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Transnational Class Actions and the Illusory Search for Res Judicata

Tanya J. Monestier*

The transnational class action—a class action in which a portion of the class consists of non-U.S. claimants—is here to stay. Defendants typically resist the certification of transnational class actions on the basis that such actions provide no assurance of finality for a defendant, as it will always be possible for a non-U.S. class member to initiate subsequent proceedings in a foreign court. In response to this concern, many U.S. courts will analyze whether the “home” courts of the foreign class members would accord res judicata effect to an eventual U.S. judgment prior to certifying a U.S. class action containing foreign class members. The more likely the foreign court is to recognize a U.S. class judgment, the more likely an American court will include those foreigners in the U.S. class action.

Current scholarship accepts propriety of the res judicata analysis but questions the manner in which the analysis is carried out. This Article breaks from the existing literature by arguing that the dynamics of class litigation render the res judicata effect of an eventual U.S. class judgment inherently unknowable to a U.S. court ex ante. In particular, I argue that certain “litigation dynamics”—specifically the process of proving foreign law via experts, the principle of party prosecution, and the litigation posture of the action—complicate the transnational class action landscape and prevent a court from accurately analyzing the res judicata issues at play. This is exacerbated by the “structural dynamics” of class litigation: the complexity of foreign law on the recognition and enforcement of judgments, the newness of class action law in most foreign countries, and the distinction between general and fact-specific grounds for nonenforcement of a U.S. class judgment. Accordingly, I argue that U.S. courts should abandon their illusory search for res judicata.

Instead, courts should avoid the res judicata problem altogether by employing an opt-in mechanism for foreign class plaintiffs, whereby such plaintiffs are not bound unless they

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affirmatively undertake to be bound by U.S. class judgment. An opt-in mechanism for foreign plaintiffs also provides several advantages over the current opt-out mechanism: it allows all foreign claimants to participate in U.S. litigation if they so choose; it provides additional due process protections for absent foreign claimants; it respects international comity; and it sufficiently deters defendant misconduct.

I. INTRODUCTION

II. CERTIFICATION OF TRANSNATIONAL CLASSES UNDER RULE 23
   A. The “Near Certainty” Approach
   B. “More Likely Than Not” or “Probability” Standard
   C. “Evidentiary Value” or “Substantial Effect” in Foreign Court
   D. The “Nonstandard” Recognition of Res Judicata Issue

III. THE ILLUSORY SEARCH FOR RES JUDICATA
   A. Litigation Restrictions on the Search for Res Judicata
      1. Foreign Law Proved by Experts
      2. The Principle of Party Prosecution
      3. Litigation Posture: Contested Certification or Settlement Certification?
   B. Structural Restrictions on the Search for Res Judicata
      1. Complexity of Foreign Law on the Recognition and Enforcement of Judgments
         a. Jurisdiction
         b. Public Policy
         c. Natural or Procedural Justice
         d. Miscellaneous Grounds for Nonenforcement
      2. Foreign Law on Aggregate Litigation
      4. Case Study: Currie v. McDonald's

IV. THE CASE FOR AN OPT-IN CLASS ACTION: TOWARD A PRINCIPLED APPROACH TO THE INCLUSION OF FOREIGN PLAINTIFFS IN U.S. TRANSNATIONAL CLASS ACTIONS
   A. The “So What?” Issue
   B. Opt-In Class Actions Under Rule 23
C. An Opt-In Class Offers a Principled Way of Including Foreign Class Members in a U.S. Class Action

1. An Opt-In Class Action Eliminates the Res Judicata Problem and Allows the Benefits of U.S. Litigation To Be Available to All Foreign Claimants ........................................ 67
2. An Opt-In Class Action for Foreign Claimants Better Comports with Due Process than an Opt-Out Class Action .................................................. 68
4. An Opt-In Class Action for Foreign Claimants Sufficiently Deters Defendant Misconduct .......... 76

V. CONCLUSION ............................................................... 78

The time is long past when U.S. class actions played themselves out on the purely domestic stage. The new paradigm is one in which certification in U.S. litigation is sought for a class consisting heavily and possibly even preponderantly of nationals or residents of other countries. The emergence of multinational classes in securities, antitrust, and mass tort claims is something we can expect in a world of truly international markets. Of course, the multinational character of today's classes complicates class action practice significantly.¹

I. INTRODUCTION

The globalization of corporate, consumer, and securities markets has led broadly to the globalization of litigation, and specifically to the emergence of transnational class actions. A transnational class action is one in which some portion of the class consists of non-U.S. claimants.² One author observes: "[F]rom the first time a U.S. lawyer created a class of plaintiffs . . . without explicitly limiting that definition to citizens/residents/parties within the geographical limits of the United States, the courts of this country have entertained

2. These class actions are sometimes referred to as "international," "transborder," "worldwide," "global," "multinational," or "multijurisdictional" class actions to denote the fact that they encompass claimants from outside the United States. For ease of reference, I will use the term "transnational" throughout this Article to refer to a U.S. class action containing foreign plaintiffs.
[transnational] class actions." American courts have certified transnational class actions in a variety of substantive areas including securities, product liability, mass tort, consumer protection, and antitrust.

Transnational class actions have come to be perceived as vehicles for the redress of wrongs that cross international boundaries. The common sense rationale put forward by proponents of transnational class actions is that, whether a plaintiff purchased a defective product or an overvalued security in Australia, Belgium, or the United States, where the underlying conduct is the same, such claims should be handled in a unitary forum—that forum being, of course, a U.S. court.


4. The problem, arguably, is that while the scope of the impugned conduct that is the subject of the litigation may be international, the forum in which it is adjudicated is necessarily territorially circumscribed. Professor Richard Nagareda describes this problem as one of "regulatory mismatch." He posits that the structural dynamics of aggregate litigation, including class litigation, arise from the relationship between the following features: "(1) the scope of the [impugned] activity that is the subject of the litigation [that is, what is the aggregate litigation about?], (2) the desired scope of preclusive effect for the judgment in the aggregate proceeding [that is, who is to be precluded thereby?], and (3) the territorial authority of the government that has constituted the [forum] court [that is, where the litigation is to take place?]" Richard A. Nagareda, Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism, 62 VAND. L. REV. 1, 10-11 (2009). As commerce becomes increasingly global, there is a desire for the scope of preclusion in aggregate litigation to expand commensurately with the underlying activity in question. At the risk of oversimplifying, there is a desire for global preclusion to global misconduct. This, in turn, places enormous pressure on the remaining feature of aggregate litigation dynamics: the scope of authority wielded by the government in which the forum court operates. As long as the scope of the underlying activity, the scope of preclusion, and the territorial authority of the court operate in tandem, there is likely to be little controversy. However, problems arise when these three structural features of aggregate litigation fall out of synchronization with one another. Nagareda elaborates:

In our world, no formal political state has authority of a scope commensurate with modern global business. As a result, our world is one that virtually invites regulatory mismatches. The underlying dispute is likely to be global, as might well be the desired preclusive scope for litigation. But aggregate litigation necessarily must proceed in some court within some government whose territorial authority stops considerably short of the entire globe. When the underlying activity transcends state boundaries, it may be possible procedurally to limit the resulting judgment to the territorial boundaries of the state that has constituted the rendering court. But one or the other side in the litigation—quite possibly, both—might well regard such a limitation as undesirable in practical terms . . . . The desired preclusive effect of the judgment in the aggregate proceeding then would expand so as to be commensurate with the scope of the underlying dispute.

Id. at 13 (footnote omitted).

American class actions that include foreign claimants and purport to resolve issues that are decidedly international in scope squarely raise problems of regulatory mismatch.
Defendants resisting the certification of a class action containing foreign claimants have tended to argue that the inclusion of foreigners in a U.S. class action raises serious due process concerns. Specifically, defendants maintain that transnational class actions provide no assurance of finality for a defendant because it will always be possible for a non-U.S. class member to initiate subsequent proceedings in a foreign court. If the foreign court does not accord preclusive, or res judicata effect to the U.S. class judgment, the defendant will face the risk of relitigation abroad. According to defendants, it is unfair for foreign claimants to get "two bites at the apple" at defendants' expense: once in a U.S. court in the original class proceeding and once in a foreign court that refuses to give effect to the resultant U.S. class judgment.

Rule 23 of the Federal Rules of Civil Procedure is silent on the inclusion of foreign plaintiffs in U.S. classes, thus leaving courts with little direction on whether, or under what circumstances, to include foreign claimants in a U.S. class action. However, most U.S. courts confronted with the issue have been responsive to the due process concerns raised by defendants. Thus, courts have tended to focus on the question of whether the foreign class members' "home" jurisdiction would accord preclusive effect to a U.S. class judgment. Consequently, prior to including Italians within a U.S. class, the U.S. court would ask: "Would an Italian court grant preclusive effect to a U.S. class judgment in this case?" If the U.S. court conducting the certification analysis determines that the Italian court would likely grant preclusive effect to an eventual U.S. judgment, the court would include Italian claimants within the U.S. class. Conversely, if the U.S. court determines that an Italian court would likely not grant preclusive effect to the U.S. class judgment, the court would not include Italian claimants within the class. The nuanced response of U.S. courts to the res judicata problem is an attempt to walk a fine line between extending the perceived benefits of U.S.-style aggregation to foreign

Generally speaking, American courts have been cognizant of the potential for regulatory mismatches in transnational class litigation. Though the class action jurisprudence itself does not use the term "regulatory mismatch," it is nonetheless clear that many courts are struggling with how to reconcile territoriality, preclusion, and conduct that transcends borders.

The terms "res judicata" and "preclusion" (or any variation thereof) are used interchangeably throughout this Article to signify the idea that a foreign court will recognize a U.S. class judgment as binding against a foreign absent class member and prevent that class member from litigating the claim in the foreign court. See 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4402 (2d ed. 2002) (addressing the terminology of res judicata).
claimants and ensuring that defendants in class litigation are not deprived of due process protections.

In this Article, I challenge the assumption that it is possible for U.S. courts to predict ex ante the eventual res judicata effect of their own judgments abroad and question the normative underpinnings of this practice. While others have noted some of the complications generally posed by the existence of transnational class actions, there has been little academic treatment accorded to the propriety of including foreign claimants in U.S. class actions based upon a U.S. court's determination of the anticipated preclusive effect of a class judgment abroad. Accordingly, this Article represents the only sustained doctrinal challenge to the current practice employed by U.S. courts in ascertaining foreign claimants' membership in a U.S. class action. In addition, this Article seeks to set forth an alternative to


7. Rhonda Wasserman offers a different critique related to the current practice of U.S. courts attempting to predict the res judicata effect of a class judgment abroad. Wasserman's argument is that U.S. courts are not going far enough in the analysis because the courts fail to appreciate the distinction between recognition and preclusion. As such, she submits: "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." Rhonda Wasserman, Transnational Class Actions and Interjurisdictional Preclusion, 86 NOTRE DAME L. REV. 313, 379 (2011). Wasserman's critique assumes the propriety of U.S. courts engaging in the recognition/preclusion analysis as part of the certification inquiry. This Article, however, takes issue with the premises under which Wasserman operates: that U.S. courts can and should predict the eventual preclusive effect of class judgments abroad as a means of determining whether to include foreign claimants in a U.S. class action. See id. Similarly, Michael Murtagh purports to critique the current practice of U.S. courts predicting the res judicata effect of foreign judgments, but he ultimately proposes a solution that accepts the propriety of excluding or including foreign class members based on this res judicata prediction. See Michael P. Murtagh, The Rule 23(b)(3) Superiority Requirement and Transnational Class Actions: Excluding Foreign Class Members in Favor of European Remedies, 34 HASTINGS INT'L & COMP. L. REV. 1, 2-3 (2011) (proposing that foreign claimants be excluded or included in U.S. class actions where the evidence is "clear" either way and that where the evidence of res judicata is "unclear," American courts should err on the side of caution by excluding foreign claimants). Finally, Linda Sandstrom Simard and Jay Tidmarsh offer an economic critique of what they refer to as "the Bersch-Vivendi rule" and propose instead a series of four steps to guide courts in determining whether to include or exclude foreign class members from a transnational class
outright inclusion or exclusion of foreign class members from American class actions based on the predicted res judicata effect of an eventual judgment: the possibility of an opt-in class action for foreign claimants.

The Article proceeds as follows: In Part II, I discuss the certification of transnational class actions under Rule 23, with particular attention paid to the varying standards of proof that courts employ in assessing res judicata concerns. In Part III, I call into question the practice of U.S. courts speculating as to the eventual res judicata effect of a U.S. judgment in a foreign court; I do so by analyzing both the litigation and structural restrictions on the search for res judicata. First, I argue that certain litigation dynamics—the proving of foreign law via expert testimony, the principle of party prosecution, and the distinction between contested certification and settlement certification—obscure the analysis and prevent a U.S. court from accurately being able to assess whether a foreign court would accord preclusive effect to a U.S. class judgment. Second, I argue that in addition to these litigation dynamics, there are serious structural restrictions on the search for res judicata. In particular, I contend that the complexity of foreign law on the recognition and enforcement of judgments, the newness of class action law in most foreign countries, and the distinction between general and fact-specific grounds for nonenforcement of a U.S. class judgment render the res judicata effect of an eventual U.S. class judgment inherently unknowable to a U.S. court ex ante. In Part IV, I argue that an opt-in mechanism presents a more principled approach to the inclusion of foreign claimants in U.S. class actions. An opt-in class action for foreign claimants eliminates the res judicata problem altogether because a foreign claimant who has affirmatively evidenced his intent to be bound to a result (through the act of opting in) cannot later challenge the authority of the adjudicating court to render judgment against him. An opt-in mechanism for foreign plaintiffs also provides several advantages over the current opt-out mechanism: it allows all foreign claimants to participate in U.S. litigation if they so choose; it provides additional due process protections for absent foreign claimants; it respects international comity; and it sufficiently deters defendant misconduct.

II. Certification of Transnational Classes Under Rule 23

In most U.S. class actions, plaintiffs seek certification under Rule 23(b)(3) of the Federal Rules of Civil Procedure or its respective state analogue. Rule 23(b)(3) authorizes the creation of an opt-out class action for damages in cases where "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." As its name suggests, an opt-out class action will bind any class member who does not take proactive steps to exclude himself from the proceeding. Opt-out class actions are said to comport with due process as long as absent class members are provided with certain procedural safeguards: adequate representation at all times, notice, and an opportunity to opt out of the class. Where absent class members have been afforded these due process protections, they are precluded from subsequently relitigating their claim in another jurisdiction by virtue of the doctrine of res judicata.

The majority of transnational class actions are brought as opt-out actions under Rule 23(b)(3) of the Federal Rules of Civil Procedure. Unfortunately, Rule 23 is silent on its geographical scope and does not speak to whether, or under what conditions, foreign plaintiffs may be included in American class actions. Consequently, U.S. courts currently lack coherent direction on how to proceed in the face of a motion for certification of a class that encompasses foreign plaintiffs.

In seeking to certify a transnational class, plaintiffs will typically argue that a class action should encompass all aggrieved plaintiffs, regardless of where they are situated. Plaintiffs will assert that the goals underlying class actions, in particular access to justice, judicial economy, and deterrence, are better served through a unitary proceeding that purports to resolve the claims of both U.S. and non-

8. THOMAS E. WILKGLE ET AL., FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 22 (1996) ("The largest number of certified classes—eighty-four (61%)—were in the (b)(3) category.").
9. FED. R. CIV. P. 23(b)(3).
11. More specifically, once a U.S. court issues a judgment, courts in other U.S. states will grant the judgment preclusive effect in accordance with the Full Faith and Credit Clause of the U.S. Constitution. Preclusion is seen as the "centerpiece" of the opt-out class action. In the words of one commentator, "A class action defendant must be able to enter into a settlement, or proceed to judgment, with the assurance that members of the plaintiff class will not later be able to lodge the same claims again in another forum. Class actions involving only U.S. plaintiffs provide this assurance." Buxbaum, supra note 6, at 31 (footnote omitted).
authors expressing this view, see Peter M. Saparoff & Katharine Coughlin Beattie, The Benefits of Including Foreign Investors in U.S. Securities Class Action Suits, in Securities Litigation: Planning and Strategies 669, 671 (2008); Buschkin, supra note 6, at 1564-66.

13. This also applies to a foreign claimant who did not receive the notice or did not apprehend its significance and thus failed to act.


15. Choi & Silberman, supra note 6, at 480 ("The argument of defendants in resisting class-action lawsuits that include foreign investors is that if they, as defendants, are successful, they may still face a potential lawsuit in a foreign jurisdiction brought by the absent class plaintiffs.").

16. The term "relitigation" may be a bit of a misnomer in this context. This is because it is likely that a foreign claimant who is seeking to litigate the claim in a foreign jurisdiction (presumably his "home" court) has not participated in any way in the U.S. proceeding. Rather, that foreign claimant has "litigated" the claim in the United States only by virtue of his inclusion in the class definition.

17. See Choi & Silberman, supra note 6, at 482 (noting that in Vivendi, "defendants ... argued that the lack of "preclusion protection" amounted to a due process violation"). Whether the question of preclusion is, in fact, a due process issue is beyond the scope of this Article.

18. Note that almost all class actions result in settlement rather than a trial on the merits. See Samuel Issacharoff & Richard A. Nagareda, Class Settlements Under Attack, 156 U. Pa. L. Rev. 1649, 1650 (2008) ("Settlements dominate the landscape of class actions. The overwhelming majority of civil actions certified to proceed on a class-wide basis and not otherwise resolved by dispositive motions result in settlement, not trial.").
that the plaintiffs were accorded due process. Conversely, in the latter scenario, the defendants are left without any assurance that a judgment will be binding because the ultimate preclusive effect of the judgment is left at the whim of a foreign court.

American courts have been increasingly sensitive to these res judicata concerns raised by defendants in transnational class litigation. Thus, prior to certifying a U.S. class action containing foreign class members, many courts will analyze whether the “home” courts of the foreign class members would accord preclusive effect to an eventual U.S. judgment. The more likely the foreign court is to recognize a U.S. class judgment, the more likely an American court will include those foreigners in the U.S. class action. Such an


20. Shapiro & Kim, supra note 14, at 41 (“The possibility of a second action in a US court after a final determination in a class action is not significant. Once there has been a final determination, the doctrine of res judicata bars subsequent actions in US courts. With non-US class members in a US class action, however, even after a final determination, it is possible that a non-US citizen could return to his home jurisdiction to commence a redundant lawsuit because that home jurisdiction may not recognise the validity and binding effect of the final determination in a US class action.”).

21. This presupposes, of course, that courts were aware of the potential issues with preclusion. In several cases, courts have certified class actions comprised of U.S. and non-U.S. class members without any discussion of the res judicata issue. See, e.g., In re CP Ships Ltd. Sec. Litig., 578 F.3d 1306, 1318 (11th Cir. 2009) (affirming district court’s approval of a securities class action settlement where the class included foreign purchasers of stock of a foreign corporation), abrogated by Morrison v. Nat’l Austl. Bank Ltd., 130 S. Ct. 2869 (2010); Wagner v. Barrick Gold Corp., 251 F.R.D. 112, 120-21 (S.D.N.Y. 2008) (certifying a plaintiff class including Canadian investors who purchased stock on the Toronto Stock Exchange and concluding it had subject matter jurisdiction over the Canadian investors’ claims); In re Flag Telecom Holdings Ltd. Sec. Litig., 245 F.R.D. 147, 174 (S.D.N.Y. 2007) (certifying a class that included foreign investors who purchased stock of Flag Telecom Holdings, Ltd. on the London Stock Exchange), aff’d in part, vacated in part, 574 F.3d 29 (2d Cir. 2009); In re Ashanti Goldfields Sec. Litig., No. CV 00-0717(DGT), 2004 WL 626810, at *18 (E.D.N.Y. Mar. 30, 2004) (certifying a class that included foreign investors who purchased shares of a foreign corporation on the New York Stock Exchange); In re Nortel Networks Corp. Sec. Litig., No. 01 Civ. 1855(RMB), 2003 WL 22077464, at *7-8 & n.7 (S.D.N.Y. Sept. 8, 2003) (certifying a class that included Canadian investors who purchased stock of a Canadian corporation on the Toronto Stock Exchange); In re Gaming Lottery Sec. Litig., 58 F. Supp. 2d 62, 77 (S.D.N.Y. 1999) (same), In re Pizza Time Theatre Sec. Litig., 112 F.R.D. 15, 17, 22 (N.D. Cal. 1986) (certifying transnational class action that included claimants from fifteen foreign countries).

22. I use the term “judgment” in this Article to denote both a judgment on the merits or a settlement that has been given judicial approval.

23. Note that this approach appears to have some international acceptance. See, e.g., Int’l Bar Ass’n Legal Practice Div., Guidelines for Recognising and Enforcing Foreign Judgments for Collective Redress (Oct. 16, 2008), available at http://ec.europa.eu/competition/consultations/2011_collective_redress/iba_guidelines_en.pdf (“It is appropriate for a court to assume jurisdiction over foreign class members if the court has subject matter jurisdiction over the claim and it is reasonable for the court to expect that its judgment will be given
analysis typically takes place under Rule 23’s “superiority” criterion\(^2\) that requires a plaintiff seeking to have a class action certified under Rule 23(b)(3) to establish “that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”\(^2\) Under this analysis, it is thought that if a foreign court

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\(^2\) Sometimes, the res judicata issue is discussed under the rubric of forum non conveniens and/or comity. See *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. MD 06-1775(JG)(VVP), 2008 WL 5958061, at *24, *43-44 (E.D.N.Y. Sept. 26, 2008) (granting defendants’ motion to dismiss on forum non conveniens and international comity grounds because claims in an antitrust action were brought “by largely foreign plaintiffs, against largely foreign defendants, arising out of events occurring abroad”); Warlop v. Lernout, 473 F. Supp. 2d 260, 263-65 (D. Mass. 2007) (granting defendants’ motion to dismiss a securities class action on forum non conveniens grounds where the class included mostly foreign investors who purchased stock of a Belgian corporation on the European Stock Exchange); *In re Assicurazioni Generali S.P.A. Holocaust Ins. Litig.*, 228 E.Supp.2d 348, 363, 375 (S.D.N.Y. 2002) (denying European insurance companies’ motion to dismiss consolidated breach of contract class actions, noting that it was too early in the litigation to give potential res judicata concerns great weight in the forum non conveniens inquiry); Del Fierro v. Pepsico Int’l, 897 F. Supp. 59, 63-64 (E.D.N.Y. 1995) (granting defendants’ motion to dismiss a class action brought by a Filipino resident for conduct allegedly occurring in the Philippines on forum non conveniens grounds in part based on res judicata concerns). Note also that the res judicata issue is sometimes raised in connection with lead plaintiff status in transnational securities class actions. See *Buettgen v. Harless*, 263 F.R.D. 378, 382-83 (N.D. Tex. 2009) (ruling on competing motions to be appointed as lead plaintiff in a securities class action, the court held that because there was no treaty between the United States and Switzerland with respect to recognition and enforcement, Swiss investment group would possibly be subject to res judicata defense and therefore refused to appoint Swiss investment group as lead plaintiff); Mohanty v. Bigband Networks, Inc., No. C 07-5101 SBA, 2008 WL 426250, at *7-8, *10 (N.D. Cal. Feb. 14, 2008) (appointing as lead plaintiff in a securities class action a British citizen residing in the Republic of Cyprus over another plaintiff’s objection that the British citizen was an inadequate lead plaintiff because a U.S. class action judgment would not be given preclusive effect in Cyprus); Marsden v. Select Med. Corp., 246 F.R.D. 480, 486, 490 (E.D. Pa. 2007) (certifying a class and appointing as a lead plaintiff an Austrian investment manager who purchased stock of an American company on the New York Stock Exchange despite defendants’ concerns that a U.S. class action judgment would not be given preclusive effect by Austrian courts); *In re Molson Coors Brewing Co. Sec. Litig.*, 233 F.R.D. 147, 153 (D. Del. 2005) (appointing a German investment manager as lead plaintiff in a securities class action lawsuit over objections by another plaintiff that the German investment manager would not be an ideal choice for lead plaintiff because of, among other things, the possibility that a judgment against the German investment manager may not be given preclusive effect in Germany); Takeda v. Turbodyne Techs., Inc., 67 F. Supp. 2d 1129, 1138-39 (C.D. Cal. 1999) (granting motion to appoint as lead plaintiff in a securities class action a group of American and German investors who purchased stock of an American corporation over objection that it would be improvident to appoint a group that contained German investors as lead plaintiff because a German court may not recognize and give preclusive effect to a U.S. class action judgment).

\(^2\) The rule states:

The matters pertinent to these findings include:
is not likely to accord preclusive effect to a U.S. class judgment, then the U.S. class action device is not a "superior" method of adjudicating the controversy in respect of those foreign claims. American courts have used this method of analysis primarily in securities fraud cases, but also in a variety of other substantive areas including product liability, mass torts, antitrust, consumer protection, and breach of contract.

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;
(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
(D) the likely difficulties in managing a class action.

Id. With transnational classes, factors (C) and (D) are the most pertinent to the analysis.

26. Bermann, supra note 1, at 95 ("Interestingly, not one U.S. court (and there have been many) that has faced this issue has taken this easy way out. Rather, courts have made the 'recognizability' of the eventual U.S. class action judgment a central consideration in determining whether the class action is indeed a 'superior' vehicle for adjudicating the controversy, within the meaning of Rule 23(b). That fact alone is worth noting for, in itself, it reveals a profound sensitivity to the delicacy of multinational class actions.").

27. Transnational securities class actions have garnered attention as of late owing to the recent spate of "foreign-cubed" or "f-cubed" class actions in U.S. federal courts. F-cubed actions are those brought under U.S. securities laws by foreign plaintiffs who purchased or sold securities from a foreign issuer on a foreign stock exchange. Defendants resisting certification of an f-cubed class action have tended to argue that U.S. courts lack subject-matter jurisdiction over foreign claims brought by foreign plaintiffs under either the "conduct" or "effects" test (or some "admixture" of both). See Buxbaum, supra note 6; Kun Young Chang, Multinational Enforcement of U.S. Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction, 9 FORDHAM J. CORP. & FIN. L. 89 (2003); Choi & Silberman, supra note 6; Erez Reuveni, Extraterritorial As Standing: A Standing Theory of the Extraterritorial Application of the Securities Laws, 43 U.C. DAVIS L. REV. 1071 (2010); Julie B. Rubenstein, Note, Fraud on the Global Market: U.S. Courts Don't Buy It, Subject-Matter Jurisdiction in F-Cubed Securities Class Actions, 95 CORNELL L. REV. 627 (2010).

In Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869 (2010), the United States Supreme Court was faced with the issue of whether section 10(b) of the Securities Exchange Act of 1934 provided a cause of action to foreign plaintiffs suing both American and foreign defendants for fraud in connection with securities traded on foreign exchanges. The Court held that the question was not one of subject matter jurisdiction, but one related to merits. Id. at 2877. Applying the "longstanding principle . . . that legislation of Congress . . . appl[ies] only within the territorial jurisdiction of the United States," unless a contrary intent appears, the Supreme Court held that because section 10(b) is silent regarding its extraterritorial application, the section has no application outside the United States. Id. at 2877-78 (internal quotation marks omitted). The Court then enunciated a "transactional test" for defining the reach of federal securities laws: U.S. federal securities laws will apply when "the purchase or sale is made in the United States, or involves a security listed on a domestic exchange." Id. at 2886.

While Morrison has significantly reduced the universe of transnational securities class actions, the case has not foreclosed transnational securities class actions outright. Foreign plaintiffs can still be included in 10(b)(5) securities class actions provided that the Supreme
While most courts have considered the ultimate enforceability of a U.S. class judgment as relevant to the certification analysis, they have been divided on the standard to apply in assessing res judicata concerns. At present, there is no clear consensus as to the weight courts will accord to concerns about the preclusive effect of a U.S. judgment abroad. In fact, one district court has referred to the courts' assessment of the res judicata issue in transnational class actions as "haphazard." The varying approaches adopted by courts evidence a

Court's new "transactional test" is satisfied. Thus, as long as a foreign claimant makes a "purchase or sale . . . in the United States" or the transaction "involves a security listed on a domestic exchange," U.S. securities laws do not operate extraterritorially, and the foreign claimant can be included in an American class action. See id.; see also Horatia Muir Watt, A "View from Across" (in the Other Direction), CONFLICT OF LAWS.NET (July 1, 2010), http://conflictoflaws.net/2010/a-view-from-across-in-the-other-direction/ ("The Morrison decision is not necessarily going to . . . prevent trans-Atlantic class actions including European investors as claimants or European firms as defendants, as long as the new transactional criteria are satisfied."). Thus, while a particularly problematic species of transnational class actions (the f-cubed securities class action) is now rendered impermissible under Morrison, transnational class actions in the securities context will continue to exist. Indeed, some commentators believe that Morrison may not ultimately prove as restrictive as it appears. For instance, some argue that the second prong of the transactional test is nebulous and may eventually be interpreted expansively to provide for the inclusion of foreign plaintiffs in U.S. class actions. See, e.g., Margaret Sachs, International Securities Fraud Makes Supreme Court Debut, OPINIO JURIS (June 25, 2010, 11:12 AM), http://opiniojuris.org/2010/06/25/morrison-and-the-presumption-against-extraterritoriality ("Most likely it is the second prong—'domestic transactions in other securities'—that will produce trouble. Suppose a foreign brokerage firm has a US affiliate. If the foreign brokerage firm receives an order to trade from a foreign investor and executes the trade in the US through the US affiliate, does the trade qualify as a domestic transaction?"). Moreover, it is predicted that resourceful plaintiffs' attorneys will find ways to circumvent the Morrison ruling. In the words of one commentator:

Some possible ways it might be circumvented include filing individual lawsuits in state court under state law, and filing federal court class actions alleging state law violations. Claimants in these kinds of cases arguably may face the same hurdles of trying to show that the relevant law provides remedies regarding securities transactions on foreign exchanges, but the existence of U.S.-based fraudulent conduct potentially could provide a sufficient basis for relief under many legal theories, even if not under the federal securities laws.

Kevin LaCroix, More Thoughts About Morrison v. National Australia Bank, THE D & O DIARY (June 28, 2010, 4:11 AM), http://www.dandodiary.com/2010/06/articles/securities-litigation/more-thoughts-about-morrison-v-national-australia-bank. In light of the interpretative challenges ahead and the creativity of the plaintiffs' bar, it would be unwise to believe that transnational securities class actions will simply fall by the wayside. Thus, we can expect that in securities class actions—as in other substantive areas such as product liability, consumer protection, and antitrust—courts will still need to grapple with the issue of how the presence of foreign claimants impacts the certification analysis. See also Wasserman, supra note 7, at 314 ("In short, even after Morrison, class counsel are likely to keep filing transnational class actions and defense counsel are likely to keep opposing them.").

great deal of confusion about the framework within which to conduct
the res judicata analysis. Nonetheless, it is possible to group the
approaches into the following general categories: the “near certainty”
approach, the “probability” standard, the “evidentiary value” approach,
and the “nonstandard.”

A. The “Near Certainty” Approach

The first case to consider this issue in any depth was Bersch v.
Drexel Firestone, Inc., a securities action brought on behalf of a class
of domestic and foreign purchasers of stock in a Swiss-based
Canadian corporation.\(^{29}\) The Bersch court, in refusing to certify the
class, expressed concerns about “the serious problem . . . of the
dubious binding effect of a defendants’ [sic] judgment (or a possibly
inadequate plaintiff’s judgment) on absent foreign plaintiffs [and] the
propriety of purporting to bind such plaintiffs by a settlement.”\(^{30}\) The
United States Court of Appeals for the Second Circuit ultimately
concluded that while an American court does not need to abstain from
entering judgment when there is a possibility that a foreign court may
not recognize it, the situation is different when nonrecognition is a near
certainty.\(^{31}\) The court elaborated:

This point must be considered not simply in the halcyon context of a
large recovery which plaintiff visualizes but in those of a judgment for
the defendants or a plaintiffs’ judgment or a settlement deemed to be
inadequate. As Judge Frankel stated in his order permitting the case to
proceed as a class action: if defendants prevail against a class they are
entitled to a victory no less broad than a defeat would have been.\(^{32}\)

Bersch is thus credited with articulating the “near certainty” test
for evaluating the res judicata effect of a U.S. class judgment:
American courts should not certify (and thus, should not adjudicate)

\(^{29}\) Notably, most of these approaches were developed in the context of “f-cubed”
class actions, which were recently rendered impermissible by the Supreme Court in
Morrison. See 130 S. Ct. at 2886. The approaches to res judicata, however, exist
independently of the underlying cause of action.

\(^{30}\) 519 F.2d 974, 978 (2d Cir. 1975), abrogated by Morrison, 130 S. Ct. 2869. The
proposed class included approximately 50,000 purchasers, of whom 386 were American and
the balance of whom were “citizens and residents of Canada, Australia, England, France,
Germany, Switzerland, and many other countries in Europe, Asia, Africa, and South
America.” Id. at 977-78 & n.2.

\(^{31}\) In addition to the res judicata issues, the United States Court of Appeals for the
Second Circuit held that it lacked subject matter jurisdiction over the foreign purchasers’
claims. Id. at 986-87.

\(^{32}\) Id. at 996.

\(^{33}\) Id.
claims involving foreign class members where nonrecognition of an eventual judgment by a foreign court is a "near certainty." Despite the fact that this standard has been called into question because of the difficulty of establishing a "near certainty" of nonrecognition, many courts continue to apply it in assessing res judicata concerns.  

B. "More Likely Than Not" or "Probability" Standard

The United States District Court for the Southern District of New York in *In re Vivendi Universal, S.A. Securities Litigation* took a decidedly more nuanced approach to the res judicata issue.  

*Vivendi* involved a securities fraud class action brought against a French-based defendant on behalf of a worldwide class of all persons who purchased or acquired the defendant’s common stock or American Depository Shares during the proposed class period. Approximately twenty-five percent of the shares in question were held by American shareholders, while thirty-seven percent of the shares were held by French shareholders. The remainder of the defendant’s shares were held predominantly by other European persons or entities. In opposing the motion for class certification, the defendant argued that the foreign plaintiffs should be excluded from the class definition because of the "near certainty" that the defendant would be unable to assert claim

34. Other cases that appear to have adopted this approach include: *In re Royal Dutch/Shell Transp. Sec. Litig.*, 380 F. Supp. 2d 509, 546-47, 573 (D.N.J. 2005) (denying defendants’ motion to dismiss a securities class action for lack of subject matter jurisdiction with respect to claims brought by foreign investors who purchased stock of an English and Dutch corporation on foreign exchanges over defendants’ objections that a foreign court would not recognize and give preclusive effect to a U.S. class action judgment); *In re Cable & Wireless, PLC, Sec. Litig.*, 321 F. Supp. 2d 749, 755, 766 (E.D. Va. 2004) (holding that the court had subject matter jurisdiction over claims brought by Canadian investors who purchased stock of a British corporation on the London Stock Exchange because, inter alia, defendants failed to show that nonrecognition of a U.S. class action judgment by an English court would be a near certainty); *In re Telectronics Pacing Sys., Inc., No. MDL-1057, 1996 U.S. Dist. LEXIS 11088*, at *3-5 (S.D. Ohio Feb. 22, 1996) (granting defendant’s motion to decertify a class with respect to foreign members of the class under Bersch’s "near certainty" standard because defendant submitted uncontested affidavits showing that a U.S. class action judgment would not be recognized and given preclusive effect in several foreign jurisdictions), rev’d *on other grounds*, 221 F.3d 870 (6th Cir. 2000); *Jordan v. Global Natural Res., Inc.*, 102 F.R.D. 45, 52 (S.D. Ohio 1984) (certifying a class that included foreign purchasers of stock of a British corporation despite defendant’s argument that a U.S. class action judgment would not be given preclusive effect by foreign courts on the basis that the "standard for ... abstention [from entering judgment] is ‘near certainty’").


36. *Id.* at 81 ("During this time, virtually all of Vivendi's ADSs—which traded on the NYSE—were held by persons or entities in North America, while virtually all of Vivendi's ordinary shares—traded predominantly on the Paris Bourse—were held by persons or entities outside the United States, predominantly in France and the rest of Europe.").
preclusion as a bar to subsequent litigation in France and other European countries.37

Although the defendant did not frame it as such, the court considered the res judicata argument under Rule 23’s superiority requirement.38 The court indicated that it did not find the Bersch “near certainty” standard to be a “particularly useful analytical tool.”39 Rather, the court considered it more appropriate to evaluate the risk of nonrecognition of a U.S. class judgment along a continuum. The court emphasized that the superiority requirement of Rule 23 will be satisfied “[w]here plaintiffs are able to establish a probability that a foreign court will recognize the res judicata effect of a U.S. class action judgment.”40 Conversely, where plaintiffs are unable to demonstrate that a foreign court is “more likely than not” to recognize a U.S. class judgment, this factor—considered alongside other factors—may lead to the exclusion of foreign claimants from the class.41 In short, “The closer the likelihood of non-recognition is to being a ‘near certainty,’ the more appropriate it is for the Court to deny certification of foreign claimants.”42

The Vivendi court was clear to indicate that res judicata concerns alone should not be dispositive of the superiority issue.43 Rather, courts should assess res judicata concerns alongside “other factors” that typically impact the superiority analysis.44 Ultimately, after reviewing volumes of expert testimony on the likelihood of nonrecognition in plaintiffs’ home jurisdictions, the court concluded that French, English, and Dutch investors could be part of the class because it was “more likely than not” that their respective countries would accord preclusive effect to a U.S. class judgment.45 Conversely, German and Austrian plaintiffs would be excluded from the class because it was probable that their respective courts would not give res judicata effect to a U.S. opt-out class judgment.46 Several courts post-

37. Id. at 92.
38. Id. ("Although defendants do not consistently characterize their argument as such, the Court will consider this aspect of their opposition to be an attack on the superiority of class action treatment of the claims of foreign purchasers.").
39. Id. at 95.
40. Id.
41. Id.
42. Id.
43. Id.
44. Id.
45. Id. at 105.
46. Id. at 105-06. For subsequent developments in the case, see Choi & Silberman, supra note 6, at 480 (“Defendants sought to appeal the certification issue via an FRCP 23(f)
Vivendi have employed its probability of recognition standard in assessing whether a foreign court would likely grant res judicata effect to a U.S. class judgment.\(^{47}\)

C. "Evidentiary Value" or "Substantial Effect" in Foreign Court

A few courts have used an approach to the res judicata issue in transnational class actions that examines whether a U.S. class judgment would have any sort of effect or evidentiary value abroad. In short, these cases do not apply a definitive standard, so much as they look at the general question: Will a U.S. judgment matter to a foreign court?

In In re Turkcell Iletisim Hizmetler, A.S. Securities Litigation, plaintiffs sought to certify a class action comprised of a group of domestic and foreign shareholders who had purchased the American Depository Shares issued by a Turkish defendant pursuant to a registration statement.\(^{48}\) The defendants in Turkcell argued that class certification was improper because, inter alia, "the Turkish courts do not recognize class actions."\(^{49}\) The Southern District of New York rejected the defendants' argument, stating that "[t]he case law suggests that, if there is some possibility that a class action judgment would be enforceable—or at least have some substantial effect—in the foreign jurisdiction at issue, then class certification is proper."\(^{50}\) The Turkcell court ultimately held that based on the affidavit evidence, it could not "conclude that a Turkish court would give no weight to a judgment of motion, requesting clarification of the appropriate standard for assessing the relationship between the requirement of res judicata and the determination of class-action superiority under FRCP 23(b)(3). Specifically, defendants challenged the 'more likely than not' standard and argued that the lack of 'preclusion protection' amounted to a due process violation. The Second Circuit refused to hear the appeal, and defendants then sought certiorari in the Supreme Court which was denied."\(^{51}\) In early 2011, the Vivendi court modified the class definition in light of Morrison v. National Australia Bank Ltd. See In re Vivendi Universal, S.A. Sec. Litig. (Vivendi III), 765 F. Supp. 2d 512, 533-34 (S.D.N.Y. 2011). Specifically, the court has excluded from the class Americans and foreigners who purchased Vivendi ordinary shares on foreign markets because such purchasers cannot satisfy Morrison's "transactional test."\(^{52}\) However, the court explained that "[t]he class going forward shall consist of all persons from the United States, France, England and the Netherlands who purchased or otherwise acquired Vivendi [American Depository Receipts] on the New York Stock Exchange during the class period.\(^{53}\) Therefore, as some foreign purchasers remain in the class after Morrison, Vivendi's res judicata analysis has not been affected by Morrison.

47. See, e.g., In re Alstom SA Sec. Litig., 253 F.R.D. 266, 282 (S.D.N.Y. 2008) ("The Court finds that the Probability Standard is appropriate.").
49. Id. at 360.
50. Id. (emphasis added).
The Southern District of New York in *In re Lloyd's American Trust Fund Litigation* also took an approach to the res judicata issue that did not focus specifically on a discrete standard to be applied, but rather looked at whether the U.S. class litigation would be of evidentiary value abroad. In *Lloyd's* plaintiffs sought to certify a class of approximately 1700 current and former beneficiaries of trust funds held by the defendant in an action for breach of fiduciary duty in a case where approximately two-thirds of the proposed plaintiff class resided outside the United States. In opposing class certification, the defendants argued that a class action should not be certified because foreign class members would not be precluded from relitigating claims in their home jurisdictions. Plaintiffs, on the other hand, argued that a class action was superior to other methods of adjudication because a class judgment would “have evidentiary value in any subsequent proceedings in foreign courts.” The court in *Lloyd's* appeared to accept this “evidentiary value” approach, reasoning that “[defendants’] affidavits regarding foreign law do not compel the conclusion that a judgment in the United States would have no value in a foreign court” and that “a foreign court may look to the results achieved here for guidance.” Thus, both *Turkcell* and *Lloyd's* seem to suggest that, as long as a U.S. class judgment would in some way be meaningful to a foreign court, this militates in favor of a finding of superiority.

### D. The “Nonstandard”: Recognition of Res Judicata Issue

A final category of cases considering res judicata in transnational class actions appears to apply what might be considered a “nonstandard” to the assessment of the issue. That is, several courts have recognized that there may ultimately be preclusion issues associated with the inclusion of foreign plaintiffs in U.S. class actions but do not provide any guidance on how to deal with res judicata

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51. *Id.* Note that the U.S. court appeared to have misunderstood the res judicata issue when it stated, “We cannot expect the many American investors who are members of the class to pursue independent actions in Turkey.” *Id.* at 361. The concern should have been that absent Turkish class members would pursue subsequent actions in Turkey. See *id.*

52. *Id.*


54. *Id.* at *5.*

55. *Id.* at *15.*

56. *Id.*

57. *Id.*
concerns. For instance, in *In re U.S. Financial Securities Litigation*, the United States District Court for the Southern District of California noted, “Although the *res judicata* problem is one factor to consider . . . it should not be used to deny [class certification] especially when [the court] otherwise has subject matter jurisdiction.” Thus, these courts appear to look at *res judicata* concerns alongside all the other elements of the litigation to determine whether or not to include foreign claimants in the class.

While most courts recognize *res judicata* concerns as relevant to the certification analysis—in particular, the superiority prong of Rule 23—they are sharply divided on the standard that a plaintiff must satisfy in convincing a court that it is appropriate to include foreign claimants within the class. The obvious implication of the application of such disparate standards to the superiority analysis is that differential treatment is accorded to similarly situated foreign claimants. Courts using the “near certainty” approach are likely to include foreign claimants in a U.S. class action because it will be difficult to establish that nonrecognition in a foreign jurisdiction is a near certainty. Those same foreign claimants, however, are less likely to be included in a U.S. class action under a “probability” or “evidentiary value” standard. Under this latter standard, plaintiffs may be unable to show that a foreign court will “more likely than not” enforce a U.S. class judgment. Consequently, the inclusion or exclusion of a foreign claimant will often turn on nothing more than the particular standard chosen by a U.S. court in evaluating *res judicata* concerns.

At a more fundamental level, however, regardless of which approach is used, the underlying assumption is that the *res judicata* effect of a U.S. class judgment is knowable to a court in advance. That is, the tests hinge on the idea that it is, in fact, possible to predict with a

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59. For other cases where the *res judicata* issue is raised as a general concern, but not dealt with in any depth, see *In re Infineon Techs. AG Sec. Litig.*, 266 F.R.D. 386, 392-93, 397-98 (N.D. Cal. 2009) (certifying a class where ninety percent of the class members resided in Germany and Italy and expressly declining “to speculate as to the preclusive effect” of a U.S. class action judgment abroad); *Steinberg v. Ericsson LM Tel. Co.*, No. 07 Civ. 9615(RPP), 2008 WL 1721484, at *1 (S.D.N.Y. Apr. 11, 2008) (denying a motion for reconsideration of its earlier ruling declining to appoint as lead plaintiff a group of foreign investors who purchased stock on foreign exchanges because of, among other things, *res judicata* concerns); *In re Activision Sec. Litig.*, 621 F. Supp. 415, 432 (N.D. Cal. 1985) (certifying a class consisting of some foreign purchasers of stock of an American corporation and noting that “[i]n the absence of further information, defendants’ argument will not prevent certification of a class including the foreign purchasers”).
measure of certainty the preclusive effect of a U.S. class action judgment in a foreign jurisdiction. In the next Part, I call into doubt this assumption and argue that the practice of speculating as to the res judicata effect of an eventual U.S. class judgment is misguided and should be abandoned. This will set the stage for the discussion in Part IV advocating that courts employ an opt-in model for foreign claimants in order to minimize the res judicata problems that characterize transnational class actions.

III. THE ILLUSORY SEARCH FOR RES JUDICATA

American courts have generally been responsive to the due process concerns raised by defendants resisting the certification of transnational class actions. Consequently, they have developed a nuanced approach to the res judicata issue which examines what effect a foreign court would give to a U.S. class judgment purporting to bind foreign absent class members. However, this res judicata analysis is only a "solution" to the due process problems inherent in transnational class actions if U.S. courts are able to predict accurately the preclusive effect of an eventual class judgment. In other words, it only makes sense to condition the superiority analysis in transnational class litigation on the eventual res judicata effect of a U.S. class judgment abroad if that res judicata effect were indeed knowable to a U.S. court ex ante. It is submitted, however, that U.S. courts are not positioned to predict accurately the preclusive effect of U.S. class judgments abroad owing to both the litigation and structural dynamics of class proceedings. As such, the search for the res judicata effect of a U.S. class judgment is nothing short of illusory.

A. Litigation Restrictions on the Search for Res Judicata

Certain litigation dynamics interfere with the ability of a court to assess and predict correctly the res judicata effect of a U.S. class judgment in a foreign court. In particular, the process of proving foreign law via experts, the principle of party prosecution, and the litigation posture of the action complicate the transnational class action landscape and prevent a court from accurately analyzing the res judicata issues at play.

60. Note that the issue can also be perceived as a due process issue for absent foreign class members. See Debra Lyn Bassett, Implied "Consent" to Personal Jurisdiction in Transnational Class Litigation, 2004 Mich. St. L. Rev. 619, 624-25; infra Part IV.C.2.
1. Foreign Law Proved by Experts

Although the Federal Rules of Civil Procedure provide that a court may consider "any relevant material or source" in ascertaining foreign law, courts generally rely on experts in determining whether a foreign court would grant preclusive effect to a U.S. judgment. Consequently, parties on both sides of the certification motion tend to adduce expert evidence—usually in the form of expert declarations or expert affidavits—on the likelihood that a foreign court would grant preclusive effect to a judgment in a U.S. class action containing foreign nationals. The use of experts to assist a court in ascertaining the eventual res judicata effect of a U.S. class judgment raises several interrelated concerns that ultimately call into question the propriety of courts looking to foreign preclusion law as a component of the domestic Rule 23 superiority analysis.

First, the process of ascertaining foreign law on preclusion via conflicting expert affidavits is cumbersome. Notably, U.S. courts will conduct a country-by-country analysis and consider the testimony of multiple expert witnesses in order to predict the eventual res judicata effect that will be accorded to a U.S. class judgment abroad. George Bermann describes the process in reference to the recent case of In re Royal Dutch/Shell Transport Securities Litigation as follows:

[T]he federal district court examined the likely fate of a future U.S. class action judgment in no fewer than eight foreign jurisdictions, with each side in the dispute proffering opinions and reply opinions by foreign country experts on the question. As the analysis was conducted on a country-by-country basis, it resulted in thirty-two separate opinions in all, with no two countries taking exactly the same position for the same reasons and, thus, leading the court to appoint two opposing "super synthetic experts" who could somehow make sense of the whole.

61. FED. R. CIV. P. 44.1 (“In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.”). The advisory committee notes further elaborate: “In further recognition of the peculiar nature of the issue of foreign law, the new rule provides that in determining this law the court is not limited by material presented by the parties; it may engage in its own research and consider any relevant material thus found.” FED. R. CIV. P. 44.1 advisory committee’s notes.


64. Bermann, supra note 1, at 100 (footnote omitted); see also Choi & Silberman, supra note 6, at 480 (“Nonetheless, several courts have expressed concern with that issue [of
It has become routine in transnational class actions for scores of experts to opine as to the res judicata issue. In the *Vivendi* case, for instance, the Southern District of New York considered testimony from over a dozen different experts or groups of experts on the question of class action recognition in France alone. In *U.S. Financial*, the Southern District of California referred to the “multitude” of affidavits submitted to the court concerning the enforcement laws of France, West Germany, Luxembourg, Norway, Great Britain, Belgium, Switzerland, and Italy. Similarly, in *In re Alstom SA Securities Litigation*, the Southern District of New York considered in detail submissions from various experts on the recognition laws of England, the Netherlands, Canada, and France. Based on the volume of expert evidence and complexity of the recognition analysis, it is no wonder that courts are, in Bermann’s words, struggling to “make sense of the whole.” The inevitable by-product of ascertaining foreign law in this manner is the proverbial battle of the experts. One commentator astutely notes, “[I]t is remarkable to see that in the very same procedure and concerning the very same country, the experts will diverge considerably in their views.” Courts are left with few definitive answers other than “maybe.”

Second, one must bear in mind that expert witnesses are necessarily partisan—that is, either the plaintiff or defendant solicits

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66. 69 F.R.D. at 48 & n.19.
68. Bermann, supra note 1, at 100.
69. Arguably, the problem could be alleviated to some extent by courts appointing special masters to report on foreign law. See Fed. R. Civ. P. 53. While this may be a “fix” to the “battle of the experts” problem, it still does not change the fact that the special master would be attempting to predict that which is incapable of being predicted: whether a foreign court at some later point in time would accord preclusive effect to a U.S. judgment or settlement that is not yet in existence. See infra Part III.B.
them to opine as to a certain state of affairs. In this respect, Judge Posner states:

Lawyers who testify to the meaning of foreign law, whether they are practitioners or professors, are paid for their testimony and selected on the basis of the convergence of their views with the litigating position of the client, or their willingness to fall in with the views urged upon them by the client. These are the banes of expert testimony. 72

Given that experts are paid for their testimony, one might question both the helpfulness and reliability of the expert opinion. 73 Judge Easterbrook, for instance, notes that given the partisan nature of expert testimony, courts must “discount” the expert’s testimony to account for its adversarial spin. 74

73. Note that the defendants in Royal Ahold critiqued the plaintiff’s expert, Professor Smit, on the basis that he was not opining as to what the law was, but rather what the law should be.

Rather than analyze existing law, Professor Smit makes legislative and policy arguments as to what he believes should be the law in foreign jurisdictions. The Smit Declaration is peppered with policy statements such as: a “judgment favorable to the class would secure for Dutch shareholders benefits that are judged desirable and appropriate”; “class actions are a significant benefit for society at large”; there is “intrinsic fairness to shareholders to receive the benefits from a class action if they so desire”; and that class actions serve “universally recognized desirable social goals”. Smit’s subjective and unsupported opinions about class actions are, in fact, directly contrary to the views of the foreign jurisdictions at issue here. In any event, this Court is not tasked with determining whether inclusion of foreign investors is somehow “[t]he sensible solution”, but rather what is the law of the foreign jurisdictions.

74. Bodum USA, 621 F.3d at 629. In some cases, parties submit affidavits from stakeholders in the litigation. As with paid experts, the testimony of these parties must account for the particular agenda the stakeholder is attempting to advance. For instance, on the motion for reconsideration of the certification decision in the Vivendi case, defendants adduced submissions from members of the French Ministry of Justice, the former Minister of Justice, a French business organization, and the President of the French Chamber of Commerce. In re Vivendi Universal, S.A. Sec. Litig. (Vivendi II), No. 02 Civ. 5571(RJH) (HBP), 2009 WL 855799, at *4-6 (S.D.N.Y. Mar. 31, 2009). Not surprisingly, each of these submissions was not receptive to the possibility that French courts would recognize U.S. class actions containing French nationals as absent class members. See id. Also, compounding this “spin” problem is the fact that frequently some or all of the relevant source materials on judgment recognition abroad are in languages other than English. Therefore, a court is oftentimes doubly reliant on paid experts: first, for the literal translation of the documents and second, for their legal meaning.
Third, adding to the complication is the fact that a court’s findings on the res judicata issue do not carry precedential value. They are not, in other words, subject to the doctrine of stare decisis. As such, it is entirely possible that based on expert testimony, courts will come to conflicting decisions as to the res judicata effect of a U.S. transnational class judgment in a foreign court. This is precisely what happened in the *Vivendi* and *Alstom* cases decided by the Southern District of New York only months apart. In *Vivendi*, the court thoroughly canvassed French law on the res judicata issue and concluded that it was more likely than not that a French court would recognize a U.S. class judgment; consequently, French investors were included in the class.\(^75\) About a year later, the Southern District of New York decided *Alstom*, a securities class action involving shares of a French corporation that were traded on the New York Stock Exchange. After considering French law and observing that a French court had not yet determined the extent to which France would recognize a U.S. class judgment, the court ultimately concluded that the plaintiffs had not sufficiently demonstrated that French courts would “more likely than not” recognize and give preclusive effect to a judgment rendered by a U.S. court.\(^76\) The court acknowledged that it had come to a different conclusion than the *Vivendi* court and justified the decision by reference to recent legal developments in France which suggested that any opt-out mechanism would be contrary to French public policy.\(^77\) Shortly thereafter, and in light of *Alstom*, the *Vivendi* court was faced with a motion for partial reconsideration of the certification decision in respect of French shareholders.\(^78\) The defendants argued that recent developments in France demonstrated that French courts would not give preclusive effect to a U.S. opt-out class action judgment, and thus, the U.S. action was not a superior means of litigating the French shareholders’ claims.\(^79\) The court rejected the

\(^75\) *Vivendi I*, 242 F.R.D. 76, 102, 109 (S.D.N.Y. 2007).


\(^77\) *Id.* at 287 n.11 (“The Court notes that the *Vivendi* court concluded that a French court would not find that a United States opt-out class action would violate French public policy because, at least in part, there was at that time an ‘ongoing debate in legal and business sectors’ regarding the possibility of French authorities adopting an opt-out framework. *Vivendi*, however, was issued on May 21, 2007, which was prior to the issuance of the Ministry of Justice Letter, the Constitutional Council’s August 16, 2007 decision, and the Attali Commission’s final report in 2008, all of which expressly rejected opt-out mechanisms of class actions as contrary to French Constitutional principles.” (citations omitted)).

\(^78\) *Vivendi II*, 2009 WL 855799, at *1.

\(^79\) *Id.* at *3 (“According to defendants a series of ‘recent events’ in France have ‘now made it clear beyond any doubt’ that opt-out class actions are unconstitutional in France, and
defendant’s argument, citing to the recent trend in France and in other countries to adopt some form of group litigation.⁸⁰ The court recognized that it had come to a different conclusion than that reached in Alstom but felt free to do so, noting, “Of fundamental importance to the Alstrom [sic] decision, however, was the conclusion that this Court does not draw, namely, that Decision No. 89-257 holds that a collective action must provide for each member’s individual consent in order to pass muster under the French Constitution.”⁸¹ Given the inconsistent and seemingly odd results in Alstom and Vivendi, “[b]oth plaintiffs and defendants are left to speculate as to what the next US court will conclude would be the most likely outcome in a French court faced with the question of whether to give the determination of a US court in a class action case preclusive effect.”⁸²

The complicated dynamics surrounding how foreign law is proved in this context suggest that the practice of attempting to predict the res judicata effect of U.S. judgments abroad is less than principled. Stephen Choi and Linda Silberman posit that the current regime leads to “inconsistent determinations” of class membership depending on an individual judge’s assessment as to whether a foreign country will recognize a U.S. class judgment with respect to absent claimants.⁸³ Thus, the process by which res judicata issues are presented to the court—by way of partisan, conflicting expert affidavits that are not subject to the doctrine of stare decisis—should give courts pause about the appropriateness of looking to foreign preclusion law in the domestic certification analysis.⁸⁴

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⁸⁰. Id. at *7.
⁸¹. Id. at *13.
⁸². Shapiro & Kim, supra note 14, at 43.
⁸³. Choi & Silberman, supra note 6, at 501-02.
⁸⁴. One might argue that this “battle of the experts” problem is no different from any other “battle of the experts” problem in a complicated case. It is suggested, however, that the problem is more acute in the transnational class context where experts are opining on a judgment that does not exist, based largely on law that does not exist. Moreover, in other cases involving expert determinations, the expert opinion is necessary to a ruling on the merits. Here, the res judicata guesswork is not necessary to a ruling on class certification.
2. The Principle of Party Prosecution

Another litigation dynamic that impedes the ability of a court to assess the res judicata effect of a U.S. class judgment stems from the principle of party prosecution: the idea that it is the parties themselves who frame the dispute and raise the relevant legal issues. If the parties do not raise the res judicata "problem," then a court will not usually consider the issue on its own motion. Consequently, whether foreigners are included within U.S. class actions may hinge on nothing more than what particular evidence the parties have submitted to the court on the res judicata issue.

In several transnational class actions, courts have certified (or refused to certify) transnational classes based on the failure of one of the parties to adduce any evidence on the res judicata issue. In Bersch, for example, the Second Circuit rested its decision not to certify a class containing foreign plaintiffs in part based on "uncontradicted affidavits" submitted by the defendants to the effect that England, Germany, Switzerland, Italy, and France would not grant preclusive effect to a judgment in favor of the defendant. In Jordan v. Global Natural Resources, Inc., on the other hand, it was the defendant that failed to submit any supporting affidavits attesting to the res judicata effect of a U.S. judgment abroad. The defendant's failure to adduce evidence on this point ultimately led the United States District Court for the Southern District of Ohio to certify a class that included foreign purchasers of stock of a British corporation. The Bersch and

85. It is unclear why a party would fail to make submissions on this point. However, one can surmise that perhaps the added cost and/or complexity of the res judicata analysis would lead one or both parties to avoid the issue. Alternatively, it may be that attorneys in certain transnational class actions are not familiar with the due process implications of including foreign claimants within the class. Indeed, although foreign claimants have been included in American class actions since at least the 1970s, it is only recently that the res judicata issue has gained some judicial attention, particularly in the securities arena.
88. Id. ("However, in Bersch, the defendants submitted affidavits in support of their contention that foreign courts could not recognize a United States judgment. In excluding foreign purchasers, the Bersch court relied on these affidavits. Unfortunately, we do not have the assistance of such affidavits." (citation omitted)); see also Marsden v. Select Med. Corp., 246 F.R.D. 480, 486 (E.D. Pa. 2007) ("Defendants did not consult with experts on Austrian law to determine the likelihood that an Austrian court would recognize such a claim or fail to enforce a U.S. judgment in this case, as the parties did in In re Vivendi;" (citation omitted)); Vivendi, 242 F.R.D. 76, 105 (S.D.N.Y. 2007) (including Dutch shareholders within the class because defendants have offered no evidence to dispute the affidavit of the plaintiffs' expert indicating that the enactment of class action legislation in the Netherlands signifies that recognition of a U.S. class judgment would not be contrary to fundamental principles of
Jordan cases illustrate that judges’ decisions to include or exclude foreign class members are oftentimes based solely on whether the parties have turned their minds to the res judicata issue.

In many cases, parties have adduced evidence as to the res judicata effect of a U.S. class judgment abroad; however, the evidence is scant or conclusory. In such circumstances, courts have tended to subscribe to one of two approaches: either they have found the evidence inadequate to make an informed determination on the res judicata issue and thus decided the issue on the basis of the standard of proof, or they have made assumptions and extrapolations based on the limited evidence presented. In short, in the absence of comprehensive evidence on the question of whether a foreign court would grant preclusive effect to a U.S. class judgment, courts have developed what might be considered either a “restrained” or “activist” approach to the res judicata issue.

Where a party has not adduced much evidence on the preclusive effect of a U.S. class judgment in a foreign country, courts adopting a “restrained” approach have decided the res judicata issue on the basis of the burden of proof. This is readily apparent in Mohanty v. Bigband Networks, Inc., where the United States District Court for the Northern District of California noted, “[T]he arguments and evidence presented by [one of two prospective lead plaintiffs] are a totally inadequate basis for this Court to form any opinion as to whether Cypriot courts would give binding effect to this Court’s judgments.” Because the court had “no basis on which to render an informed ruling on this question,” it excluded the Cypriot claimant from lead plaintiff status. Similarly, in Vivendi, the Southern District of New York noted that the plaintiffs’
expert opinion that "one cannot rule out a U.S. class action settlement or judgment ... will be recognized or enforced in German [sic]" was "insufficient on its face," thereby leading the court to conclude that plaintiffs had not shown a probability that German courts would accord res judicata effect to a U.S. judgment.92 Thus, even though the plaintiffs in Mohanty and Vivendi submitted some evidence on the res judicata issue, the court in both cases did not consider the evidence particularly helpful and thus resolved the issue on the basis of the burden of proof.

Courts adopting an "activist" approach, on the other hand, have shown themselves quite willing to extrapolate from limited factual evidence on the res judicata issue. Nowhere is this clearer than in Alstom, a transnational securities case involving alleged misrepresentations by a French defendant. In Alstom, the Southern District of New York was required to decide, inter alia, whether Canadian claimants should be included in the class of foreign purchasers of the defendant's stock. According to the defendants, plaintiffs did not carry their burden of demonstrating that Canadian courts would recognize a judgment rendered by an American court "because none of the cases cited by Plaintiffs contain any serious analysis of Canadian judgment-recognition law and Plaintiffs did not provide any declarations from Canadian law experts."93 Nonetheless, the Alstom court found that plaintiffs had sufficiently demonstrated that Canadian courts would likely recognize and give preclusive effect to a class judgment rendered by an American court. The court was apparently persuaded by the plaintiffs' argument that a Canadian court would recognize a U.S. class judgment because "Canadian law recognizes opt-out class actions and ... several courts have certified classes which included Canadians as lead plaintiffs or class members."94 Thus, despite what appeared to be a lack of factual evidence on the res judicata issue—especially when compared to the evidence adduced with respect to French, English, and Dutch shareholders—the court decided that it was appropriate to include Canadian shareholders in the class. The decision to do so appears to have been based on the fact that Canadian law provides for opt-out class actions domestically and that other U.S. courts have

92. Vivendi I, 242 F.R.D. at 105 (alteration in original) (internal quotation marks omitted).
93. Alstom, 253 F.R.D. at 291. The Alstom court acknowledged this issue but based its holding on other factors.
94. Id. at 290-91.
certified actions containing Canadian class members. Interestingly, the Alstom court used the limited factual evidence provided by the parties to include foreign claimants in the class, while the Mohanty and Vivendi courts used the limited factual evidence to exclude foreign claimants from the class.

In short, the entire res judicata analysis turns on the nature and extent of evidence adduced by the parties and what courts ultimately decide to do with the evidence. Where one of the parties has not adduced any evidence as to the eventual preclusive effect of a U.S. judgment, the other side "wins by default." Where some evidence is submitted on the res judicata issue, whether foreign class members will be included in a U.S. class action will turn on what evidence is presented and how willing courts are to extrapolate findings from the evidence presented. The inherent malleability and subjectivity of the res judicata inquiry clearly raise concerns about whether courts should be undertaking this line of inquiry when confronted with the issue of transnational classes.

3. Litigation Posture: Contested Certification or Settlement Certification?

Another as-of-yet unexplored facet of the res judicata analysis stems from the litigation posture of the class action. When a plaintiff seeks certification of a transnational class action, both parties will usually have an incentive to raise and adduce evidence on the res judicata issue. The plaintiff will be inclined to submit evidence on the issue in order to meet his burden of proof in establishing the superiority of the class proceeding in respect of foreign claimants. A larger class of plaintiffs translates into increased settlement leverage.

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95. See id. The Alstom court also noted:

Furthermore, the Court is not persuaded that a Canadian court would rely on Article 23 and dismiss any action brought by a Canadian shareholder against Alstom. With respect to Canadian courts, as opposed to the evidence submitted regarding English and Dutch law, Defendants have not submitted sufficient evidence demonstrating that a Canadian court would find Article 23 valid and binding, thereby requiring dismissal of any case brought by a Canadian shareholder against Alstom in deference to French courts.

Id. at 291. Article 23 of the Brussels Regulation, dealing with lis pendens, is not applicable in Canada because Canada is not a signatory to the Brussels Regulation. Council Regulation 44/2001, art. 23, 2000 O.J. (L 012) 1 (EC). That Rule 23 would even be raised by a party, and entertained by a court, as a potential basis upon which a Canadian court may refuse to enforce a foreign judgment shows the danger in American courts trying to apply foreign law in this context.
and increased fees for class counsel. The defendant also has an interest in adducing evidence on the res judicata issue. If a defendant is able to convince a court that the presence of foreign claimants is problematic under the superiority prong of Rule 23, it may either defeat certification in its entirety, or at least cut down the geographical scope of the class. Under either scenario, the defendant benefits: if certification is defeated because the presence of foreign claimants renders a class action an inappropriate means of proceeding, the defendant no longer faces a class action; if the class is narrowed in scope to exclude foreign class members, the defendant faces decreased financial exposure and less pressure to settle.

There is one scenario, however, where the interests of the plaintiffs and defendants are generally aligned: where they are seeking certification of a settlement class. A settlement class is one in which the plaintiffs and defendants agree to settle a class action before the action is certified. The parties will present the court with the detailed terms of the settlement agreement alongside a motion for certification. The United States Supreme Court in Amchem Products, Inc. v. Windsor held that a class that is certified for settlement purposes must nonetheless satisfy all the prongs of Rule 23, with the notable exception of 23(b)(3)(D), the likely difficulties in managing a class action. Because the action will not actually be tried to judgment, the manageability of the class action is not a relevant concern in the settlement context. Although Amchem is generally regarded as making settlement-only certification more difficult for parties, the case did not sound the predicted death knell for settlement-only class actions. Settlement class actions continue to be certified in federal

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96. It stands to reason that the greater the number of claimants in the class, the greater the settlement value will be. That is, a defendant will pay more to settle the claims of 100,000 class members than it will to settle the claims of 10,000 class members. Because lawyers are usually paid a percentage of the settlement amount, it follows that more claimants translates into a higher settlement, which, in turn, translates into a higher fee recovery.

97. See, e.g., In re DaimlerChrysler AG Sec. Litig., 216 F.R.D. 291, 301 (D. Del. 2003) (“However, in the Court’s view, the appropriate way in which to address the concerns related to foreign investors is not to deny class certification, but to certify a class comprising only domestic investors. Accordingly, the Court will certify the class but exclude any foreign investors from it.”).


99. See, e.g., Elizabeth J. Cabraser, Life After Amchem: The Class Struggle Continues, 31 Loy. L.A. L. Rev. 373, 376 (1998) (“In a sense, the Amchem Supreme Court decision was a nonevent. Those who sought to enforce their own nostalgia for the nonexistent halcyon days of ‘every man has his day in court’ were disappointed that Amchem did not smite down either class action settlements or settlement class actions.”).
courts, and many have migrated to state courts which are not bound by the Amchem decision.100

When the parties are seeking certification of a settlement class, there is no reason for either side to raise the potential res judicata problems associated with binding foreign claimants. Class counsel will want the class to be defined as expansively as possible because the fee collected will reflect the number of class members. Similarly, the defendant will also wish to include the maximum number of claimants in the class (both domestic and foreign) in an effort to achieve a global resolution to the underlying legal issues. Most defendants would prefer to buy global peace and have all claims, including foreign claims, swept up in one U.S. proceeding.101 Although it may be the case that the U.S. class action judgment will not "stick" abroad—that is, bind foreign absent class members in their home countries—it seems that defendants would prefer to deal with that risk when, and if, it were to develop.

The clearest illustration of the point is In re Royal Ahold N.V. Securities & “ERISA” Litigation, a transnational securities class action involving alleged fraud perpetrated by a Dutch defendant.102 In that case, plaintiffs sought to certify a class consisting of Dutch, German, English, Swiss, and French purchasers of the defendant’s securities. Both the plaintiffs and defendants retained experts and fully briefed the res judicata issue.103 The defendants strenuously argued that foreign plaintiffs should not be included within the class action, inter alia, because “it is fundamentally unfair to deny Ahold the mutual right to a final judgment in this action, thereby permitting foreign shareholders

100. Jesse Tiko Smallwood, Nationwide, State Law Class Actions and the Beauty of Federalism, 53 DUKE L.J. 1137, 1138-39 (2003) (“Amchem’s effect has been to make settlement classes more difficult to certify in federal courts. Amchem, however, does not apply to state courts. Thus, the same defendants who have criticized state courts for their alleged abuse of the class action system are now also turning to state courts for assistance.”).

101. Samuel Issacharoff & Geoffrey P. Miller, Will Aggregate Litigation Come to Europe?, 62 VAND. L. REV. 179, 206 (2009) (“U.S. experience indicates that defendants desire to extinguish all liability when they settle a class action. That desire is expressed in clauses, demanded by defendants, which declare the entire agreement to be null and void if more than a specified number of plaintiffs opt out of the litigation. The goal of global peace also indirectly benefits members of the class because defendants will pay more for settlements that offer assurances against future litigation.”).

102. See Memo in Opposition, supra note 73, at 5.

103. See id. at 11-13; Reply Memorandum of Law in Further Support of Lead Plaintiffs’ Motion for Class Certification, Appointment of Class Representatives and Appointment of Class Counsel at 14-25, In re Royal Ahold N.V. Sec. & “ERISA” Litig., No. 03-MD-01539, 2006 WL 132080 (D. Md. Dec. 19, 2005).
to use an adverse decision against Ahold to their advantage, without affording Ahold the benefit of any success it may achieve here.

Before a decision was reached on class certification, the parties agreed to settle the action. They jointly submitted a motion for certification of a settlement class comprised of "[a]ll persons and entities [that] purchased and/or received as a dividend Royal Ahold N.V. common shares and/or American Depository Receipts [during the period] from July 30, 1999 through February 23, 2003, regardless of where they live or where they purchased their Ahold shares." The United States District Court for the District of Maryland ultimately approved the settlement which purported to bind both U.S. and non-U.S. class members, and the res judicata problem was never addressed any further. Royal Ahold clearly highlights that the preclusive effect of a U.S. judgment abroad is only a problem if the defendant says it is.

Thus, whether res judicata issues will even be raised in any given transnational class action is a function of the posture of the litigation—that is, whether the case is a contested certification or a settlement certification. Usually, only in the former scenario will the defendant have any incentive to raise due process concerns related to foreign preclusion. This means that, as in Royal Ahold, whether foreign claimants are included within the class may turn simply on whether the certification motion is adversarial or nonadversarial. Clearly, this is a less than principled way of ascertaining foreign claimants' membership in U.S. class actions.

In short, there are certain features of the American litigation system generally, and class litigation in particular—the proving of foreign law via conflicting expert testimony, the principle of party prosecution, and the distinction between certification for litigation purposes and certification for settlement purposes—that cloud the transnational class action landscape. Owing to these litigation dynamics, courts are placed in a position where it is difficult to determine in a principled manner whether including foreign class

104. Memo in Opposition, supra note 73, at 12.
106. See also In re Parmalat Sec. Litig., 497 F. Supp. 2d 526, 531-32 (S.D.N.Y. 2007) (dismissing securities claims against two banks because the minimal U.S.-based conduct alleged did not warrant extraterritorial application of the securities laws in favor of non-U.S. resident absent class members; when defendants subsequently settled the class action claims, the district court certified a worldwide class for settlement purposes and entered a final judgment which included releases covering non-U.S. absent class members).
members in a U.S. action is “superior to other available methods for fairly and efficiently adjudicating the controversy.”

B. Structural Restrictions on the Search for Res Judicata

As discussed, there are issues surrounding how and when preclusion concerns are raised by the parties to a transnational class action. Specifically, the use of expert affidavits, the principle of party prosecution, and the litigation posture of the case greatly affect the ability of a court to properly gauge and analyze the res judicata issues at play. Aside from these general features of class litigation that interfere with a court’s assessment of the res judicata issue, there are also concerns about what courts are called upon to predict: whether a U.S. class action judgment that is not yet in existence would, at some later point in time, be accorded res judicata effect by a foreign court.

In this Part, I advance the position that the res judicata effect of an eventual U.S. class judgment is inherently unknowable ex ante. Thus, efforts at ascertaining whether a defendant faces the risk of relitigation abroad because a foreign court will not grant preclusive effect to a U.S. class judgment are tantamount to legal crystal ball-gazing. I develop this idea by looking at three different issues: the complexity of foreign law on the recognition and enforcement of judgments, the newness of class action law in most foreign countries, and the distinction between general and fact-specific grounds for nonenforcement of a U.S. class judgment (what I refer to as the distinction between “extrinsic” and “intrinsic” grounds for nonrecognition). The confluence of these three factors—especially when viewed in combination with the complicated litigation dynamics in class proceedings—suggests that the practice of speculating as to the res judicata effect of U.S. judgments is inappropriate and should be abandoned.

1. Complexity of Foreign Law on the Recognition and Enforcement of Judgments

In assessing whether a foreign court would accord res judicata effect to a U.S. class judgment, U.S. courts have found themselves parsing through a morass of foreign law on the recognition and enforcement of judgments. The analysis is complicated by the fact

108. Wasserman persuasively argues that the res judicata analysis is even more complicated than the American case law would suggest:
that courts have had to discern first, what that foreign law is, and second, how that foreign law would apply to a prospective U.S. class judgment, bearing in mind that "actual recognition practice is more diverse than the recognition law on the books." This is particularly difficult given that few foreign jurisdictions have directly addressed the issue of the enforceability of a U.S. class judgment.

Despite the complexity of foreign law on judgment enforcement, there appear to be several recurring grounds upon which foreign courts might base a decision not to grant preclusive effect to a U.S. judgment, each of which is explored in some detail below. The purpose of the discussion is not to provide a fulsome analysis of potential grounds for nonrecognition in various foreign jurisdictions. Rather, the objective

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." 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.

Wasserman, supra note 7, at 316 (footnote omitted). Wasserman's position lends further support to my overarching argument in this Article: that owing to the complexity of the analysis, U.S. courts are not able to predict the fate of a U.S. class judgment abroad. I disagree with her overarching premise, however, that U.S. courts should now take the analysis one step further by looking at international preclusion law.


[T]here have been countries in which some of the domestic recognition requirements have been interpreted so as to make recognition of U.S. judgments more difficult both to protect domestic firms from U.S. practices and in response to U.S. approaches to transnational litigation that have been insensitive to sovereignty concerns of those countries.

Id. at 181-82.

110. Bermann, supra note 1, at 96 ("U.S. courts are obviously accustomed to deciding when they should (or should not) recognize or enforce a foreign country judgment, but they are much less accustomed to predicting the fate of a U.S. class action judgment in a foreign court. And yet, prediction is the most one can reasonably offer, given that no foreign court has ever addressed the question or even a closely analogous one." (Footnote omitted)); Pinna, supra note 70, at 38 ("[T]he specificities of such a procedure make it nearly impossible to apply reasoning by analogy, simply because European courts have not had the opportunity to rule on similar situations.").

111. For an analysis of the enforceability of U.S. class judgments in Europe generally, see Pinna, supra note 70. For country-specific materials, see John C.L. Dixon, The Res

a. Jurisdiction

A foreign court may refuse to enforce a U.S. class judgment on the basis that the U.S. court lacked jurisdictional competence in the matter. In the traditional two-party adjudication context, the jurisdiction issue is fairly straightforward. The foreign court will consider whether a U.S. court had the power to bind a defendant.\footnote{112. A related concern stems from the fact that some countries use recognition law to "exercise some leverage in response to what they see as power play by U.S. courts." Baumgartner, supra note 109, at 228. If this is the case, then U.S. courts are never able to approximate the decision that will be rendered by the foreign court simply by looking to the technical requirements for enforceability in the foreign state.}

Under the law of many jurisdictions, whether the foreign court will regard the defendant as bound by a U.S. judgment will turn on a consideration of the nature of the contacts that the defendant had with the litigation in the United States.\footnote{113. The court need not consider whether the United States had the power to bind the plaintiff, as the plaintiff has evidenced his consent to be bound by the result by virtue of selecting the United States as the forum for litigation.} In certain countries, however, a defendant must be “present” in the United States, or have consented to jurisdiction in the United States, in order for a foreign court to regard the United States as jurisdictionally competent.\footnote{114. For instance, in the United States, the defendant is required to have "minimum contacts" with the forum (see Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945)); in Canada, there must be a "real and substantial connection" between the forum and the litigation (see Morguard Invvs. Ltd. v. De Savoye, [1990] 3 S.C.R. 1077 (Can.); in France, and some other civil law jurisdictions, there must be a "characteristic link" between the forum and the cause of action (see Cour de cassation [Cass.] [supreme court for judicial matters], 1e civ., Feb. 6, 1985, Bull. civ. I, No. 470 (Fr.)).} Additionally, some foreign jurisdictions will only regard a U.S. court as competent in enforcing a U.S. class judgment if the defendant was "present" in the United States, or has consented to jurisdiction in the United States, in order for a foreign court to regard the United States as jurisdictionally competent.\footnote{115. For the English position, see, for example, Tanya J. Monestier, Foreign Judgments at Common Law: Rethinking the Enforcement Rules, 28 Dalhousie L.J. 163, 168 (2005) ("Apart from 'presence' and 'submission,' it is thought that no other basis of jurisdiction will suffice to render a foreign court competent in the international sense, such that its judgment will be enforced in England.").}
circumstances where the U.S. court assumed jurisdiction on grounds that the foreign court itself employs in domestic civil litigation (the "mirror image" principle).116

The jurisdiction issue, however, takes on an added dimension in the class action setting. The nature of a Rule 23(b)(3) class action is such that class members are presumptively included within the class unless they take affirmative measures to request exclusion, or opt out. Unlike the plaintiff in traditional litigation, the plaintiffs in class litigation have not actively consented to the jurisdiction of the U.S. court. As such, a foreign court will likely need to consider whether the U.S. court has personal jurisdiction over foreign absent class members. In the United States, this issue was definitively addressed over twenty-five years ago in *Phillips Petroleum Co. v. Shutts*, where the Supreme Court held that a court has personal jurisdiction over absent plaintiffs as long as they have been provided with adequate representation, notice, and the opportunity to opt out of the class action.117

In other countries, however, the question of personal jurisdiction over plaintiffs is a decidedly alien one. That is, because most other jurisdictions do not have anything akin to U.S.-style class action litigation, the issue of personal jurisdiction over plaintiffs has simply not arisen.118 For instance, the Southern District of New York noted in *Vivendi*, "[The] English authorities consistently discuss the competency of a foreign court in terms of whether there was jurisdiction over the defendant."119 In the vast majority of

116. Linda J. Silberman, *Some Judgements on Judgments: A View from America*, 19 K.L.J. 235, 255 (2008) ("Some countries adopt what is often characterized as 'mirror image' jurisdiction. That is, if a country permits the exercise of a particular basis of jurisdiction over a foreign defendant by its courts, it will accept a similar assertion of jurisdiction by a foreign court as an appropriate basis of jurisdiction in the recognition/enforcement context.").


118. Pinna, *supra* note 70, at 57 ("[Personal jurisdiction over plaintiffs] is not generally a condition required for recognition but the peculiarity of US class actions procedures does seem to require such supplementary investigation by the court . . . . The absence of case law on this point renders the issue very complex.").

119. *Vivendi*, 242 F.R.D. 76, 102 (S.D.N.Y. 2007). Some English commentators take this to mean that jurisdiction over the plaintiff is not a relevant consideration in enforcing a U.S. class judgment. *See* Harris, *supra* note 111, at 633 ("[I]t can be argued that unless and until a specific exception evolves (and none has evolved yet in English private international
circumstances where foreign law is silent on the question of personal jurisdiction over absent plaintiffs, U.S. courts are left in an uncomfortable position: they can ignore the issue altogether; they can assume that the foreign court would extend general principles of jurisdiction over the defendant to the class of absent plaintiffs; or they can assume that a foreign court would adopt U.S.-style Shutts reasoning to the issue. Clearly, none of these options is entirely satisfactory; they either result in U.S. courts ignoring a critical recognition issue or "making up" foreign law based on limited information.

b. Public Policy

Nearly all legal systems provide a basis for not recognizing or enforcing a foreign judgment where to do so would violate the forum's public policy.\(^{120}\) The public policy defense to recognition (sometimes referred to by the French term "ordre public") is generally regarded as connoting something more than simply a distaste of a foreign law or some aspect of the foreign judgment.\(^{121}\) Rather, public policy is seen as protecting against the enforcement of judgments that grossly offend a sense of universal justice or basic morality.\(^{122}\)

At the forefront of concerns about class actions is the issue of whether the opt-out feature of U.S. class actions is compatible with the public policy of foreign countries. In the words of one European


\(^{121}\) Notably, public policy is not necessarily offended because the particular cause of action or legal mechanism employed in the foreign court does not exist domestically. See Pinna, *supra* note 70, at 41 ("International public policy does not prevent a juridical situation created abroad to produce effect in the forum simply because the legal institution or the procedure applied do not exist. In other words, the mere fact that a legal rule or a procedural tool that does not exist, or even could not be enacted, in the country where a foreign judgment is asked to produce its Res Judicata effects, is not enough to consider the foreign judgment to be contrary to public policy.").

\(^{122}\) Blom, *supra* note 120, at 374 ("Public policy intervenes to block the ‘normal’ application of other conflicts rules in order to avoid an unacceptable derogation from values that the court sees as fundamental to its own legal system."); Mills, *supra* note 120, at 202 ("As a ‘safety net’ to choice-of-law rules and rules governing the recognition and enforcement of foreign judgments, it is a doctrine which crucially defines the outer limits of the ‘tolerance of difference’ implicit in those rules.").
commentator, "Even if the legal grounds are not always the same, it is clear that everywhere in Europe the main problem with US class actions is the opt-out mechanism and its asserted contrariety to the domestic foundations of civil procedure." The argument regarding public policy manifests itself in several ways, but all revolve around the central theme that a plaintiff can only become a party to the litigation (and therefore be bound by any result) where he has affirmatively engaged the processes of the court. The court in Vivendi elaborated upon how recognition of a U.S. opt-out class judgment might be counter to public policy in France:

First, it is an accepted principle of French law that no one may claim in court by proxy. This principle-in French, *nul ne plaide par procureur*-procedurally requires anyone acting as a plaintiff or defendant in a lawsuit to make his identity known individually in the legal proceedings. As a result, defendants' [sic] argue, the fact that not all members of the putative class will be identified by name, but instead represented by court-appointed class representatives, will be fatal to recognition of a U.S. judgment in this case by a French court. Defendants further argue that the failure to identify each plaintiff individually contravenes French notions of due process. This is because of a "strong principle" of French law that no one should be a plaintiff without consenting affirmatively to do so. Members of an opt-out class, of course, are not required to take any steps to be included in this class. Defendants also argue that the opt-out class is inconsistent with the fundamental principle of adversarial proceedings, *le principe du contradictoire*, which gives every litigant the "personal freedom" to appear and be heard during any proceeding affecting his rights. Particularly where individual notice is not required (as is permissible under Rule 23), a class member could be deprived of his fundamental right to appear without ever having received actual notice.

The public policy debate over the recognition of the U.S. opt-out mechanism takes on a similar flavor in other jurisdictions. In Germany, for instance, the argument might be that a U.S. class action judgment violates Article 103 of the German Constitution, which establishes the right of citizens to participate and be heard in legal proceedings. Or, in Sweden, claimants may resist the recognition of a U.S. class judgment on the basis that the opt-out feature of Rule 23

123. Pinna, *supra* note 70, at 41.
124. *Vivendi*, 242 F.R.D. at 100 (citations omitted).
125. *Id.* at 104. Note that according to the affidavits presented in *Vivendi*, this form of due process protection is referred to as the right of "correct representation" or the "disposition maxim." *Id.*
violates "the Swedish principle that people have the right to decide for
themselves whether they want to file a suit or not."\footnote{126} In short, the
public policy defense to recognition requires U.S. courts to confront
the intricate issue of whether the opt-out feature of U.S.-style class
actions is fundamentally incompatible with core principles of
procedure in foreign states—a feat which involves delving deep into
foreign procedural and constitutional law.

c. Natural or Procedural Justice

A foreign court may also refuse to enforce a U.S. class judgment
on the basis that the judgment, or the process by which it was rendered,
contravenes fundamental principles of natural justice.\footnote{127} Natural justice
entails the right to a fair procedure, which, at a minimum, includes
notice and an opportunity to be heard.\footnote{128} As with other defenses to
recognition, natural justice in traditional two-party litigation is
generally conceptualized in reference to the defendant.\footnote{129} In the class
context, an absent plaintiff can also raise natural justice as a defense to
the enforcement of a U.S. judgment. The natural justice argument
could take on several permutations. First, an absent plaintiff could
argue that active consent is necessary in order to bind the plaintiff
class. As such, any form of notice whereby plaintiffs are required to
opt out is per se deficient. This argument clearly dovetails with that of
public policy, described above. Second, an absent plaintiff may argue
that \textit{actual} notice is required under principles of natural justice. Under
this logic, an absent plaintiff could only be bound by a U.S. class
judgment in circumstances where he actually received the notice and
did not take steps to opt out of the proceeding. Third, an absent
plaintiff may challenge the particular \textit{content} of the notice, arguing that


\footnote{127. See INT\'L BAR ASS\'N LEGAL PRACTICE DIV., \textit{GUIDELINES FOR RECOGNISING AND ENFORCING FOREIGN JUDGMENTS FOR COLLECTIVE REDRESS} 23 (Oct. 16, 2008) ("Natural justice and due process as requirements for recognition or enforcement of a foreign judgment have universal acceptance.").}

\footnote{128. See, e.g., Council Regulation 44/2001, art. 34, 2000 O.J. (L 012) 1 (EC) [hereinafter Brussels Regulation]. The Brussels Regulation is, of course, not directly applicable to the enforcement of U.S. judgments, as it is only concerned with the enforcement of judgments issued by E.U. Member States. However, it does embody what are generally regarded as universal principles pertaining to the recognition and enforcement of foreign judgments.}

\footnote{129. See id.}
the specific notice in question was complicated or confusing, and thereby rendered the plaintiff unable to meaningfully understand his rights. Fourth, the absent plaintiff may argue that the notice was not disseminated widely enough, such that the proceeding was not a truly representative one. In any of these scenarios, the end result would be the same: the judgment would not be accorded preclusive effect, and the absent class member would be permitted to relitigate the claim in a foreign jurisdiction.

d. Miscellaneous Grounds for Nonenforcement

There are myriad other bases upon which a foreign court may conclude that it is not appropriate to accord res judicata effect to a U.S. class judgment. These include: the judgment is not considered final;\textsuperscript{130} the judgment is not "on the merits";\textsuperscript{131} the judgment is not for a fixed sum;\textsuperscript{132} there is an already-existing forum judgment that is incompatible with the U.S. judgment;\textsuperscript{133} the judgment conflicts with an already-existing foreign judgment that is entitled to recognition;\textsuperscript{134} the U.S. judgment raises questions of foreign public law;\textsuperscript{135} the foreign

\textsuperscript{130} Baumgarten, supra note 109, at 191 (observing that generally for a foreign judgment to be recognized by a European court, the judgment must be final). Note, however, that this is not a requirement for enforceability under the Brussels Regulation. \textit{See also} Richard Fentiman, \textit{The European Regime for Enforcing Foreign Judgements}, 19 INT'L L. PRACTICUM 160, 160 (2006).

\textsuperscript{131} \textit{See}, e.g., Andrew Dickinson, \textit{Transnational Securities Class Actions—A Private International Law Perspective}, CONFLICT OF LAWS.NET (July 15, 2010), http://conflict oflaws.net/2010/transnational-securities-class-actions-a-private-international-law-perspective ("Finally, in the case of a U.S. judgment approving a class action settlement, it seems doubtful whether [under English law] the judgment meets the requirement that the judgment be ‘on the merits’ . . . ").

\textsuperscript{132} For the position in England, see Beatty v. Beatty, [1924] 1 K.B. 807 (C.A.) at 816 (Eng.) ("No doubt a judgment to be final must be for a sum certain. But a sum is sufficiently certain for that purpose if it can be ascertained by a simple arithmetical process."). Some jurisdictions have abandoned the requirement that the judgment be for a fixed sum. \textit{See}, e.g., Pro Swing Inc. v. Elta Golf Inc., [2006] 2 S.C.R. 612, para. 15 (Can.) ("[T]he time is ripe to revise the traditional common law rule that limits the recognition and enforcement of foreign orders to final money judgments."); Fentiman, supra note 130, at 160 (noting that under the Brussels I Regulation, "[t]he judgment need not be . . . for a fixed sum of money" in order to be enforceable).

\textsuperscript{133} \textit{See}, e.g., Brussels Regulation, supra note 128, art. 34 ("A judgment shall not be recognised: . . . if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought . . . ").

\textsuperscript{134} \textit{See}, e.g., id. ("A judgment shall not be recognised: . . . if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.").

\textsuperscript{135} Buschkin, supra note 6, at 1579 ("[C]ourts are often wary about enforcing foreign judgments based upon public law subjects, such as securities or antitrust.").
court applied the wrong law; the foreign court did not have subject matter jurisdiction; or the judgment was obtained by fraud. Each of these general grounds for nonrecognition would provide a foreign court with a legitimate basis upon which to refuse enforcement of a U.S. class judgment and, possibly, to permit an absent plaintiff to litigate the claim abroad.

This brief survey illustrates the breadth of challenges that absent plaintiffs may ultimately level at a U.S. class judgment in order to escape its res judicata effect abroad. U.S. courts considering whether a foreign court would recognize an eventual class judgment are forced to navigate through a complicated maze of foreign law on the recognition and enforcement of judgments.

In fact, a quick perusal of the U.S. case law shows the intricacies of the foreign judgment recognition landscape in practice. In *Vivendi*, the Southern District of New York identified the following elements as relevant to the enforcement of a U.S. judgment in France:

The conditions that must be met under *Munzer* in order to grant exequatur may be summarized as follows: (1) the foreign court must properly have jurisdiction under French law (the “jurisdictional prong”); (2) the foreign court must have applied the appropriate law under French conflict-of-law principles (the “applicable-law prong”); (3) the decision must not contravene French concepts of international public policy (the “public policy prong”); and (4) the decision must not be a result of *fraude á la loi* (evasion of the law) or forum shopping (the “forum shopping prong”).

In turn, each of the four prongs of the *Munzer* test for the recognition and enforcement of judgments contains further “sub-prongs.” For instance, whether a U.S. court is regarded as jurisdictionally competent is governed by the *Simitch v. Fairhurst* case, which holds that in order for a foreign court to have properly exercised its jurisdiction, the following requirements must be met: “(1) the case must not fall within the exclusive jurisdiction of the French courts,

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136. Silberman, supra note 116, at 253 (“[A] few countries continue to use a choice-of-law check as part of the law on foreign-judgment recognition and enforcement practice.”).

137. Fentiman, supra note 130, at 161 (“A judgment is unenforceable if the court of origin assumes jurisdiction contrary to the Regulation’s rules concerning insurance or consumer contracts, or those providing for exclusive jurisdiction under article 22 . . . .”).

138. Baumgartner, supra note 109, at 191 (noting that generally for a foreign judgment to be recognized by a European court, the judgment must not be based on fraud).

139. *Vivendi I*, 242 F.R.D. 76, 96 (S.D.N.Y. 2007). Note that Matousekova argues that there is an additional element that must be satisfied in France, namely that “the foreign proceedings must have been conducted in a regular manner.” Matousekova, supra note 111, at 654.
(2) the circumstances of the case or judgment at issue must be linked in a 'characterized manner' to the foreign court, and (3) the choice of the foreign court must not be fraudulent.” Each of these Sinitch elements pertaining to the jurisdictional prong requires additional refinement. Part (3) of the Sinitch test, for example, is further subdivided into two different elements: “[T]he foreign judgment must not have been obtained through deceitful maneuvers[,] [and] the case must not have been brought in a foreign court in order to obtain a ruling from that foreign court, under foreign law that differs from the law to which a litigant would otherwise be subjected domestically.”

An analysis of each of the prongs and subprongs of the French framework for the recognition and enforcement of judgments requires U.S. courts to scrutinize painstakingly the law through the lens of French jurisprudence. The potential for error is plain: a U.S. court must correctly “guess” as to how a French court would answer no less than a dozen questions.

Clearly, the grounds upon which a foreign court may refuse to enforce a U.S. transnational class judgment are manifold and will depend on the particulars of judgment enforcement in the foreign state. However, given the number of grounds upon which a U.S. class judgment might be refused recognition and the complexity of foreign recognition law, it is virtually impossible for U.S. courts to accurately assess whether a foreign court would accord preclusive effect to the U.S. judgment.

2. Foreign Law on Aggregate Litigation

In assessing whether a foreign court would enforce a U.S. transnational class judgment, many U.S. courts have examined the status of aggregate litigation generally in the foreign jurisdiction.

141. Vivendi I, 242 F.R.D. at 98 (internal quotation marks omitted).
142. Note that sometimes it may be possible for a U.S. court to accurately conclude that a foreign court would not enforce a U.S. class judgment—for example, because there is a statute precluding enforcement in the relevant jurisdiction.
143. I use the term “aggregate litigation” deliberately because it encompasses both class actions as well as other forms of collective redress. See Nagareda, supra note 4, at 20 (“The term ‘aggregate litigation’ creates a big tent, within which one may place both representative litigation for claimants as a collective group and consolidated litigation whereby each claimant’s suit has a nominally separate existence.”).
144. The issue is usually raised as part of the analysis of the “public policy” of the foreign jurisdiction. See, e.g., In re Alstom SA Sec. Litig., 253 F.R.D. 266, 285-87 (S.D.N.Y. 2008) (looking at the status of French law on aggregate litigation as part of the “public
At a very broad level, the more the foreign country regime resembles that which exists in the United States, the more likely a U.S. court is to conclude that the foreign court would accord preclusive effect to a U.S. class judgment. In reality, however, U.S. courts are unable to glean much insight into whether a foreign court would enforce a U.S. class judgment based on an analysis of foreign aggregation mechanisms. Such mechanisms—to the extent that they even exist—are new, evolving, and do not look anything like U.S. Rule 23. Accordingly, "It is risky...to attempt a detailed analysis of any particular country’s venture into class actions."\(^{145}\)

Aggregate litigation outside the United States is in a nascent state.\(^{146}\) Although class actions in their modern incarnation have been around in the United States since the 1960s,\(^{147}\) very few jurisdictions outside the United States have any sort of track record with aggregate litigation, much less "U.S.-style" class actions.\(^{148}\) It is only in the past

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\(^{145}\) Issacharoff & Miller, supra note 101, at 192.

\(^{146}\) See Samuel P. Baumgartner, Class Actions and Group Litigation in Switzerland, 27 NW. J. INT'L L. & BUS. 301, 308-09 (2007) ("Although there have increasingly been suggestions to introduce class actions—at least in limited circumstances—in many other countries, few of those countries have yet acted on them. Among those that have, most are squarely in the common law tradition (Australia, England, and several Canadian provinces other than Quebec), and a few (Quebec and Sweden) have a close connection to common law procedure, with Brazil as the big exception." (footnotes omitted)).

\(^{147}\) For a historical account of class action litigation, see Stephen C. Yeazell, Group Litigation and Social Context: Toward a History of the Class Action, 77 COLUM. L. REV. 866 (1977).

\(^{148}\) Deborah R. Hensler, The Globalization of Class Actions: An Overview, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 7, 16 (2009), available at http://ann.sagepub.com/content/622/1/7 ("Because the United States has been the leading model for class action adoption in recent years, its choices with regard to these different class action procedure design features—standing for private actors to represent a class, trans-substantive application of the procedure, availability of money damages, and an opt-out rather than an opt-in procedure for money damage class actions—constitute what has come to be known as a ‘U.S.-style class action.’ Of the eighteen countries that reported some form of class action procedure, only six in addition to the United States have such a class action regime: Australia, Canada, Indonesia, Israel, Portugal, and Norway.").
decade or so that certain foreign countries have begun to experiment with some form of aggregation of claims.\footnote{According to Nagareda, the support for aggregate litigation abroad has rendered the U.S.-style class action “less exceptional” in the Western world. The point, however, should not be overstated: the receptiveness of foreign countries to new procedures for aggregate litigation “stops markedly short of full-fledged embrace for U.S.-style class actions.” Nagareda, \textit{supra} note 4, at 6.}

Moreover, the aggregate litigation mechanisms that are emerging outside the United States do not resemble the classical American Rule 23 opt-out class action model.\footnote{See Mark A. Behrens et al., \textit{Global Litigation Trends}, 17 Mich. St. J. Int’l L. 165, 172-73 (2009) (“Not all counties [sic] ... are jumping on the bandwagon. For instance, in counties [sic] such as Japan, Austria, Belgium, and Switzerland, suggestions to examine the possibility of introducing class action procedures have met with considerable opposition.” (footnotes omitted)).} One author observes that in Europe, opt-out forms of collective redress are “most definitely the exception,” with only Denmark, the Netherlands, and Portugal adopting some version of the opt-out mechanism.\footnote{Rachael Mulheron, \textit{The Case for an Opt-Out Class Action for European Member States: A Legal and Empirical Analysis}, 15 Colum. J. Eur. L. 409, 415 (2009). Note that Italy’s class action statute, enacted into law in 2010, also provides for an opt-out mechanism. \textit{See} Roald Nashi, \textit{Note, Italy’s Class Action Experiment}, 43 Cornell Int’l L.J. 147, 148 (2010).} Many foreign countries are in fact deliberately taking steps to fashion collective redress procedures that do not mimic those in the United States. Several commentators have noted this conscious trend away from U.S.-style collective litigation in Europe. For instance, Samuel Issacharoff and Geoffrey Miller write:

And, yet, one need spend only a few minutes in conversations with European reformers before the proverbial “but” enters the discourse: “But, of course, we shall not have American-style class actions.” At this point, all participants nod sagely, confident that collective actions, representative actions, group actions, and a host of other aggregative arrangements can bring all the benefits of fair and efficient resolution to disputes without the dreaded world of American entrepreneurial lawyering. And no doubt the American entrepreneurial ways must and will be resisted fully, in much the same way that Europe has held off the unwelcome presence of McDonald’s or Starbucks in its elegant piazzas.\footnote{Issacharoff & Miller, \textit{supra} note 101, at 180.}

Similarly, Richard Nagareda observes:

European leaders speak of designing distinctively European solutions that do not import what they see as the “litigation culture” of the United States. EU Competition Commissioner Neelie Kroes emphasizes: “I
do not want to cut and paste an American-style system here. We must avoid excessive levels of litigation.” EU Consumer Protection Commissioner Meglena Kuneva adds: “This is not a John Grisham story.”

As these authors intimate, foreign aversion to U.S.-style litigation can be seen as both a reaction to the perceived excesses and abuses associated with U.S. class actions and as a manifestation of a different cultural perspective on the resolution of claims. Regardless of the reasons for this aversion, the fact remains that foreign countries are consciously embracing mechanisms of aggregate dispute resolution that do not resemble the American Rule 23 opt-out model.

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155. It is sometimes said that European countries prefer methods of aggregation which prioritize “closure” rather than “enabling.” Nagareda, supra note 4, at 28 (“[O]ne might say that Europe seeks to strike a precarious balance—to facilitate the closure of related civil claims in the aggregate but, at the same time, not to ‘enable’ litigation.”). Nagareda continues:

[T]he relative emphasis in Europe on closure over enabling is revealing. Such a view accords considerable normative significance to the individual civil claim in the sense of taking it as something like a strong baseline for what one might call the appropriate level of claiming. On this view, aggregate procedure—if embraced at all—largely comes along afterwards to deal with the claims already in the system.

Id. at 30.

156. One notable exception is the Dutch Collective Settlement Act of 2005. See Murtagh, supra note 7, at 40. The Act is aimed at facilitating the settlement (not litigation) of mass disputes through aggregation on an opt-out basis. Id. at 39-40. The potency of the Dutch Act rests on the fact that a settlement that has the judicial approval of a Dutch court is readily enforceable throughout the European Union through the Brussels Regulation. Id. at 38. Some have observed: “[T]he Netherlands is becoming a mecca for European class action settlements, in the way that Delaware has become a destination for bankruptcy law.” Michael Goldhaber, “Shell Model” Opens Door to European Class Actions, AM. LAW.COM (Jan. 7, 2008), http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1199700328427. In 2009, the Amsterdam Court of Appeals issued a ruling authorizing Royal Dutch Shell to begin funding an April 2007 securities settlement reached under the Dutch Act in the amount of $381 million. See Press Release, The Hague, Amsterdam Court of Appeals Declares Shell Settlement Binding (May 29, 2009), available at http://www.shellsettlement.com/docs/20090529-press%20release%20amsterdam%20court%20o%20appeals%20declares%20shell%20settlement%20binding.pdf. Recently, on January 10, 2011, a special foundation backed by over 140 institutional investors and 2000 individuals from the United States, Europe, Middle East,
In concrete terms, most jurisdictions outside the United States have shown a preference for opt-in forms of aggregate litigation. An opt-in collective redress procedure requires that class members affirmatively consent to participate in the litigation in order to be bound thereby. Leaving aside the merits of the debate between the desirability of opt-in versus opt-out regimes,\textsuperscript{157} the opt-in regime is thought to better accord with foreign notions of due process by "respect[ing] the jurisprudential idea that litigation cannot be legitimate, as regards an innocent party, unless he has voluntarily agreed to join the action."\textsuperscript{158}

Whereas class litigation in the United States allows individual litigants to pursue damages in a wide variety of substantive contexts (for example, antitrust, and securities and consumer protection) collective action mechanisms that are developing abroad tend to be more circumscribed in scope.\textsuperscript{159} In addition, in many foreign countries, private individuals do not have standing to bring a collective action; rather, the action must be initiated by some sort of public association and Australia filed a securities action in Utrecht Civil Court under the Dutch Act over the collapse of Belgium-based financial services provider Fortis N.V. \textit{See International Investors Join Forces in Support of Lawsuit Against Fortis over Massive Misrepresentation Ahead of Bank's Collapse in 2008, PR Newswire (Jan. 10, 2011), http://www.prnewswire.com/news-releases/international-investors-join-forces-in-support-of-lawsuit-against-fortis-over-massive-misrepresentation-ahead-of-banks-collapse-in-2008-113195084.html.} Note, however, that Dutch courts are still grappling with issues concerning the jurisdiction of Dutch courts over foreign parties. \textit{See, e.g., Gerechtshof [Hof] [Amsterdam Court of Appeal], 12 Nov. 2010, No. 200.070. 039/01 (SCOR Holding (Switzerland) AG/Zurich Fin. Serv. Ltd. Stichting Convenun Sec. Compensation Found./Vereniging VEBNCVB) (unreported) (Neth.), translated in Sworn Translation from Dutch to English of Decision by the Amsterdam Court of Appeal in Case No. 200.070.039/01 rendered on 12 November 2010, (A.J.B. Burrough, 24 Feb. 2011), available at http://www.blbglaw.com/cases/00172_data/Judgmentof12November2010CourtofAppeal.pdf (unreported) (Neth.) (holding provisionally that the Dutch court had jurisdiction over foreign purchasers named in the settlement). For further discussion of the Dutch Act, see Tomas Arons & Willem H. Van Boom, \textit{Beyond Tulips and Cheese: Exporting Mass Securities Claim Settlements from the Netherlands}, 2010 EUR. BUS. L. REV. 857.

\textsuperscript{157} See Issacharoff & Miller, \textit{supra} note 101, at 202 ("But opt-in procedures also pose problems [including] 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.").

\textsuperscript{158} \textit{Id.}

\textsuperscript{159} Hensler, \textit{supra} note 148, at 14 ("In about half of the countries that have adopted some form of class action procedure (ten of eighteen), the procedure is 'trans-substantive,' meaning that it can be used for a variety of substantively different legal claims. In the remaining countries, the use of class actions is limited to securities, antitrust (anticompetition), consumer fraud, or constitutional rights claims or some designated mix thereof.").
or government agent. For instance, the Finnish Group Action Act (2007) applies exclusively to consumer disputes and can only be initiated by the government-funded "consumer ombudsman." In France, two forms of collective action procedures exist: "Actions Taken in a Collective Interest" and "Joint Representative Actions." While the scope of both is fairly broad, only authorized associations may initiate such actions. In Germany, collective litigation generally takes the form of complaints by interests groups, wherein associations serve as intermediaries between the individual person and the state. A specialized collective dispute resolution procedure, the Capital Investors' Model Proceeding Law (KapMuG), also exists in Germany to provide for the resolution of securities disputes.

Several foreign countries have fashioned collective action procedures that do not allow individual claimants to collect money damages for injuries suffered. Rachael Mulheron notes that fourteen Member States of the European Union do not have any form of collective redress mechanisms that would enable groups of claimants to recover judicially-awarded damages. Rather, in the vast majority of these jurisdictions, some form of group or representative action may be initiated but only for a limited purpose, such as seeking injunctive relief.

160. Id. ("Who has legal standing to bring representative litigation differs across jurisdictions and within jurisdictions standing is often conditioned on multiple factors. Standing may be limited to associations that the government has approved for the purpose of bringing representative actions, or to specially designated public officials.").

161. Klaus Viitanen, Finland, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 209, 213 (2009), available at http://ann.sagepub.com/content/622/1/209 ("The Finnish act clearly differs from the other Nordic countries. According to the committee report published in 2006, the scope of application was to be restricted to two types of disputes: mass consumer disputes and environmental damage issues. The government’s proposal adopted by Parliament was even stricter: group action would be possible in mass consumer disputes only. So according to article 1.1. of the Group Action Act, the act applies, within the limits of the competence of the Consumer Ombudsman, to the hearing of a civil case between a consumer and a business as a class action." (footnote omitted)).

162. Nagareda, supra note 4, at 23 (internal quotation marks omitted).

163. See id.

164. Choi & Silberman, supra note 6, at 486-87 ("In 2005, Germany passed the Capital Investors' Model Proceeding Law (KapMuG), which provides for designation of a ‘model case’ in actions by investors for false, misleading, or omitted public capital-markets information or shareholder actions for specific performance in actions brought under the Securities Acquisition and Takeover Act. The model case proceeds and then all individual cases are decided on the basis of the model-case decision." (footnote omitted)).

165. Mulheron, supra note 151, at 415-16.

166. Id. at 416; see also Richard O. Faulk, Armageddon Through Aggregation? The Use and Abuse of Class Actions in International Dispute Resolution, 37 TORT & INS. L.J. 999,
Again, the objective here is not to provide a thorough analysis of various foreign collective dispute resolution mechanisms, but to illustrate the broad range of approaches to aggregate litigation that are developing abroad.\(^{167}\) These foreign collective action regimes differ significantly from the U.S. Rule 23 model: they tend to be opt-in, rather than opt-out; they are generally oriented toward protecting consumers rather than broadly remediying all civil wrongs; they often only allow standing to consumer or public interest organizations; and they may be limited in the remedy that they can provide to individual claimants.

1015 (2002) ("[M]any states restrict the utility of the group action to injunctive proceedings, as opposed to suits for money damages.").

Moreover, it must be borne in mind that foreign law on aggregate litigation is in a constant state of evolution and flux. According to Issacharoff and Miller, "Rules here are rapidly changing, and new proposals and recommendations are appearing at a dizzying rate."\(^{168}\) Finland, for instance, adopted its Group Action Act in 2007,\(^{169}\) Argentina and Denmark enacted statutes providing for collective redress in 2008,\(^{170}\) Italy passed its class action law in 2010,\(^{171}\) and Mexico passed its first class action law in 2011.\(^{172}\) Because many of these aggregate litigation procedures are so new, they have not yet been fully "road tested." In other words, courts have not yet had the opportunity to figure out the intricacies of their domestic aggregate litigation procedures, much less turn their attention to what the existence of such aggregate procedures means for the enforcement of U.S. class judgments.\(^{173}\) Thus, U.S. courts looking to a foreign country's law on aggregate litigation in their search for res judicata will undoubtedly be left with a less-than-satisfactory answer to the question: "Will this foreign court enforce a U.S. class judgment?" An adequate comparison between U.S. law and foreign law on the subject simply cannot be made.


As discussed, the analysis conducted by U.S. courts in ascertaining the res judicata effect of a U.S. judgment abroad is complicated by the myriad potential grounds for nonenforcement as well as the relative newness of aggregate litigation in many foreign

\(^{168}\) Issacharoff & Miller, supra note 101, at 191.

\(^{169}\) Behrens, supra note 150, at 175.

\(^{170}\) Id. at 173.

\(^{171}\) Nashi, supra note 151, at 148. For Italy's class action law, see Legge 23 luglio 2009, n. 99, art. 49, para. 14, in G.U. 31 luglio 2009, n. 176, Supplemento ordinario, n. 136 (It.).


\(^{173}\) Shapiro & Kim, supra note 14, at 44 ("[A]s foreign jurisdictions begin to decide the extent to which they may want to reject, or embrace, aspects of the US model of class litigation in their own jurisdictions, the results will be fluid as their jurisprudence evolves in response to initial choices and the impact of those decisions—perhaps unforeseen—on that jurisdiction's economic interests. In other words, there will be trial and error in those jurisdictions that will make speculation by US courts about the expected outcomes in foreign courts inherently unreliable.").
jurisdictions. A further limitation on the ability of U.S. courts to predict the eventual res judicata effect of a U.S. class judgment abroad stems from the distinction between what I call "extrinsic" and "intrinsic" grounds for nonrecognition.174

Extrinsic grounds for nonrecognition are those that are independent of the content and substance of the underlying class judgment or the process by which the judgment was reached. In short, they are "extrinsic" to the actual class judgment rendered in a particular case. Concerns related to the opt-out class action mechanism or to jurisdiction, for instance, do not hinge on the particular class judgment at hand. Rather, they are general objections to enforcement that could be raised in any transnational class action.

In contrast, intrinsic grounds for nonrecognition are those that are inextricably intertwined with the actual judgment or settlement in a particular case, or the process by which it was reached. "Intrinsic" thus refers to the fact that the ground for nonrecognition originates from the particular class judgment at hand, including the particular way that it was reached. Intrinsic grounds for nonrecognition would include, for instance, challenges based on deficient notice or inadequate representation.

Courts attempting to ascertain the eventual res judicata effect of a U.S. class judgment as part of the certification analysis necessarily must confine their analysis to extrinsic grounds for nonrecognition: Would the foreign court regard a U.S. court as having jurisdiction over the parties? Is the opt-in mechanism contrary to public policy or natural justice in the foreign state? The reason for this is obvious: because a judgment on the merits does not yet exist, a court cannot factor intrinsic grounds for nonrecognition into the certification calculus.175

However, the consequence of focusing on extrinsic grounds for nonrecognition is that the judgment enforcement picture is incomplete. At best, by looking at extrinsic grounds for nonrecognition, a U.S. court may be able to conclude that there are no general obstacles to enforcement in the foreign state. However, a U.S. court is never in a position to predict ex ante whether the foreign court would accord res

174. Another way of conceptualizing this issue is to look at the distinction between "general" and "fact-specific" grounds for nonrecognition.

175. Note that the certification decision is made very early in the litigation. See FED. R. CIV. P. 23(c)(1)(A) ("At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.").
judicata to the particular class judgment at hand. This is because additional challenges that are specific to the class judgment can always be leveled by an absent class member after the judgment is rendered. For instance, an absent class member may argue that the notice did not adequately apprise him of his rights, that the notice was not adequately disseminated, that the judgment or settlement amounts were fundamentally unfair, that he was not adequately represented by the named plaintiff, that he was not adequately represented by class counsel, etc. The point is that these intrinsic grounds for nonrecognition are not knowable by a U.S. court at the certification stage of the analysis. They depend on the content of, and the process surrounding, the eventual class judgment or settlement.

The court in Vivendi recognized that the ultimate enforceability of a U.S. judgment will turn on an individualized inquiry of the class judgment that is eventually rendered. In reference to the analysis of whether French claimants should be included in the U.S. class, the Southern District of New York observed:

It also bears noting that whether a foreign judgment is contrary to international public policy will be made on an individualized case-by-case basis, not upon an abstract comparison of U.S. and French law, or upon consideration of an as-yet unenacted French statute. Thus the res judicata effect of a judgment as to any particular Vivendi shareholder will await a determination of the facts surrounding the institution of a second action by that shareholder and, thereafter, the assertion by Vivendi of a res judicata defense.176

Despite this observation, the court proceeded to focus on extrinsic grounds for nonrecognition, concluding that “it is unlikely that a French court will decline to respect a U.S. judgment on the grounds that the form of notice (mail or publication) or the method of consent (opt-in or opt-out) offends constitutional principles, let alone French concepts of international public policy.”177 Although the Vivendi court was attuned to the fact that the ultimate res judicata effect of a U.S. class judgment would turn on the individual circumstances of the case, or intrinsic grounds for nonrecognition, it failed to appreciate the significance of this fact. If the enforceability of every class judgment will turn on the peculiarities of a particular class judgment and/or the process by which it was rendered, why are courts

177. Id.
attempting to predict something that is, by its very nature, incapable of being predicted?

In short, even if a court finds, based on its consideration of extrinsic grounds for nonrecognition, that a foreign class judgment would likely be enforceable, there is the omnipresent chance that intrinsic defects unique to the class judgment or settlement itself might render it unenforceable. At most, then, a court will only be able to predict half of the equation: whether a foreign court in general would enforce a U.S. class judgment in a certain litigation context. The other half of the equation—whether there are any concerns with the actual class judgment that is actually rendered—must simply be ignored.

4. Case Study: Currie v McDonald's

Despite the attention paid by U.S. courts to the hypothetical enforceability of U.S. class judgments abroad, there has been very little in the way of reported case law from foreign jurisdictions concerning the topic.178 One case that did look at the issue of the enforceability of

178. In a landmark decision handed down by the Amsterdam District Court on June 23, 2010, the Dutch court recognized a U.S. class judgment in a securities fraud case and barred any Dutch class members who did not opt out from bringing a subsequent action. See Rechtbank Amsterdam, 23 juni 2010, No. 398833/HA ZA 08-1465, Stichting Onderzoek Bedrijfs Informatie Sobi/Deloitte Accountants B.V., para. 6.5.6 (Neth.). The court recognized the U.S. judgment for three reasons: (1) the U.S. District Court entering the class judgment had an “internationally accepted basis” for jurisdiction over the matter; (2) the U.S. proceedings satisfied the requirements of Dutch due process; and (3) the class judgment “survive[d] the test against Dutch public order.” Id. paras. 6.5.1–6.5.5; see also Rob Polak et al., Recognition of a U.S. Class Action Settlement in the Netherlands (Royal Ahold N.V.), LEGAL ALERT (June 28, 2010), at 1–2, available at http://www.debrauw.com/News/Legal Alerts/Pages/LegalAlert-RecognitionofaUSClassActionSettlementintheNetherlands.aspx (“The main reason for this decision was that the proceedings for a class action settlement in the U.S. are very similar to the Netherlands’ system for collective settlements. The Amsterdam District Court found in general that the interests of the injured parties were adequately safeguarded by the U.S. system since investors belonging to the Class can object to, and opt-out from, a collective settlement. The Amsterdam District Court further ruled that in this specific case the Class had sufficient time to opt out, and that the possibility to opt out and to object had been effectively communicated to the Class (all known shareholders received an information letter, and 65 announcements had been published in Dutch newspapers.”). On the other side of the judgment recognition issue, courts in the United Kingdom and Germany have suggested that a U.S. class action judgment would not be recognized in those respective countries. In Campos v Kentucky & Indiana Terminal Railroad Co., an English court expressed uneasiness with the notion that an absent member of a U.S. class action could be bound by a class action judgment:

[T]here is great force in [the] contention that in accordance with English private international law a foreign judgment could not give rise to a plea of res judicata in the English Courts unless the party alleged to be bound had been served with the process which led to the foreign judgment.
TRANSPORTNA
tional Class Actions

53

A U.S. class judgment was Currie v. McDonald's Restaurants of
Canada Ltd., decided in 2005 by the Court of Appeal for Ontario. Currie
aptly illustrates the three points explored above: the complexity
of the enforcement analysis, the newness of the legal issues at play, and
the distinction between extrinsic and intrinsic grounds for nonrecognition.

There are several reasons why Currie is the ideal case for
analysis. First, it emanates from a legal system that, while foreign, is
not quite so foreign. Canada and the U.S. share a common legal
heritage, including similar views on procedural and substantive
fairness. Second, Canada has wholeheartedly embraced the class
action mechanism. Most Canadian provinces have enacted
legislation governing class actions, and even those provinces that do
not specifically provide for class actions via statute are still able to
conduct class proceedings under the auspices of their joinder rules.
Moreover, the Canadian statutory framework for class actions is
modeled largely on Rule 23 of the Federal Rules of Civil Procedure. While there are differences in terms of certification requirements, the

(1962) 2 Lloyd's List L.R. 459 (Q.B.) at 473 (Eng.); see Jonathan E. Richman, Transnational
Class Actions and Judgment Recognition, 11 Class Action Litig. Rep. (BNA) No. 583, at 7
(June 25, 2010), available at http://www.deweyleboeuf.com/~media/Files/attorneyarticles/
2010/20100628_CALReport.ashx (discussing the Campos case). Similarly, a German court
has suggested that a U.S. class action judgment, "[a]t least to the extent it involves [a]
plaintif[ without his active participation[,]"] would not be afforded recognition in Germany
because recognition of such a judgment would violate public policy. Landgericht [LG]
Stuttgart Regional Court] Nov. 24, 1999, 24 IPRAX 240 (241) 2001 (Ger.). Instead, in order
for a U.S. class action judgment to be recognized in Germany, "The applicable law would
have to provide that all members of the class, without exception, must be informed of the
action." Id. at 241-42; see also Richman, supra, at 6 (discussing this case).

Geneviève Saumier, USA-Canada Class Actions: Trading in Procedural Fairness, 5 GLOBAL
("The class action plays an important role in today's world. The rise of mass production, the
diversification of corporate ownership, the advent of the mega-corporation, and the
recognition of environmental wrongs have all contributed to its growth... The class action
offers a means of efficiently resolving such disputes in a manner that is fair to all parties.").
181. For the Ontario class action statute, see Class Proceedings Act, 1992, S.O. 1992,
c. 6 (Can.). For the Québec statute, see An Act Respecting the Class Action, R.S.Q. 2000, c.
R-2.1 (Can.). Only Prince Edward Island has not yet enacted legislation governing class
proceedings.
182. Dutton, [2001] 2 S.C.R. 534, para. 34 (determining that absent provincial class
proceedings legislation, "courts must determine the availability of the class action and the
mechanics of class action practice").
183. For instance, Canadian courts do not require common issues to "predominate"
over individual issues. See Watson, supra note 167, at 272-73 ("The procedures provided by
the legislation in each of the three provinces are structurally similar to those prescribed by
standard for the certification of settlement classes, and the receptiveness of Canadian courts to mass tort class actions, the basic framework governing class proceedings is similar. Third, Currie deals with a discrete consumer protection issue. The case was not a complicated one involving mass torts or securities fraud, with multiple and perhaps novel causes of action. Currie was a run-of-the-mill consumer protection case where enforceability issues should not have been overly complex.

Based on these factors, one would expect that if a U.S. class judgment were to be enforced, it would be in a context such as this—where the enforcing court shares a similar legal tradition and embraces the class action mechanism and where the judgment itself is based on a discrete and widely recognized common law cause of action. Taken a step further, if it were possible for a U.S. court to predict the ultimate res judicata effect of its own judgment, one would expect it to be able to do so in a case such as this. Yet, it is unlikely that the U.S. court, even if it had turned its mind to the eventual enforceability of its own judgment, would have been able to predict the judgment’s res judicata effect.

The Currie case arose from allegations of impropriety by the co-defendants, McDonald’s Corporation and Simon Marketing, in the sponsoring and running of numerous promotional games or contests in McDonald’s restaurants between 1995 and 2001. On August 21, 2001, a number of individuals were indicted for embezzling prizes allocated to McDonald’s games. The next day, a class action complaint

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Rule 23 of the U.S. Federal Rules of Civil Procedure, although in certain respects the Canadian legislation is more liberal in facilitating class actions than its American counterpart. ... The Canadian criteria for certification of a proceeding as a class action are relatively undemanding.” (footnotes omitted); Gordon McKee & Robin Linley, The Evolving Landscape for Pharmaceutical Product Liability Litigation in Canada, 73 DEF. COUNS. J. 242, 243 (2006) (“Accordingly, the test for class certification is generally considered to be lower in Canada than in the U.S.”).

184. Canadian courts apply a lower threshold than their U.S. counterparts in certifying a class for settlement purposes. See Gariepy v. Shell Oil Co., [2002] O.J. No. 4022, para. 27 (Can. Ont. Sup. Ct. J.) (“The requirements for certification in a settlement context are the same as they are in a litigation context and are set out in section 5 of the Class Proceedings Act, 1992. However, their application need not, in my view, be as rigorously applied in the settlement context as they should be in the litigation context, principally because the underlying concerns over the manageability of the ongoing proceeding are removed.”).

185. Canadian courts appear more willing than U.S. courts to certify mass tort class actions. See, e.g., McKee & Linley, supra note 183, at 244 (“Overall, the current trend in mass tort litigation in Canada continues to be towards class actions, and those involving product liability have been certified more often than not.”).

was filed in Illinois in the name of the representative plaintiff, Boland, on behalf of "all customers of McDonald's who paid money for McDonald's food products in order to receive a subject contest game piece for subject contest promotions between 1995 and the present." Settlement discussions ensued and ultimately culminated in a settlement agreement between the plaintiffs and defendants on April 19, 2002, that was preliminarily approved by the Illinois court.

Some months later, a group of Canadians moved for leave to intervene in the Boland proceedings to object to the settlement of that action. On January 3, 2003, the Illinois court dismissed the objections of the Canadian objectors and approved the final terms of the settlement and certification order. On April 8, 2003, the formal order of the court was entered purporting to bind all members of the class who had not opted out of the proceeding. Two of the Canadian objectors, Parsons and Currie, then sought to bring separate class proceedings in Ontario in respect of the claims that had been settled in the Boland action. The motions judge dismissed Parsons' action, reasoning that by voluntarily appearing as an objector in Boland, Parsons had necessarily submitted to the jurisdiction of the Illinois court. The motions judge, however, refused to stay or dismiss the Currie action, holding for a variety of reasons that the Boland judgment should not be recognized and enforced in Ontario. The defendant then appealed the motions judge's decision to the Ontario Court of Appeal.

In Currie, the Ontario Court of Appeal was asked to enforce an Illinois settlement of a class action that included Canadian class members. The court noted that the central issue was precisely the one that U.S. courts are concerned with: "whether the [U.S.] judgment is binding so as to preclude [the Ontario class member's] proposed class action in Ontario." The Ontario Court of Appeal observed that Canadian rules for the recognition and enforcement of judgments needed to take into account certain unique features of class action proceedings. In particular, the court noted that principles of personal jurisdiction needed to be adapted to the international class context.

187. Class Action Complaint at ¶35 Boland v. Simon Marketing, Inc., No. 01CH13803 (Ill. Cir. Aug. 22, 2001), 2001 WL 34396099. Note that numerous class complaints were filed in various jurisdictions, but where ultimately consolidated by way of MDL proceedings in Cook County, Illinois.
188. Currie, 74 O.R. 3d 327, para. 5.
189. Id. at 325, 327, paras. 2, 6-7.
190. Id. at 300, para. 16. For a general description of Canadian law on the enforcement of judgments, see Monestier, supra note 115.
Specifically, the court analyzed how the principles of "real and substantial connection" and "order and fairness"—the jurisdictional tests applied to out-of-province defendants—translated to nonresident class plaintiffs.

Sharpe J.A. observed that there was a real and substantial connection between the nonresident plaintiff class and the judgment forum, Illinois, because the defendant had its head office in Illinois and the alleged wrong had been committed there. However, the factual connections between Illinois and the nonresident plaintiff class did not end the inquiry. The Ontario Court of Appeal emphasized that the principles of order and fairness required that careful consideration be paid to the rights of nonresident class members, who would have no reason to expect that any legal claim arising from a consumer transaction that took place entirely within Ontario and that gave rise to damages in Ontario would be litigated in the United States. In order to address the concern for fairness, the Ontario Court of Appeal considered it helpful to review "the adequacy of the procedural rights afforded [to] the unnamed non-resident class members in the [Illinois] action." In particular, "Respect for procedural rights, including the adequacy of representation, the adequacy of notice and the right to opt out, could fortify the connection with Illinois jurisdiction and alleviate concerns regarding unfairness." Sharpe J.A. thus concluded that "it may be appropriate to attach jurisdictional consequences to an unnamed plaintiff’s failure to opt out" in circumstances where "there is a real and substantial connection linking the cause of action to the foreign jurisdiction, ... the [interests] of non-resident class members are adequately represented, and ... non-resident class members are accorded procedural fairness." Even though the court was of the view that a real and substantial connection existed between the nonresident plaintiff class and Illinois, it held that the judgment should not be enforced because the notice provided to the Ontario class was inadequate.

192. Id. at 333, para. 25.
193. Id.
194. Id. at 334, para. 30.
195. Id. at 335, para. 31. The Ontario Court of Appeal observed that because of its conclusion that notice was inadequate, it did not need to consider the adequacy of representation in any detail. However, the court noted that transnational class actions may raise issues of inadequate representation:

In the circumstances of this case, it is not necessary for me to consider the issue of adequacy of representation in detail. I note, however, that American
In terms of the content of the notice, the Ontario Court of Appeal affirmed the motions judge’s findings that “the wording of the notice was so technical and obscure that the ordinary class member would have difficulty understanding the implications of the proposed settlement on their legal rights in Canada or that they had the right to opt out.” The court also affirmed the motions judge’s conclusion that the mode of notice was inadequate, noting evidence that suggested that the Canadian notice had reached only 29.9% of the Canadian class, while the corresponding American notice had reached 72% of the U.S. class. In light of these conclusions on notice, the Ontario Court of Appeal refused to accord res judicata effect to the U.S. judgment and permitted the absent class member to proceed with litigation in Canada.

Currie illustrates the three interrelated structural restrictions on the search for res judicata described above: the complexity of the recognition analysis, the newness of the legal issues at play, and the importance of intrinsic grounds for nonrecognition. First, Currie shows the complexity of foreign recognition law by showcasing myriad possible grounds for nonenforcement: jurisdiction, adequacy of representation, adequacy of notice, and abuse of process. Each of these potential bases for nonrecognition of a U.S. class judgment must be analyzed through a distinctively Canadian jurisprudential lens. So, it does not suffice, for instance, to say that a “real and substantial connection” appears to exist without an appreciation of the underlying constitutional doctrine of personal jurisdiction articulated by the Supreme Court of Canada in Morguard Investments Ltd. v. De Savoye and its progeny. Nor does it suffice to say that notice would be

 commentators have raised the “race-to-the-bottom” concern . . . . A sophisticated defendant may persuade plaintiffs’ counsel to accept a sharply discounted recovery rate for non-resident (including Canadian or Ontario) plaintiffs. The foreign representative plaintiff’s interests may conflict with those of the Ontario class, or not fully encapsulate the interests of the Ontario class. Recognition and enforcement rules must be attentive to these possibilities and retain sufficient flexibility to address concerns of this nature.

Id. at 333, para. 26 (citation omitted).

196. Id. at 336, para. 39.

197. According to the Ontario Court of Appeal, the “notice” issue was relevant both to the issue of jurisdiction and the defense of natural justice. Id. at 336-38, paras. 35, 38, 42-43, 46.

adequate by American standards; what matters is the standards Canadian courts would apply in these circumstances.\footnote{199} Second, Currie illustrates that even in a country with a relatively lengthy history of class action litigation, courts are still working out some critical legal issues. In other words, while class actions are not new in Canada, many of the attendant legal issues are. Notably, the question of whether, and when, it is appropriate for a court in one province to purport to bind plaintiffs resident in another province is still an unanswered one. Canadian courts have accepted that a court in one province has personal jurisdiction over a class member in another province where there is a “real and substantial connection” between the plaintiff class and the adjudicating forum. Unfortunately, courts are still struggling to define the content of the real and substantial connection that provides the jurisdictional “hook” to enable the adjudicating forum to render a judgment binding on nonresident class members.\footnote{200} Divergent approaches have developed with respect to the real and substantial connection test as it applies to a nonresident plaintiff class.\footnote{201} Some courts have merely required that there be an issue common to all class members, resident and nonresident, to find jurisdiction; that commonality, in itself, supplies the real and

\footnote{199}{Notably, Currie demonstrates that the standards cannot necessarily be ascertained by looking to “the law on the books.” The defendants in Currie had argued: 

\begin{quote}
[T]he motion judge erred in law by applying a higher standard to the notice than would be applied in [a corresponding] Ontario class action. They point[ed] out that under Ontario law, there is no absolute requirement for effective notice in class actions and, where the stake[s] [are] extremely low, notice requirements may be tailored accordingly.
\end{quote}

74 O.R. 3d 337, para. 41.

The Ontario Court of Appeal rejected this argument, stating:

In assessing the fairness of the foreign proceedings, “the courts of this country must have regard to fundamental principles of justice and not to the letter of the rules which, either in our system, or in the relevant foreign system, are designed to give effect to those principles”. The adequacy of the notice had to be assessed in terms of what is required in an international class action involving the assertion of jurisdiction against non-residents. While Ontario’s domestic standard may have some bearing upon that issue, I do not agree that it is conclusive . . . . \footnote{199}

\footnote{200}{See Craig Jones & Angela Baxter, Fumbling Toward Efficacy: Interjurisdictional Class Actions After Currie v. McDonald’s, 3 CAN. CLASS ACTION REV. 405, 405-06 (2006) (“[T]he decisions seem to unequivocally confirm the concept of interjurisdictional classes (in the past the subject of some controversy), they do leave some important questions unanswered as to when such classes are permissible.”).}

\footnote{201}{For a thorough discussion of the issue of jurisdiction in the multijurisdictional class context in Canada, see Tanya J. Monestier, Personal Jurisdiction over Non-Resident Class Members: Have We Gone Down the Wrong Road?, 45 TEX. INT’L L.J. 537 (2010).}
substantial connection sufficient to assert jurisdiction over nonresident class members. Other courts have insisted that there be an actual link, in the sense of a nexus, between the nonresident plaintiff class and the adjudicating forum in order to ground jurisdiction. In short, there is no clear pronouncement of what constitutes a “real and substantial” connection between the forum and the nonresident class—whether that nonresident class be domestic or international. The point here is that Canadian courts have not yet “figured out” all the details of class judgment recognition even within Canada. If this is the case, how are U.S. courts positioned to ascertain the eventual res judicata effect of an American class judgment in Canada?

Finally, the Currie case highlights the distinction between extrinsic and intrinsic grounds for nonrecognition and the ultimate impossibility of predicting the res judicata effect of a U.S. class judgment ex ante. While a U.S. court might have been able to predict at the certification stage of the inquiry that, in principle, a Canadian court would enforce a judgment like this, it could never have predicted whether a Canadian court would enforce this particular judgment. The inadequacy of the content of the notice as well as the inadequacy of its dissemination (both intrinsic to the class judgment) were not knowable by a U.S. court ex ante. Thus, Currie highlights that the eventual enforceability of a judgment will ultimately turn on the particular class judgment or settlement at hand. There will always be a multitude of questions that can only be answered after the class judgment or settlement is rendered: What percentage of the class received notice? Where was notice published? Were there other notices that may have interfered with the ability of the class to understand their rights? Was the representative plaintiff adequate? Was class counsel adequate? How did domestic claimants fare vis-à-vis foreign claimants? Was the content of the judgment/settlement fair? As such, predicting at a broad level of generality that a Canadian court would enforce a U.S. class judgment (to the extent that this can be predicted) does not appreciably advance the res judicata analysis when there are so many ex post challenges that can be directed at a class judgment.

My objective for this Part of the Article was to call into question the current practice of U.S. courts attempting to predict the res judicata effect of their own judgments abroad. While the goal may be laudable—that is, to ensure that defendants are not exposed to the risk of relitigation abroad—the practice itself is suspect. In particular, certain litigation and structural dynamics of class actions prevent a U.S. court from accurately assessing the res judicata issues at play. It
appears that U.S. courts are simply venturing a "best guess" at whether a given foreign court would generally enforce a U.S. class judgment, and a best guess is not an appropriate basis upon which to determine whether foreign claimants should be part of a U.S. transnational class action.

Given the inherent limitations associated with divining the ultimate preclusive effects of a U.S. class judgment abroad, Rule 23's superiority requirement should not be read to require courts to engage in a speculative res judicata analysis as a predicate to certification of a class action containing foreign claimants. Rule 23(b)(3)(C) provides that "the desirability or undesirability of concentrating the litigation of the claims in the particular forum" is a relevant consideration in assessing whether "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." The section must rest on the assumption that the desirability of concentrating litigation in the chosen forum—as opposed to a foreign forum—can be ascertained. In other words, this section contemplates that courts can make a reasonably informed decision as to the "pros" and "cons" of having litigation proceed in the forum court. Where such a decision cannot be made, owing to the speculative nature of the inquiry, the superiority requirement should not be read to encompass a consideration of whether a foreign court would grant preclusive effect to a U.S. class judgment.

That is not to say, of course, that preclusion concerns are unimportant. Indeed, they are of paramount importance to the parties. Accordingly, in the next Part, I turn toward establishing the groundwork for a more principled approach to the inclusion of foreign class members in U.S. class actions.

IV. THE CASE FOR AN OPT-IN CLASS ACTION: TOWARD A PRINCIPLED APPROACH TO THE INCLUSION OF FOREIGN PLAINTIFFS IN U.S. TRANSNATIONAL CLASS ACTIONS

Above, I discussed the restrictions placed on the search for res judicata by both the litigation and structural dynamics of class litigation. In short, I have argued that the practice of courts attempting to predict the eventual res judicata effect of a U.S. class judgment will fail to yield any definitive answers, and as such is not an appropriate method of assessing the "superiority" of a transnational class proceeding. However, if the preclusive effect of a U.S. class judgment

is not the relevant touchstone in the Rule 23 superiority inquiry, what should be? Simply put, how should courts assess whether and when to include foreign claimants in U.S. class actions? It is submitted that the best approach is also the simplest: avoiding the res judicata problem altogether. Courts can do this by interpreting Rule 23 to allow for an opt-in mechanism for foreign claimants, such that they will only be bound by the result of a U.S. class judgment if they affirmatively consent to participate in the litigation.  

This Part proceeds in three sections. First, I examine what I call the “so what?” issue. That is, even if it is not possible to predict the eventual res judicata effect of a U.S. judgment in a foreign court, what is the harm in including foreign class members in a U.S. class action and then letting the foreign court deal with preclusion issues down the road?  

Next, I discuss the Rule 23 legal framework and argue that Rule 23 should be read to allow for the creation of opt-in class actions for foreign claimants; alternatively, the Rule should be amended to expressly provide for this possibility. Finally, I argue that an opt-in regime presents a more principled way of determining foreign claimants’ class membership in a U.S. class action because an opt-in class action eliminates the res judicata problem altogether, allows all foreign claimants to participate in U.S. litigation if they so choose, provides additional protections for absent foreign claimants, respects international comity, and sufficiently deters defendant misconduct.

A. The “So What?” Issue

Even accepting the premise of my argument in Part III—that it is impossible to predict with any degree of certainty the eventual res judicata effect of a U.S. class judgment abroad—one might still

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203. In practice, this would mean a hybrid regime, whereby U.S. claimants would participate in Rule 23 under an opt-out regime and non-U.S. claimants would participate under an opt-in regime. For a similar model in the domestic Canadian context, see Class Proceedings Act, R.S.B.C. 1996, c. 50, § 16 (Can.).

204. Bermann puts the point as follows:

Arguably, a U.S. court should not care whether a future adverse judgment in the class action will be granted preclusive effect in subsequent litigation abroad. For any number of practical reasons, such litigation is not likely to be brought, and so predicting the preclusive effect of the U.S. judgment may be an entirely academic exercise. Even if such subsequent litigation were probable, the U.S. court need not really care; it could simply go ahead and run the risk of including large numbers of persons in the class action, as against whom the resulting judgment may not be res judicata at a later date in their home court. What is there to lose?

Bermann, supra note 1, at 95.
wonder what the harm is in continuing the practice. In other words, is it really that objectionable that U.S. courts attempt to "weed out" claimants from foreign jurisdictions that would likely not enforce a U.S. class judgment and then presumptively bind (or purport to bind) foreigners from jurisdictions that may enforce class judgments? Despite its shortcomings, is this still not the best way to expand the perceived benefits of U.S.-style class actions while balancing defendants' concerns about relitigation? It is submitted that the answer to this question is a resounding "no."

The practice of differentiating between foreign claimants on the basis of whether a U.S. court believes that their home courts would enforce an eventual judgment is unsound in principle. Ultimately, the inclusion of foreign claimants in U.S. class actions is designed to facilitate access to justice. It has been said that owing to the inadequacy of aggregation procedures and substantive remedies abroad, the U.S. provides the most viable forum in which plaintiffs, both foreign and domestic, can realize some meaningful form of redress.205 If the purpose behind including foreign claimants in U.S. class actions is to provide foreign claimants with access to justice, then distinguishing between litigants from different countries based on a "guess" as to whether a foreign court would enforce a U.S. class judgment is nothing short of arbitrary. In order to facilitate access to justice, all foreign claimants who are aggrieved must be able to participate in a U.S. class proceeding, not simply those who hail from a jurisdiction that a U.S. court assumes will likely enforce a class judgment. Fundamentally, then, the approach that courts are currently using to ascertain foreign claimants' membership in a U.S. class action undermines one of the fundamental purposes of including foreign claimants in a U.S. proceeding in the first place: to provide all similarly situated claimants with an appropriate form of redress.

Further, by purporting to bind foreign claimants whose home jurisdictions U.S. courts consider would be receptive to enforcing a U.S. class judgment, U.S. courts may actually be thwarting foreign claimants' ability to access justice. This is because an absent foreign class member who is seeking to litigate a claim in a foreign jurisdiction that has been purportedly resolved in a U.S. class proceeding now has an additional obstacle to overcome: that of an already existing class judgment that may or may not be res judicata as

205. Buschkin, supra note 6, at 1598-99 ("[F]oreign claimants rarely have an adequate remedy outside of the class device or a realistic and practical way to relitigate the same case in a foreign court . . . .").
to the class member's claims. Thus, absent foreign class members will now have to address a complicated threshold issue of whether they are entitled to proceed in the foreign jurisdiction or whether their claims are barred owing to their apparent inclusion in a U.S. class action. The Currie case, described above, is a clear illustration of this point. The plaintiffs in Currie were forced to first litigate the issue of whether their action was barred by the doctrine of res judicata because of the prior Illinois proceedings. Because Currie was appealed to the Ontario Court of Appeal, it took over two years to settle this threshold issue, such that the Ontario plaintiffs could finally proceed with the underlying claim. This additional obstacle for foreign claimants seeking to proceed with claims in their home jurisdiction increases litigation costs, is time consuming, and detracts from the overall objective of plaintiffs seeking vindication of their rights.

Finally, an ad hoc and speculative determination of whether or not foreign plaintiffs are included in U.S. class actions is also undesirable from the vantage point of defendants. The inclusion of foreign claimants in a U.S. class action will undoubtedly increase the settlement value of the action without providing what the defendant wants most: an assurance of finality. Assume, for instance, that a defendant would settle a purely domestic class action for $100 million; assume further that after claimants from several foreign jurisdictions (England, France, and Italy) are included in the class action, the settlement value of the action increases to $130 million. The settlement is funded and the relevant payments are made. Subsequently, courts in all three foreign countries refuse to accord preclusive effect to the U.S. settlement and permit relitigation of the claim (perhaps in some sort of aggregate form). In such circumstances, the defendant will have overpaid to settle the claim by $30 million based on the assumption that claims in these three jurisdictions would be settled. Premising class membership—and thus, ultimate settlement values—on a precarious prediction as to the res judicata effect of a U.S. judgment abroad makes little economic sense from the perspective of the defendant.


207. See Saparoff & Beattie, supra note 12, at 680-81 ("[T]he recent attempts by defendants to exclude [foreign] plaintiffs from class actions obviously are motivated by the desire to greatly reduce the settlement value of the class remaining.").

208. Note that the economic calculus may be different in situations where the defendant is seeking to certify a settlement class. See supra Part III.A.3; infra Part IV.C.3.
In short, there are compelling reasons why U.S. courts should not simply venture a best guess as to the eventual preclusive effect of a class judgment and let another court deal with the issue down the road. Whether plaintiffs are included or excluded in a U.S. class action matters to the parties and impacts litigation decisions; therefore, it will not suffice to include foreign claimants in the mere hope that a foreign court would accord res judicata effect to an eventual judgment.

B. Opt-In Class Actions Under Rule 23

In Part III, I discussed the problems associated with the practice of U.S. courts trying to divine the ultimate res judicata effect of a class judgment abroad as a means to deciding which foreign claimants should be included within a U.S. transnational class action. A more principled way of deciding whether foreign claimants should be included in a U.S. proceeding would be to adopt an opt-in mechanism for foreign claimants. As such, only foreign class members who affirmatively decide that they wish to be part of a U.S. class action would be included within the class. In this Part, I discuss whether an opt-in regime is permissible under Rule 23 and argue that the Rule should be interpreted to allow for such a possibility. In the alternative, I suggest that Rule 23 be amended to expressly allow for courts to craft opt-in regimes for foreign claimants. This will define the parameters of my argument that an opt-in regime presents a more principled way of including foreign claimants in U.S. class actions.

Rule 23 does not speak to the issue of whether foreign claimants may be included in U.S. class actions, much less the issue of whether they should be permitted to opt into, rather than opt out of, an American class proceeding. At least one district court, however, saw the wisdom in crafting an opt-in regime under Rule 23 in a case involving predominantly foreign plaintiffs. In re Ski Train Fire in Kaprun, Austria involved litigation brought in the United States by the surviving family members of passengers killed in a ski train fire in Austria. Of the 155 passengers that were killed, only eight were

209. An alternative solution would be to exclude foreign claimants from participating in U.S. class actions altogether. In fact, Murtagh suggests that where U.S. courts are unable to determine accurately the res judicata effect of a judgment, foreign claimants should be presumptively excluded from a U.S. class action. Murtagh, supra note 7, at 32. It is submitted that while outright exclusion would certainly solve the res judicata problem identified above, the solution might be overly restrictive, ultimately thwarting the fairness, efficiency, and deterrence goals underlying class actions.

American. The Southern District of New York certified a class consisting of "all heirs, beneficiaries and personal representatives of all individuals who died in the fire who consent to inclusion."211 Because participation in the class required prospective class members to consent to be bound by the judgment, the certification was one of an opt-in class (rather than a traditional opt-out class) under Rule 23(b)(3). The court explained that an opt-in class ameliorates "the potential preclusion problems by conditioning participation in this class action on each class member's agreement to be bound by a final determination on the merits."212 Consequently, defendants could be assured finality in the event that there is a finding of no liability in the United States.213 The court held that an opt-in class was necessary because it would be unfair to presumptively include members in a class that would require a waiver of their right to sue defendants in a foreign jurisdiction.214 While acknowledging that no direct precedent existed for the creation of such a class, the court was of the view that there was nothing in the rule or the jurisprudence that foreclosed such a possibility.215 The court noted that its authority to certify an opt-in class derived from its equitable powers.216

The Second Circuit in Kern v. Siemens Corp. reversed the district court's decision that an opt-in class was authorized under Rule 23(b)(3), stating:

The language of Rule 23 does not, however, require members of any class affirmatively to opt into membership. Nor is such an "opt in" provision required by due process considerations.

Not only is an "opt in" provision not required, but substantial legal authority supports the view that by adding the "opt out" requirement to Rule 23 in the 1966 amendments, Congress prohibited "opt in" provisions by implication.217

After discussing the relevant case law, the court concluded that it could not "envisage any circumstances when Rule 23 would authorize an 'opt in' class in the liability stage of a litigation."218

Certainly, as the Second Circuit pointed out, an opt-in mechanism for foreign claimants is difficult to reconcile with the plain wording of

211. Id. at 199 (internal quotation marks omitted).
212. Id. at 209.
213. Id.
214. Id. at 209-10.
215. Id. at 210.
216. Id.
218. Id. at 128.
Rule 23, which provides: "[A]ny class certified under Rule 23(b)(3) ... must concisely and clearly state in plain, easily understood language ... that the court will exclude from the class any member who requests exclusion." 219 However, it should be considered that Rule 23 was drafted nearly half a century ago without foreign claimants in mind. Courts should be able to interpret Rule 23 flexibly and with an understanding of the additional complexity posed by the presence of foreign claimants. Foreign claimants should not have American procedures thrust upon them, and their legal rights potentially compromised, without some sort of affirmative "say" in the decision.

The latest draft of the American Law Institute's (ALI) Principles of Aggregate Litigation supports the view that there may be situations that warrant the creation of an opt-in regime under Rule 23. 220 As such, the ALI proposes § 2.10, which provides: "Aggregation By Consent[:] When justice so requires, a court may authorize aggregate treatment of related claims or of a common issue by affirmative consent of each affected claimant." 221

The comment to § 2.10 recognizes that the section is intended to create, "in the parlance of class-action law, an 'opt-in' proceeding" in certain "exceptional" circumstances. 222 The comment further notes that such an exceptional situation might arise "when litigation takes place in the United States but primarily involves claimants located in foreign countries." 223 The reporters' notes elaborate on the desirability of opt-in regimes in certain circumstances, pointing to existing statutes that authorize representative actions on an opt-in basis in certain substantive areas such as employment law. The reporters' notes also take issue with the Second Circuit's decision in Kern. 224 However, the reporters' notes proceed to acknowledge that "[o]n the assumption that the Kern court properly
read the current Rule 23, rule amendment would suffice for this purpose.\textsuperscript{225}

Indeed, it may be preferable to codify an opt-in regime for foreign claimants in Rule 23, rather than rely exclusively on courts to fashion opt-in regimes on an ad hoc basis. An amended Rule 23 could provide guidance on the circumstances in which opt-in regimes are permitted (or mandated), how such opt-in regimes will work in respect of foreign claimants, the logistics of notice, and other related details.

C. An Opt-In Class Offers a Principled Way of Including Foreign Class Members in a U.S. Class Action

In this Part, I argue that an opt-in mechanism for foreign plaintiffs would provide several advantages over the current opt-out mechanism: it would eliminate the res judicata problem altogether; it would allow all foreign claimants to participate in U.S. litigation if they so choose; it would provide additional due process protections for absent foreign claimants; it would respect international comity; and it would sufficiently deter defendant misconduct.

1. An Opt-In Class Action Eliminates the Res Judicata Problem and Allows the Benefits of U.S. Litigation To Be Available to All Foreign Claimants

An opt-in mechanism for foreign claimants would avoid altogether the res judicata problems that plague U.S. courts in determining whether to certify a class including foreign claimants. This is because a foreign claimant who has affirmatively consented to be bound to a result (through the act of opting in) cannot later challenge the authority of the adjudicating court to render a decision that is binding on him. Most foreign jurisdictions would regard the foreign claimant's consent to the U.S. class proceeding as sufficient to preclude any subsequent action by him.\textsuperscript{226}

An opt-in class proceeding also addresses the concern that similarly situated foreign claimants will be treated differently based solely on the happenstance of their home countries' rules on judgment enforcement (or, more accurately, what a U.S. court determines those rules to be). The perceived advantages of U.S. class actions would be

\textsuperscript{225} Id.

\textsuperscript{226} In an exceptional case, a plaintiff might still be able to argue that some defect intrinsic to the class proceeding violated natural justice or public policy, and thus, he should not be bound to the U.S. judgment.
available to all foreign claimants who share a commonality of interest with U.S. claimants, not simply those who hail from jurisdictions that a U.S. court believes will enforce an eventual U.S. class judgment.\footnote{227} In short, an opt-in mechanism for foreign claimants is the simplest solution to the res judicata problems that plague transnational class actions. In addition to ensuring eventual enforceability of a U.S. class judgment through the act of consenting to the jurisdiction of a U.S. court, the opt-in mechanism has the additional advantage of being equitable vis-à-vis the claimant class.

2. An Opt-In Class Action for Foreign Claimants Better Comports with Due Process than an Opt-Out Class Action

Further, some commentators argue that due process may actually require that foreign claimants opt into, rather than opt out of, a class action as a means of evidencing their consent to a U.S. proceeding.\footnote{228} In the purely domestic context, Shutts holds that plaintiffs are provided with adequate due process where they are afforded notice, adequate representation at all times, and an opportunity to opt out of the class action. In such circumstances, it is said that plaintiffs who fail to opt out of the class proceeding have impliedly consented to the jurisdiction of the adjudicating court. It has been suggested that in the transnational class context, these protections—notice, adequate representation, and opportunity to opt out—are insufficient to afford foreign claimants adequate due process.

In Shutts, the Supreme Court held that notice “must be the best practicable, ‘reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action.’”\footnote{229} Many commentators have questioned the effectiveness of notice as a means...
of apprising class members of their rights.\textsuperscript{230} Class action notices tend to be lengthy, confusing, and full of legal jargon.\textsuperscript{231} They have been said to be "incomprehensible" to the average reader and in fact designed to "encourage nonappearance."\textsuperscript{232} Moreover, "Class members do not naturally understand concepts in class actions. The [Federal Judicial Committee] conducted research on laypersons' understanding of class action notices and found that even the terms 'class' and 'class action' often confused people."\textsuperscript{233} Aside from the content of the class notice, adequate dissemination of class action notice is also a problem.\textsuperscript{234}

Notice, however, takes on an added dimension in the transnational class context. Debra Lyn Bassett elaborates:

As unintelligible as a legal notice may seem to a U.S. citizen, a foreign citizen is likely to find it even more so. Language issues can arise when a non-English speaker receives a class action notice printed in English. Language issues can also arise even when the class action notice is printed in the foreign claimant's native language. "As anyone who has ever tried to translate a document from a foreign language knows, a literal word-by-word, or even sentence-by-sentence, translation of a foreign document will at best confuse . . . and at worst produce nonsense."


\textsuperscript{231} RULE 23(c)(2) of the Federal Rules of Civil Procedure now includes a "plain language" notice requirement: "For any class certified under Rule 23(b)(3), 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. The notice must clearly and concisely state in plain, easily understood language . . . ." \textit{FED. R. CIV. P. 23(c)(2)}. Additionally, the Federal Judicial Center has recently promulgated a class action notice checklist and plain language guide to instruct judges and attorneys on the necessary steps to ensure that this "plain language" notice requirement is fully satisfied in each case. \textit{See FED. JUD. CTR., JUDGES' CLASS ACTION NOTICE AND CLAIMS PROCESS CHECKLIST AND PLAIN LANGUAGE GUIDE} (2010), available at http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/$file/NotCheck.pdf.


\textsuperscript{233} Todd B. Hilsee et al., \textit{Do You Really Want Me To Know My Rights? The Ethics Behind Due Process in Class Action Notice Is More Than Just Plain Language: A Desire To Actually Inform}, 18 GEO. J. LEGAL ETHICS 1359, 1365 (2005).

\textsuperscript{234} Christopher R. Leslie, \textit{The Significance of Silence: Collective Action Problems and Class Action Settlements}, 59 FLA. L. REV. 71, 92 (2007) ("Because class action litigation is designed to create a remedy for a large number of individual victims, who often are widely dispersed, even under the best of circumstances many class members might not receive actual notice of the class action litigation.").
Unfamiliarity with the legal system generally, and with class actions in particular, can also interfere with the foreign claimant’s comprehension of the class action notice. Class actions exist in few jurisdictions outside the United States, so the class action concept may be unknown to the foreign claimant. Thus, potential language issues, unfamiliarity with the U.S. legal system, and the natural human tendency to ignore that which we do not understand, all combine to render notice potentially ineffectual for foreign claimants.235

These issues with notice to foreign claimants directly implicate another pillar of due process: the class member’s opportunity to opt out. Only where a claimant receives and is able to understand the class action notice can he exercise any meaningful choice to opt out of the class action. Bassett observes that where the notice is not understood, the absent class member will not opt out of the litigation. Instead, he will remain in the class—though not by choice—which in turn “foils the notion of implied consent to the court’s jurisdiction.”236

Finally, problems of adequate representation are particularly acute with respect to foreign claimants. Because the class is usually represented by American attorneys, there may be a danger that the interests of foreign class members will be overlooked. The foreign claimants may simply be seen as an “add on” to an American class, less deserving of redress than American claimants, or at least less likely to complain about inadequate recovery.237 The concern that foreign claimants may be inadequately represented is evidenced in the differential treatment accorded to U.S. and foreign claimants in the U.S. breast implant litigation.238 Initially, a mere three percent of a $3

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235. Bassett, supra note 6, at 65-66 (footnotes omitted); see also Buschkin, supra note 6, at 1582-83 ("When many of the potential class members live outside of the United States, determining what constitutes adequate notice is more complicated. Linguistic and cultural barriers make it more difficult to ‘communicate effectively to [foreign] claimants their rights and options.’ If the judge is not familiar with the language, customs, literacy levels, or print-media sources of the foreign countries in which the potential class members reside, it is virtually impossible to draft an order identifying the ‘best notice practicable under the circumstances.’ If the foreign class members do not receive adequate notice, they cannot be bound to the class settlement or final judgment, because binding them without proper notice would violate their due process rights." (footnotes omitted)).

236. Bassett, supra note 6, at 74.

237. Mulheron, supra note 151, at 441 (referring to “‘Add-on’ European Classes to U.S. Class Actions”).

238. Mulheron describes other instances of foreign (specifically English) claimants not faring as well as their U.S. counterparts: This was the scenario in Kruman v. Christie’s International plc. In this case, arising out of allegedly price-fixed commissions charged by auctioneers at Christie’s and Sotheby’s in London, foreign class members (including English purchasers of items at these London auction houses) had to continue to contest the
billion global class settlement fund was allocated to non-U.S. citizens, even though non-U.S. citizens comprised fifty percent of the class.\textsuperscript{239} After the initial settlement faltered, a subsequent settlement was reached that provided non-U.S. claimants with only half the compensation awarded to U.S. claimants.\textsuperscript{240}

Thus, the additional hurdles faced by foreign claimants with respect to notice, adequate representation, and the opportunity to opt out suggest that due process may require that foreign claimants be afforded the opportunity to opt into a class action,\textsuperscript{241} rather than have their failure to exclude themselves from the action be construed as tacit consent.\textsuperscript{242} Although courts have yet to accede to this argument, it nonetheless lends further support to the idea that an opt-in class action model for foreign claimants is preferable to the current opt-out regime.

3. An Opt-In Class Action Respects International Comity Better than an Opt-Out Class Action

The practice of American courts including foreign class members in transnational opt-out class actions rests on at least two interrelated assumptions: First, U.S. courts are better positioned than foreign courts or institutions to mete out justice, and second, foreign claimants want to be presumptively included in American class actions. Each of these assumptions is questionable.

\textsuperscript{motion to dismiss. By contrast, the domestic U.S. class settled on favorable terms (over $500 million in cash and discount benefits). Significantly, the recent BA-Virgin settlement agreement reached by the District Court of the Northern District of California was noted to be the first occasion upon which the domestic U.S. class and an English class had been treated entirely equivalently in respect of the compensation awarded. Id. at 444 (footnotes omitted).

\textsuperscript{239. Bassett, supra note 6, at 70.}

\textsuperscript{240. Id.}

\textsuperscript{241. In a separate article, Bassett argues that an opt-in mechanism is more consistent with due process for all class action claimants. See Debra Lyn Bassett, Just Go Away: Representation, Due Process, and Preclusion in Class Actions, 2009 BYU L. Rev. 1079, 1118 ("Direct representation in litigation—the foundational prerequisite for preclusion in nonclass litigation—can be achieved in class litigation in a manner that both renders the application of the preclusion doctrines more consistent and accords genuine due process protections. The solution is not profound. The solution is not even novel, because it requires merely returning to a previous practice that was in place before the 1966 amendments to Federal Rule 23, and is still required by statute in some class litigation today. The solution is opt-in participation." (footnotes omitted)).}

\textsuperscript{242. Bassett, supra note 6, at 87 ("Requiring foreign claimants to affirmatively opt in, rather than absurdly construing their silence as an agreement to be bound by the class litigation, will ensure that their consent is genuine." (footnote omitted)).}
It has been said that owing to the inadequacy of aggregation procedures and substantive remedies available abroad, the United States provides the most viable forum in which plaintiffs can realize some meaningful form of redress. Accordingly, one commentator advances the argument that U.S. courts should adopt a "default presumption in favor of including foreign claimants" in U.S. class actions and that such claimants should only be excluded from the U.S. action if they are able to "prove in their affidavits that [they] have an adequate alternative remedy either in the U.S. courts or the courts of their home countries." This position assumes that U.S. courts are "better" than foreign courts at adjudicating grievances and ensuring that foreign claimants are provided with access to justice. However, we should be careful not to equate "access to justice" with access to American justice. That is, the superiority of the American system of justice, including class procedures, should not be assumed.

European countries, for instance, eschew what they perceive as the litigious culture embodied in both the procedural and substantive law of the United States. Instead, they generally rely upon governmental regulation, public enforcement proceedings, and a robust social safety net to safeguard the public interest. One author

243. See Buschkin, supra note 6, at 1596-97.
244. See id. at 1569.
245. The literature is replete with references to the fact that U.S. justice is "better" than justice meted out abroad. See, e.g., Saporoff & Beattie, supra note 12, at 680 ("The class action suit is usually the best mechanism for foreign investors to seek justice and economic recovery for securities fraud. Due to the uniqueness of these types of suits worldwide, exclusion of "f-cubed" plaintiffs risks a miscarriage of justice . . .").
246. Mulheron notes:

At a recent conference on collective redress in London, one participant expressed the view, in all seriousness, that an opt-out regime was not required in English law, because English claimants had an increasing tendency to seek to be joined to opt-out class actions instituted in the United States, and thus, they were already "catered for."

Mulheron, supra note 151, at 441 (footnote omitted). She referred to the "assumption that the English citizen would be prepared to condone a situation whereby the U.S. was an appropriate forum to determine his or her rights and obligations in the absence of "anything better" in England" as "breathtaking." Id.

248. Faulk, supra note 166, at 1001-02 ("The concept of the 'private attorney general,' a citizen or advocate who represents the public interest and who uses the judicial system, as opposed to parliamentary action, to advance social aims or redress public wrongs, is not commonly accepted outside the borders of the United States. . . . Indeed, it appears that the cultures of most democracies, other than the United States, have already determined that tort
notes, "There is no empirical evidence that threats of litigation are necessary to coerce responsible behavior and regulatory compliance, nor is there evidence that current [European] regulations and compensation programs are inadequate to protect personal and public interests." To the extent that European countries are adopting aggregate litigation devices, such devices are decidedly "un-American." The development of a distinctly European collective litigation culture demonstrates that different does not mean inferior.

Just as it should not be assumed that American justice is preferable to justice dispensed elsewhere, so too should it not be assumed that foreign claimants necessarily wish to partake in U.S. class actions. Here again, it is necessary to acknowledge the intricate dynamics of class litigation. Foreign class members do not personally appear before American courts seeking to be included in U.S. class actions. Rather, class counsel proposes a class definition that encompasses both domestic and foreign claimants. It is in class counsel's financial interest for the class to be as large as possible—the more claimants in the class, the larger the settlement value of the class action, and the higher the eventual fee. Class counsel's motive in seeking to include foreign claimants in the class is not altruistic, but rather tied directly to the financial gains that are to be had by increasing the number of claimants in the class. Similarly, when class counsel and the defendant are seeking to certify a settlement class, the inclusion of foreign class members serves a dual function: it increases the potential fee for class counsel, and it provides defendants with some modicum of peace. While it is clear that a foreign class member will not necessarily be precluded from relitigating the action abroad, at least the defendant will have discouraged such an attempt and set up

litigation is not an effective or efficient method to achieve social or personal justice. In those nations, social security systems are the major methods of providing compensation and care for persons who have sustained an injury." (footnotes omitted)).

249. Id. at 1002.


251. Coffee, *supra* note 247, at 329 ("From a governance perspective, the oldest maxim is, 'One size doesn't fit all.' No one structure of corporate governance is optimal for all firms. The same is likely true for litigation governance where legal systems and legal cultures differ markedly." (footnote omitted)).

252. Id. at 298-99 ("Effectively, Rule 23 of the Federal Rules of Civil Procedure allows this [plaintiffs'] attorney, often using only a nominal client, to file an action that sets forth its own proposed definition of the class of persons who will be bound by it; then, it is up to the proposed class members to flee the class by opting out.").
an additional obstacle for a foreign claimant. Thus, a careful look at the interests at play—and, in particular, a look at the prime movers behind the inclusion of foreign claimants in U.S. class actions—should cast some doubt on the assumption that foreign claimants necessarily wish to be included in U.S. class actions.

U.S. courts should be wary about perpetuating any assumption that the United States is the best forum for the resolution of disputes or that foreign claimants desire to be included in U.S. class actions. However, presumptively including foreign claimants in U.S. opt-out class actions—even after considering whether those foreign claimants’ home courts would accord res judicata effect to a U.S. judgment—does just that. One author observes:

The use of U.S. . . . collective liability devices to resolve claims of nonresident foreign litigants represents a major intrusion into the internal social policies and cultures of other sovereign states. Although “globalism” may be useful as a commercial cliché, its intrusion into jurisprudence is disturbing, especially when procedural devices that are not yet recognized internationally are used to resolve claims arising from conduct that occurs beyond the forum state’s borders.²⁵³

It is arrogant and imperialistic for U.S. courts to attempt to bind foreign claimants to a result reached in an action thousands of miles away that they had no knowledge of or control over.²⁵⁴ In fact, the Supreme Court has expressed concerns about the propriety of U.S. courts adjudicating the claims of foreigners, particularly in contexts which involve the application of public law to foreign claimants.²⁵⁵ In F. Hoffmann-La Roche Ltd. v. Empagran S.A., for instance, the Supreme Court refused to apply the Foreign Trade Antitrust Improvement Act and the Sherman Act to claims based solely on

²⁵³. Faulk, supra note 166, at 1000.
²⁵⁴. This point has been made repeatedly in numerous defendants’ motions resisting certification of a class including foreign nationals, as well as the affidavits filed in support of these motions. For instance, in the In re Royal Dutch/Shell Transportation Securities Litigation case, defendants argued that “considerations of international comity readily confirm the impropriety of stretching the appropriate bounds of this Court’s jurisdiction to entertain those [foreign] claims.” Royal Dutch/Shell Defendants Memorandum in Support of Their Motion To Dismiss in Part for Lack of Subject Matter Jurisdiction at 37, In re Royal Dutch/Shell Transp. Sec. Litig., 380 F. Supp. 2d 509 (D.N.J. 2005) (No. 04-374 (JWB)), 2004 WL 3929298 (D.N.J. June 30, 2005). The defendants noted that the governments of the Netherlands and the United Kingdom—the two jurisdictions where Royal Dutch and Shell Transport were incorporated—jointly filed amicus briefs submitting that “their respective choices concerning the remedies available for particular types of commercial wrongdoing were conscious and entitled to the respect of United States courts.” Id. at 38.
²⁵⁵. Normally, these concerns are voiced as part of the Court’s analysis of subject matter jurisdiction or forum non conveniens.
foreign effects, reasoning, "Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?" Similarly, in Morrison v. National Australia Bank Ltd., the Supreme Court held that the antifraud provision of the Securities Exchange Act did not apply extraterritorially to provide a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges. In support of its decision, the Court emphasized that "[l]ike the United States, foreign countries regulate their domestic securities exchanges and securities transactions occurring within their territorial jurisdiction" and that this regulation "often differs" from that of the United States.

The thrust of these decisions is that restraint needs to be demonstrated in adjudicating claims of foreign claimants in U.S. class actions. An American court should not substitute its judgment for that of a foreign court in deciding what is best for foreign claimants. An opt-in class mechanism for foreign claimants exhibits appropriate judicial restraint and respect for international comity. By allowing foreign claimants to participate in a class action if they so wish, U.S. courts are not forcing American procedures and American law upon foreign claimants. Rather, they are making such procedures available to foreign claimants, while respecting that foreign countries have different—but equally legitimate—methods of resolving legal disputes.

257. 130 S. Ct. 2869, 2885 (2010).
258. Id.
While this may be a viable option if the foreign claimants hail from a jurisdiction that has adopted class mechanisms similar to those in the United States, it may be more problematic in countries with no class action mechanism or with forms of collective redress that differ significantly from Rule 23. Moreover, where the foreign claimants are geographically dispersed over multiple countries, such transnational cooperation will undoubtedly prove difficult.
260. Note also that the day will soon come when American courts will have to decide whether to give effect to class or other aggregate judgments rendered by foreign courts purporting to bind U.S. class members. Unless American courts are fully prepared to enforce...
4. An Opt-In Class Action for Foreign Claimants Sufficiently Deters Defendant Misconduct

Clearly, an opt-in class action for foreign claimants has several advantages: it eliminates concerns about res judicata; it does not distinguish between similarly situated foreign claimants; it ensures that foreign claimants are provided with adequate due process; and it respects international comity. Despite these benefits, some argue that only an opt-out class that includes foreign claimants can serve the deterrent effect of class actions:

Excluding foreign claimants from U.S. class action lawsuits, when these claimants cannot bring independent lawsuits or group actions abroad, undermines the deterrent effect of the class device. The deterrent effect of the class action only works because corporations know that if they engage in fraud, price-fixing, or some other consumer abuse, victims will band together and sue for large damages. . . .

Excluding foreign claimants from class action lawsuits removes, or at least lessens, the economic risk of engaging in illegal conduct because it removes an entire category of purchasers from the litigation system. . . . Even if the wrongdoers have to pay out large damages to U.S. purchasers, as long as courts exclude foreign claimants from class action lawsuits the corporations retain a large portion of the foreign profits. If the misconduct stretched far enough around the globe, there is a realistic chance that the large sums gained from the foreign misconduct would more than make up for the U.S. liability. U.S. courts can deter such conduct only if all claimants, both domestic and foreign, are permitted to sue as a class.

According to this view, an opt-in class action for foreign claimants would undermine the deterrent effect of class actions.

While the argument carries a superficial measure of appeal, it must be more carefully scrutinized in light of the actual mechanics of class action procedure. The deterrence argument assumes that the larger the class in terms of sheer numbers, the larger the payout by a defendant, thus maximizing the deterrent effect of class actions.

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261. Buschkin, supra note 6, at 1588, 1591 (footnotes omitted) (affirming the certification decision); see also Saparoff & Beattie, supra note 12, at 671 (noting that courts should include foreign investors in securities class action inter alia because “including foreign investors will promote securities fraud settlements and deter future fraud”).
Under this logic, if there are 10,000 U.S. class members and 2000 foreign class members, a defendant will pay twenty percent more to settle a class action encompassing all claimants than it would to settle a class action involving only U.S. claimants. The problem with this argument is that normally, the amount that a defendant will pay to settle a claim corresponds to the number of claims filed by class members, not the number of class members in absolute terms. Issacharoff and Miller explain how this works as follows:

Attorneys in U.S. cases have found ways to make class action settlements resemble outcomes under an opt-in rule. When a common fund is created, some settlements contain “reverter” clauses providing that any amounts not claimed revert to the defendant. Reverter settlements are no longer seen in securities class actions, but reverters are occasionally found in other contexts. Much more common these days is the consumer class action settlement where the defendant promises to provide relief in a defined amount to every class member who files a claim. These settlements, as a practical matter, are similar to settlements under opt-in class actions because the defendant ends up having to pay out only to those class members who file claims—usually only a fraction of the class.26

Using the above example, if only 100 out of 2000 foreign class members file valid claim forms pursuant to the settlement, the defendant will indeed internalize the cost of the foreign misconduct—but only to the extent of the additional 100 claimants.26 Thus, including foreign class members in a U.S. class action will increase the

262. Issacharoff & Miller, supra note 101, at 207-08 (footnotes omitted).
263. The number of class members who file claim forms as a percentage of the total number of members in the class is very low. Coffee elaborates:

Although the opt-out class action includes everyone, relatively low percentages of the class may actually file claims after a settlement is achieved. Professors Cox and Thomas find that less than thirty percent of the institutional investors in the securities class actions that they studied filed claims after a settlement had been reached. In some special contexts, the rate is even less and may fall to one percent or lower. Because institutional investors generally hold claims for significant amounts (at least in proportion to the minimal cost of filing a claim) and because they are generally thought to be sophisticated, this evidence suggests that proponents of the opt-out class have overstated their case and that the presumed difference in participation may be largely illusory. Even if the opt-out class action includes the passive holders of negative value claims, these negative value claimants do not actually benefit from such an action where, for whatever reason, they fail to file a claim. In short, apathy reemerges at the back end of the opt-out class action where a procedure resembling the act of opting in remains necessary if the class member is to receive compensation.

Coffee, supra note 247, at 334 (footnotes omitted); see also Issacharoff & Miller, supra note 101, at 205.
deterrent effect of class actions, but only marginally so.\textsuperscript{264} At the very least, the argument that supports the inclusion of foreign claimants in U.S. class action in order to maximize deterrence should be approached with some degree of caution; the argument certainly is not sufficiently compelling to overcome the many advantages associated with an opt-in class for foreign claimants.

V. CONCLUSION

As consumer, securities, and financial markets have become increasingly global, so too has class litigation. Plaintiffs (or more accurately, their attorneys) posit that access to justice, judicial efficiency, and deterrence mandate that U.S. courts include foreign claimants in American class actions. Defendants respond that the inclusion of foreign class members potentially compromises their due process rights by exposing them to the risk of relitigation abroad. Because an American court cannot bind a foreign claimant in the same way it can a domestic claimant, defendants can never be assured that an American proceeding will be res judicata in respect of the claims of foreign class members. American courts, in an effort to be responsive to the res judicata issue, now incorporate into the Rule 23 superiority analysis an assessment of the likelihood that a foreign court would grant preclusive effect to a U.S. class judgment abroad. The more likely a foreign court would, in the eyes of a U.S. court, grant preclusive effect to a U.S. class judgment, the more likely those claimants will be included in the U.S. class.

This Article has argued that U.S. courts are engaging in an illusory search for res judicata because it will never be possible for a U.S. court to know with any degree of certainty what the preclusive effects of its own judgment will be. In particular, litigation dynamics—such as the proving of foreign law by partisan experts, the principle of party prosecution, and the distinction between contested and settlement-only certification—hinder the ability of a court to make an accurate determination as to the res judicata effect of a U.S. class judgment abroad. More importantly, however, there are structural restrictions on the search for res judicata that stem from exactly \textit{what} U.S. courts are called upon to analyze: whether a judgment or

\textsuperscript{264} Note that there are other ways that the parties might structure a settlement agreement that do not involve a reverter or reversionary settlement. For instance, parties might allocate any residual balance of the settlement fund to a designated charity by way of a \textit{cy-pres} distribution. \textit{See}, \textit{e.g.}, Sam Yospe, Note, \textit{Cy Pres Distributions in Class Action Settlements}, 3 COLUM. BUS. L. REV. 1014 (2009).
settlement not yet in existence would, at some later point in time, be enforced by a foreign court. The complexity of foreign law on the recognition and enforcement of foreign judgments generally, as well as the lack of comparable class procedures elsewhere, greatly limits the ability of a U.S. court to ascertain whether or not a U.S. class judgment would be enforceable in a given foreign court. Moreover, the preclusive effect of a particular class judgment can never be predicted by a court ex ante because an absent class member can always challenge the judgment on grounds that are specific or “intrinsic” to the class judgment itself.

Given these serious limitations on the search for res judicata, I argue that U.S. courts should not be in the business of speculating as to the anticipated preclusive effect of their judgments abroad. Not only is such speculation inherently unreliable, but the entire practice yields an unprincipled determination of whether or not to include foreign class members in U.S. class actions. Instead, U.S. courts should seek to avoid the res judicata problem altogether by fashioning an opt-in mechanism for foreign claimants. An opt-in mechanism would expand the perceived benefits of U.S. class actions to all foreign claimants, not simply those who reside in jurisdictions that the United States perceives would enforce a U.S. class judgment. In addition, an opt-in class action for foreign claimants pays due respect to comity concerns and offers absent foreign class members heightened due process protections.

Bermann has observed: “[T]he multinational character of today’s classes complicates class action practice significantly.” But, perhaps American courts have made transnational class actions too complicated. Perhaps the solution lies in the adoption of a simple opt-in mechanism for foreign claimants. Perhaps the time has come for American courts to abandon their search for res judicata.

265. Bermann, supra note 1, at 93.