also bind absentees if their interests were represented in the action.<sup>139</sup> The BIICL Report notes that “[t]his may occur in the context of group and representative actions.”<sup>140</sup> We turn, then, to the circumstances in

134 See REPORT OF GERMANY, *supra* note 93, at 37 (“The only part of the judgment that is binding is the decision of the court on the procedural claim which is limited to the ‘Streitgegenstand’ [i.e., the demand] . . . e.g. payment of 10.000 Euro damages for breach of contract . . . . A judgment does not bind later courts on preliminary questions such as the existence of the contract, the breach of its conditions, etc.”); BIICL REPORT, *supra* note 67, at 27 & n.148 (identifying limited circumstances in which judgments in Romania and Switzerland have limited issue preclusive effect).

135 See BIICL REPORT, *supra* note 67, at 16 n.46 (listing all countries surveyed except France); *id.* at 19 (stating that claim preclusion “principally only applies between the named parties in proceedings”). The Report of France makes clear that under French law, too, generally only the parties to the first lawsuit are bound by the judgment. See REPORT OF FRANCE, *supra* note 101, at 22–23. Indeed, the Report of France further notes that “[r]es judicata relates only to the parties. This aspect is one of the main theoretical obstacles of the implementation of class action with the opting out system in France.” *Id.* at 5.

136 See BIICL REPORT, *supra* note 67, at 16–17.

137 See *id.* at 17.

138 See *id.* at 24. The BIICL Report and the country reports consider in detail the extent to which others—such as intervenors, impleaded third parties, and privies—may be bound by a judgment. See *id.* at 19–27. We will focus on the extent to which represented parties, such as absent class members, are bound.

139 See *id.* at 17.

140 *Id.* (listing England and Wales and the Netherlands); see also REPORT OF ENGLAND AND WALES, *supra* note 87, at 29–30 (identifying five circumstances in which

which, as a matter of domestic law, the participating European countries authorize group litigation to resolve disputes affecting large numbers of people and the extent to which the judgments rendered in such litigation are accorded preclusive effects within the rendering state. Once we understand the extent to which the participating European countries accord their *own* group litigation judgments preclusive effect, we can explore the extent to which they may accord preclusive effect to the group litigation judgments of other countries.

C. *The Preclusive Effects of Group Litigation Judgments Under the National Laws of the Participating European Countries*

There has been a dramatic change in the legal landscape in Europe as the participating European countries (and others) have experimented with a variety of vehicles for efficiently and fairly resolving disputes that affect large numbers of people.<sup>141</sup> Indeed, as Professors Issacharoff and Miller contend, “[a]nalyzing European class actions is like shooting at a moving target.”<sup>142</sup> The country reports prepared in connection with the BIICL Judgments Project reveal both an increasing willingness on the part of the participating European

---

the Civil Procedure Rules permit a nonparty whose interests are represented to be bound by a judgment, and further discussing the binding effect of group litigation); REPORT OF THE NETHERLANDS, *supra* note 87, at 54–55 (discussing collective actions and collective settlements and their respective preclusive effects); *infra* notes 208–17 and accompanying text.

141 In addition to the countries surveyed here, a number of European countries have recently enacted class action litigation, including Denmark, Gruppessøgsmål [Class Actions] (2007:181); *see also* LAW DEP’T, DANISH MINISTRY OF JUSTICE, NEW RULES ON DANISH CLASS ACTIONS (2007), available at <http://www.justitsministeriet.dk/fileadmin/downloads/rules.pdf> (describing the effect of Act Number 181); Norway, 35 ch. Lov om mekling og rettergang i sivile tvister (Tvisteloven) [Law on Mediation and Legal Proceedings in Civil Disputes (The Dispute Act)] (2007:90) 5, available in English at [http://www.law.stanford.edu/library/globalclassaction/PDF/Norway\\_Legislation.pdf](http://www.law.stanford.edu/library/globalclassaction/PDF/Norway_Legislation.pdf); Finland, Ryhmäkannelaki [Class Action Law] (2007:444), available in English at <http://www.finlex.fi/fi/laki/kaannokset/2007/en20070444.pdf>; and Italy, Decreto Legislativo 6 settembre 2005, n. 206, in G.U. 8 ottobre 2005, n. 235, available in English at [http://www.law.stanford.edu/library/globalclassaction/PDF/Italian\\_Collective\\_Action\\_for\\_Damages.pdf](http://www.law.stanford.edu/library/globalclassaction/PDF/Italian_Collective_Action_for_Damages.pdf). For a discussion of various approaches to collective and representative actions, *see* OSCAR G. CHASE ET AL., CIVIL LITIGATION IN COMPARATIVE CONTEXT 390–462 (2007).

142 Issacharoff & Miller, *supra* note 45, at 191–92. Professors Issacharoff and Miller question whether the European reforms will be effective as long as the Europeans continue to resist American-style entrepreneurial lawyering. *See id.* at 180–81; *cf.* John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 346–49 (2010) (proposing a nonentrepreneurial model that employs a non-profit organization as plaintiff and an opt-in class).

countries to experiment with group litigation<sup>143</sup> and a cautious attitude regarding the preclusion of claims held by represented nonparties. As the late Professor Nagareda pointed out, while Europe has embraced aggregate litigation, it “stops markedly short of full-fledged embrace for U.S.-style class actions.”<sup>144</sup> Professor Coffee identifies two reasons for Europe’s reluctance to fully embrace American-style opt-out class actions: first, Europeans fear that opt-out class actions will “invite [ ] abuse by giving a positive settlement value to nonmeritorious actions,” and second, Europeans believe that “a litigant should not be bound by agents that the litigant has not authorized to act on the litigant’s behalf.”<sup>145</sup> Thus, the participating European countries have sought to develop group litigation vehicles that achieve efficiency without sacrificing fairness to either defendants or individual claimants.

Any effort to categorize the different types of group litigation that the Europeans have developed is fraught with difficulty. Christopher Hodges posits that there are two primary models: a representative model, in which one litigant files suit purporting to represent a group of others; and an aggregation model, in which the court collectively resolves a group of individually filed claims.<sup>146</sup> Let us analyze the results of the BIICL Judgments Project with these two models in mind, seeking to understand both the circumstances in which the participating European countries authorize group litigation and the extent to

---

143 Of the eight participating European countries, only Romania appears to have no group litigation mechanism in place. See REPORT OF ROMANIA, *supra* note 101, at 18; BIICL REPORT, *supra* note 67, at 22. In discussing the group litigation options pursued by the participating European countries, I draw not only on the BIICL Report and the national reports prepared in connection with the BIICL Judgments Project, but also on the country reports prepared in connection with Stanford Law School’s Global Class Actions Exchange and other supplemental sources. See *Global Class Actions Exchange*, STAN. L. SCH., <http://www.stanford.edu/group/lawlibrary/cgi-bin/globalclassactions> (last visited Nov. 29, 2010).

144 Nagareda, *supra* note 3, at 6.

145 Coffee, *supra* note 142, at 330.

146 See CHRISTOPHER HODGES, THE REFORM OF CLASS AND REPRESENTATIVE ACTIONS IN EUROPEAN LEGAL SYSTEMS 2 (2008); see also BIICL REPORT, *supra* note 67, at 22–23 (discussing comparative response and actions in different legal systems and the claim preclusive effects of judgments on group members); cf. Coffee, *supra* note 142, at 298–304 (offering five models of large-scale aggregate litigation: the opt-out class action, the non-opt-out class action, the opt-in class action, representative actions, and public interest litigation); Louis Degos & Geoffrey V. Morson, *Class System: The Reforms of Class Action Laws in Europe Are as Varied as the Nations Themselves*, L.A. LAW., Nov. 2006, at 32, 34 (using “the term ‘class action’ to refer to any European procedure in which one or more plaintiffs seek a civil legal remedy in a national court or a procedure in which any such remedy may be sought on their behalf”).

which they accord preclusive effect to the judgments rendered therein.

### 1. Representative Actions

Many of the jurisdictions surveyed in the BIICL Judgments Project permit some type of representative action. Unlike the aggregation model described in section II.C.2 below, which seeks a collective resolution of a group of claims filed by individual litigants, a representative action permits one person or entity to file suit and to represent an individual or group of individuals who do not themselves join the litigation as parties.<sup>147</sup> Since our ultimate objective is to understand the extent to which the participating European countries would accord preclusive effect to decisions rendered in group litigation, we will focus on those representative actions filed on behalf of a group of similarly situated persons, and put to the side representative actions filed on behalf of individual children, those lacking mental capacity, trust beneficiaries, and the like.<sup>148</sup>

#### a. Collective Actions

In France,<sup>149</sup> Germany,<sup>150</sup> the Netherlands,<sup>151</sup> and Switzerland,<sup>152</sup> representative organizations or interest groups are authorized to

---

147 See HODGES, *supra* note 146, at 2; BIICL REPORT, *supra* note 67, at 22.

148 See REPORT OF ENGLAND AND WALES, *supra* note 87, at 29–33 (describing a variety of circumstances in which a nonparty whose interests are represented by another may be bound by the judgment); REPORT OF FRANCE, *supra* note 101, at 27–29 (describing the binding effect of litigation brought on behalf of minors and others lacking capacity, and others in privity with a named party, such as a corporate chairman); REPORT OF SWITZERLAND, *supra* note 93, at 25–27 (describing the binding effect on a child of a judgment obtained by a custodial parent seeking child support); BIICL REPORT, *supra* note 67, at 22–23; REPORT OF THE NETHERLANDS, *supra* note 87, at 43–45 (describing the preclusive effect a judgment has on minors and majority shareholders).

149 See REPORT OF FRANCE, *supra* note 101, at 28 (citing CODE DU TRAVAIL [C. TRAV.] art. L411-11 (2007) (Fr.); C. CIV. art. L421-1 (Fr.)); VÉRONIQUE MAGNIER, CLASS ACTIONS, GROUP LITIGATION & OTHER FORMS OF COLLECTIVE LITIGATION: PROTOCOL FOR NATIONAL REPORTERS: FRANCE 5–7 (2007), available at [http://www.law.stanford.edu/library/globalclassaction/PDF/France\\_National\\_Report.pdf](http://www.law.stanford.edu/library/globalclassaction/PDF/France_National_Report.pdf).

150 See DIETMAR BAETGE, CLASS ACTIONS, GROUP LITIGATION & OTHER FORMS OF COLLECTIVE LITIGATION: GERMANY 1–14, 16–18, 21, 25–27, 30 (2007), available at <http://www.law.stanford.edu/library/globalclassaction/reports.html#germany>; REPORT OF GERMANY, *supra* note 93, at 32–33 (discussing interest group complaints in consumer and unfair competition cases).

151 See IANIK TZANKOVA, THE NETHERLANDS 5 (2007), available at [http://www.law.stanford.edu/library/globalclassaction/PDF/Netherlands\\_National\\_Report\\_2.pdf](http://www.law.stanford.edu/library/globalclassaction/PDF/Netherlands_National_Report_2.pdf); REPORT OF THE NETHERLANDS, *supra* note 87, at 54 & nn.548–49 (citing BURGERLIJK

bring collective actions to enforce specified laws, such as consumer protection laws and laws against unfair competition.<sup>153</sup> These collective actions may seek injunctive or declaratory relief to protect the interests of their members, but not monetary relief.<sup>154</sup> As one commentator put it, “[t]o the extent that the purpose of this type of actions [sic] is to defend the collective interest, the injury to be repaired continues to be collective and the repair of an individual injury is not possible, unlike a true class action.”<sup>155</sup>

---

WETBOEK [BW] [CIVIL CODE] arts. 3:305a-c & 3:305a(3) (Neth.); Memorandum from I.N. Tzankova & D.F. Lunsingh Scheurleer, NautaDutilh, to Deborah Hensler, Professor, Stanford Law Sch., & Christopher Hodges, Head, Research Programme on Civil Justice Sys., Univ. of Oxford, Re: Class Actions, Group Litigation and Other Forms of Collective Litigation Dutch Report 2–3, 7 (Sept. 24, 2007) [hereinafter, Tzankova & Lunsingh Scheurleer], available at [http://www.law.stanford.edu/library/globalclassaction/PDF/Netherlands\\_National\\_Report.pdf](http://www.law.stanford.edu/library/globalclassaction/PDF/Netherlands_National_Report.pdf). The Dutch law requires that “the interest of the group members are similar enough (a kind of a commonality test) to be handled in a collective action.” Tzankova & Lunsingh Scheurleer, *supra*, at 7.

152 See SAMUEL P. BAUMGARTNER, GROUP LITIGATION IN SWITZERLAND 14–29 (2007), available at [http://www.law.stanford.edu/library/globalclassaction/PDF/Switzerland\\_National\\_Report.pdf](http://www.law.stanford.edu/library/globalclassaction/PDF/Switzerland_National_Report.pdf); REPORT OF SWITZERLAND, *supra* note 93, at 25 (citing SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], CODE CIVIL [CC], CODICE CIVILE [CC] [CIVIL CODE] Dec. 19, 1986, SR 241, art. 10 (Switz.)). In Switzerland, “the common law *Verbandsklage* is limited to claims of harm to one’s person.” *Id.* at 15. Swiss law also allows associations to challenge decisions by administrative agencies, *id.* at 31–34, and allows a shareholder to sue on behalf of other shareholders, *id.* at 34–37.

153 See BIICL REPORT, *supra* note 67, at 22–24; Coffee, *supra* note 142, at 302 (describing the plaintiffs as “ombudsmen, private consumer organizations, or other nonprofit associations”); Issacharoff & Miller, *supra* note 45, at 192–97 (identifying and discussing four objectives served by the requirement that the lead plaintiff be an organization). England and Wales also authorize representative actions to pursue consumer claims under the Enterprise Act of 2002. See Mark Mildred, *Group Actions*, in THE LAW OF PRODUCT LIABILITY 565, 596 (Andrew Grubb & Geraint Howells eds., 2007) (citing Enterprise Act, 2002, c. 40, § 19 (Eng.)). Mildred stated that no claims had been made under the law as of 2007. *Id.* Throughout the European Union, European Union Directive 98/27 authorizes “a qualified entity” to seek injunctive relief to protect the collective interests of consumers. Council Directive 98/27, art. 3, 1998 O.J. (L 166) 151 (EC), as amended by European Union Directive 2005/25, 2005 O.J. (L 149) 22; accord Harald Koch, *Non-Class Group Litigation Under EU and German Law*, 11 DUKE J. COMP. & INT’L L. 355, 355–57, 359 (2001); Degos & Morson, *supra* note 146, at 32.

154 See BAETGE, *supra* note 150, at 22; BAUMGARTNER, *supra* note 152, at 14, 17, 23; REPORT OF GERMANY, *supra* note 93, at 33 (“The interest group complaint seeks in almost all cases injunctive relief.”); MAGNIER, *supra* note 149, at 9; TZANKOVA, *supra* note 151, at 5, 9; REPORT OF THE NETHERLANDS, *supra* note 87, at 54; Koch, *supra* note 153, at 358–60; Tzankova & Lunsingh Scheurleer, *supra* note 151, at 2; cf. BAETGE, *supra* note 150, at 23–24 (describing “skimming-off” actions, which seek to recover illegal profits in antitrust cases).

155 MAGNIER, *supra* note 149, at 9.

Some have expressed concern that a suit for money damages would interfere with the members' individual rights.<sup>156</sup> In these collective actions, only the unions or the plaintiff organizations (and the defendant) are bound by the judgment; the members remain free to bring their own individual actions.<sup>157</sup> As the Report of the Netherlands emphasizes, "[t]he *preclusive effect* does not extend to those persons whose interests are represented. The class members can still sue in their own rights, although a certain *persuasive effect* is typically attributed to those decisions."<sup>158</sup> Similarly, the Report of Germany states that "other interest groups or even the members of the relevant interest group or association are not bound by the judgment and could start separate proceedings"<sup>159</sup> if the plaintiff loses the action.

If the plaintiff *prevails* in a German collective action alleging the use of unfair standard contract terms, any party to a contract containing the challenged language may invoke the judgment against the defendant, who is bound by it.<sup>160</sup> Thus, Germany appears to sanction a result rejected by the Advisory Committee on Civil Rules in 1966—a form of "'one-way' intervention"—that permits absentees to benefit from a judgment if the plaintiff is successful but to avoid its binding effect if the plaintiff loses.<sup>161</sup> The risk to the defendant in Europe may not be great, however, for, as the Supreme Court of Switzerland noted, absentees are not likely to undertake individual actions against the defendant if the representative association already has lost on the same claim.<sup>162</sup> The prohibition in Europe on contingent fees and the prevailing "loser-pays" rule regarding attorneys' fees<sup>163</sup> make individ-

---

156 See BAUMGARTNER, *supra* note 152, at 17.

157 See BAETGE, *supra* note 150, at 14; BAUMGARTNER, *supra* note 152, at 24–25; REPORT OF GERMANY, *supra* note 93, at 33; REPORT OF FRANCE, *supra* note 101, at 28; REPORT OF SWITZERLAND, *supra* note 93, at 25; TZANKOVA, *supra* note 151, at 6; REPORT OF THE NETHERLANDS, *supra* note 87, at 54; Tzankova & Lunsingh Scheurleer, *supra* note 151, at 4, 10.

158 REPORT OF THE NETHERLANDS, *supra* note 87, at 54.

159 REPORT OF GERMANY, *supra* note 93, at 33.

160 See BAETGE, *supra* note 150, at 22 (discussing how the German Injunction Suit Act, *Unterlassungsklagengesetz* [UKlaG] [Injunction Suit Act], Aug. 27, 2002, BUNDESGESETZBLATT, Teil I [BGBL. I] at S. 977 (Ger.), alters the preclusive effect of judgments rendered in the consumer law context); REPORT OF GERMANY, *supra* note 93, at 33 (same).

161 See FED. R. CIV. P. 23(c)(3) advisory committee's note (1966); see also Tzankova & Lunsingh Scheurleer, *supra* note 151, at 10 ("[D]efendants . . . can 'only loose' [sic] in a collective action.").

162 See BAUMGARTNER, *supra* note 152, at 24–25 (citing BGer May 20, 1947, 73 BGE II 65, 72–73 (Switz.)).

163 See Issacharoff & Miller, *supra* note 45, at 198, 201.

ual follow-up suits unlikely, especially in the face of a loss by the organizational plaintiff.<sup>164</sup>

### b. Group Actions

In addition to the United States, three other countries participating in the BIICL Judgments Project—Sweden, Spain, and France—permit group actions that seek monetary relief<sup>165</sup> and another participating country—the Netherlands—permits class-wide settlements of mass claims. Unlike the collective actions discussed above, these group actions and group settlements seek monetary relief like American class actions. The group action vehicles discussed here nevertheless differ from American class actions in important ways. As we will see, the Swedish and French group actions require absent group

---

164 American courts have also noted that “defendants’ *res judicata* concerns are ‘more hypothetical than real,’ since the likelihood of relitigation by absent class members in a European forum is low,” given a “loser pays” system of attorneys’ fees, the absence of contingency fee arrangements, and the knowledge that one court has already rejected the claim. *In re Vivendi Universal, S.A. Secs. Litig.*, 242 F.R.D. 76, 106–07 (S.D.N.Y. 2007); *see also, e.g., Cromer Fin. Ltd. v. Berger*, 205 F.R.D. 113, 135 n.32 (S.D.N.Y. 2001) (identifying “such practical deterrents [to subsequent litigation in Europe] as the unavailability of contingent-fee representation or a class action vehicle in those courts”).

165 England and Wales also permit representative actions “[w]here more than one person has the same interest in a claim.” CPR 19.6(1) (Eng.); *accord* REPORT OF ENGLAND AND WALES, *supra* note 87, at 29; CHRISTOPHER HODGES, GLOBAL CLASS ACTIONS PROJECT: COUNTRY REPORT: ENGLAND AND WALES 3 (2007) [hereinafter HODGES, ENGLAND AND WALES], *available at* [http://www.law.stanford.edu/library/globalclassaction/PDF/England\\_CountryReport.pdf](http://www.law.stanford.edu/library/globalclassaction/PDF/England_CountryReport.pdf); CHRISTOPHER HODGES, MULTI-PARTY ACTIONS 122–24 (2001) [hereinafter HODGES, MULTI-Party Actions]; RACHAEL MULHERON, THE CLASS ACTION IN COMMON LAW LEGAL SYSTEMS 87–89 (2004); Neil Andrews, *Multi-Party Proceedings in England: Representative and Group Actions*, 11 DUKE J. COMP. & INT’L L. 249, 250–57 (2001); Mildred, *supra* note 153, at 592–99. Because the courts have interpreted the phrase “same interest” very restrictively, this mechanism has been very rarely used. *See* HODGES, *supra* note 146, at 3; HODGES, MULTI-Party Actions, *supra*, at 122–24; MULHERON, *supra*, at 80–84, 87; Mildred, *supra* note 153, at 594. An influential research report prepared by Professor Rachael Mulheron for the Civil Justice Council of England and Wales concluded in 2008 that “there is overwhelming evidence of the need for a further collective redress mechanism,” including an opt-out mechanism. Rachael Mulheron, *Reform of Collective Redress in England and Wales*, at vii (Civil Justice Council of Eng. & Wales, Research Paper, 2008), *available at* [http://www.civiljusticecouncil.gov.uk/files/collective\\_redress.pdf](http://www.civiljusticecouncil.gov.uk/files/collective_redress.pdf); *see also* Mulheron, *supra* note 5, at 413 (“[I]nsofar as England and Wales are concerned, there is an overwhelming *evidence of need* for an opt-out collective redress mechanism . . . .” (footnote omitted)).

members to opt in,<sup>166</sup> the Spanish and French group actions are limited to consumer claims,<sup>167</sup> and the Dutch legislation authorizes only court-approved *settlements*, not representative litigation.<sup>168</sup>

The Swedish Group Proceedings Act, which took effect in 2003, authorizes a plaintiff to file a group action on behalf of others whose claims are “founded on circumstances that are common or of a similar nature.”<sup>169</sup> According to Professor Per Henrik Lindblom, “[t]he Group Proceedings Act brought a paradigm shift with respect to group actions”<sup>170</sup> in that it authorizes “[a] ‘true’ class action, brought in a general court by a member of the group and allowing claims for not only injunctive relief but also individual damages for the group members.”<sup>171</sup> Previously, only certain entities had authority to bring group claims only in courts of limited jurisdiction,<sup>172</sup> and they could not seek money damages for absent class members.<sup>173</sup>

Under the Group Proceedings Act, group actions may be filed by one or more members of the group, certain nonprofit organizations or government authorities.<sup>174</sup> Unlike the Spanish law to be discussed below, which authorizes only consumer class actions, the Swedish Group Proceedings Act “is applicable in all cases normally brought in general courts of first instance,”<sup>175</sup> regardless of the substantive claim.

166 Issacharoff and Miller identify three problems posed by opt-in procedures: “problems with incentivizing a named plaintiff under an opt-in regime, difficulties in attracting adequate participation rates, and the challenge of offering defendants the opportunity to achieve global peace through the class procedure.” Issacharoff & Miller, *supra* note 45, at 202.

167 See Report of France, *supra* note 101, at 27–28; REPORT OF SPAIN, *supra* note 91, at 47–50.

168 See REPORT OF THE NETHERLANDS, *supra* note 87, at 55.

169 See LAG OM GRUPPRATTEGANG [GROUP PROCEEDINGS ACT] (Svensk författningssamling [SFS] 2002:599) (Swed.), available in English at <http://www.sweden.gov.se/content/1/c6/02/77/67/bcbe1f4f.pdf>; accord REPORT OF SWEDEN, *supra* note 99, at 32–33; PER HENRIK LINDBLOM, NATIONAL REPORT: GROUP LITIGATION IN SWEDEN 8–28 (2007), available at [http://www.law.stanford.edu/library/globalclassaction/PDF/Sweden\\_National\\_Report.pdf](http://www.law.stanford.edu/library/globalclassaction/PDF/Sweden_National_Report.pdf). Enacted in 2002, the Group Proceedings Act entered into force on January 1, 2003. During its first five years, only nine group actions were filed and only one was resolved, but the availability of the group action vehicle apparently has prompted the pre-filing settlement of other group claims. See *id.* at 21–26, 35 (discussing the cases).

170 LINDBLOM, *supra* note 169, at 3.

171 *Id.* at 6.

172 See *id.*

173 See *id.* at 5–6, 29.

174 See 4–6 §§ LAG OM GRUPPRATTEGANG (SFS 2002:599) (Swed.); see also LINDBLOM, *supra* note 169, at 11–12 (stating that the Act applies to “three forms of group action: private, organization, and public”).

175 LINDBLOM, *supra* note 169, at 10.

After group members receive notice of the action, they must notify the court in writing if they “wish[ ] to be included in the group action”;<sup>176</sup> if they do not provide such notice within a specified period of time, they “shall be deemed to have withdrawn from the group.”<sup>177</sup>

A Swedish group action judgment is binding only on those group members who provide notice of their wish to be included (i.e., opt-in) and whose names are mentioned in the judgment.<sup>178</sup> Thus, the opt-in requirement assuages the concerns of the law’s opponents that it would be unconstitutional to bind absentees by a group action judgment.<sup>179</sup> As the Report of Sweden emphasized, “the judgment does not have legal force *vis-à-vis* parties who did not submit an application notwithstanding that they have claims which could have been included in the class action.”<sup>180</sup> Regarding absentees who do opt in, the group action judgment has the same “legal force” or claim preclusive effect in Sweden as a judgment rendered in an individual action.<sup>181</sup> If the group action settles, absent group members are bound only if the court approves the settlement.<sup>182</sup>

In defending the Swedish Group Proceedings Act, Professor Lindblom specifically emphasized the protection it affords defendants: “[G]roup actions also make defendants more secure, since the judgment is binding on every member of the group. Group actions reduce the risk of repeated litigation and strengthens [sic] protection against frivolous and unethical lawsuits.”<sup>183</sup> But the opt-in mechanism does not provide the defendant with global peace. Those prospective

---

176 14 § LAG OM GRUPPRATTEGANG (SFS 2002:599) (Swed.).

177 *Id.*; see also LINDBLOM, *supra* note 169, at 12–13 (describing the Swedish opt-in system). Professor Lindblom suggests that “rules on the opt-in system for group members should be supplemented with an opt-out alternative in actions involving minor claims, at least in public group actions.” *Id.* at 37.

178 See REPORT OF SWEDEN, *supra* note 99, at 33; see also 28 § LAG OM GRUPPRATTEGANG (SFS 2002:599) (Swed.) (requiring the court to “specify in a judgment the members of the group to which the judgment refers”); *id.* § 29 (“The determination of the court in group proceedings has legal force in relation to all members of the group who are subject to the determination.”); Choi & Silberman, *supra* note 3, at 487–88 (contrasting the Swedish procedure with other systems).

179 See LINDBLOM, *supra* note 169, at 33.

180 REPORT OF SWEDEN, *supra* note 99, at 33; accord LINDBLOM, *supra* note 169, at 13.

181 REPORT OF SWEDEN, *supra* note 99, at 33; see also 29 § LAG OM GRUPPRATTEGANG (SFS 2002:599) (Swed.) (“The determination of the court in group proceedings has legal force in relation to all members of the group who are subject to the determination.”); LINDBLOM, *supra* note 169, at 13 (“The ruling takes legal force (*res judicata*) both for and against all who have opted in as if they had personally sued.”).

182 See LINDBLOM, *supra* note 169, at 13–14.

183 *Id.* at 36.

plaintiffs who decline to opt in may pursue individual lawsuits against the defendant.<sup>184</sup>

In October 2008, Sweden issued a report evaluating whether the objectives of the Group Proceedings Act—“strengthening individuals’ actual access to the judicial system”—had been achieved.<sup>185</sup> Notwithstanding suggestions by commentators that the law be amended to provide an opt-out alternative,<sup>186</sup> the report recommended no amendment to the current requirement that “a person must give notice in order to become a member of the group.”<sup>187</sup> In other words, it recommended preservation of the opt-in requirement.<sup>188</sup>

Spanish law, too, authorizes group actions, but only on behalf of groups of consumers.<sup>189</sup> Article 11 of the Civil Procedure Act (CPA)<sup>190</sup> provides that “legally constituted associations of consumers and users shall have standing to defend in legal proceedings the rights and interests of their members and those of the association, and the general interests of consumers and users.”<sup>191</sup> Stated differently, an association has standing to represent its members, to represent itself, and to represent “the general interests of consumers and users” (including, presumably, nonmembers).<sup>192</sup>

The law distinguishes between situations involving “a group of consumers or users the members of which are perfectly determined or easily determinable”<sup>193</sup> and those involving “a number of consumers

184 See Issacharoff & Miller, *supra* note 45, at 206–07 (identifying “insufficient finality” as a problem with opt-in regimes).

185 SWED. MINISTRY OF JUSTICE, EVALUATION OF THE GROUP PROCEEDINGS ACT: Summary 1 (2008), available at <http://www.sweden.gov.se/content/1/c6/11/43/57/4562d098.pdf>. The full report (in Swedish), *Utvärdering av lagen om grupprättegång*, is available at <http://www.regeringen.se/content/1/c6/11/35/22/0aa99502.pdf>.

186 See, e.g., LINDBLOM, *supra* note 169, at 37.

187 SWED. MINISTRY OF JUSTICE, *supra* note 185, at 3.

188 Accord Werner Kraneburg, *Sweden Evaluates Group Proceedings Act*, WITH VIGOUR & ZEAL (Dec. 19, 2008, 8:26 PM), <http://kranenborgesq.com/blog/2008/12/sweden-evaluates-group-proceedings-act> (stating that the committee proposes to “preserv[e] the opt-in model, despite calls for changing to an opt-out model”).

189 See REPORT OF SPAIN, *supra* note 91, at 47–50; see also PABLO GUTIÉRREZ DE CABIEDES HIDALGO, GROUP LITIGATION IN SPAIN (2007), available at [http://www.law.stanford.edu/display/images/dynamic/events\\_media/spain\\_national\\_report.pdf](http://www.law.stanford.edu/display/images/dynamic/events_media/spain_national_report.pdf) (describing the Spanish statutory rules for group litigation).

190 Civil Procedure Act art. 11 (B.O.E. 2000, 575) (Spain), translated in REPORT OF SPAIN, *supra* note 91, at 48; see GUTIÉRREZ DE CABIEDES HIDALGO, *supra* note 189, at 2.

191 Civil Procedure Act art. 11, para. 1 (Spain); see also GUTIÉRREZ DE CABIEDES HIDALGO, *supra* note 186, at 9–12 (outlining the CPA).

192 Civil Procedure Act art. 11, para. 2 (Spain).

193 *Id.*

or users who are undetermined or difficult to determine.”<sup>194</sup> Where the members of the group harmed “are perfectly determined or easily determinable”—where the class is readily identifiable—an action may be filed by “[1] associations of consumers and users, [2] legally constituted entities the object of which is the defence or protection of consumers, and [3] groups of the affected persons.”<sup>195</sup> These suits do not pursue the public interest or the political interest of a segment of society (such as environmentalists), but rather the interests of identifiable people whose claims are pursued collectively for purposes of “procedural economy.”<sup>196</sup>

If an association files suit, the courts require that at least one affected person belong to the plaintiff association.<sup>197</sup> The “legally constituted entities” are groups of injured persons formed specifically to take action on behalf of those injured.<sup>198</sup> A group of affected persons that do not form such a legally constituted entity may seek to represent others only where “active voluntary joint litigation” would not be practicable.<sup>199</sup>

On the other hand, where the consumers harmed “are undetermined or difficult to determine”—in cases involving “diffuse interests”—the suit is brought in the public interest and only those associations deemed to be “representative” have standing.<sup>200</sup> Although the CPA does not define the term “representative,” according to the Royal Legislative Decree 1/2007, 16 November, associations are deemed “representative” as long as “they are on the Council of Consumers and Users, unless the geographical area of the conflict affects basically one autonomous region, in which case its specific regulations will apply.”<sup>201</sup>

---

194 *Id.* art. 11, para. 3.

195 *Id.* art. 11, para. 2; *see also* GUTIÉRREZ DE CABIEDES HIDALGO, *supra* note 139, at 9–10 (outlining the CPA).

196 Koch, *supra* note 153, at 361 (discussing association claims in general, not specifically under Spanish law).

197 *See* REPORT OF SPAIN, *supra* note 91, at 49.

198 *Id.*

199 *Id.*

200 Civil Procedure Act art. 11, para. 3 (Spain); *see also* GUTIÉRREZ DE CABIEDES HIDALGO, *supra* note 189, at 10 & n.7 (discussing the definition of “representative”); Koch, *supra* note 153, at 361 (discussing associations’ right to sue, but not under Spanish law in particular).

201 REPORT OF SPAIN, *supra* note 91, at 49 (discussing Royal Legislative Decree (B.O.E. 2007, 49181) (Spain)); *cf. id.* (explaining that courts gauge the representativeness of an association by the number of its members who reside in the area in which the suit is filed).

In all events, the CPA provides that absentees are bound by the judgment, whether they participated or not and whether the class prevailed or not;<sup>202</sup> the Spanish law rejects an approach that would have bound consumers and users only if the class prevailed.<sup>203</sup> Some have argued that absentees in the Spanish system are more tightly bound than in an opt-out class action: “if affected parties who meet the conditions laid down in the judgment do not wish to benefit from it, they are not actually entitled to take separate action on their own.”<sup>204</sup>

The French group action, known as a joint representative action, combines features of the Swedish and Spanish group actions. Like the Spanish model, the French joint representative action is limited to consumer claims and permits a consumer association to pursue the individual interests of its members by filing suit on their behalf.<sup>205</sup> Like the Swedish model, each of the represented consumers must consent in writing to the action before the trial.<sup>206</sup> In these joint representative actions, the consumers who give the written mandates are bound by the judgment, but the association itself is not.<sup>207</sup>

The Dutch collective settlement procedure, initially created by the Dutch Class Action (Financial Settlement) Act (WCAM) to resolve the claims of women and girls harmed by DES, is different from the group actions in that it is available only where the parties first reach an agreement and then jointly request judicial approval thereof; it

---

202 See *id.* at 49 (discussing Civil Procedure Act art. 222, para. 3, which states that “res judicata affects those who did not take part in the proceeding but who hold rights referred to in Article 11”); see also GUTIÉRREZ DE CABIEDES HIDALGO, *supra* note 189, at 8–9 (discussing the effects of judgments).

203 See REPORT OF SPAIN, *supra* note 91, at 49 (explaining Article 11’s preclusive effect).

204 Mulheron, *supra* note 5, at 423 (quoting PAUL LOMAS & MIRA RAJA, FRESHFIELDS BRUCKHAUS DERINGER, CLASS ACTIONS AND THIRD PARTY FUNDING OF LITIGATION 50 (2007), available at <http://www.freshfields.com/publications/pdfs/2007/jun18/18825.pdf>).

205 See REPORT OF FRANCE, *supra* note 101, at 27–28 (citing CODE DE LA CONSOMMATION [C. CON.] art. L. 422-1 (Fr.), available in English at [http://195.83.177.9/upl/pdf/code\\_29.pdf](http://195.83.177.9/upl/pdf/code_29.pdf)); see also MAGNIER, *supra* note 149, at 5, 8–12 (differentiating between association suits filed in the collective interest of consumers and joint representative actions that pursue the personal claims of consumers). A similar joint representative action may be brought on behalf of investors who suffer harm from a common origin. See *id.* at 8–9 (citing CODE MONÉTAIRE ET FINANCIER [C. MON. ET. FIN.] art. L. 452-2 (Fr.), available in English at [http://195.83.177.9/upl/pdf/code\\_25.pdf](http://195.83.177.9/upl/pdf/code_25.pdf)). An association cannot commence a joint representative action until it is authorized to do so by at least two consumers or investors. See *id.* at 10.

206 See REPORT OF FRANCE, *supra* note 101, at 27; MAGNIER, *supra* note 149, at 10.

207 See REPORT OF FRANCE, *supra* note 101, at 27–28; MAGNIER, *supra* note 149, at 11.

does not authorize representative or aggregate litigation.<sup>208</sup> As a result, the threat of a damages class action, to induce the defendant to reach a settlement, is unavailable.<sup>209</sup>

Under WCAM, the foundation or association that negotiates the agreement must “represent[ ] the interests of [the represented] persons pursuant to its articles of association.”<sup>210</sup> The agreement should “provide for compensation for losses caused by ‘a single event or similar events.’”<sup>211</sup> Once a settlement is reached, the parties jointly petition the court to approve it. Notice of the proposed settlement must be sent to the represented parties.<sup>212</sup> The court must reject the settlement if “the amount of the compensation awarded is not reasonable having regard, inter alia, to the extent of the damage, the ease and speed with which the compensation can be obtained and the possible causes of the damage,”<sup>213</sup> among other circumstances. The repre-

---

208 See REPORT OF THE NETHERLANDS, *supra* note 87, at 55 (citing BW art. 7:907–910 (Neth.); WETBOEK VAN BURGERLIJKE RECHTSVORDERING [RV] [Code of Civil Procedure] art. 1013–1018 (Neth.)); see also TZANKOVA, *supra* note 150, at 1 (describing the settlement proceeding); Mulheron, *supra* note 5, at 424–25 (describing the history of the Dutch class action regime); Nagareda, *supra* note 3, at 37–41 (describing “mismatches” in the Dutch settlement of the Royal Dutch Shell case); Tzankova & Lunsingh Scheurleer, *supra* note 151, at 2, 4; *The Dutch ‘Class Action (Financial Settlement) Act’ (WCAM)*, RIJKSOVERHEID [GOV’T], 4, <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/circulaires/2008/06/24/the-dutch-class-action-financial-settlement-act-wcam/wcamenglish.pdf> (last visited Nov. 29, 2010) [hereinafter Dutch Ministry of Justice Circular] (arguing that WCAM avoids “black-mail settlement[s]”).

209 See TZANKOVA, *supra* note 151, at 6; REPORT OF THE NETHERLANDS, *supra* note 87, at 55; Nagareda, *supra* note 3, at 9 (noting that “the Royal Dutch Shell settlement invite[d] renewed attention . . . to when and how a lack of embrace for the enabling potential of aggregation might undermine the legitimacy of aggregate peacemaking”); Tzankova & Lunsingh Scheurleer, *supra* note 151, at 7; Dutch Ministry of Justice Circular, *supra* note 208, at 4 (explaining the rationale of the Dutch system). Although Dutch law also authorizes representative or collective actions, see *supra* Part II.C.1.a, those actions may not seek money damages. In the event the prospective defendant denies liability, a collective action may be brought to determine the underlying question of liability. If liability is found, then the defendant may choose to negotiate a settlement under WCAM.

210 BW art. 7:907(1) (Neth.), translated in Dutch Ministry of Justice Circular, *supra* note 208, at 1–2; see also Tzankova & Lunsingh Scheurleer, *supra* note 151, at 8 (noting that such representation is necessary).

211 Dutch Ministry of Justice Circular, *supra* note 208, at 2.

212 See TZANKOVA, *supra* note 151, at 7; REPORT OF THE NETHERLANDS, *supra* note 87, at 55; Tzankova & Lunsingh Scheurleer, *supra* note 151, at 8–9.

213 BW art. 7:907(3)(b) (Neth.), translated in Dutch Ministry of Justice Circular, *supra* note 208, at 2.

sented parties have an opportunity to opt out of the settlement.<sup>214</sup> If they do not opt out, they are bound by the settlement if it is approved.<sup>215</sup> According to the explanatory memorandum that accompanied the legislation,

The binding effect of the court approved settlement agreement is comparable to that of a normal court judgment in accordance with Article 236 Rv, in that, in the same sense as the preclusive effect of a judgment, the effect of a settlement agreement is that a dispute may not entail a renewed discussion of the contents of the agreement. In fact, the interested parties are prevented from addressing the court in this regard.<sup>216</sup>

The Report of the Netherlands quarrels with this conclusion, noting that an order approving a settlement has no preclusive effect itself, but adds that a court-approved settlement agreement is contractually binding.<sup>217</sup> This quarrel reinforces the need for further research on the varying preclusive effects accorded to settlements, on the one hand, and group judgments, on the other, an issue raised in section III.B.3 above.

This discussion of the representative actions available in the participating European countries supports a few tentative conclusions. First, the collective actions authorized in France, Germany, the Netherlands, and Switzerland differ significantly from American class actions both in the limitation on the type of relief and in the binding effect of the judgments. The plaintiff organizations can seek only declaratory or injunctive relief, not money damages. This limitation on the type of relief available in collective actions is consistent with the general preference in civil law systems for specific performance,

---

214 See REPORT OF THE NETHERLANDS, *supra* note 87, at 55 (citing BW art. 7:908(1) (Neth.); Rv art. 1013(5) (Neth.); BW art. 7:908(2) (Neth) (providing that “[t]he declaration that the agreement is binding shall have no consequences for a person entitled to compensation who has [provided written notice] . . . that he does not wish to be bound”), translated in Dutch Ministry of Justice Circular, *supra* note 208, at 3); see also Mulheron, *supra* note 5, at 425 (discussing a class member’s right to opt out of a settlement agreement).

215 See TZANKOVA, *supra* note 151, at 1, 8; REPORT OF THE NETHERLANDS, *supra* note 87, at 55; Tzankova & Lunsingh Scheurleer, *supra* note 151, at 9.

216 REPORT OF THE NETHERLANDS, *supra* note 87, at 55 (alteration omitted) (internal quotation marks omitted) (translating into English TWEDE KAMER DER STATEN-GENERAAL, MEMORIE VAN TOELICHTING [EXPLANATORY MEMORANDUM], WET COLLECTIEVE AFWIKKELING MASSASCHADE [LAW ON COLLECTIVE SETTLEMENT OF MASS DAMAGE] (2003–2004)).

217 See *id.*

rather than money damages, in contracts cases.<sup>218</sup> Furthermore, only the organizational plaintiff is bound by the judgment, not the individual members. Thus, while these collective actions in no way preclude individual actions for money damages, they fail to facilitate or streamline recovery by a large group of similarly situated individuals.

Second, while money damages are available in the group actions authorized in Sweden, Spain, and France and in the collective settlements in the Netherlands, these proceedings, too, differ in important ways from American-style class actions. The Swedish and French judgments are binding only on those individuals who affirmatively “opt in,” reflecting greater concern for actual notice and individual autonomy. While the Spanish group action judgment is binding on absentees and the Dutch settlement is binding on all those notified who fail to opt out, these vehicles are of limited utility. The Spanish group actions pursue only consumer claims, rather than the wide range of claims that American class actions prosecute. And the Dutch procedure is available only where the defendant and the representative organization reach a settlement. Because the Dutch procedure does not authorize representative or aggregate litigation, it cannot be used to compel an unwilling defendant to change its behavior (e.g., to reform the prison system) nor can the threat of a damages class action be used to induce the defendant to settle.

## 2. Test Case Actions

In test case actions authorized under the laws of England and Wales and Germany,<sup>219</sup> the court aggregates individually filed actions; no representative commences proceedings (or negotiates a settlement) on behalf of, or to pursue the collective interest of, absentees who have not themselves initiated litigation.<sup>220</sup>

---

218 See, e.g., RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW* 739–40 (6th ed. 1998); see also Ronald J. Scalise, Jr., *Why No “Efficient Breach” in the Civil Law?: A Comparative Assessment of the Doctrine of Efficient Breach of Contract*, 55 AM. J. COMP. L. 721, 726–30 (2007) (discussing the civil law system’s preference for specific performance).

219 Sweden and Switzerland also permit test cases to be brought, but the device has not been employed frequently. While the judgment in a Swedish test case has precedential effect in other cases raising the same issue, it “does not have legal force [i.e., preclusive effect].” REPORT OF SWEDEN, *supra* note 99, at 34. In Switzerland, “[t]he judgment in a test case does not have res judicata effect for or against those claimants not formally parties to the litigation. Moreover, some have raised the question whether the contractual obligation to accept the judgment as binding is judicially enforceable.” BAUMGARTNER, *supra* note 152, at 43.

220 See HODGES, *supra* note 146, at 2 (explaining that the GLO mechanism “is not regarded as *representative* litigation, since it covers *all individual* claims that have been brought”); MULHERON, *supra* note 165, at 99 (noting that the group litigation order

Section III of Part 19 of the Civil Procedure Rules (CPR) of England and Wales,<sup>221</sup> added in 2000, governs group litigation, or “a number of claims”<sup>222</sup> that “give rise to common or related issues of fact or law (the ‘GLO issues’).”<sup>223</sup> The group litigation mechanism was crafted by the courts and was not enacted legislatively by the Parliament, so the political debate was limited.<sup>224</sup> According to the Practice Direction, which supplements the Civil Procedure Rules, each group member commences her own action individually.<sup>225</sup> Upon the application of a party or on the court’s own initiative,<sup>226</sup> the court may enter a Group Litigation Order (GLO), which specifies the GLO

---

(GLO) schema does not “permit recovery of damages for an unknown mass of plaintiffs”); ADRIAN ZUCKERMAN, *PRINCIPLES OF PRACTICE* 519 (2006) (“Unlike representative proceedings and class actions, the claims included within a GLO remain separate claims. Requiring the issue of claim forms has the benefit of clarifying that group members have formal litigant or party status.”); Andrews, *supra* note 165, at 249 (“Group actions are different from class actions because each group litigant is a member of a procedural class as a party, rather than as a represented non-party.”); Rachael Mulheron, *Some Difficulties with Group Litigation Orders—and Why a Class Action Is Superior*, 24 *CIV. JUST. Q.* 40, 47–48 (2005) (identifying several differences between class actions and the GLO regime); Janet Walker, *Crossborder Class Actions: A View from Across the Border*, 2004 *MICH. ST. L. REV.* 755, 766 (stating that a GLO “consolidates claims for the purpose of efficient case management but that does not designate one claimant as the representative of the others”).

221 The group litigation procedure was added by the Civil Procedure (Amendment) Rules, 2000, S.I. 2000/221, sched. 2 (U.K.), available at [http://www.legislation.gov.uk/ukSI/2000/221/pdfs/ukSI\\_20000221\\_en.pdf](http://www.legislation.gov.uk/ukSI/2000/221/pdfs/ukSI_20000221_en.pdf).

222 CPR 19.11(1) (Eng.); see also MULHERON, *supra* note 165, at 98 (discussing the numerosity requirement and noting that a proposal to require a minimum of ten claims was rejected).

223 CPR 19.10 (Eng.); see also MULHERON, *supra* note 165, at 98 (discussing the commonality requirement); ZUCKERMAN, *supra* note 220, at 517; Andrews, *supra* note 165, at 258 (providing an overview of England’s group action procedures). For further discussion of Group Litigation Orders, see generally REPORT OF ENGLAND & WALES, *supra* note 87, at 29–30; HODGES, *MULTI-Party Actions*, *supra* note 165; HODGES, *supra* note 146, at 2–3, 10–20; MULHERON, *supra* note 165, at 94–111; ZUCKERMAN, *supra* note 220, at 515–27; Andrews, *supra* note 165, at 258–62; Mildred, *supra* note 153, at 616–72; Mulheron, *supra* note 5, at 427–31, identifying legal and practical difficulties with the GLO regime; and Scott Campbell, *English Classes*, *LAWYER* 2B (Dec. 20, 2007), <http://12b.thelawyer.com/english-classes/130561.article>.

224 See HODGES, *supra* note 146, at 2. For a discussion of the objectives of the GLO procedure, see ZUCKERMAN, *supra* note 220, at 516.

225 See CPR Prac. Direction 19B ¶ 6.1A (Eng.) [hereinafter GP Practice Direction], available at [http://www.justice.gov.uk/civil/procrules\\_fin/pdf/practice\\_directions/pd\\_part19b.pdf](http://www.justice.gov.uk/civil/procrules_fin/pdf/practice_directions/pd_part19b.pdf); see also Mulheron, *supra* note 220, at 48–49 (describing the 2002 amendment that imposed this requirement).

226 See GP Practice Direction, *supra* note 225, ¶¶ 3.1, 4; HODGES, *ENGLAND AND WALES*, *supra* note 165, at 13, 21; ZUCKERMAN, *supra* note 220, at 518; Andrews, *supra* note 165, at 259.

issues and claims that will be managed as a group, establishes a group register on which to record the claims to be managed under the GLO, and specifies the court that will manage the claims on the group register (the “management court”).<sup>227</sup> The court may not enter a GLO without the consent of the Lord Chief Justice, the Vice-Chancellor, or the Head of Civil Justice.<sup>228</sup> A GLO may transfer extant claims raising GLO issues to the management court, direct that new claims raising GLO issues be filed in the management court, and order publicity of the GLO.<sup>229</sup> Because each plaintiff files her own claim,<sup>230</sup> however, each consents to the court’s jurisdiction<sup>231</sup> (without the need for a fiction à la *Shutts*).<sup>232</sup> Although Rule 19.11 specifically provides that the GLO may “direct . . . entry on the group register” of claims raising one or more GLO issues<sup>233</sup> and further permits “[a] party to a claim entered on the group register . . . [to] apply to the management court for the claim to be removed from the register”<sup>234</sup>—a procedure that sounds like an opt-out mechanism—commentators uniformly contend that “claimants must actively opt in and register their claims under the GLO.”<sup>235</sup> One British commentator reconciles this seeming inconsistency as follows:

---

227 See CPR 19.11 (Eng.); see also REPORT OF ENGLAND AND WALES, *supra* note 87, at 30 (summarizing Rule 19.11); ZUCKERMAN, *supra* note 220, at 517–18.

228 See GP Practice Direction, *supra* note 225, ¶ 3.3; see also MULHERON, *supra* note 165, at 98–99, 101 (“[C]onsent of the Lord Chief Justice or the Vice-Chancellor is required before a GCO is possible.”); ZUCKERMAN, *supra* note 220, at 518; Andrews, *supra* note 165, at 259 (“[A]n application for a group litigation order . . . will be considered by a judge.”).

229 See CPR 19.11(3) (Eng.); see also REPORT OF ENGLAND AND WALES, *supra* note 87, at 30 (summarizing Rule 19.11); HODGES, ENGLAND AND WALES, *supra* note 165, at 18 (discussing commencement of a claim, cut-off dates, and limitations); ZUCKERMAN, *supra* note 220, at 518 (discussing the provisions that the GLO may order, including publicizing the claims or setting cut-off dates); Andrews, *supra* note 165, at 259 (discussing procedural aspects of GLOs, including specification of a management court and publicity of the order).

230 See Walker, *supra* note 220, at 766–67.

231 See *id.*

232 See *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 811–13 (1985) (concluding that absent class members who decline to opt out are deemed to have consented to personal jurisdiction); see also Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1170, 1185–87 (1998) (challenging the Court’s implied consent rationale); Rhonda Wasserman, *The Curious Complications with Back-End Opt-Out Rights*, 49 WM. & MARY L. REV. 373, 406–08 (2007) (same).

233 CPR 19.11(3)(a)(iii) (Eng.); see also ZUCKERMAN, *supra* note 220, at 518–19.

234 CPR 19.14(1) (Eng.); see also ZUCKERMAN, *supra* note 220, at 519.

235 Campbell, *supra* note 223; accord HODGES, ENGLAND AND WALES, *supra* note 165, at 10; MULHERON, *supra* note 165, at 99 (“The GLO schema is an opt-in regime

Those wishing to join and take advantage of group litigation . . . must either affirmatively register as parties to the relevant claim, or at least have their particular claims adjoined by judicial consolidation to the group action. Therefore group actions involve positive opting-in, or at least a *positive decision to litigate*. This contrasts with representative proceedings where no such positive decision is necessary.<sup>236</sup>

Even though each plaintiff makes this positive decision to litigate, the GLO process is akin to a class action in that the management court may direct that “one or more claims on the group register . . . proceed as test claims”<sup>237</sup> and may appoint the solicitor of one of the parties to serve as lead solicitor.<sup>238</sup> The court will select as test cases those that “best typify and adequately represent the full range of common issues arising between the parties.”<sup>239</sup> The Practice Direction

---

. . . , in which litigants have to choose affirmatively to litigate by entering their names on the group register, or having their claims adjoined by judicial consolidation to the group action.” (footnotes omitted)); ZUCKERMAN, *supra* note 220, at 522 (“[T]he CPR group litigation system is an opt-in system” (footnote omitted)); Choi & Silberm an, *supra* note 3, at 487 (“Parties who want to join the group litigation must affirmatively opt in.”); Mulheron, *supra* note 220, at 47; Walker, *supra* note 220, at 766–67 (citing England as an example of opt-in class action); Degos & Morson, *supra* note 146, at 35; *see also* JULES STUYCK ET AL., STUDY CTR. FOR CONSUMER LAW, AN ANALYSIS AND EVALUATION OF ALTERNATIVE MEANS OF CONSUMER REDRESS OTHER THAN REDRESS THROUGH ORDINARY JUDICIAL PROCEEDINGS 291 (2007), available at [http://ec.europa.eu/consumers/redress/reports\\_studies/comparative\\_report\\_en.pdf](http://ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf) (stating that in the United Kingdom, “citizens who wish to benefit from a collective action for individual damages must affirmatively declare their desire by opting-in to the collective action”).

236 Andrews, *supra* note 165, at 260 (emphasis added); *see also* ZUCKERMAN, *supra* note 220, at 525 n.80 (distinguishing opt-out class actions because there, “all persons who fall within the class definition are automatically included in the action, and are bound by the class action outcome, unless they take some positive step to dissociate themselves from the action”); Mulheron, *supra* note 220, at 47 (noting that in the GLO opt-in regime, litigants “have to choose affirmatively to litigate”). For a summary of the various arguments for and against the opt-in approach, *see id.* at 50–51 tbl.1.

237 CPR 19.13(b) (Eng.); *see also* REPORT OF ENGLAND AND WALES, *supra* note 87, at 30 (“[T]he court may give directions, including directions . . . providing for one of more claims in the group register to proceed as test claims.”); ZUCKERMAN, *supra* note 220, at 519–20 (“[I]n practice, courts will aim to select the smallest number of cases that taken together . . . adequately represent the full range of common issues arising . . .”).

238 CPR 19.13(c) (Eng.); *see also* ZUCKERMAN, *supra* note 220, at 520 (“The management court may appoint the solicitors for one or more parties to be the lead solicitors for the claimant or the defendant group.”).

239 ZUCKERMAN, *supra* note 220, at 520.

further authorizes the management court to “give directions . . . for the trial of common issues.”<sup>240</sup> Under Rule 19.12:

Where a judgment or order is given or made in a claim on the group register in relation to one or more GLO issues—

(a) that judgment or order is binding on the parties to all other claims that are on the group register at the time the judgment is given or the order is made . . . and

(b) the court may give directions as to the extent to which the judgment or order is binding on the parties to any claim which is subsequently entered on the group register.<sup>241</sup>

Only claims registered on the group register “benefit from the fruits of group litigation and share its burdens.”<sup>242</sup> Although a party adversely affected by the judgment or order may seek permission to appeal,<sup>243</sup> a party whose claim is entered on the group register *after* the entry of the judgment or order that purports to bind her may not appeal or seek to have the judgment or order set aside, varied or stayed, but she may seek an order “that the judgment or order is not binding on [her].”<sup>244</sup>

Parties who decline to join the group litigation and seek to proceed independently do so at some peril. Although the Court of Appeal in *Taylor v. Nugent Care Society*<sup>245</sup> held that it is not an abuse of process to file an independent action raising GLO issues after the cut-off date for the group litigation,<sup>246</sup> it cautioned that the trial “court is fully entitled to manage the proceedings which he brings in a way which takes account of the position of those who have joined the GLO.”<sup>247</sup> Expressing concern that a defendant may need to divert some of its limited resources to defend the parallel individual

240 GP Practice Direction, *supra* note 225, ¶ 15.1; *see also* REPORT OF ENGLAND AND WALES, *supra* note 87, at 30 (discussing a court’s discretion to provide directions for the adjudication of group registered claims); ZUCKERMAN, *supra* note 220, at 520.

241 CPR 19.12(1) (Eng.); *see also* REPORT OF ENGLAND AND WALES, *supra* note 87, at 30 (summarizing Rule 19.12); HODGES, MULTI-Party Actions, *supra* note 165, at 42–46 (discussing the impact of Rule 19.12); ZUCKERMAN, *supra* note 220, at 525 (outlining Rule 19.12); Andrews, *supra* note 165, at 260–61 (discussing binding effect of a Group Litigation Order).

242 ZUCKERMAN, *supra* note 220, at 518.

243 *See* CPR 19.12(2) (Eng.); REPORT OF ENGLAND AND WALES, *supra* note 87, at 30; ZUCKERMAN, *supra* note 220, at 525.

244 CPR 19.12(3) (Eng.) (emphasis added); *see also* ZUCKERMAN, *supra* note 220, at 525 (explaining the appeals process under Rule 19.12).

245 [2004] EWCA (Civ) 51, [2004] 1 W.L.R. 1129 (Eng.).

246 *See* ZUCKERMAN, *supra* note 220, at 520–23 (discussing the *Taylor* case); Mulheron, *supra* note 220, at 41, 46, 52–54 (same).

247 *Taylor*, [2004] 1 W.L.R. at 1134.

action,<sup>248</sup> the Court of Appeal suggested that a trial court can take steps to protect the defendant. In particular, the court suggested that a trial court can stay an individual parallel action pending resolution of the GLO issues, and, as a condition to the removal of the stay, the trial court can require “that the claimant should be bound by generic decisions in the group action so far as they affect the claimant’s case.”<sup>249</sup> While perhaps not troubling in the *Taylor* case itself, where the individual plaintiff sought to join the group action after the cut-off date and was denied leave to do so, this decision is striking to the extent that it suggests that litigants who *decline* to join a group action may nevertheless be bound by the decision on the common issues rendered therein.<sup>250</sup>

Germany, too, has a mechanism in place to collectively resolve issues common to multiple separately-filed claims. In Germany, the Capital Markets Model Case Act (Kapitalanleger-Musterverfahrensgesetz or the “KapMuG”)<sup>251</sup> was enacted in 2005 to facilitate the adjudication of thousands of securities fraud claims filed against Deutsche Telekom, one of Germany’s largest public companies.<sup>252</sup> The KapMuG authorizes “model proceedings” (*Musterverfahren*) in the securities context, where many claims raise a common question.<sup>253</sup> The law was introduced as a five-year experiment, set to expire in

248 See *id.* at 1133–35; see also Mulheron, *supra* note 220, at 53–54 (discussing the concerns of the *Taylor* court).

249 *Taylor*, [2004] 1 W.L.R. at 1135. In addition, the trial court could protect the defendant from having to pay the individual plaintiff’s costs if she were to prevail. *Id.*

250 See *supra* notes 110–16 and accompanying text; see also *Ashmore v. British Coal Corp.*, [1990] 2 Q.B. 338 (Eng.).

251 The Kapitalanleger-Musterverfahrensgesetz [KapMuG] [Capital Markets Model Case Act], Aug 19, 2005, BUNDESGESETZBLATT, Teil 1 [BGBl. I] S 2437 (Ger.), available in English at [http://www.bmj.bund.de/files/-/1110/KapMuG\\_english.pdf](http://www.bmj.bund.de/files/-/1110/KapMuG_english.pdf). For a brief description of the law provided (in English) by the German Federal Ministry of Justice, see *Capital Markets Test Case Act (CMTCA)*, GER. FED. MINISTRY JUST., [http://www.bmj.de/enid/Corporate\\_Governance/Capital\\_Markets\\_Test\\_Case\\_Act\\_\\_CMTCA\\_\\_1gl.html](http://www.bmj.de/enid/Corporate_Governance/Capital_Markets_Test_Case_Act__CMTCA__1gl.html) (last visited Nov. 29. 2010) [hereinafter *MOJ Page*].

252 See BAETGE, *supra* note 150, at 8–9; Choi & Silberman, *supra* note 3, at 487 n.104; Michael Stürner, *Model Case Proceedings in the Capital Markets—Tentative Steps Towards Group Litigation in Germany*, 26 CIV. JUST. Q. 250, 251, 253 (2007). Related litigation was filed in the United States. See *In re Deutsche Telekom AG Sec. Litig.*, 229 F. Supp. 2d 277 (S.D.N.Y. 2002).

253 See REPORT OF GERMANY, *supra* note 93, at 33. See generally BAETGE, *supra* note 150, at 7–31 (providing a history of the Capital Markets Model Case Act); Stürner, *supra* note 252 (explaining the basic features of KapMuG); Hans W. Micklitz, *Collective Private Enforcement of Consumer Law: The Key Questions*, in COLLECTIVE ENFORCEMENT OF CONSUMER LAW 13, 13–33 (Willem van Boom & Marco Loos eds., 2007) (analyzing the KapMuG).

November 2010.<sup>254</sup> On November 1, 2010 it was extended for two years and will now sunset in the fall of 2012.<sup>255</sup> If the experiment is deemed successful, the law may be extended further or even incorporated into the German Code of Civil Procedure (*Zivilprozessordnung*) and applied more generally to civil cases “arising on a mass scale.”<sup>256</sup>

The KapMuG regime has three phases.<sup>257</sup> In the first or opening phase, individual claimants file their separate lawsuits.<sup>258</sup> If a suit alleging violations of the securities laws “may have significance for other similar cases,” either party may apply to the court for the establishment of a model case.<sup>259</sup> The court then publicizes the application in an electronic Complaint Registry.<sup>260</sup> If nine additional related applications for the establishment of a model case are submitted within four months of the publication of the first application, the court entertaining the first action refers the matter to a higher regional court,<sup>261</sup> known as the *Oberlandesgericht*,<sup>262</sup> which then publicly announces the model case proceedings in the Complaint Registry.<sup>263</sup> Once the higher regional court makes this announcement, any action “whose decision is contingent upon the establishment to be made on the model case or the legal question to be resolved in the model case proceeding” is suspended or stayed.<sup>264</sup> Like the British GLO regime, the German model case differs from a class action in that each investor must file suit individually; no representative com-

---

254 See BAETGE, *supra* note 150, at 8.

255 See Luke Green, *German Securities Class Actions: Status Quo Prevails*, RISKMETRICS GROUP INSIGHT (Nov. 5, 2010, 12:47 PM), <http://blog.riskmetrics.com/slw/2010/11/german-securities-class-actions-survive.html>.

256 *MOJ Page*, *supra* note 251; see also BAETGE, *supra* note 150, at 8, 30–31 (“At this early stage, it is not possible to pass final judgment on the efficiency or inefficiency of this new instrument, but it is not too early to express some doubts.”); Stürner, *supra* note 252, at 265–66 (speculating on the expansion of group litigation in Germany).

257 See BAETGE, *supra* note 150, at 13; Stürner, *supra* note 252, at 256–57.

258 See Moritz Bälz & Felix Blobel, *Collective Litigation German Style*, in *CONFLICT OF LAWS IN A GLOBALIZED WORLD* 126, 135 (Eckart Gottschalk et al. eds., 2007).

259 KapMuG Aug. 19, 2005, BGBl. I at S 2437, § 1 (Ger.). The court may not act on its own motion. See BAETGE, *supra* note 150, at 15, 21; Stürner, *supra* note 252, at 257.

260 See KapMuG § 2 (Ger.); Stürner, *supra* note 252, at 257.

261 See KapMuG § 4 (Ger.); Stürner, *supra* note 252, at 258.

262 REPORT OF GERMANY, *supra* note 93, at 37.

263 See KapMuG § 6 (Ger.).

264 See *id.* § 7; see also BAETGE, *supra* note 150, at 19 (same); REPORT OF GERMANY, *supra* note 93, at 33 (explaining that the individual actions are stayed until a “master decision” is rendered); Stürner, *supra* note 252, at 258, 260 (noting that all actions filed after the order to stay the decision are automatically suspended).

mences an action on behalf of absent investors who have not themselves initiated litigation.<sup>265</sup>

In the second phase, the higher regional court designates a model case plaintiff and defendant, but they are not representatives of the other parties.<sup>266</sup> All of the parties to the remaining suspended proceedings (referred to as *Beigeladene* or the “interested parties summoned”) are summoned to the model case proceeding, file their own statements of the case, and share the costs if the defendant prevails.<sup>267</sup> Because the German Constitution guarantees litigants a right to be heard,<sup>268</sup> the interested parties summoned are afforded an opportunity to present their opinion on the model questions to the court and to play an active role in the model case proceedings (more active than the role played by absent class members in American class actions).<sup>269</sup>

Following a hearing, the higher regional court enters a model case ruling (the *Musterentscheidung*), which is served on the model case plaintiff and defendant.<sup>270</sup> The interested parties summoned are not named in the caption of the model case ruling; they are informed of the ruling only informally or by publication.<sup>271</sup> The model case ruling only resolves the common issues; it does not render a judgment for or against each of the individual plaintiffs.<sup>272</sup> A party to the model case or any of the interested parties summoned may appeal the model case

---

265 See Stürner, *supra* note 252, at 258.

266 See *id.* at 259.

267 See KapMuG §§ 8(1)(3), 8(3), 10, 17 (Ger.) (noting that such costs are shared on a pro rata basis); see also BAETGE, *supra* note 150, at 25 (explaining that the pro rata rule “is supposed to help especially small investors”); Stürner, *supra* note 252, at 259, 265 (explaining that losing plaintiffs must “bear a proportionate share of the costs of the model case proceedings”).

268 See GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I at 39 art. 103(1) (Ger.), available in English at <http://www.btg-bestellservice.de/pdf/80201000.pdf> (“In the courts every person shall be entitled to a hearing in accordance with law.”).

269 See KapMuG §§ 10, 12, 13 (Ger.); see also BAETGE, *supra* note 150, at 20 (noting that class members “are allowed to play a more active role . . . than ordinary class members in a U.S. class action suit”); Bälz & Blobel, *supra* note 258, at 136–37.

270 See KapMuG § 14 (Ger.); see also REPORT OF GERMANY, *supra* note 93, at 33 (discussing the “master decision”); Stürner, *supra* note 252, at 261 (detailing the process of deciding model cases). Model case proceedings may be settled only upon the consent of all interested parties. See KapMuG § 14(3) (Ger.). Since it will be very difficult to obtain such consent, settlements of model cases are “unrealistic.” BAETGE, *supra* note 150, at 22; Stürner, *supra* note 252, at 261.

271 See KapMuG § 14(1) (Ger.); Stürner, *supra* note 252, at 262.

272 See Stürner, *supra* note 252, at 262, 264.

ruling.<sup>273</sup> Once the decision becomes “unappealable,” it is binding on the model plaintiff and the defendant.<sup>274</sup>

In the third phase, the lower courts (what we would call the transferor courts in a multidistrict litigation)<sup>275</sup> decide the individual cases of the interested parties summoned, based on the model case decision.<sup>276</sup> Pursuant to section 16 of the KapMuG, “[t]he model case ruling shall be binding on the courts trying the matter, whose decisions depend on the establishment made on the model case or the legal question to be resolved in the model case proceedings.”<sup>277</sup> The KapMuG further provides that the model case ruling “shall have effect for and against all interested parties summoned,”<sup>278</sup> subject to a limited opportunity by the interested parties summoned to argue that the model party’s presentation of the case was “inadequate.”<sup>279</sup> As a web

---

273 See KapMuG § 8(I), 15(I) (Ger.); see also Bälz & Blobel, *supra* note 258, at 137–38 (discussing the appellate procedure under KapMuG).

274 Bälz & Blobel, *supra* note 258, at 138.

275 See 28 U.S.C. § 1407 (2006) (authorizing transfers for “coordinated or consolidated pretrial proceedings” by the judicial panel on multidistrict litigation); MANUAL FOR COMPLEX LITIGATION § 20.131 (Stanley Marcus et al. eds., 4th ed. 2004) (using “transferor court” terminology).

276 See BAETGE, *supra* note 150, at 13; Bälz & Blobel, *supra* note 258, at 138; Stürner, *supra* note 252, at 264.

277 KapMuG § 16(1) (Ger.). According to the Report of Germany, the legislature intended the model court ruling itself, and not just the final judgments in the underlying individual actions, to be treated as a judgment with preclusive effects and to be recognized and enforced under the Brussels Regulation. See REPORT OF GERMANY, *supra* note 93, at 33. But the Report of Germany also notes that, in the view of some scholars, the model case ruling is interlocutory in nature and therefore might not be recognized under the Regulation. See *id.* at 33–34 (citing, inter alia, Stürner, *supra* note 252, at 264); see also BAETGE, *supra* note 150, at 9 (“The KapMuG are designed as mere interlocutory proceedings and not as separate action.”); *id.* at 24 (noting that the interlocutory model proceedings resolve the model question(s) but do not render a final judgment).

278 KapMuG § 16(1) (Ger.); see also BAETGE, *supra* note 150, at 13, 20–21 (providing an overview of the process under KapMuG); REPORT OF GERMANY, *supra* note 93, at 33, 35 (citing KapMuG § 16(1) (Ger.)); BIICL REPORT, *supra* note 67, at 22 (noting the “preclusive effect” of the judgment on “all the individual cases”); Stürner, *supra* note 252, at 260 (discussing the preclusive effect on interested parties). Even those parties that withdrew their claims after the public announcement of the model case proceedings are bound. See KapMuG § 16(1) (Ger.); see also Stürner, *supra* note 252, at 262 (stating that withdrawing a claim after the public announcement only negates liability for the costs of the model case, not the liability or binding decision of the model case).

279 KapMuG § 16(2) (Ger.). The Report of Germany clarifies that the effect on the interested parties summoned is similar to the effect of a judgment on intervenors under Zivilprozessordnung [ZPO] [Code of Civil Procedure], 2008, § 68 (Ger.). See REPORT OF GERMANY, *supra* note 93, at 34 & n.119; accord Stürner, *supra* note 252, at

page about the KapMuG maintained by the German Federal Ministry of Justice states, “[q]uestions of fact and of law, arising with identical substance in at least ten individual compensation cases, are to be brought together in a test case and subjected to uniform decision by the Higher Regional Court *with binding effect for all plaintiffs*.”<sup>280</sup> The model case ruling is binding only on parties that were summoned to the proceedings, however—that is, “the plaintiffs and defendants of the other lawsuits pending which were stayed to wait for the model case ruling.”<sup>281</sup> Because the German Constitution guarantees a right to be heard,<sup>282</sup> the model case ruling “binds only those parties that were in a position to influence the outcome” of the model case proceedings.<sup>283</sup> As the Report of Germany elaborates, “German law has been reluctant in extending the effects of . . . the model case ruling (beyond the parties and the interested parties summoned) to any possible plaintiff who might be in the same situation.”<sup>284</sup> Thus, those investors who did not sue are not bound by the model case ruling.<sup>285</sup> Even for the parties who were summoned, the third phase involving individual follow-up litigation is necessary; the law provides no mechanism for the expeditious *collective* resolution of their claims.<sup>286</sup>

In sum, both the English group litigation mechanism and the German model case vehicle permit the collective resolution of common issues, but they bind only litigants who themselves have initiated litigation; they do not bind absentees who have not filed suit. The German vehicle is even narrower in that it applies only to cases alleging violations of the securities laws.

---

260. Another commentator has noted that interested parties summoned “are bound only insofar as they were able to influence the model proceedings. This implies that investors who have joined model proceedings at a later stage or have not brought a suit at all are not bound by the model decision.” BAETGE, *supra* note 150, at 20; *see also* Micklitz, *supra* note 253, at 31 (outlining the binding effect of settlements and decisions of a model case on all “passive” group members).

280. *MOJ Page*, *supra* note 251 (emphasis added).

281. REPORT OF GERMANY, *supra* note 93, at 35. Parties that had not yet commenced proceedings at the time the cases were referred to the higher regional court and that were not summoned to the model case proceedings are not bound. *See* BAETGE, *supra* note 150, at 20 (“[T]he model judgment binds only those parties that were in a position to influence the outcome . . .”); REPORT OF GERMANY, *supra* note 93, at 34.

282. *See* GRUNDGESETZ art. 103(1) (Ger.).

283. BAETGE, *supra* note 150, at 20.

284. REPORT OF GERMANY, *supra* note 93, at 35.

285. *See* Stürner, *supra* note 252, at 262.

286. *See* BAETGE, *supra* note 150, at 13; Issacharoff & Miller, *supra* note 45, at 182–83 (“[T]here is no mechanism for expeditious resolution of the remaining . . . claims . . .”).

With few exceptions, then, the domestic laws authorizing group litigation in the participating European countries are careful to bind only those individuals who personally choose to file suit or who affirmatively opt to be represented by others. The laws reflect skepticism of American-style class actions and our willingness to bind absentees who do not personally initiate suit or even opt into group litigation. This skepticism reflects the European conception of individualized justice.<sup>287</sup>

Given this reluctance on the part of the participating European countries to bind absentees, it is critical to determine which country's preclusion law the courts in these countries would apply to determine the binding effect of a foreign judgment. Stated differently, if courts in the participating European countries were to recognize American class action judgments, would they apply American preclusion law or their own domestic preclusion law to determine the binding effect of a class action judgment on absent class members? In light of the substantial variations between European and American group litigation practices and preclusion laws, this choice-of-law issue may be as important as the recognition issue that has captured the attention of American courts struggling with the certification of transnational class actions.

#### D. Choice of Preclusion Law

##### 1. Choice of Preclusion Law Governing a Judgment Entitled to Recognition Under the Brussels/Lugano Regime

Let us begin by first determining which country's law governs the preclusive effects of a foreign judgment entitled to recognition under the Brussels/Lugano Regime. In theory, three potential sources of preclusion law exist: the rendering state's law, the recognizing state's law, or an autonomous body of law independent of national preclusion law.<sup>288</sup>

Under an "extension of effects" approach, the preclusion law of the rendering state would determine the preclusive effects of its judgment.<sup>289</sup> In other words, the preclusive effects of a judgment would be "extended" beyond the rendering state and have the same effects in other states. From a policy perspective, adoption of the "extension

---

287 See, e.g., Vivian Grosswald Curran, *Globalization, Legal Transnationalization and Crimes Against Humanity: The Lipietz Case*, 56 AM. J. COMP. L. 363, 398-99 (2008) (focusing on France).

288 See BIICL REPORT, *supra* note 67, at 53-54, 62.

289 See *id.* at 53-54.

of effects" approach would promote respect and cooperation among the nations of Europe and reduce the risk of inconsistent judgments and the concomitant risk of nonrecognition of judgments on the grounds of irreconcilability.<sup>290</sup> The BIICL Report appears to support this approach, arguing, "to ensure that a judgment's effect is the same throughout all the Member States, the application of the law of the state of origin might be advocated to determine the conditions for and the scope of a judgment's preclusive effect."<sup>291</sup> This is, of course, the approach that the U.S. Supreme Court has adopted in defining the obligation of American states to recognize sister-state judgments under the Full Faith and Credit Clause of the Constitution<sup>292</sup> and the Full Faith and Credit statute.<sup>293</sup>

Alternatively, under an "equalization of effects" approach, the recognizing state would apply its own preclusion law to determine the effects of another country's judgment.<sup>294</sup> Stated differently, domestic judgments and foreign judgments would have the same preclusive effects, which would be determined by the preclusion law of the recognizing state.<sup>295</sup> The "equalization of effects" approach is easier for courts to apply than the "extension of effects" approach because the courts do not have to ascertain or apply the potentially unfamiliar preclusion law of the rendering state.<sup>296</sup> (Under a combined or dual approach, the recognizing state would accord the rendering state's judgment no greater preclusive effects than it would receive under *either* the law of the rendering state *or* the law of the recognizing state.)<sup>297</sup>

---

290 *See id.* at 61.

291 *Id.* at 58. Nevertheless, the BIICL Report suggests that the recognizing state's law may govern the "procedural aspects of recognition," such as time limits for invoking preclusion and the court's authority to raise preclusion *sua sponte*. *Id.* at 58–59, 66–67.

292 U.S. CONST. art. IV, § 1.

293 28 U.S.C. § 1738 (2006); *see, e.g.*, *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998) ("For claim and issue preclusion (*res judicata*) purposes . . . the judgment of the rendering State gains nationwide force." (citing *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 372 (1996); *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 485 (1982))); *Matsushita Elec. Indus. Co.*, 516 U.S. at 377 ("The Full Faith and Credit Act . . . directs all courts to treat a state-court judgment with the same respect that it would receive in the courts of the rendering State.").

294 *See* BIICL REPORT, *supra* note 67, at 54.

295 *See id.*

296 *Id.* at 62.

297 *Id.* at 54 & n.380 (citing, *inter alia*, *Case 145/86, Hoffman v. Krieg*, 1988 E.C.R. 645); *see also id.* at 54 n.380 ("[A] dual limit should be imposed: the judgment cannot have greater effects in the State in which enforcement is sought than it would have in the State in which it was delivered, nor can it produce greater effects than similar

Finally, the Brussels/Lugano Regime itself could specify the preclusive effects of judgments entitled to recognition thereunder, in which case an autonomous body of law—independent of the states' national laws—would govern.

No express term of the Brussels Regulation or the Brussels or Lugano Conventions governs the preclusive effect of judgments entitled to recognition thereunder.<sup>298</sup> Noting differences among the Member States' national laws on the preclusive effects of judgments, the Schlosser Report states that “[t]he Working Party did not consider it to be its task to find a general solution to the problems arising from these differences in the national legal systems.”<sup>299</sup> The BIICL Report submits “even today—the Brussels Regulation, and equally the Lugano Convention, cannot be construed as harmonising the effect of court decisions. In the absence of European law, the application of national law is thus necessitated.”<sup>300</sup>

But which nation's preclusion law governs? Although the BIICL Report contends that the Brussels/Lugano Regime leaves “unregulated” the “crucial” question of “which legal system is to govern the preclusive effects of a judgment after it has been recognised,”<sup>301</sup> it suggests that commentary on the Brussels Convention and European Court of Justice (ECJ) case law may provide some guidance.<sup>302</sup> In particular, the Jenard Report on the Brussels Convention and a decision

---

local judgments would.” (quoting Hoffman, 1988 E.C.R. ¶ 20 (opinion of Advocate-General Darmon)).

298 See BIICL REPORT, *supra* note 67, at 58, 62.

299 PETER SCHLOSSER, REPORT ON THE CONVENTION, 1979 O.J. (L 59) 128, 191 [hereinafter SCHLOSSER REPORT]; see also BIICL REPORT, *supra* note 67, at 54–55 (discussing the Schlosser Report). In the context of *lis alibi pendens*, by contrast, an autonomous body of law governs. The Brussels/Lugano Regime requires a court to stay its hand when a suit is filed among the same parties on the same cause of action raised in a still-pending action. Brussels Regulation, *supra* note 69, art. 27; Lugano Convention, *supra* note 69, art. 21. In this context, the “terms ‘same cause of action’ and ‘same parties,’ which are stated in Article 27 BR and 21 LC, must be interpreted and applied independently from national law.” BIICL REPORT, *supra* note 67, at 63. In other words, in the *lis alibi pendens* context, member states employ an autonomous body of law to determine whether the “same parties” are bringing the “same cause of action.” *Id.*; see also *id.* at 63–65 (discussing the definition of these terms in the *lis alibi pendens* context). The BIICL Report cautions against the application of these autonomous definitions of “same parties” and “same cause of action,” developed in the *lis pendens* context, to the preclusion context. *Id.* at 63.

300 BIICL REPORT, *supra* note 67, at 55.

301 *Id.* at 58; see also BARNETT, *supra* note 119, ¶ 7.51 (“[N]o provision in the Conventions directly and expressly addresses the problem of whether recognition entails equalising or extending the preclusive effects of the judgment.”).

302 See BIICL REPORT, *supra* note 67, at 58.

of the ECJ both support the “extension of effects” approach and the application of the rendering state’s preclusion law.<sup>303</sup>

The Jenard Report states that “[r]ecognition must have the result of conferring on judgments the authority and *effectiveness* accorded to them *in the State in which they were given.*”<sup>304</sup> Mr. Jenard elaborates upon this point in discussing Article V of the Protocol to the Brussels Convention, which governs actions in Germany that are binding on certain third parties, such as guarantors or warrantors. Article V provides that “[a]ny effects which judgments given in [Germany] may have on third parties by application of [the provisions of the German codes of civil procedure] . . . shall also be recognised in the other Contracting States.”<sup>305</sup> In commenting on Article V, the Jenard Report notes that

[j]udgments given in Germany [against third parties] will have the same effect in the other Contracting States as in Germany.

. . . Where the beneficiary of the guarantee or warranty proceeds against the guarantor or warrantor in the competent French courts, he will be able to apply for recognition of the German judgment, and it will no longer be possible to re-examine that judgment as to the merits.

. . . [A] judgment given in an action on a guarantee or warranty will have no effects in the State in which enforcement is sought other than those which it had in the country of origin.<sup>306</sup>

This commentary provides strong support for the “extension of effects” approach and the application of the preclusion law of the rendering state.<sup>307</sup>

A 1988 decision of the ECJ, too, appears to have adopted the “extension of effects” approach, albeit in the context of a case seeking *enforcement* of a Member State judgment. In *Hoffmann v. Krieg*,<sup>308</sup> the ECJ considered the Netherlands’ obligation to enforce a German

303 *See id.*

304 P. JENARD, REPORT ON THE CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS, 1979 O.J. (L 59) 43 [hereinafter JENARD REPORT] (emphasis added), available at [aei.pitt.edu/1465/01/commercial\\_report\\_jenard\\_C59\\_79.pdf](http://aei.pitt.edu/1465/01/commercial_report_jenard_C59_79.pdf); see also BIICL REPORT, *supra* note 67, at 54 (discussing the Jenard Report). The term “effectiveness” here “refers to the legal consequences of a judgment in a particular legal system.” *Id.* (citing LAYTON & MERCER, EUROPEAN CIVIL PRACTICE ¶¶ 24.007–.010 (2d ed. 2004)).

305 Brussels Convention, *supra* note 69, art. v.

306 JENARD REPORT, *supra* note 304, at 27–28.

307 *See* BIICL REPORT, *supra* note 67, at 54.

308 Case 145/86, 1988 E.C.R. 645, discussed in BIICL REPORT, *supra* note 67, at 53–55.

judgment ordering a husband to make maintenance payments to his wife. After entry of the German judgment, a Dutch court entered a decree of divorce. Quoting the Jenard Report for the proposition that a judgment recognized pursuant to the Brussels Convention must receive the same “authority and effectiveness” in the recognizing state that it would receive in the rendering state,<sup>309</sup> the ECJ stated that “a foreign judgment which has been recognized by virtue of Article 26 of the Convention [Article 33 of the Brussels Regulation] must in principle have the *same effects* in the state in which enforcement is sought as it does in the state in which judgment was given.”<sup>310</sup> “On the whole,” the BIICL Report states, “the legal systems considered reflect the opinion that the recognition of judgments under the Brussels/Lugano Regime has the result of conferring on those judgments the *claim preclusive effect* accorded to them in the state where they were rendered in the first place.”<sup>311</sup> In particular, the recognizing courts look to the rendering court’s law to determine whether the second suit presents the *same claim* between the *same parties*.<sup>312</sup> Most of the countries par-

---

309 *Hoffman*, 1988 E.C.R. ¶ 10 (quoting JENARD REPORT, *supra* note 304, at 43).

310 *Id.* ¶ 11 (emphasis added). The ECJ nevertheless held that “a foreign judgment . . . which remains enforceable in the State in which it was given must not continue to be enforced in the state where enforcement is sought when, under the law of the latter State, it ceases to be enforceable for reasons which lie outside the scope of the convention.” *Id.* ¶ 18. In other words, even though the German judgment continued to be enforceable in Germany, it no longer had to be enforced in the Netherlands since a Dutch court had since entered a divorce decree severing the marital relationship that underlaid the German judgment. In an earlier case, *Case 42/76, De Wolf v. Cox*, 1976 E.C.R. 1759, the ECJ held that a party that had obtained a judgment in his favor in one contracting state could not apply to a court in another contracting state for a judgment on the same claim even where doing so would be less expensive than seeking to enforce the original judgment. The BIICL Report states “an unwritten rule has been read into the ECJ’s case law, in particular in *De Wolf v Cox* as referring to the law of the state of a judgment’s origin when the conditions for claim preclusive effect are concerned.” BIICL REPORT, *supra* note 67, at 62 (footnote omitted).

311 BIICL REPORT, *supra* note 67, at 60 (emphasis added); *see also* REPORT OF SPAIN, *supra* note 91, at 86–90; REPORT OF ENGLAND AND WALES, *supra* note 87, at 61 (“The better view is that the English courts will apply the rules of claim preclusion of the Contracting/Member State of origin of a judgment.”); REPORT OF GERMANY, *supra* note 93, at 53–54 (noting the assumption of an extension of effects model); REPORT OF SWEDEN, *supra* note 99, at 44–45; REPORT OF SWITZERLAND, *supra* note 93, at 45; REPORT OF THE NETHERLANDS, *supra* note 87, at 89–91. *But see* REPORT OF ROMANIA, *supra* note 101, at 30 (“[A] foreign judgment will have similar claim preclusive effects as a Romanian judgment.”).

312 *See* BIICL REPORT, *supra* note 67, at 62, 66.

icipating in the BIICL Project also apply the rendering state's law to determine the *issue preclusive effects* of a foreign judgment.<sup>313</sup>

While the BIICL Report finds that "a majority of legal systems has adopted the extension of effects approach," including Germany, the Netherlands, Spain, Sweden, and Switzerland,<sup>314</sup> not all of the participating European countries concur. Romania has followed the "equalization of effects" approach.<sup>315</sup> Now that it has joined the European Union, its courts may choose to follow the "extension of effects" approach adopted by the ECJ in *Hoffman*.<sup>316</sup> England and Wales and France remain undecided;<sup>317</sup> France declines to accord a foreign

---

313 See *id.* at 68 & n.483 (discussing France, Germany, the Netherlands, Spain, and Switzerland); see also REPORT OF SPAIN, *supra* note 91, at 90, 92; REPORT OF GERMANY, *supra* note 93, at 58 (noting that "extension of effects" model applies to issue preclusion as well); REPORT OF SWITZERLAND, *supra* note 93, at 49 (noting that although the federal supreme court has not addressed the issue, "a consistent application of the *Wirkungserstreckungstheorie* would counsel in favour of according issue preclusive effects if they would be bestowed in the country of origin"); REPORT OF SWEDEN, *supra* note 99, at 44, 48; REPORT OF THE NETHERLANDS, *supra* note 87, at 89, 97; cf. REPORT OF ENGLAND AND WALES, *supra* note 87, at 68 ("Judgments recognized under the Brussels Regime may have issue preclusive effects. However the legal basis for these effects is unclear."). But see REPORT OF ROMANIA, *supra* note 101, at 30, 33 (stating that Romanian courts would apply Romanian preclusion law).

314 BIICL REPORT, *supra* note 67, at 55, 61–62 & nn.384, 434, 438; see also REPORT OF SPAIN, *supra* note 91, at 85–87; REPORT OF GERMANY, *supra* note 93, at 52 (noting adoption of an extension of effects approach); REPORT OF SWEDEN, *supra* note 99, at 44; REPORT OF SWITZERLAND, *supra* note 93, at 42 (stating that, as a matter of national law, the Federal Supreme Court would apply "the law of the state of origin; however, the effects may be subject to modification if they are completely foreign to the law of the recognizing state" and adding that a majority of scholars advocate application of the rendering state's law without modification); REPORT OF THE NETHERLANDS, *supra* note 87, at 88.

315 BIICL REPORT, *supra* note 67, at 55 & nn.384–85, 61 n.435; see also REPORT OF ROMANIA, *supra* note 101, at 29 ("Romania has yet to develop significant case law on the application of the Brussels Regulation . . .").

316 See REPORT OF ROMANIA, *supra* note 101, at 29–30.

317 See BIICL REPORT, *supra* note 67, at 55 nn.384 & 387, 61–62 nn.434, 436 & 438; see also REPORT OF ENGLAND AND WALES, *supra* note 87, at 54 (stating that "[t]he little discussion there has been by English Courts on the meaning and effect of recognition has been inconsistent and inconclusive" and adding that "a range of views have been expressed by commentators in this field"); REPORT OF FRANCE, *supra* note 101, at 40 (noting that some cases apply the law of the state of origin while others apply French law); cf. *id.* at 39 ("[A] foreign judgment will have the same effects as it has in its country of origin as long as those effects are no more than an equivalent French judgment would have in France.").

judgment any greater preclusive effect than an equivalent French judgment would receive.<sup>318</sup>

Even if many of the participating European countries apply the preclusion law of the rendering state to determine the binding effect of a group litigation judgment entitled to recognition under the Brussels/Lugano Regime, they nevertheless could take a different approach when determining the binding effect of an American class action judgment. Thus, one must consider whether the BIICL Report sheds any light on the method by which courts in the participating European countries choose the preclusion law to govern foreign class action judgments.

## 2. Choice of Preclusion Law Governing a Foreign Judgment

The final section of the BIICL Report addresses the willingness of the participating European countries to recognize and give preclusive effect to “third state” judgments—that is, to the judgments of countries, like the United States, that are *not* Member States or contracting parties to the Brussels/Lugano Regime.<sup>319</sup> Even though the questionnaire asked the rapporteurs to address the preclusive effects of third state judgments, most of the country reports (like most American courts) focused on the recognition issue, rather than on the preclusive effects accorded to third state judgments.<sup>320</sup>

All of the participating countries recognize third state judgments.<sup>321</sup> Generally, the countries will recognize such judgments only if the rendering court had jurisdiction<sup>322</sup> and only if the judgment is final.<sup>323</sup> Recognition may be denied if the judgment violates the rec-

318 See REPORT OF FRANCE, *supra* note 101, at 42. Accordingly, a foreign judgment’s preclusive effect may be limited to its holding. See *id.*; BIICL REPORT, *supra* note 67, at 68 n.483.

319 See BIICL REPORT, *supra* note 67, at 70.

320 See *id.*

321 See *id.* In Sweden, however, third state judgments are recognized only if a statute provides therefor. In the absence of statutory authorization, a third state judgment must be “transformed” into a Swedish judgment. See REPORT OF SWEDEN, *supra* note 99, at 50; see also BIICL REPORT, *supra* note 67, at 70 n.491 (citing REPORT OF SWEDEN, *supra* note 99, at 45).

322 See BIICL REPORT, *supra* note 67, at 70; see, e.g., REPORT OF SPAIN, *supra* note 91, at 94, 97; REPORT OF ENGLAND AND WALES, *supra* note 87, at 75; REPORT OF GERMANY, *supra* note 93, at 61–62; REPORT OF FRANCE, *supra* note 101, at 45; REPORT OF SWITZERLAND, *supra* note 93, at 54–55; REPORT OF ROMANIA, *supra* note 101, at 37; REPORT OF THE NETHERLANDS, *supra* note 87, at 100, 102.

323 See BIICL REPORT, *supra* note 67, at 70; see, e.g., REPORT OF SPAIN, *supra* note 91, at 94, 99; REPORT OF ENGLAND AND WALES, *supra* note 87, at 75; REPORT OF GERMANY, *supra* note 93, at 61–62; REPORT OF SWITZERLAND, *supra* note 93, at 54; REPORT OF

ognizing state's public policy<sup>324</sup> or if fundamental procedural protections such as the opportunity to be heard were denied.<sup>325</sup> Moreover, many of the participating countries decline to recognize third state judgments if they are irreconcilable with a prior judgment.<sup>326</sup> Germany and Romania impose a reciprocity requirement for the recognition of third state judgments.<sup>327</sup> Since absent class members do not affirmatively consent to the rendering court's jurisdiction and lack a meaningful opportunity to participate in the proceedings, courts abroad may hesitate before recognizing American class action judgments. At least one country report prepared in connection with the BIICL Project explicitly addressed this issue, expressing uncertainty about whether American-style class action judgments would be denied recognition on public policy grounds.<sup>328</sup>

---

ROMANIA, *supra* note 101, at 37; *cf.* REPORT OF THE NETHERLANDS, *supra* note 87, at 100 (“[F]inality is not a . . . condition for recognition, although a foreign judgment that is not irreversible can only have a limited binding effect in the Netherlands. Typically, where a foreign judgment has not yet become irreversible, Netherlands courts will stay their proceedings and await the outcome of the foreign case.”).

324 See, e.g., REPORT OF SPAIN, *supra* note 91, at 94, 101; REPORT OF ENGLAND AND WALES, *supra* note 87, at 75; REPORT OF GERMANY, *supra* note 93, at 61; REPORT OF FRANCE, *supra* note 101, at 45; REPORT OF SWITZERLAND, *supra* note 93, at 55; REPORT OF ROMANIA, *supra* note 101, at 37; REPORT OF THE NETHERLANDS, *supra* note 87, at 100, 102.

325 See, e.g., REPORT OF SPAIN, *supra* note 91, at 94, 99; REPORT OF ENGLAND AND WALES, *supra* note 87, at 75–76 (framing the issue in terms of “natural justice”); REPORT OF GERMANY, *supra* note 93, at 61; REPORT OF SWITZERLAND, *supra* note 93, at 55; REPORT OF ROMANIA, *supra* note 101, at 37 (discussing “procedural fraud”); REPORT OF THE NETHERLANDS, *supra* note 87, at 100, 102; see also 1 DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS 633–38 (Lawrence Collins et al. eds., 14th ed. 2006) (positing that “natural justice” requires a court of competent jurisdiction, notice to the defendant, and an opportunity to be heard). The Report of Sweden goes further, noting that Swedish class action judgments may be denied recognition even under the Brussels/Lugano Regime if the defendant is denied sufficiently detailed information about each class member's claim to afford it an adequate opportunity to defend. See REPORT OF SWEDEN, *supra* note 99, at 33–34.

326 See BIICL REPORT, *supra* note 67, at 71; see, e.g., REPORT OF SPAIN, *supra* note 91, at 94, 102; REPORT OF ENGLAND AND WALES, *supra* note 87, at 75; REPORT OF GERMANY, *supra* note 93, at 61; REPORT OF ROMANIA, *supra* note 101, at 37.

327 See REPORT OF GERMANY, *supra* note 93, at 61–62 (stating that a foreign judgment need only be recognized if reciprocity exists except where “the judgment concerns a claim other than a pecuniary claim and no domestic jurisdiction existed according to German law or in the event that it concerns a child-parent matter” (translating into English ZPO, 2008, § 328 (Ger.))); REPORT OF ROMANIA, *supra* note 101, at 37; *cf.* REPORT OF SPAIN, *supra* note 91, at 96 (concluding that its system for recognition of third state judgments based upon reciprocity has “fallen into disuse”).

328 See REPORT OF GERMANY, *supra* note 93, at 35 (“I am not certain whether the recognition of a US style class action judgment against parties bound by it merely

If courts abroad were to recognize an American class action judgment, they would then need to determine the preclusive effects, if any, of the judgment and which jurisdiction's preclusion law would determine those effects. Given the significant differences between American preclusion law and the preclusion laws of the participating European countries,<sup>329</sup> the choice of preclusion law may have as important an impact on the binding effect of an American class action judgment as the recognition question that has been the center of attention for so many courts and scholars.

The country reports prepared in connection with the BIICL project reveal a diversity of views among the participating European countries regarding which country's law should determine a third state judgment's binding effect. The Netherlands and Romania follow the "equalization of effects" approach and apply their own law to determine the preclusive effects of a third state judgment.<sup>330</sup> Similarly, in England, a British statute determines the preclusive effect of a third state judgment.<sup>331</sup>

In Germany, "[t]he effects of recognition of a third-state judgment are subject to considerable academic debate,"<sup>332</sup> with different commentators advocating the "extension of effects" and "equalization of effects" approaches. Although the Report of France does not mention an active debate among French scholars, it fails to provide a clear

---

because they did not opt out would not be contradictory to public policy because it violates the due process rights of the class members." (citation omitted)); *see also* Ilana T. Buschkin, Note, *The Viability of Class Action Lawsuits in a Globalized Economy—Permitting Foreign Claimants to Be Members of Class Action Lawsuits in the U.S. Federal Courts*, 90 CORNELL L. REV. 1563, 1577–82 (2005) (identifying numerous reasons why civil law countries may decline to recognize American class action judgments).

329 *See* REPORT OF GERMANY, *supra* note 93, at 4–5, 37, 38.

330 *See* BIICL REPORT, *supra* note 67, at 71 n.511; *see, e.g.*, REPORT OF ROMANIA, *supra* note 101, at 37; REPORT OF THE NETHERLANDS, *supra* note 87, at 100, 104.

331 Civil Jurisdiction and Judgments Act, 1982, c. 27, § 34 (Eng.) ("No proceedings may be brought by a person in England and Wales . . . on a cause of action in respect of which a judgment has been given in his favour in proceedings between the same parties, or their privies, in a court in another part of the United Kingdom or in a court of an overseas country, unless that judgment is not enforceable or entitled to recognition in England and Wales . . ."); *cf.* REPORT OF ENGLAND AND WALES, *supra* note 87, at 75 ("[T]he doctrine of merger by which an English judgment supersedes the cause of action on which it was founded does not apply to foreign judgments. Instead, s 34 of the Civil Jurisdiction and Judgments Act 1982 lays down a procedural bar." (footnote omitted)); *id.* at 76 ("An English court will proceed cautiously before concluding that a foreign judgment creates an issue estoppel.").

332 REPORT OF GERMANY, *supra* note 93, at 62.

answer to the question of which country's preclusion law determines the preclusive effects of a third state judgment.<sup>333</sup>

Only two of the participating countries, Switzerland and Spain, clearly adopt the "extension of effects" approach and accord third state judgments the same preclusive effect that they would have under the rendering state's law.<sup>334</sup> Even in Spain, however, preclusive effects under the rendering state's law may be avoided if they "are in breach of the fundamental principles of Spanish law."<sup>335</sup>

Although the portions of the country reports that address the recognition and preclusive effects to be accorded to third state judgments are quite short, they appear to support the thesis of this Article: an exclusive focus on recognition by European courts of American class action judgments elides the important question of preclusive effect. If few of the participating European countries would apply the rendering state's preclusion law and if significant differences exist between the preclusion laws of America and Europe, then American courts cannot assume that recognition is the only hurdle to the binding effect of a class action judgment or settlement in foreign courts.

---

333 See REPORT OF FRANCE, *supra* note 101, at 45 ("[T]he foreign judgment has a preclusive effect . . . . The foreign judgment may be invoked in French proceedings by the defendant to prevent the admissibility of the new claim in the same litigation. If the same litigation has been decided by the foreign judgment, the French judge considers that the French claim is not admissible.").

334 See BIICL REPORT, *supra* note 67, at 71; see also REPORT OF SPAIN, *supra* note 91, at 94, 103-04, 106 (stating that while the recognition statute does not address the issue, Spain follows the "extension of effects" approach and noting that Spanish law governs the procedure for raising preclusion matters); REPORT OF SWITZERLAND, *supra* note 93, at 56 ("[T]he effects of a recognized foreign judgment are primarily determined by the law of its state of origin. However, they may be modified, if they are completely alien to Swiss law.").

335 REPORT OF SPAIN, *supra* note 91, at 106. The Report of Spain was the only country report to specifically address the preclusive effects of third state judgments in collective actions. It stated that "the law of the State of Origin determines: . . . [w]hether the extent of *res iudicata* in collective proceedings affects members of the group who have not taken part in the proceeding." *Id.* at 105 ("[L]egal writers consider that these proceedings may have the effect of *res iudicata* against members of the group who have not taken part in the proceeding provided certain guarantees have been respected: (i) the members being adequately informed that the proceeding is pending by individual notice or publication in the media of the state of the forum; and, (ii) the said information including warnings in relation to the effects of the proceeding, i.e. that any decision given will have the effect of *res iudicata* and whether as affected persons they may exclude themselves from the collective proceeding or not."). Thus, it appears that Spain would apply the extension of effects approach even to judgments in collective actions.

## CONCLUSION

It is not enough for American courts entertaining motions to certify transnational class actions to determine whether an American judgment will be recognized abroad. They also need to determine the preclusive effects, if any, that the judgment will have *if* it is recognized abroad. Stated differently, even if American class action judgments are recognized elsewhere, they will not provide defendants with the protection that judgments in their favor should afford unless they preclude repetitive litigation on the same claim abroad.

Although the BIICL Project was undertaken to facilitate “the free movement of judgments in the [European Community]”<sup>336</sup> rather than to provide guidance to American courts facing difficult certification motions, the BIICL Report actually lends meaningful support to this Article’s thesis. First, it demonstrates that the claim preclusion doctrine that is part of the national law of many of the participating European countries is quite a bit narrower than the transactional test that is applied widely in the United States. Whereas American preclusion law provides robust protection from repetitive litigation that arises out of the same facts, even if the legal theory relied upon, the evidence offered or the relief sought is different,<sup>337</sup> the laws of many of the participating European countries permit a second suit arising out of the same facts if it seeks different relief or presents a different legal theory.<sup>338</sup> The practical effect of these difference in claim preclusion doctrine is mitigated both by the class action gloss, which restricts the claim preclusive effect of class action judgments in the United States,<sup>339</sup> and by the availability of wider preclusive effects under the laws of some of the participating European countries.<sup>340</sup> But even if the claim preclusive effects of class action *judgments* prove to be roughly comparable, American courts nevertheless appear more willing to accord court-approved class action *settlements* claim preclusive effect than European courts do.<sup>341</sup> While this is an issue on which more research would be helpful, the limited information included in the BIICL Report and the country reports reinforces the need to address postrecognition issues, such as preclusion doctrine and the choice of preclusion law, not simply recognition.

---

336 DESCRIPTION OF THE BIICL JUDGMENTS PROJECT, *supra* note 67, at 2; *see supra* note 71.

337 *See supra* notes 15–18 and accompanying text.

338 *See supra* notes 90–103 and accompanying text.

339 *See supra* notes 30–42 and accompanying text.

340 *See supra* Part II.B.2.

341 *Compare supra* Part I.B, *with supra* Part II.B.3.

Second, the BIICL Report reveals that about half of the participating European countries do not accord their judgments issue preclusive effect.<sup>342</sup> This is another potentially meaningful difference between American and European preclusion laws that may affect the binding effect of an American class action judgment abroad, which again suggests that courts that fail to take the second step may not have sufficient information to assess whether an American class action judgment will, in fact, have binding effect abroad.

Finally, while American constitutional law and preclusion law permit absent class members to be bound by judgments against the class even if they never were afforded an affirmative opportunity to opt in,<sup>343</sup> a review of the European class action<sup>344</sup> and collective action vehicles reveals a deep reluctance to bind those who neither commence litigation in their own name nor affirmatively choose to opt in.<sup>344</sup> Although foreign laws authorizing group litigation are in an enormous state of flux right now, the current differences among group litigation vehicles suggest that foreign courts may hesitate before concluding that a class action and a follow-up action by an individual absent class member against the same defendant involve the "same parties" for purposes of claim preclusion.

In sum, with respect to those transnational class actions that survive the Supreme Court's recent decision in *Morrison*, lower courts entertaining motions to certify a class must, first, ask whether an American class action judgment is likely to be recognized abroad, and, second, ascertain the preclusive effect, if any, that the foreign court will accord to the American class action judgment. This currently missing second step should not be ignored.

---

342 See *supra* Part II.B.4.

343 Cf. Bassett, *supra* note 39, at 1087-89.

344 See *supra* Parts II.B.5, II.C.