Draft, 22 June 2016

Alternative models of *res judicata* in class actions
A comparative law & economics approach

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ABSTRACT

After the upsurge of class actions in North America, since the amendment to Federal Rules of Civil Procedure (FRCP) of 1966, this initially idiosyncratic American sort of litigation has pervaded procedural systems of countries of Civil Law tradition in the following decades. Its reception has not been uniform nor easy nonetheless. It is still, moreover, a work in progress.

The rise of class lawsuits is commonly acknowledged as a product of the opt-out rule adopted by the amended Rule 23 FRCP. It is also a consequence of the conclusive effect of settlement or judgment on hypothetical subsequent claims, throughout *res judicata* and *collateral estoppel* nonetheless.

Civil Law jurisdictions, as France, Brazil and Argentina, in turn, include in their class action schemes variations, precisely on those matters, which gives an interesting leeway for study.

Our findings suggest that there is some room for improvements in those recent Civil Law schemes of class actions. Some of their peculiar innovations may look questionable but scarcely significant in practice. However, that empirical irrelevance may derive only from pre-existing chronic malfunctions in procedural systems that include them. Paradoxically, a betterment on the latter failures would make the negative impact of the analyzed variants significant on social cost.

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The authors are grateful to Fernando Tohmé, Pamela Tolosa and Andrea Castellano for kindly sharing their insights with us.

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1. The rise of class actions and their economics

It is well known that the amendment to Rule 23 of the Federal Rules of Civil Procedure (FRCP) has triggered an explosion of class litigation in the United States of America. The rise of the demand of this kind of court-service came along with a correlative increasing in legal, social, political and economic literature on class actions.

At first glance, the economics of class actions look simple and their effect can be captured by the idea of economies of scale. This would be especially true for claims that are too small to justify individual litigation but which, when come together as a class, become worthwhile to litigate. Nonetheless, the economies of scale argument does not apply only to small claims (Priest, 2000). The risk of inconsistent individual judgments, at some extent, may also be understood as a source of social costs to be better prevented, at low cost, by means of a unique class lawsuit.[1]

Deeper analysis, however, unveil additional and more subtle sources of social costs and benefits related to class actions (Ulen, 2011). In fact, a good number of them is strictly related to peculiarities of the procedure. Details, as usual, matter.

The reception of class actions in Europe and Latin America provides a natural showcase for contrast. Their implementation, in fact, has not been neither uniform nor easy. It is still, moreover, a work in progress. Different countries and even sub-national jurisdictions have adopted diverse procedural schemes, which makes any intent of exhaustive comparison almost impractical. On the contrary, modeling some

[1] There could be found a number of procedural instruments addressed to avoid several kinds of inconsistency between individual judgments. Among them, class actions can be seen as the most efficient tool to that aim in an ample range of cases. That result can be explained, in some sense, by means of the economy of scale idea too.

relevant (and divergent) features in order to analyze their efficiency properties may lead to helpful conclusions.

The practical relevance of some differential traits of procedure rules is evident. Although the upsurge of class lawsuits is an accepted outcome of the opt-out rule in force since the amendment of the Rule 23 of FRCP, the conclusive effect of settlement or judgment on hypothetical subsequent claims is crucial to understand the dynamics of North American class actions and their success. In other words, traditional claim and issue preclusion principles apply, and it is assumed that, in general, litigated judgments have the same preclusive effect in class actions as in any other action (Tulumello & Whitburn, 2010). The U.S. Supreme Court stated in *Cooper v. Federal Reserve Bank of Richmond*, "[t]here is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation."[2] About claim preclusion, the Supreme Court in *Cooper* explained that "[a] judgment in favor of the plaintiff class extinguishes *their* claim, which merges into the judgment granting relief[, while] [a] judgment in favor of the defendant extinguishes *the* claim, barring a subsequent action on that claim."[3] And, with respect to issue preclusion, "[a] judgment in favor of either side is conclusive in a subsequent action between them on any issue actually litigated and determined, if its determination was essential to that judgment."[4]

The class action regimes in force in Civil Law jurisdictions are, in turn, less conclusive in some of those aspects. On the one hand, the role of the opt-out rule is at least much less extended than the one in the North American system. On the other, the scheme in force in Argentina, for instance, allows the opting out victims to sue individually in any case - as the original North American model does- but even permits the members of the class that did not opt-out to bring individual actions if the class claim is not granted (*res judicata secundum eventum litis*).[5] Moreover, in the Brazil-Argentina´s model, a final decision dismissing the class claim has not effect of *res judicata* nor of *collateral estoppel* on subsequent class suits if evidence supervening to the adjudication is invoked. Thus, a renewed class action and/or a multiplicity of individual claims against the same defendant can take place. In the French model, in turn, the general rule is a very peculiar opt-in.

The sketched divergences give an interesting leeway for study. They can be slightly modeled, building a benchmark to compare alternative

[2] 467 U.S. 867, 874 (1984).
[3] Id.
[4] Id.
[5] In common law terminology, it could also be called "one-way preclusion." (See Gidi, 2003)

country systems or even exceptional regimes vs. general ones, divergent each other, within a certain unique system. Thus, in the next section we briefly outline a simple model of rational litigation. In the third, we give a notion about some peculiarities of the French and the South American scheme that are the subject matter of our study. In the fourth, we analyze the outcomes of those variants. Finally, we suggest some lines of research helpful to assess the empirical effects of those traits and certain feasible improvements of the procedural rules that govern those systems.

2. Rational litigation and settlement in single party tort suits and class actions

The simplest model to analyze private incentives either to sue or to settle [6] consists of two rational agents: a plaintiff (p) and a defendant (d), the former claiming a sum of money (for the sake of simplicity, damages) to the latter by means of a judicial claim f.

Formally:

π = probability of success of the plaintiff´s in claim f
h = value of damages if the plaintiff succeeds in her claim;

$c_p(f)$ and $c_d(f)$ represent the administrative cost of the suit for the plaintiff and, in turn, for the defendant. For simplicity´s sake, we will take the cost of the full procedure as certain. Both agents are assumed risk neutral and wealth maximizers. Then, the plaintiff´s expected value of the suit is:

$$EVf_p = \pi h - c_p(f)$$

The expected value of the lawsuit for the defendant, in turn, is,

$$EVf_d = -\left[\pi h + C_d(f)\right]$$

We roughly assume that the tortfeasor-defendant has to internalize the full cost of the harm that caused as a condition to minimize the social cost. Deviations from this goal can be justified, e.g., by reasons of higher administrative costs. Being this the case, the tradeoff between the increase of social costs derived from incomplete or excessive cost-

[6] We essentially follow Miceli (1997). Perception of the parties are assumed non-differing (see footnote 8).

internalization and the growth of administrative costs to prevent that distortion has to be computed.

The essential problem affecting this scenario is that it is not rational for the plaintiff to file any suit whenever $\pi h - c_p(f) < 0$. Following the remark of Ulen (2011) on Bone (2003) and Miller´s (1998) categorization, *negative-expected-value-claims* can be subdivided into those that are not correlated with any actual harm (i.e. frivolous claims), verifying these $h_p \leq 0$ and those that are supported by an actual but small harm $h_p > 0$ (i.e. usually small, "true" claims).[7] Differently from the former, if empirical conditions hinder victims to bring claims of the latter kind, the social cost will increase. Hence, class actions provide a mechanism that replaces individual claims with *a set* of claims to be entertained accumulated, being F a class lawsuit encompassing claims for the set H of individual instances of harm h, such as $h \in H$. Every h can be also claimed by means of an individual lawsuit f which, as already seen, correlates with an administrative cost $c(f)$. We define $F = \{f: f \ corresponds \ to \ a \ h \epsilon H\}$ and $P = \{p: p \ presents \ a \ f \epsilon F\}$.

We will assume that there exist scenarios characterized by the presence of a set of individual instances of harm h for which the relationship $\pi h - c_p < 0$ and $h > 0$ verifies (i.e, non-frivolous). Thus, being the class procedure unavailable, they will not take place. However, economies of scale can turn the administrative cost of the plaintiffs´ claims, included in a class lawsuit F (hereinafter $C_P(F)$), $C_P(F) < \sum_{\substack{f \in F \\ p \in P}} c_p(f)$ (i.e, a strictly subadditive function), being the differential enough to make the litigation rational, and then, -to express it informally- to "force" the tortfeasor to internalize the full cost of his or her activity.

Besides the final adjudication, settlement stands as the obvious alternative to finish a class or individual suit. Given that both parties have to agree on the latter, some simple and evident conditions are required to that result. Whether perceptions of the parties are coincident on the value of πh [8], if the administrative cost of the settlement s, i.e., $b(s)$ is lower than the cost of finishing the lawsuit by adjudication $c(f)$ for both parties, settlement is the rational outcome. *Mutatis mutandis*, this applies also to class suits.

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[7] It would be the case of price fixing agreements (cartel) that not only distort competition by increasing the price of a given good (such as the "yogurts affair" in France in 2015) but also harm consumers, to be forced to a minimum overpay by the product.

[8] As it is easy to infer we are drawing up what is called in the literature a *single perception model,* just for simplicity´s sake, according to our aims.

This simple basis will help, in turn, as a benchmark to analyze some differential features of the aforementioned national regimes.

3. Three models of *res judicata* in class actions

3.1. Class actions in the USA

As it is well known, a class action is adjudicated, by definition, on behalf of a large number of subjects, most of them materially absent. A major aim of his institution -to use the term by which that effect has come to be known- is to avoid *duplicative litigation*. Then, by dealing with a set of analogous claims gathered in a single lawsuit, class action promises to prevent unnecessary waste of judicial resources and avoid inconsistent judgments.

Considerations of efficiency and fairness, which underlie the Rule 23, should provide the primary touchstones for determining whether duplicative litigation is to be permitted.

Hence, *avoidance of duplicative litigation* is a factor, but not the only one, taken into account in determining class certification. Likewise, in a (b)(1)(A) the risk of *incompatible standards of conduct* for the party opposing the class -i.e., to avoid the feared interference of other instance of litigation- is accounted to make class action desirable. Provisions of (b)(1)(B), in turn, focus on the risk of *adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests*.

In *civil rights class actions* (b)(2), superiority of a declarative or injunctive relief generally applicable to the class over individual and possibly conflicting remedies, justifies class treatment.

The threat of duplicative litigation is essential to certification aims in situations prescribed in (b)(1) and (b)(2). Accordingly, no right to opt-out is given by the FRCP in those cases, nor notice of any kind is given to class members. Hence, class members are always bound by the judgment.

Conversely, in the case of (b)(3) damages class actions, the threat of duplicative litigation is not as dominant in relation to certification. Class treatment is deemed appropriate if questions of law or fact common to the class members *predominate* and the class action *is superior to other available methods for the fair and efficient adjudication of the controversy* and there is no assumption that other duplicative litigation has to be avoided. The right to opt-out given to class members, in fact,

allows them to bring individual lawsuits. Therefore, *notice* to the members of the class and *opt-out* right are issues closely related to *res judicata* and instrumental to its effect.

Notice and opt-out

In class actions under (b)(3) the need of the best notice practicable and the ensuing right to opt-out are deemed essential requirements of due process, for binding absent class members to a judgment.[9] Notice is a critical part of the class action practice, as it provides:

- a structural (formal) assurance of fairness that permits representative parties to bind absent class members (Klonoff et al, 2011);
- an occasion to participate in the litigation and to monitor the performance of class representatives and class counsel;
- a chance to be heard (constitutional guarantee of due process);
- a device to lessen the vulnerability of the final judgment to collateral attack by class members (the possibility to litigate on his own if the member shows not having been adequately represented).

Criticisms to the requirement of individual notice are essentially related to its costs.[10] It has been considered unnecessary and wasteful when the class member has a stake in the matter not large enough to justify separate litigation, lacking then any incentive to opt-out (Klonoff et al, 2011).

Nevertheless, according to the provisions of the FRCP, notice is, in general, not discretionary for the court nor for the party. Opt-out, in turn, being an individual right assured by that requirement is not neutral in terms of social cost. Under some conditions, it would reduce the efficiency of the class action by creating duplicative litigation.

Res judicata and *collateral estoppel*

As it has been said, the purpose of a class action is to adjudicate the claims of numerous similarly-situated persons in a single action. Thus, a vital goal of a class action judgment is to foreclose further litigation of claims that were or could have been adjudicated in the class action (*res judicata* or *claim* preclusion), as well as issues that were actually determined in, and were necessary to, the adjudication of the class action (collateral estoppel or *issue* preclusion). However, *res judicata* and *collateral estoppel* are two of the most difficult civil procedure doctrines

[9] The basic requirements of class certification notice and opt-out rights are set forth in Rule 23(c)(2).

[10] E.g, in *Eisen vs. Carlisle & Jacqueline* (SC, 1974, 417 US 156), the costs of notice rose to nearly $ 2,250,000.

to understand and apply, even in traditional one-on-one litigation and a detailed treatment on the matter would clearly exceed the aims and scope of this work. Then, we will sketch only some features useful to our purposes.

Claim preclusion (*res judicata*) in the class-action context

In class actions, the *res judicata* effect of a final judgment generally spreads to the entire certified class. There are two exceptions grounded in due process requirements. First, if the court and/or the plaintiff fail to direct the absent class members the best notice practicable. Second, if the class representative fails to provide fair and adequate representation in the original suit. [11]

In mandatory class actions, following an orthodox view based upon the structure of Rule 23(b)(1) and (2), class actions would bar any class member's later litigation based on the same claim against the same defendant under the principles of *res judicata,* even if class members were not given notice of the action and the right to opt-out. Nonetheless, courts have long struggled with whether due process requires something more. Klonoff et al. (2011) have suggested that when both monetary and injunctive relief are sought in an action certified under Rule 23(b)(2), notice may be mandatory if absent class members are to be bound.[12]

Instead, if a mandatory class action under Rule 23(b)(1) or (2) includes a claim for damages, commentators have debated this issue for years. According to Shutts,[13] minimal due process requires that "an absent plaintiff be provided with an opportunity to remove himself from the

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[11]. In *McDowell vs. Brown*, (392 F.3d 1283, 1290–92,11th Cir. 2004) the Court held that, under the doctrine of res judicata, the veteran McDowell is precluded from challenging the constitutionality of section 5505 of the Omnibus Budget Reconciliation Act of 1990. Some years before, a court had approved a settlement agreement in *Disabled American Veterans v. United States Dep't of Veterans Affairs*, 783 F Supp. 187 (SDNY 1992). The plaintiff had contended that the class representatives failed to provide fair and adequate representation to the members of the class and therefore, alleged not to be bound by the prior class settlement. On the contrary, in *Stephenson v. Dow Chemical co*, 273, F3d 249 (2d circuit 2001), the court found a less frequent case of a judgment not being binding because the original class representatives were inadequate. The settlement in the Agent Orange class action (1984) did not provide for post-1994 claimants and the settlement-fund terminated in that year, whereas Daniel Stephenson and Joe Isaacson's disability appeared afterwards. Thus, they have not been adequately represented in violation of due process.

[12] In *Johnson v. General Motors Co,* (598 F.2d 432, US Court of Appeals, 5th circuit. 1979), Johnson brought an employment discrimination action for money damages even though he had been a member of a class in a case - the Rowe action, certified under Rule 23(b)(2) - that had successfully sought only injunctive relief. The district court found Johnson's case barred by *res judicata,* but the Fifth Circuit reversed, as the class claims did not include damages.

[13] *Philipps Petroleum Co. v. Shutts*, 472 US 797. 1985

class by executing and returning an opt-out if monetary claims are involved".

Issue preclusion (collateral estoppel) in the class-action context

Collateral estoppel or issue preclusion permits a court to prevent a party who has actually litigated an issue in a prior action from relitigating that issue in a subsequent action. Tulumello & Whitburn (2010) recall that "The Seventh Circuit recited the difficulties with Rule 23's predecessor— difficulties that authors of the new Rule sought to avoid when they drafted it in 1966. Under the old rule, plaintiffs could style a case a "class action" without binding absent class members to any judgment. If plaintiffs prevailed, absent class members would intervene and share in the rewards. If not, then absent class members would wait for the next plaintiff to have a go.[14] As unfair as such a device may have been, the current rule would prove equally unfair, according to the Seventh Circuit, if it permitted opt-outs to use collateral estoppel. In that court's view,"[w]hether class members should get the benefit of a favorable judgment, despite not being bound by an unfavorable judgment, was considered and decided in 1966. That decision binds us still...However, not all courts have shied away from permitting opt-out plaintiffs to invoke the doctrine of offensive collateral estoppel."[15]

Particulars of the field are far from being included among the content of this work. However, it is interesting to observe certain similarities between the old American rule and some features of the civil law class actions that we will discuss in the next section. We must note that we will deal with both effects (claim preclusion and issue preclusion) loosely under the scope of (unqualified) *res judicata* effect when we analyze civil law schemes of class actions.[16]

Class action settlements

In class action settlement, Rule 23(e) states, "*the claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval*". This simple rule, in practice, is challenged by several sources of complexity. Difficulty comes first from the multiple interested participants (aside the materially absent subjects): the defendant, the defense counsel, the class

[14] *Premier Electrical Construction co.*, 814 F.2d at 362

[15] See *Saunders v. Naval Air Rework Facility* (608 F.2d 1308, 1312, 9th Cir. 1979)

[16] We will not provide in this work precisions about the correspondence between claim preclusion and what in civil law countries is known by variants of "formal *res judicata*" (*"cosa juzgada formal", "autorité formelle de chose jugée", "coisa julgada formal"*), and issue preclusion and "material *res judicata*" (*"cosa juzgada material", "autorité matérielle de chose jugée", "coisa julgada material"*). See Gidi et al. (2011).

representative, the class counsel, the insurers and objectors (class members who come forward to challenge the substantive or procedural fairness of the proposed settlement), the court, legislative and public agencies. Second, from the presence of competing interests that may arise: intra-class conflicts, conflicts between class counsel and their clients, and those potentially yielding from the role of the judge in fostering settlement (Klonoff et al., 2011). Those relevant peculiarities are invoked to defend the need of judge intervention to check that the settlement terms were fair and *negotiated without collusion*.

With all its complexities and even uncertainties, the system instituted by the amended FRCP is regarded as the mainstream model and then the benchmark to check alternative systems and so we are going to do. As we said before, any attempt of complete comparison is probably unfruitful. Then, the extent of our inquiry will encompass only a few elements of certain systems. In first place, the procedural scheme implemented in Brazil and Argentina. Then, the France´s one.

3.2. The Brazil and Argentina´s scheme

The usual approach to class actions in Brazilian literature starts by distinguishing different kinds of rights or interests and then goes to the procedural devices tending to their protection.

In words of Pellegrini Grinover (2014) "Nowadays, it is usual to admit two kinds of collective rights (in a broad sense) in the legislation, legal writings and jurisprudence, these being: (i) the diffuse rights, which are indivisible and to which indefinite classes of people are entitled; (ii) the homogeneous individual rights (in the Brazilian and Iberian-American jargon)[17], which are divisible and to which the members of specific classes are entitled. They may be taken to court in the form of personal suits, but may also be dealt with in a collective way." Then, "sometimes, the diffuse rights belong to indeterminate and indeterminable people, since there is not any legally binding relationship that joins the members of the group. They are rights concerning quality of life, like environmental, consumer, and public service user rights. But, sometimes, one cannot determine who is entitled to them, as (sic) people are members of a group having some kind of legal connection – for instance, associations and legal entities – and they may be determinable...In Brazil ... the first abovementioned rights are, strictly speaking, diffuse, whereas the latter are named collective, also *stricto sensu*. Nevertheless, the procedure for both diffuse and collective rights is alike."

[17] See also the Argentinean case *Halabi vs PEN*, footnote 23.

All of them would share a loosely defined property -any sort of "indivisibility". Diffuse (it has been said) would be "ontologically"[18] indivisible whereas indivisibility of homogeneous individual rights would be only procedural.

Class actions[19] in Brazil are generally governed by the principle that a judgment has "expansive" effects of *res judicata* only whether it is favorable to the class: *secundum eventum litis*, or "one-way preclusion". Conversely, a rebuffed action would never prejudice the individual rights of the class members, who will always be able to individually litigate on their own.

Under certain conditions, a different representative can also bring a successive class action. The Brazilian *res judicata* system on the issue is in fact based on the nature of the rights at stake. For instance, the *Public Interest Civil Action Act (PICAA),*[20] if the class action fails due to lack of evidence on the merits, allows to any other representative to file a new class action conveying identical content as long as *new evidence can be produced*. Moreover, the *Consumer Defense Code (CDC)* distinguishes between three kinds of rights, and enacts a slightly different system on that basis, as follows:

- Regarding "diffuse rights" and "collective rights" *stricto sensu*, the *res judicata* expands *erga omnes* but always *secundum eventum litis*. Alike PICAA, a new class action can be filed in the event of rejection due to lack of evidence on the merits, i.e., *secundum eventum probationis.*
- Regarding "homogeneous individual rights" the system is *ultra partes* only if favorable to the group, that is to say, also in this case, *secundum eventum litis.*

Concerning the procedural role of the members of the class, the Brazilian system "deliberately bears on the opt-out and the opt-in of the common law system, in which the member of the group will not be affected by the res judicata unless the class action was chosen (opt-in) or the intention to be excluded from the action has been demonstrated (opt-out)." (Pellegrini Grinover, 2014).

In words of Gidi (2003), "The Brazilian system of res judicata can be considered an alternative to the opt-out system, in which a class member

[18] It is obviously outside the limits of this work to discuss if attributing "ontological" properties to a class of things or events makes any sense. The usage of the adjective "ontological" has been credited to the Brazilian jurist Barbosa Moreira.
[19] We will use the denomination "class action" loosely although in Brazil it is common to use more than one name, having "collective action" and "class action" a relationship of genus to species.
[20] *Lei da Ação Civil Pública*, Lei N° 7347, 1985.

may request exclusion from the class judgment. The opt-out device is only justified in a system in which the class judgment is binding on absent class members, regardless of the case's ultimate outcome ("whether or not favorable to the class.") However, an opt-out system is incompatible with a system of *res judicata secundum eventum litis*. Inasmuch as absent members will not be bound by an unfavorable class decree, a member need not exclude himself from the class".

On the reasons of giving *secundum eventum litis* effect to class action judgment, it has been invoked the cost (difficulty) to give the best notice practicable, if strictly required, and the violation of the consumer´s constitutional right of his or her day on the court, if not.

In practice, class lawsuits entertaining homogenous individual interests consist of two phases. The first, tending only to deliver a generic judgment on the liability of the defendant. This initial stage involves only the plaintiff (a consumer´s protection organization) and the defendant (usually a firm). Being the action granted, individual proceedings, tending to determine individual damages, take place.

In Argentina, in turn, *collective actions* have constitutional ground.[21] Those general principles are mainly developed in two special statutes: on the one hand, the *Consumer Protection Act* (CPA),[22] and the *Environmental General Act* (EGA),[23] on the other.

The first version of the CPA (1993) had not enacted any "expansive" effect of *res judicata* because of a Presidential veto on the original draft. Its amendment in 2008,[24] nonetheless, instituted the expansive effect of the judgment pronounced in class actions to all consumers in the *same or similar* situation.

However, a major innovation of the Argentinean system, following mainly but not exactly, the Brazilian Consumer Protection Code, is the adoption of the "one-way preclusion" -the abovementioned *res judicata secundum eventum litis*. Its effect, in short, can be described as follows:

- If the class action is rebuffed,
    - *Res judicata* binds the parties and any registered consumer organizations, who cannot file again the same class claim against the defendant (in the literature it is said "*collective* expansion of *res judicata*").
    - *Res judicata* does not bind individual claims of consumers (it is said that "*individual* expansion of collective *res judicata*" is not present in that case).

[21] Paragraphs 41 to 43, Argentina´s Constitution, according to the Amendment of 1994.
[22] CPA, *Ley 24240, 1993*.
[23] *Ley 25675, 2002*.
[24] EGA, *Ley 26.361, 2008*.

- If the class claim is granted, *res judicata* binds all consumers in the same of similar situation ("*individual* expansion of collective *res judicata*" holds), with the exception of those who opted-out.

On the latter, the 2008 amendment introduced the right to opt-out in favor of individual consumer, which makes a significant difference between Brazilian and Argentinean systems.

Argentinean opt-out right is to be exercised "according to the terms and conditions decided by the judge".[25] In practice, likewise the usual outcome in the North American system (and reinforced here by the advantage given by the *secundum eventum litis* effect) the exercise of the opt-out right is quantitative insignificant. Formally, if claimants had not opted-out, they would have not individually sue meanwhile the class action is not finished.[26]

Regarding the provisions of the EGA, following the Brazilian system, the effect of *res judicata* is *erga omnes* but also *secundum eventum probationis.*[27] I.e., if the class action is denied by failure of proof, a new class action can be filed by the same or other party.

A good part of Argentina's practice of class actions -even outside CPA and EPA scopes - is governed by case law, being the decisions of the Argentina´s Supreme Court, particularly active on this matter, the maximum authoritative source.[28]

3.3. The France´s scheme

France passed a Consumer Protection Act, popularly known as the "Hamon Law" (HL), in 2014.[29] Its most significant innovation is,

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[25] Current text of paragraph 54, CPA.

[26] Gidi (2003) cited above, says "...an opt-out system is incompatible with a system of res judicata secundum eventum litis. Inasmuch as absent members will not be bound by an unfavorable class decree, a member need not exclude himself from the class..." Strictly speaking, his point is not about incompatibility of the type "forbidden/permitted" but on practical inutility. The legislative choice adding both effects may be questionable, but its practical impact is clearly visibly while the class lawsuit is in course, what can take several years. In short, adding *opt out* to *secundum eventum litis* has relevant (either good or bad) practical outcomes.

[27] Paragraph 33, EGA.

[28] *Halabi vs PEN* (CS, H. 270. XLII, 2009) stated the precedent on the matter. The Argentinean Supreme Court said in the case: "...there is no legislation that enacts the effective exercise of the so called class actions in the specific realm of the issue implied in this controversy [*homogenous individual rights* -being the meaning equivalent to the Brazilian in footnote 13]...Facing this lack of legislation it must be said that aforementioned constitutional provisions are clearly operative, and judges are obliged under the law to give them effectiveness..."

[29] Law 2014/344 passed by the French Parliament on 13 February 2014, validated on 13 March by the French Constitutional Council.

undoubtedly, the introduction of a class action *"à la française"* (the so called "*action de groupe"*) in France´s legal system.

The HL addresses serious procedural problems that had faced the consumers when litigating for their statutory rights. Probably the most critical was the high cost and the complexity of judicial procedure. The HL intends to enhance the effectiveness of consumers' rights, in special in the case of damages.

Standing to sue

Differently to the North American and the Argentinean system, only authorized consumer organizations with national scope and some local organizations in the French Islands (15 approximately) may bring a "group action" (hereinafter, for uniformity´s sake, "class action") *in the name* of consumers, who will later opt-in to benefit of the judgment.

According to HL, the cause of action can result from the violation of legal or contractual obligations in relation to goods sold, services supplied or anticompetitive practices. Only natural persons are to be considered consumers and able to be included in the class -neither professionals nor firms are to be admitted. Unlike the North American class actions, France implemented an idiosyncratic opt-in scheme. Surprisingly, the opt-in right is only to be exercised after (and only if) the liability of the defendant is decided. Consumers´ economic interests are the only issues to be claimed, being expressly excluded *physical injury* and *pain and suffering*. Nonetheless, the recent "health related class action" (hereinafter, HRCA)[30] provides a new procedural mechanism for those kind of claims. We will get back to the issue (with a favorable appraisal) when we address some suggestions for amendment.

The procedure under HL runs two steps. The first tends to examine and decide only if the defendant has to be deemed liable or not. Although only non-profit consumer´s organizations have standing to sue as representative (before the *Tribunal de Grande Instance*, TGI) it has to bring a few individual consumer cases, to play the role of test-case for the adjudication of the class action.

Contrasting to North American class actions, the class action under HL has no specific phase of certification. However, specific standing prerequisites must be checked by the court as a starting requirement. Procedural general conditions (legitimate interest to sue and no *res judicata* or preclusion affecting the claim or issue litigated) also apply.[31]

[30] On 17 December 2015 the National Assembly passed a health reform law (*Projet de loi de modernisation de notre système de santé*), introducing new Articles L.1143-1 et seq. into the Code of Public Health regulating health-related class actions.
[31] *French Code of Civil Procedure*, paragraph 31.

The first step of procedure concludes with the issuance of a "declaratory judgment" by the court ruling substantial and organizational issues, as

- admission and maintainability of the class action,
- liability of the defendant,
- requirements and time for the consumers to opt-in,
- nature of the harm to be compensated,
- quantification of damages
- publicity of the judgment

If deemed necessary, the court may order the defendant to pay a provisional amount to cover expenses incurred by the plaintiff, which are not included in judicial costs, particularly the costs to publicize the decision. In addition, a proportion of damages may be deposited in a state-run financial institution, the *Caisse des Dépôts et Consignations.*

Class integration. The opt-in stage and the determination of damages

Following the criteria set in the judgment, the plaintiff has to publicize the decision in order to allow the consumers to join the class. Claimants that meet the conditions described in the judgment (i.e., identical or similar relevant features to the individual cases brought as test-cases and determinant conditions of time and place) and would like to benefit from the individual compensation already decided, have to opt to join the class (opt-in), in the manner also described by the court decree.

The judgment has to specify the mechanisms to compensate the consumers that joined. Payoffs can be made effective by several ways. First, they can be given directly by the defendant to individual consumers; second, they can be channeled through the representative plaintiff (a consumer organization) or, third, by the assistance of third person (such as a lawyer) designated *ad hoc* for that task, assuming a sort of *special master* role. The provisions of HL include specific execution proceedings.

Aside the general class procedure, the HL instituted a *simplified class action,*[32] that applies when the potential claimants are known from the outset (identity and number) and the amount of damages *per capita* is unique (an identical amount per unit of good or service consumed, or by reference to a period of time). Registered consumers organizations have standing as representative of the class in this simplified case too. According to this special procedure, after the liability is affirmed, the court must order the defendant to compensate the consumers directly and individually. In short, there is not opt-in stage within the simplified

[32] "*Procédure d'action de groupe simplifiée.*"

class action. Nevertheless, if the defendant fails in compensating, the consumer has to make his or her claim via the plaintiff, which assumes its representative role for that claim.

Follow-on class actions

In the case of a final decision issued from a national or European competition authority, determining the existence of a violation of competition law, a "follow-on class action" can be filed.

To this particular kind of class actions, the authority´s final decision operates as an irrefutable presumption of the illegal practice[33] that replaces the first stage of the general class action´s procedure. Plea bargaining or other form of legal settlement in cartel cases -when admitted before competition authorities- could play the same role, even if the LH is not clear enough on this point.[34]

4. Comparative Analysis of Some Critical Features Focusing on Efficiency

The ensuing paragraphs will be devoted to compare a small array of differential key points that characterize the procedural schemes previously sketched. As it was warned, this task assumes a necessary loss of detail as every comparison of empirical systems does. Accordingly, we will limit our conclusions to class action schemes characterized by those features and only in respect to their influence. We will address our study only to class actions that involve pecuniary claims, based on common questions of law or fact, and will employ the term *res judicata* in a broad sense, as loosely comprehending claim preclusion and issue preclusion.

4.1. The French opt-in and settlement

Opt-in has been the subject matter of an extensive literature. Aside some works advocating for their adoption for specific stages of procedure, as settlement (Bronsteen, 2005), the consensus is against opt-in (Gidi, 2013) and favoring opt-out as a condition of the practical existence of class actions.[35]

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[33] Otherwise, the instance would be suspended until the final decision on the competition issue is rendered.

[34] According to L. 423-21, "*Decisions mentioned in L. 423-3* (liability judgment) *and L. 423-10* (simplified class action)*, as well as the one resulting from the application of L. 423-16* (settlement)*, also have binding effect of res judicata towards each member of the class whose damage was repaired throughout the class action procedure*".

[35] "*If a class action adjudication bound only the people who opted in by replying to the notice letter, then class litigation would disappear. Because people simply do not reply to notice letters [38] a lawsuit that includes only the few who reply would be too small to attract a lawyer for the group"* (Bronsteen, 2005)

The French system, however, is certainly idiosyncratic. While opt-in option, when in force, usually has to be made *before* the adjudication of liability, within the French scheme, as we have already seen, it has to be made *after* the liability judgment. This peculiarity, one might think, can change the usual quantitative irrelevance of individual victims effectively incorporated to the class in opt-in regimes. Moreover, categorizing the scheme instituted by the Hamon Law as "opt-in" might lead to some confusion concerning this effect.

Opt-out, being the current North American mainstream (and successful) option, has been regarded as inconsistent with European Civil Law principles of litigation and human rights.[36] Nonetheless, there is some unclearness about the actual significance and practical effects of its circumstantial rival, that peculiar opt-in *à la francaise*.

There is no dispute about a starting-point: *opt-in* in HL, implies that a specific (positive) activity is required by victims (consumers) to join the class (again, in the French case, *after* the liability judgment), and those who join are to be bound by the effect of *res judicata*. It seems clear as well, that being the class action rejected, individual claims are fully allowed.

At first glance, the text of HL may cast some doubts on the effect of the judgment of liability on individual claims. On the one hand, it might be understood that, if a judgment favorable to the class is delivered, victims must address their claims *only* by opting-in, being their right to sue individually, precluded. If this were the content of the rule, the French opt-in would combine a sort of super inclusive effect, in the event that the class action succeeded (as long as any individual claim intended outside the class action would be precluded) and a *secundum eventum litis* effect in the case of rejection (since any individual claim would be allowed).

However, this is not probably the understanding that will prevail in French courts. It seems more plausible to understand that victims that do not exerted their right to opt-in, maintain the right to file an individual action even in the case that class action succeeds (Molfessis, 2014).

[36] *Case of Ruiz-Mateos v.Spain*, 26 June 1993 , Application n°12952/87 ; *Case of McMichael v. United-Kingdom*, 24 February 1995, Application n°16424/90 ; *Vermeulen v. Belgium*, 20 February 1996, Application n° 19075/91 ; *Kress v. Franc*e, 7 June 2001, Application n° 39594/98

A detailed discussion about the reasons given to support the latter understanding is far beyond the scope of this work[37] but we will take it for granted. The unclearness of the provisions on the point is *per se*, objectionable from an efficiency viewpoint, nonetheless. A better draft of the provisions on the matter would be itself a desirable betterment (even in terms of error costs), to be suggested for a hypothetical amendment.

Opt-in and settlement

Based on the previous assumptions, being the vast majority of potential claimants not fully involved in the class, it is tempting to think that there would be insufficient incentives for the defendant to settle. Settlement, in turn, is usually assumed the most desirable option in social-cost terms. Then, that effect, if true, would turn the French opt-in into problematic.

The explanation of this intuition demands only a small development. Let us think of two sets of claims, one (insignificantly small)[38] included in the lawsuit at the time of the settlement and the other (certainly large, by definition) not yet brought but potential at that time. According to our assumption, it is clear that the result of the class suit has no *formal* influence on successive individual actions. However, a commonsense intuition leads to think that it should convey some sort of *informal* impact, no matter the reasons or sources of that effect. Judges of individual claims can take the defendant´s choice to settle a class suit as an indirect confession or a vague way of acceptance of their liability on the issue they are dealing with -common to both individual and class lawsuits by definition. The hype brought about by the settlement itself, particularly in massive cases, can trigger dormant, frivolous and non-frivolous claims, both increasing the defendant´s cost, as well. On this basis, it is easy to conclude that, if settlement on actual class claims increased the value of potential individual claims for any reason whatsoever, settlement would not be the feasible option. This effect, if true, would pervade the France´s idiosyncratic scheme.

This intuition leaves room for deeper examination nonetheless. So far, we have been assuming that probability of success π affects only one variable h and implicitly have taken into account only the resulting expected value, i.e., πh. However, this new argument is implicitly based on a more complex set of relations. Probably, one that fits better with relevant legal categories. On this alternative view, let us assume that one thing is the probability of *being deemed liable* (π_l) related to a binary variable (liable/not liable) and the other is the probability (π_d) of

[37] Some of those reasons, including the opinion of V. L. Boré can be found in Molfessis (2014), cited.
[38] 2014-344 of 17 March 2014, L. 423-3.

different *amounts of damages to be awarded*, being this, more accurately, a probability distribution function.

Following that distinction, we can think of two separate dimensions of the problem: *success* and *amount or quantity*. Thus, as long as the effect of the first class judgment or settlement can influence independently one dimension and the other, the results significantly vary.

Just to illustrate the point simply, let us think of a claim f_1 [39] and another potential claim still unfiled f_2. To start, let us pose the problem according to the simplest and most traditional framework. Let us think, then, that the expected value of each of them is the same in the usual consideration of a unique probability π of h (for the sake of simplicity, let the probability be a unique value, instead of a probability distribution function for all the explanation purposes, assume risk neutrality and usual bases).

$f_1 \rightarrow \pi_1 = 0.5$; $h_1 = \$1{,}000 \rightarrow EVf_1 = \$500$
$f_2 \rightarrow \pi_2 = 0.05$; $h_2 = \$10{,}000 \rightarrow EVf_s = \$500$

As it is easy to see, administrative costs aside, it would be acceptable for the defendant a $ 500 payoff for each claim, totaling $ $1,000 for both. Therefore, if the influence of a $ 500 settlement on the first induced a sort of mild anchor-point for the second (around $ 500 for this too), this option would be acceptable for the defendant too.

However, if stating the *existence of liability* is independent of setting the *amount of the damages* and a settlement on the first affected *only* the former, or even *differently one and the other*, the expected value of the potential and still unfiled second suit f_2 would obviously change.

Let us now think of a case f_2 in which probability $\pi_2 = 0.05$ has to be interpreted only as the probability *of being deemed liable*, being the amount of damages $ 10,000 to be easily proved, almost with certainty. If settling on f_1 ($ 500) raised π_1 *(in* f_2*) to almost 1, the expected value of* f_2 would skyrocket to $10,000. Moreover, this can be particularly acute for claims mandatorily excluded from the class action procedure in the French regime, as pain and suffering and personal injuries, but deriving from a common source-event admitted as a subject matter of class action.[40]

[39] To these aims, f_1 can be interpreted as either an individual claim or a set of claims.

[40] Art. L. 423-1. 2° *"L'action de groupe ne peut porter que sur la réparation des préjudices patrimoniaux résultant des dommages matériels subis par les consommateurs."*

As a corollary, it is obvious that, having both parties symmetric information on the issue, the second plaintiff will not be willing to settle for the sum awarded on the first lawsuit ($ 500), but for something closer to $ 10,000 instead.

There is an additional effect nonetheless, and it is an instance of adverse selection. If some variance in individual harms´ amount is present, and the effect previously described verifies, it is predictable that only victims of harms quantitative near to the amount settled per victim in f_1 or smaller, will opt-in. Conversely, victims having larger claims will choose to sue individually, with almost certain chances to win, but with larger amounts feasible to be proved and awarded. The amount settled per victim, then, would be a floor instead of an average.

However, the previous intuition may be flawed. So far, we were discussing only the effect of a settlement, intentionally disregarding that its obvious alternative, a judgment, can yield an equivalent informal influence. Moreover, the informal authority of a potential liability judgment can be even stronger then the influence of a settlement.

Then, since the effect of either a settlement or a judgment on potential individual claims were merely equivalent, the former could be yet preferable for the defendant. Taking a comparable informal influence for granted, difference on administrative costs turns up as the most relevant factor at stake. Settlement´s administrative costs are usually deemed lower than judgment´s. Nonetheless, we will come back to this issue in the peculiar conditions of the French framework.

In sum, the effect previously described would suggest nothing about the option settlement vs. judgment, but *an increasing in the total costs to be afforded by the defendant.*

A recapitulation might be helpful at this point. Our previous analysis started by assuming a defined interpretation of the provisions of French Consumer Law, after the Hamon Law, specifically on the meaning of the opt-in option and its effect on successive individual claims. On those underpinnings three conclusions may be reached. First, quantitative irrelevance usually associated to opt-in regimes of Class Actions is not strictly predictable of the French design, given its peculiarity. Second, it is only apparent that the most general features of the French opt-in previously described (i.e., potential individual claims outside the class action to be informally impacted by the class lawsuit result), generate incentives that disfavor settlements, although specific transaction costs imposed by the rules governing settlements can hamper them. Third, if the previous interpretation of their provisions were accepted, the France´s scheme would induce an increasing in the costs of the defendant. Fourth, the effects of the system previously analyzed,

although with some differences, place it close to the South American *secundum eventum litis*, which we analyze in the next paragraphs.

We left deliberately pending the issue of the efficiency or inefficiency of the defendant´s over cost yielded by the opt-in *à la française* so far. We will address the point when we discuss some public policy insights.

4.2. The Brazil & Argentina´s System and the *secundum eventum litis res judicata*

The scheme in force in the two main South American countries features some traits that deserve consideration.

i. Unlike the France´s scheme, Argentina´s one instituted an explicit and standard opt-out option. At first glance, this could be seen as equaling the system to the US one, sharing their pros and cons. However, this is not that simple, because additional features significantly alter the results.

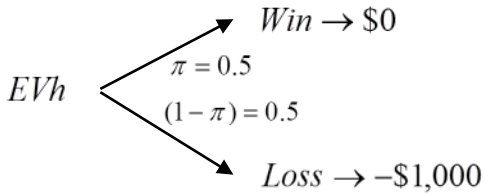
ii. Res *judicata secundum eventum litis*, in turn, makes a visible difference. This effect, as it has been explained, binds individual plaintiffs gathered in the class only in the event of success. Its role, then, splits the consequences of settlement and judicial adjudication. While settlement binds all (in Argentina all non-opting out) victims with no exception, final adjudication only binds parties as long as the defendant is deemed liable, whereas plaintiffs can file separate individual suits on the contrary.

This also differ from the French procedure. In France, any settlement requires a new opt-in to bind potential victims.[41] This, as it is easy to see, although intended to protect absent consumers, significantly rise the administrative costs of the settlement, discouraging that option.

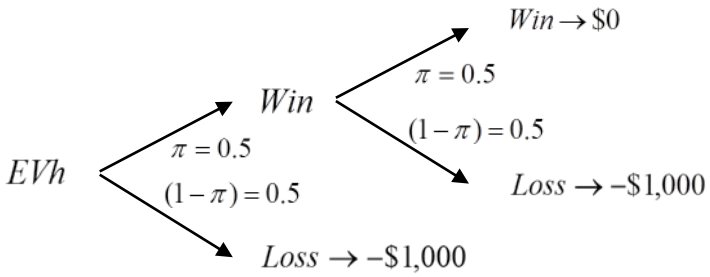
The basic economics of *secundum eventum litis* are easy. Its effect provides the victims with a sort of right to "try twice" or a "second-chance-right", which alters the expected value of the claim.

Being $h = \$1{,}000$ an individual harm included in a class action (not opted out), within a standard opt-out scheme the probability tree and payoffs of the defendant are,

[41] L 423-15/16.



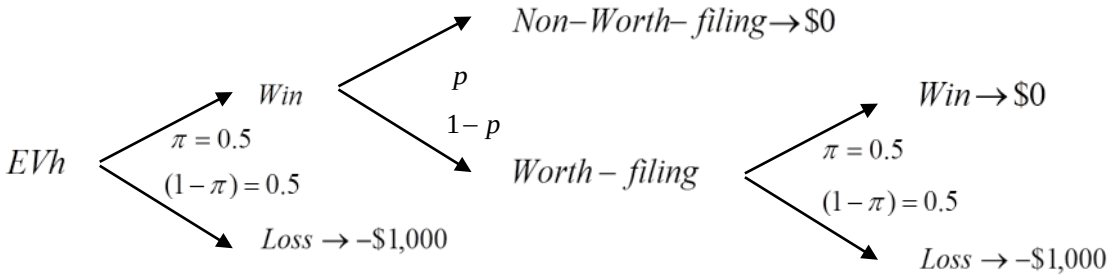
As it is easy to see, the defendant faces an expected value of -$ 500 ($0-\frac{1}{2}\$1{,}000=-\$500$). In opposition, within a *secundum eventum litis* scheme, if the defendant prevails in class lawsuit, victims can renew the claim by filing a subsequent individual action. So,



The aggregate expected value of the harm h (the sum of the expected values of both lawsuits, a class action and an individual one) will be $-\$500-\frac{1}{2}\$500=-\$750$.

An objection can be made, though: the universe implied may include some claims too small to bring a lawsuit (let us name them "non-worth-filing"), i.e. $\pi h - c_p(f) < 0$.

Assuming the point, and with *p: proportion of claims that are not worth to be individually filed*,[42] the resulting tree would be,



[42] In epistemic probability fashion, we can interpret the same nodes as being each claim either *non-worth-filing* with a certain (undefined) probability p or *worth-filing* with probability $1-p$

As it is clear, in the example

$$EVh = ½(-1000) + ½½(1-p)(-1000) = -500 - ¼(1-p)1000 = -500 - 250(1-p)$$

This illustrates a general proposition. If the proportion of individual *worth-filing* claims is >0 (in other words, if the proportion of non-worth filing claims is <1) the defendant´s cost is, in this scenario, larger than the one represented in the first tree.[43] In fact, the universe implied would predictably consist of claims of both types.

This simple approach is certainly debatable. Symmetrically to the argument used to analyze the France´s system, it is plausible to state that independency of successive claims is empirically illusory and the rejection of the class suit will seriously decrease the probability to prevail in individual litigation afterword. Even if this argument were sound, if the expected benefit of some individual lawsuits for potential claimants were larger than zero, it would be still licit to assume that this procedural scheme increases (at any extent) the expected cost of the defendant.

The same can be said about the chance to file a successive class action when the first is rejected and new evidence is discovered and invoked. These simple economics of alternative systems will be explored more in-depth at the time of suggesting actions of legal policy.

5. - Some remarks on legal policy

Based on the previous analysis the overall impression is that both alternative systems tend in fact, aside to their merely formal effects and under the assumptions shown before, to increase the costs of the defendant.

The French HL does it, first, by implicitly setting the damages awarded *per capita* in a class suit granted, as a sort of floor for each claim, given that the victims can choose between to collect them or to file an individual suit. Second, because the liability judgment delivered in a class action may informally rise the probability of success of those potential, individual claims. Third, since the result of the class action is unsuccessful for the plaintiffs, it leaves open the chance for individual actions. Fourth, for the costs of a settlement (e.g., cost of notice) are probably high enough to discourage some socially acceptable settlements.

[43] That is the most important conclusion on the point. The defendant´s cost expressed by the third tree is smaller than less realistic case represented in the second tree, though.

The schemes instituted in the two main South American countries, in turn, deserve some remarks. Yet *sui generis*, being the Argentinean an opt-out system, it will expectedly include the vast majority of individual claims. However, by the effect of *res judicata secundum eventum litis* individual claims will only be bound in the event that the class action to succeed. The same effect and not any form of opt-out, is generally in force in Brazil. Therefore, if the class claim is not granted, it also gives a second chance for individual claims. Additionally, another class action is allowed according some statutory law if new evidence is brought.

Under those scenarios, an initial issue is worth to be explored. In short, is the increase of defendant´s costs equivalent to over-deterrence and excessive social cost? An intuitive answer would be plainly affirmative. Assuming the standard judicial procedure as an optimal tool, distortions of the standard effect of *res judicata* must lead to inefficiencies. Nonetheless, a less naive approach may lead to different conclusions.

Rise of defendant costs and probability of success

As it has been shown, the basic source of the predicted growth of defendant´s costs is the rise of probability of success of the plaintiffs´ actions. An ideal system of litigation, it is easy to think, would be in capacity to distinguish perfectly between cases based on true harms and others, bringing only pretended ones (frivolous or mistakenly advised). Hence, if the state of the system before the inclusion of class actions had featured a poor capacity of selection and a definite bias against victims (in general, consumers) it would be thought that a variant tending to correct that failure is nothing than a usual institutional adjustment.

Yet, should this be true, the efficiency of the chosen instrument will need to be assessed. To explore the issue, let us start by looking at successful class actions. If our suggestion on splitting *probability of success* (probability of a judgment of liability) and *probability (distribution) of obtaining certain amount of damages* to base the framework of analysis were accepted, there would not be any problem to fix, related to the former, in this case. Then, there is no reason based on plaintiff (consumer) protection that explains the necessity of an entire individual lawsuit to revisit both aspects. Therefore, the choice of preserving the right to individually sue might be based only on the latter.

Class action granted. Individual actions vs. individualized proceeding within class action

Undoubtedly, there can be peculiarities to be pondered at the time to assess the amount of individual damages when common issues of law or

of fact are present. Then, a variety of proceedings to deal with these issues may be established *within the class action lawsuit*.

Aside individualization, there is no reason whatsoever to suspect that a court different from the one that is entertaining the class lawsuit, will be in better position to calculate the correct amount of individual damages. Then, if individualization is required, it may be obtained with no need of a whole new lawsuit (which must duplicate the phase of liability adjudication wastefully), but by means of an individual proceeding of assessment brought in the same court, that takes place after the liability has been granted to the class.

Class action rejected. The second-chance right

Conversely, if the class action were not granted, the "second-chance right" (the right to renew the claim by means of an individual action) might be justified in terms of correcting a systemic bias against the consumer-plaintiff, whatever its source is. This argument would cover the France´s scheme and the *secundum eventum litis* effect that characterized the South American systems.

With their formal variants, the idea of "second chance", in short, tends to enhance the consumers-plaintiffs´ probability to obtain a judgment in their favor, and the one-way-preclusion assumes a bias against them. The effectiveness and efficiency of the procedural devices chosen to that aim is, though, questionable.

- On the one hand, claims too small to be rationally brought (but not frivolous, i.e., those that meet $\pi h - c_p < 0$ and $h > 0$) will remain unfiled, as long as this institutional option has no positive effect to foster them.
- On the other, should the refusal of class action (negatively) influence the probability of success of the subsequent individual lawsuits, the universe of worth-filing claims will in fact reduce. As it was said, no individual action that fulfills the conditions $\pi h - c_p < 0$ (even if $h > 0$) will be rationally filed; then, if that negative influence verifies, and probability π lowers, a sub-set of claims that previously to the refusal were $\pi h - c_p > 0$ would turn $\pi h - c_p < 0$.

An additional, contingent but highly relevant effect has to be accounted: the negative influence of the length of the procedures. On the most evident formal effect, the French system includes explicit provisions stating that class actions toll the statute of limitations for subsequent

individual actions.[44] The Argentinean scheme, in turn, is not explicit about the issue. Nonetheless, aside this question, it is clear that the passing of time itself is a quite relevant (informal) source of costs that affects victims´ claims.

Moreover, the significance of the passing of time is enhanced by malfunctions of procedure that reduce the expected value of damages as a function of time. Aside the natural increasing of judicial error against the plaintiffs, derived from their burden of proof (loss or degradation of evidence and increased cost to gather it), other peculiarities of the system may affect the effectiveness of this supposed second chance for relief. Among them, an unfitting judicial interest rate, aside to generating incentives for the defendant to delay, may improperly reduce the real value of damages collected by the victims in comparison with their actual harm (Acciarri & Garoupa, 2014).

The previous remarks give a clue to answer the question beforehand posed. Both French and South American schemes instituted additional chances for claimants and this, at least in formal and abstract terms, can be seen as increasing the costs of the defendant. The actual reasons to relax the usual effect of *res judicata* in this definite sense, should be found out more in legal considerations of Civil Law tradition and moral intuitions built on the relative power of the parties, than in efficiency grounds. However, law & economics allows us, aside those motivations, to explore and to make good guesses on the behavior of real people facing the legal scheme, and to assess the impact of their aggregation on the local distribution of gains (i.e. relative gains of plaintiffs and defendants) and on social cost.

Hence, if a systemic bias that induced judicial error against a class of plaintiffs verifies, the second-chance right implied in the *secundum eventum litis* or its practically similar right to individually sue, in the French scheme, may, at the same time, increase defendant´s cost and reduce social cost. In intuitive terms, the initial scenario would be plagued by type II error (i.e., over exclusion) either induced by natural factors or institutional failures, where true cases of harm were only incompletely awarded or not granted at all. Then, a second chance of detection could ameliorate this failure. Administrative costs of those institutional tools and their effectiveness must be jointly assessed, nonetheless. Thus, better procedural devices, if available, could reduce bias (error) costs at less administrative costs.

Therefore, as we have seen, there is some room for improvements in the French HL system on the point. This is visible in relation to the option of individual actions permitted to consumers unsatisfied with the

[44] L. 423-20.

amount of damages per capita set by the court, in the case of successful class actions. Is seems plausible to hold that a proceeding inside the class action could reach the same goals at lower cost.

Specific proceedings are not even stranger to the logic of HL. For instance, the provisions of HL explicitly include a litigated proceeding for the consumer whose right to be included in the class, is contested by the defendant.[45] That is why a similar sort of proceeding might be used as a vehicle for consumers dissatisfied with *per capita* sums determined in class action´s adjudication, to argue for their rights. This change, at the same time, would achieve the goal to comply with legal guarantee of having consumers their day in court, and the aim of saving wasteful administrative costs derived from repeating stages of procedure. At the same time, would convey gains derived from the information gathered and expertise acquired by the class action´s court on the substantial subject matter litigated, and on details of other individual proceedings of the same kind.[46]

Conversely, in the case of rejection of class actions, actual outcomes of the right to individually sue seem to be dubiously satisfactory. First, the quantitative relevance of these individual actions will probably be too modest, and even smaller the number of successful complaints. Second, the previous conclusion suggests that an improper increasing in defendant costs derived from successful individual actions is not predictable according to the functioning of the actual systems by that reason itself. Unfavorable judgments in successive individual actions are not the real threat for defendants nor a source of increasing social cost.

However, a different conclusion can be inferred focusing on frivolous litigation. Some peculiarities of the costs regimes, specifically the window to abuse of proceeding *in forma pauperis* could encourage frivolous litigation. If frivolous litigation is allowed or even worse, encouraged, by the system, losing individual actions, and not successful ones, will be the real threat for the defendant and source of social cost at the same time. This problem is more general and clearly exceeds the scope of class actions, but its effect can be at least easily minimized in this field, by the standard preclusion of non-opted-out claims.

Real significance of "second-chance" individual actions and their costs and benefits

In short, some negative outcomes predicted by the basic formal model can be deemed not significant in practice, if certain empirical and

[45] L. 423-12/13.
[46] For a detailed account of the issue of informational externalities, see Deffains and Langlais (2011).

institutional conditions are present (additional details and transaction costs accounted), but others still hold. On the latter, some of them may be fixed by simple means. On the former, the second-chance right granted by the French HL system (via its peculiar opt-in) and the Brazil-Argentina´s one (via *res judicata secundum eventum litis*) may be irrelevant as a threat (either concerning defendant private costs or social cost) but, at the same time, could be scarcely beneficial to victims. Both outcomes would be predictable since the result of potential individual claims is not materially independent of the class lawsuit´s result, and the stop-and-wait option is not cheap enough for victims to take it.

Paradoxically, shortening the delay of proceedings or a betterment of conditions that hinder the consumers from obtaining a materially fair decision (i.e., improving access to Justice), might make the second chance right effective and, at the same time, socially costly. I.e., if the objective bias against consumers disappeared, one-way additional chances could worsen judicial error (error type I, i.e., over inclusion) and encourage frivolous litigation, increasing the social cost.

Concerning the French HL rules of procedure, a proceeding *within* the class lawsuit, tending to determine individual damages when the class action success *in replace* of the chance to individually sue, at least deserves to be explored. The model of the same country´s HRCA looks preferable on this matter. The same kind of proceeding is generally followed in Brazil and can be applied in the Argentina´s scheme with no need of amendment, based on judge faculties. Details of this proceeding obviously matter, and should be the theme of further research.

Empirical research on the actual significance of individual claims following a rejected class action is also worth doing in both systems. If their significance were actually low, this would mean that this second-chance right is not enough valuable to victims. Thus, improvements in the functioning of class actions procedure or in the design of alternative tools can help harmed consumers more than this idiosyncratic tool, at less social cost. At the same time, banning subsequent individual litigation cancels the possibility of frivolous individual litigation.

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