Broadening the Scope of Judicial Gatekeeping: Adopting the Good Faith Doctrine in Class Action Proceedings

Eran B. Taussig

Follow this and additional works at: https://scholarship.law.stjohns.edu/lawreview

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.
BROADENING THE SCOPE OF JUDICIAL GATEKEEPING: ADOPTING THE GOOD FAITH DOCTRINE IN CLASS ACTION PROCEEDINGS

ERAN B. TAUSSIG†

Without [invoking good faith a judge] might, in a particular case, be unable to do justice at all, or he might be able to do it only at the cost of fictionalizing existing legal concepts and rules, thereby snarling up the law for future cases. In begetting snarl, fiction may introduce inequity, unclarity or unpredictability. In addition, fiction can divert analytical focus or even cast aspersions on an innocent party.¹

TABLE OF CONTENTS

TABLE OF CONTENTS ........................................................................................................ 1275
I. INTRODUCTION ............................................................................................................. 1276
II. MERITS AND DRAWBACKS OF CLASS ACTIONS ...................................................... 1279
III. MECHANISMS DESIGNED TO SOLVE CLASS ACTIONS PROBLEMS ......................... 1290
   A. Rule 23 Certification Prerequisites and Courts' Increased Scrutiny ................................ 1292
   B. Rule 23(e)—Approval of Settlements ........................................................................ 1295
   C. Rule 11 Sanctions and Inquiring into the Merits ....................................................... 1298
   D. The PSLRA ............................................................................................................... 1300

¹ S.J.D., University of Pennsylvania Law School. This article is a part of my doctoral dissertation, which explores the involvement of the good faith doctrine in class actions in Israel and in the United States and analyzes the content of good faith in various contexts. I wish to thank Professors Stephen Burbank, Catherine Struve, Jill E. Fisch, Craig Martin, Amos Shapiro, Chien-Chung Lin, and Chemi Benno for their invaluable feedback on a previous draft of this article. I would like to particularly acknowledge my deep gratitude and appreciation for the guidance and assistance provided on this project and others by Professor Stephen Goldstein, who passed away shortly after this article was completed. Errors and inaccuracies remain entirely my own.

I. INTRODUCTION

This Article deals with the doctrine of “good faith” and its application in class action proceedings in the United States federal courts. Class actions have grown to play a vital role in the American legal landscape and culture; they enable the realization of claims that otherwise could never be litigated, no
GOOD FAITH IN CLASS ACTIONS

matter how meritorious they are. Their virtues, however, are sometimes overshadowed by their shortcomings. A vast body of literature has been written about the problems and abuses of the class action procedure. Among other problems, scholars lament the extensive filing of meritless class actions in order to extort unwarranted settlements and so-called “sweetheart settlements,” in which class counsel colludes with the defendant to settle meritorious claims for far less than they are worth in exchange for greater fees than counsel would have expected had the parties proceeded to trial.

Even though modern class actions have existed in the United States since 1966, no satisfactory solutions to the abuses of this procedure have been developed. This Article attempts to address this gap by describing and evaluating a solution that has not been applied in the United States: the good faith concept. The focus will be mainly on class actions seeking monetary relief facilitated by Rule 23(b)(3) of the Federal Rules of Civil Procedure.

The absence of a good faith prerequisite in Rule 23 is, perhaps, the most prominent distinction between American and Israeli class action procedure. Unlike Rule 23, the recently enacted Israeli Class Actions Law includes a good faith requirement as one of the prerequisites to certification of a claim.

---

2 See Deborah R. Hensler & Thomas D. Rowe, Jr., Beyond “It Just Ain’t Worth It”: Alternative Strategies for Damage Class Action Reform, 64 LAW & CONTEMP. PROBS. 137, 145–46 (2001) (“[O]ne of the key purposes of collective action [is to facilitate] litigation precisely when many persons have suffered, as a result of another’s wrongdoing, losses that are too modest to allow them to obtain individual counsel.”).


6 For the reader’s convenience, the text of the rule reads: A class action may be maintained if Rule 23(a) is satisfied and if . . . (3) 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. FED. R. CIV. P. 23(b)(3). The other two kinds of class actions are entrenched in Rules 23(b)(1) and 23(b)(2). Id. at 23(b)(1), (2).
as a class action.⁷ The class action procedure reflects the differences between Israeli and American approaches to the concept of good faith, and provides an interesting lens through which to explore the different impact of the substantive aspects of the law.

This Article examines whether and, if so, how the American legal system attempts to achieve some of the same substantive results as those sought by the use of good faith in the Israeli system. This Article contends that federal class actions would better achieve their goals if a good faith prerequisite were adopted. While doing so, it considers both the larger legal and socio-political contexts—specifically the role that litigation plays in American and in Israeli societies. Arguably, the differences in the role that litigation plays in the two societies may affect the role that a “good faith” requirement can usefully play in both.

Part II of this Article briefly outlines the merits of class actions and the major problems inherent to these proceedings. Part III explores the main mechanisms created in the United States to solve class action problems and examines whether they are successful. Part IV begins by describing the role that good faith plays in Israeli class action proceedings. It then describes how good faith is sporadically used in parallel American proceedings. In order to do that, this Part offers concise introductions to class actions in Israel and to the implementation of the general good faith doctrine in the United States. Part V examines some of the key differences between the American and Israeli legal systems, specifically, the different role that litigation plays in each society, which may or may not justify the differences concerning the usage of good faith in class action proceedings. Part VI of this Article addresses the questions of whether and to what extent the American legal system achieves, by current Rule 23 prerequisites, the same goals as are achieved by the Israeli good faith requirement. Put differently, this Part attempts to answer the question of whether the good faith concept can add value when used as a condition precedent for the certification of a class action. Through this process, this Article considers how such a concept could be incorporated into the current procedure.

II. MERITS AND DRAWBACKS OF CLASS ACTIONS

Ample commentary has been written about the drawbacks of class actions. As discussed later in this Article, some of the criticism leveled against this important procedure is overstated. Before addressing some of this criticism, it is appropriate to take up briefly the merits of class actions. Class actions have broad social and economic significance. They facilitate access to courts in a society that depends upon private litigation for the enforcement of important social norms. While it is true that class action proceedings protect the interests of individuals who have been harmed, but have not bothered to institute a claim, class actions also serve the important public purpose of providing a mechanism for the enforcement of the law in various regulatory regimes. Class actions warn against the violation of the law, save resources, and prevent multiple claims. Their primary purpose is to compel compliance with legal norms through the threat of legal sanctions if these norms are not adhered to and, of course, through the imposition of such sanctions when necessary.

Class action proceedings aim to overcome the problem that small recoveries do not provide the incentive for any individual to file a personal claim. Even in economically viable claims not

---

9 Burbank, supra note 5, at 321.
10 Rule 23(b)(3) class actions may be the most important kind of class action because they enable those with small claims for whom individual litigation would be economically irrational to band together in group litigation against a common adversary. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985); Stephen B. Burbank & Linda J. Silberman, Civil Procedure in Comparative Context: The United States of America, 45 AM. J. COMP. L. 675, 684 (1997).
13 Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997))). See also Hensler & Rowe, supra note 2 ("[O]ne of the key purposes of collective action [is to facilitate] litigation precisely when many persons have suffered, as a result of another's wrongdoing, losses that are too modest to allow them to obtain individual counsel.".).
joined as a class action, the defendant can take advantage of economies of scale; that is, he or she can invest more in case preparation and expert witnesses.\textsuperscript{14} If the defendants foresee a lot of similar claims that will follow, it is worthwhile for them to spend more on proving common questions.\textsuperscript{15} This is true even in large claims such as tort claims, in which defendants will outspend the plaintiffs on common issues, unless the claims are aggregated.\textsuperscript{16} This foils the law's general objectives of deterrence and compensation.\textsuperscript{17} This is why, in harnessing lawyers' private pursuit of contingency fees, class actions have promoted the common good by taking law enforcement out of the state's hands and putting it in the hands of "private attorneys general."\textsuperscript{18} These lawyers spot potential legal violations, identify individuals to serve as named plaintiffs, and file class actions on behalf of a class of similarly situated individuals.\textsuperscript{19} If they win, they obtain a percentage of the total payment made by defendants; if they lose, they bear the litigation expenses.\textsuperscript{20} Since the representative plaintiff's lawyer can spread his investment over all of the claims—similarly to the defendant's lawyer—it becomes possible to make investments in the litigation that the plaintiff

\begin{footnotesize}
\begin{enumerate}
\item See Hay & Rosenberg, supra note 4, at 1379.
\item See id. at 1384.
\item See, e.g., David Rosenberg, Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't, 37 HARV. J. ON LEGIS. 393, 394-95 (2000).
\item See Coffee, supra note 12, at 1548; Hensler & Rowe, supra note 13, at 137–38. On the objectives of class actions, see RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 615 (2007) ("[W]hat is most important from an economic standpoint is that the violator be confronted with the costs of his violation—this preserves the deterrent effect of litigation—not that he pay them to his victims.").
\item See Carl W. Hittinger & Jarod M. Bona, The Diminishing Role of the Private Attorney General in Antitrust and Securities Class Action Cases Aided by the Supreme Court, 4 J. BUS. & TECH. L. 167, 168 (2009).
\end{enumerate}
\end{footnotesize}
could not make if the claims were filed independently.\textsuperscript{21} Simply put by former United States Supreme Court Justice Douglas, "[t]he class action is one of the few legal remedies the small claimant has against those who command the status quo."\textsuperscript{22}

Class actions also help gain efficiency and save costs.\textsuperscript{23} Efficiency is achieved by the joinder of many claims with similar facts against the same defendants.\textsuperscript{24} Thus, courts are not compelled to deal with every claim separately, and valuable judicial time is conserved. Moreover, class actions obtain uniform decisions, reduce the risk of multiplicity of findings, and, therefore, bring stability to the judicial system.\textsuperscript{25}

Class actions achieve equality between plaintiffs: Without class actions, a plaintiff who files or collects first would be in a better situation than a peer who files a claim at a later date when the defendant's finances have diminished. Class actions ensure that similarly situated plaintiffs receive the same compensation.\textsuperscript{26}

Class action procedure also deals with the social interest in defending the rule of law. To deter potential violations of the law, it is imperative that defendants who violate the law be sanctioned. In other words, class actions assist in norm enforcement, whereas, without class action suits, these norms would be violated with impunity due to a lack of incentive to file an individual suit.\textsuperscript{27} Since public agencies, both in Israel and the United States, lack sufficient financial resources to monitor and

\textsuperscript{21} The economy of scale problem remains to some extent because even in class action proceedings, class counsel does not get the whole recovery but a mere percentage of it. This means that the defendant still has an incentive to outspend the class counsel. See, e.g., Hay & Rosenberg, supra note 4, at 1385–86.


\textsuperscript{23} See, e.g., Greenfield v. Villager Indus., Inc., 483 F.2d 824, 831 (3d Cir. 1973).


\textsuperscript{26} See generally Parker v. Time Warner Entm't Co., 239 F.R.D. 318, 338–39 (E.D.N.Y. 2007) (explaining the rationale for equal distribution among similarly-situated plaintiffs, along with the rare circumstances in which "asymmetrically allocated damage awards may be justified").

\textsuperscript{27} The significance of private enforcement has been widely discussed in legal scholarship. See, e.g., Lisa L. Casey, Reforming Securities Class Actions from the Bench: Judging Fiduciaries and Fiduciary Judging, 2003 BYU L. REV. 1239, 1247–50.
detect all wrongdoing or to prosecute all violators, class actions are needed to fill this gap.\textsuperscript{25} This is why class actions add an important dimension to regulatory enforcement.\textsuperscript{29} As discussed in detail below, the United States uses ex post regulation, as opposed to heavy ex ante constraints, far more than most European countries.\textsuperscript{30} This choice necessitates the wide scope of class actions.

In addition to the benefits of ex post enforcement, class actions produce "spillovers"\textsuperscript{31}—positive externalities—that provide public advantages such as information sharing between plaintiffs' attorneys, accountability of both corporations and the entities that regulate them, and transparency of the judicial process.\textsuperscript{32} They also produce innovative legal theories, sophisticated damage models, and other innovations that are propelled by entrepreneurial class representatives and class counsel.\textsuperscript{33}

To sum up, class actions benefit the public and society when they integrate private actors into ex post enforcement. However, class actions have been repeatedly criticized for allowing class attorneys to appropriate more than their rightful shares of the common fund and for providing much less compensation and deterrence than alleged.\textsuperscript{34} The image of class actions in the media, and therefore in peoples' minds, is of a mechanism created for lawyers' personal profit and not as a means of achieving public good.\textsuperscript{35} Commentators and courts have also


\textsuperscript{29} DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSuing PUBLIC GOALS FOR PRIVATE GAIN 69–71 (RAND 2000).

\textsuperscript{30} See infra text accompanying notes 179–184, 266–274, 280–284.


\textsuperscript{32} See Elizabeth Chamblee Burch, Securities Class Actions as Pragmatic Ex Post Regulation, 43 GA. L. REV. 63, 67 (2008).

\textsuperscript{33} See id.

\textsuperscript{34} See, e.g., HENSLER ET AL., supra note 29, at 119–20, 434–37 (comparing attorney fees with payouts to class members).

\textsuperscript{35} See Deborah R. Hensler, Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation, 11 DUKE J. COMP. & INT'L L. 179, 180 (2001) ("Many ordinary Americans seem to think that class actions are a new-fangled litigation device invented by greedy plaintiff attorneys."); see also
lamented the lack of communication that often arises between class action lawyers and absent members of the class whom they purport to represent. Various scholars describe class actions as a “Frankenstein monster.” Eminent jurists such as Henry Friendly and Richard Posner warn that unscrupulous plaintiffs can leverage the class action device to extract “blackmail settlements” from defendants.

The problems created by the class action procedure can be divided into three categories according to different standpoints: the defendant’s standpoint, the represented class’s standpoint, and the judiciary’s standpoint—which reflects the interests of the public at large.

Viewed from the defendant’s standpoint, class actions are sometimes filed for ulterior motives such as extortion, collusion, interference with competition, and hostile takeover. Frivolous lawsuits may thus be employed to pressure a defendant to compromise, even when that same defendant would have prevailed at trial. Given such a scenario, a defendant will often

---

Editorial, Restoring Class to Class Actions, WASH. POST, Mar. 9, 2002, at A22 (“At settlement time, the lawyers cash in, while the ‘clients’ get coupons for product upgrades.”).

See Mars Steel Corp. v. Cont’l Ill. Nat’l Bank & Trust Co. of Chi., 834 F.2d 677, 678 (7th Cir. 1987) (“Class actions differ from ordinary lawsuits in that the lawyers for the class, rather than the clients, have all the initiative and are close to being the real parties in interest. This ... generates a host of problems.”); see also John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 COLUM. L. REV. 1343, 1346 (1995) (“[I]ndividual plaintiffs have weak to nonexistent control over their attorneys across the mass tort context for reasons that are inherent to the economics of mass tort litigation.”).


See In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1298–300 (7th Cir. 1995) (Judge Posner quoting Judge Friendly); HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (Columbia Univ. Press 1973). Similar views were expressed by other judges, such as Judge Easterbrook. See In re Bridgestone/Firestone, Inc., 288 F.3d 1012, 1016–17 (7th Cir. 2002); West v. Prudential Sec., Inc., 282 F.3d 935, 937 (7th Cir. 2002).


See, e.g., Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) (“[C]lass certification creates insurmountable pressure on defendants to settle, whereas individual trials would not.”). According to a RAND study, the ex ante goal of most class action plaintiffs is to reach a settlement. See HENSLER ET AL., supra note 29, at 93–94. Moreover, some legal counsels of big corporations admitted that they were negotiating with lawyers who approached them with offers for cheap settlements in return for agreements not to challenge fee requests. Id. at 93.
make the economic choice to pay in order to minimize his or her costs. 41 Defendants are sometimes ready to pay to prevent damage to their reputations, even if the claim is without merit. This strategy thwarts two of the main goals of class action proceedings: enforcing the law and deterring its breach. 42 Frivolous class actions may obtain larger settlements than plaintiffs would have obtained at regular trials. 43 This phenomenon arises mainly from the extensive discovery process imposed upon defendants under federal law, regardless of whether or not the suit has merit, 44 and from the fact that the initial costs of class action management are higher for the defendant than for the plaintiff. 45 Discovery enables the class counsel to harass defendants to the point of disrupting day-to-day management of a defendant corporation. 46 It is thus apparent that some class actions are filed with no intention to go to trial and obtain a final judgment, but instead to intimidate the defendant into settling the claim. The lack of connection between the merit of the claim and the damage sustained on the one hand, and the agreed settlements on the other hand, frustrates the purposes underpinning class actions. Both extortionate class actions, which raise considerably the liability of defendants who

41 This may ultimately damage the entire public, for example, when the class compensation payments are passed on to the public.


43 This phenomenon can be explained via the theory that posits that the decision frame in frivolous litigation induces risk-seeking behavior in plaintiffs and risk-averse behavior in defendants. According to this theory, “[p]laintiffs in frivolous litigation . . . are psychologically inclined toward trial, while defendants in frivolous litigation are psychologically inclined toward settlement.” Chris Guthrie, Framing Frivolous Litigation: A Psychological Theory, 67 U. CHI. L. REV. 163, 168 (2000). In addition, “[b]ecause plaintiffs in frivolous suits have a greater tolerance for risk than the defendants they have sued, the plaintiffs have ‘psychological leverage’ in settlement negotiations.” Id. at 191.


45 See John C. Coffee, Jr., Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 COLUM. L. REV. 669, 677 (1986). According to the “American rule,” under which each litigant pays his or her own attorney fees regardless of the outcome, plaintiffs have less to lose when filing a class action. This may play into the calculations of lawyers considering whether to bring frivolous lawsuits.

follow the law, and decrease settlements reached for meritorious claims, undercut the potential deterrence value of class action lawsuits.

Class actions are also problematic from the standpoint of the represented members of the class. First, in an adversarial legal system, every litigant is entitled to his day in court. Certifying a claim as a class action means denying the right of every plaintiff to choose his own counsel and to file an individual claim. Since the absent members of the class are bound by the class action's outcome, an inappropriate use of this mechanism may harm their rights. This is less problematic in “negative value” class actions, where individual plaintiffs do not have an economically viable claim.

---

47 This occurs when class counsel colludes with the defendants. See infra text accompanying notes 65–67 (discussing these types of situations).
48 HENSLER ET AL., supra note 29, at 79. It should be noted that limited empirical evidence exists pertaining to deterrence achieved by class actions. See, e.g., Dan M. Kahan, The Secret Ambition of Deterrence, 113 HARV. L. REV. 413, 416 (1999) (“Empirically, deterrence claims are speculative.”); Michelle M. Mello & Troyen A. Brennan, Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform, 80 TEX. L. REV. 1595, 1604 (2002) (“Hard empirical evidence of [tort] deterrence is indeed difficult to come by.”). Professors Dewees and Trebilcock, however, “found mixed evidence of deterrence.” Id.
49 This issue purports to be solved by the opt-out opportunity, which is given to the individual plaintiffs by the certifying court. Clearly, when plaintiffs either do not know about the damage or do not care about their personal claims, notice and opportunity to opt-out are hardly important. See, e.g., Burbank, supra note 5, at 325.
50 Class actions represent an exception to the rule that an absent party cannot be bound by judgment in personam. As long as the named parties adequately represent the absent class members, the judgment will bind the absent parties. See Hansberry v. Lee, 311 U.S. 32, 41–43 (1940); Susman v. Lincoln Am. Corp., 561 F.2d 86, 89–90 (7th Cir. 1977) (quoting Nat’l Ass’n of Reg’l Med. Programs v. Mathews, 551 F.2d 340, 344–45 (D.C. Cir. 1977)); see also Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 807–08 (1985) (prescribing due process requirements with respect to jurisdiction over absent members of a plaintiff class action in state court).
51 This is why several scholars have written that class actions have transformed from being a sword for the harmed to a shield for the malfeasant. See, e.g., Coffee, supra note 36, at 1350; Charles Silver, “We’re Scared to Death”: Class Certification and Blackmail, 78 N.Y.U. L. REV. 1357, 1405 (2003) (discussing class actions’ effect in protecting defendants from bankruptcy).
Another, potentially more significant problem, is the built-in conflict of interest between the members of the class and the class counsel, which stems from agency problems. The class counsel is interested in his or her contingency fee, while the members of the class are interested in maximizing their compensation. The result is a substantial gap between the interests of the representatives and those of the absent class members. An information gap also exists: Class counsel obtains all the information, both factual and legal, and can better assess the real value of the claim and the results of potential litigation. Class counsel alone can estimate the cost of going to trial. The disparity in information distribution leaves the representative plaintiff and the absent members of the class unable to monitor the counsel’s decisions. The named plaintiff

53 According to Israeli law, in addition to his or her share of the settlements proceeds, the named plaintiff is also entitled to a reward in case of a settlement or if he or she wins at trial. Class Actions Law, 2006, S.H. 2054, p. 264, § 22 (trial); § 18 (settlement). Therefore, at least partly, there is also an integral conflict of interest between the named plaintiff and the members of the class. In current federal securities class actions the named plaintiff cannot receive any compensation above what each other member of the class receives, other than costs and expenses. See Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 77z-1 (2006).

54 See Jonathan R. Macey & Geoffrey P. Miller, The Plaintiff's Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform, 58 U. Chi. L. Rev. 1, 12–13 (1991). There has been ample discussion concerning the misalignment between the interests of the class counsel and those of absent members of the class. See, e.g., Coffee, supra note 36, at 1442–43; Samuel Issacharoff, Class Action Conflicts, 30 U.C. Davis L. Rev. 805, 830 (1997); Susan P. Konik & George M. Cohen, Under Cloak of Settlement, 82 Va. L. Rev. 1051, 1056 (1996).

55 See, e.g., Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 524 (1st Cir. 1991) ("[L]awyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees.").

56 Professors Macey and Miller suggested to solve this problem by an auction to sell plaintiffs' rights to the highest bidder. Macey & Miller, supra note 54, at 6; Jonathan R. Macey & Geoffrey P. Miller, Auctioning Class Action and Derivative Suits: A Rejoinder, 87 Nw. U. L. Rev. 458, 460 (1993).

57 Judges experience similar problems when the class counsel and the defendants jointly request the approval of a class action settlement. See, e.g., COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, CIVIL, AND CRIMINAL PROCEDURE 52 (1996).

The court's Rule 23(e) obligation to review and approve a class settlement commonly must surmount the informational difficulties that arise when the major adversaries join forces as proponents of their settlement agreement. Objectors frequently appear to reduce these difficulties, but it may be difficult for objectors to obtain the information required for a fully informed challenge.
GOOD FAITH IN CLASS ACTIONS

is sometimes considered to be a “figurehead” with the class counsel being the real party in interest. The class action suit is even named a “lawsuit without clients.” In these circumstances, one cannot expect the named plaintiff to monitor the class counsel’s decisions.

The lack of confidence in the named plaintiff’s supervisory role over class counsel is magnified in decisions to settle: Unlike in ordinary litigation, in which a client may override the lawyer’s decision and settle, in class actions the class counsel is the only one who can launch a settlement, and he or she can do it without the approval of the named plaintiff. The settlement needs to be approved by the court, but even the court cannot force an alternative settlement on the lawyer.

Class counsel may prefer to minimize the costs incurred by him or her in representation, as some may not be fully reimbursed, even where the expected reimbursement for the class exceeds these costs. This is so since class counsel bears all the costs, yet enjoys only part of the returns. Class counsel invests less than he would if he was the sole owner of the proceeds from the class action or if he was directly and effectively monitored by the owner and always paid to cover his costs.

\[\text{id.; see also Koniak & Cohen, supra note 54, at 1122–23; Jonathan R. Macey & Geoffrey P. Miller, Judicial Review of Class Action Settlements, J. LEGAL ANALYSIS 179–83 (explaining why courts have limited capability to evaluate the value of settlements).}\]

\[\text{Jean Wegman Burns, Decorative Figureheads: Eliminating Class Representatives in Class Actions, 42 HASTINGS L.J. 165, 165 (1990); Macey & Miller, supra note 54, at 5; see also Richard H. Underwood, Legal Ethics and Class Actions: Problems, Tactics and Judicial Responses, 71 KY. L.J. 787, 802 (1983). Professor Coffee named representative plaintiffs “token figures.” Coffee, supra note 52, at 384.}\]


\[\text{See HENSLER ET AL., supra note 29, at 75.}\]


\[\text{Plaintiffs’ lawyers are more risk averse than class members and may wish to accept settlement offers that the members of the class may rationally wish to reject. Coffee, supra note 52, at 390–91.}\]


\[\text{Issacharoff and Nagareda argue that even unconflicted class counsel might simply do a bad job or might shirk and agree to an inadequate settlement to gain at}\]
some plaintiffs cannot monitor the actions of the class counsels, and others just do not care, then in some “negative value” class actions, the only one who cares is the entrepreneur—usually the class counsel—since most of the members of the class do not care about their claim or about obtaining compensation.65

The weak monitoring of class counsel and the lack of information in the hands of the represented plaintiffs sometimes leads to the phenomena called “sweetheart settlements,” in which class counsel colludes with the defendant to settle meritorious claims for far less than they are worth, in exchange for greater fees than he or she would have expected had the parties proceeded to trial.66 Sometimes this can also evolve into a “reverse auction,” “with the low bidder among the plaintiffs’ attorneys winning the right to settle with the defendant.”67


67 Coffee, supra note 36, at 1354, 1370–73 (“[Reverse auction is] a jurisdictional competition among different teams of plaintiffs’ attorneys in different actions that involve the same underlying allegations. The first team to settle with the defendants in effect precludes the others . . . .”); see Hay & Rosenberg, supra note 4, at 1390–91; Geoffrey P. Miller, Competing Bids in Class Action Settlements, 31 HOFSTRA L. REV. 633 (2003) (suggesting ex post competing bids as a mechanism to solve the “reverse auction” problem); see also PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION 192 (proposed final draft, Apr. 1, 2009) (on file with the American Law Institute).
possibility of collusive settlements grows in direct proportion to the attorney’s ‘independence’ from his client.68

From the judiciary’s standpoint, class actions prevent duplicative claims, which may otherwise have to be dealt with in different courts and lead to a multiplicity of results.69 On the other hand, class action proceedings are expensive for the judicial system.70 When multiple frivolous class actions are filed, the costs for the judiciary are immense.71 Even if most of those claims end with settlement agreements, courts are still required to check the fairness of the agreement and make sure it does not harm the absent plaintiffs.72 This process takes a considerable amount of time, let alone when class actions go to trial. In addition to the fact that settlements in frivolous cases grow in inverse proportion to the efficacy of the class action procedure, expensive judicial time is being wasted on these frivolous settlements instead of using it on other worthy lawsuits. Even

reverse auction phenomenon was dealt with recently by Judge Posner in Reynolds v. Beneficial Nat’l Bank, 288 F.3d 277, 282–83 (7th Cir. 2002) (“Although there is no proof that the settlement was actually collusive in the reverse-auction sense, the circumstances demanded closer scrutiny than the district judge gave it.”); see also Crawford v. Equifax Payment Servs., 201 F.3d 877, 882 (7th Cir. 2000) (rejecting class settlement because “Crawford and his attorney were paid handsomely to go away; the other class members received nothing...and lost the right to pursue class relief”); Coffee, supra note 36, at 1367–83 (discussing the “new collusion” as opposed to “old” collusive settlements).


69 The burden of dealing with duplicative claims is true only under the assumption that the members of the class would file individual claims. This is not true in “negative value” class actions.

70 See, e.g., Kenneth W. Dam, Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest, 4 J. LEGAL STUD. 47, 52 (1975). In certain situations “judges[s] may understandably view the class action not as saving court time but as consuming it.” Id.


when the claim is not frivolous, it may still cause manageability problems, and may still not succeed in preventing multiple litigations (for example, as a result of exclusions from the class). 73

Class actions have both vices and virtues. Controlled use of the procedure advances worthy social interests, while its abuse may damage both defendants and the absent members of a represented class. 74 As this Article discusses in the next section, mechanisms that have been created in the United States to reduce the potential problems with the procedure are inadequate.

III. MECHANISMS DESIGNED TO SOLVE CLASS ACTIONS PROBLEMS

This Part briefly reviews the means taken in order to curtail certain perceived class action problems, mainly frivolous lawsuits and “blackmail” settlements on the one hand, and collusion and sweetheart class settlements on the other hand. This section addresses: Rule 23(a) certification prerequisites and the increased scrutiny of courts; Rule 23(e) and the approval of settlements; the Private Securities Litigation Reform Act of 1995 (“PSLRA”); 75 heightened pleading standards and motions to dismiss; and Rule 11 and the court’s consideration of the merits of the claim. It then examines the recent Class Action Fairness Act of 2005 (“CAFA”). 76

Before describing these mechanisms, it is important to note that recent scholarship suggests that some of the criticism leveled against class actions might be exaggerated. 77 An empirical study determined that frivolous claims were often found to be without merit and were terminated by rulings on motions to dismiss or motions for summary judgment, not by settlements, coerced or otherwise. 78 The same study also found

73 For a comprehensive discussion concerning judicial advantages and disadvantages of class actions, see 2 HERBERT B. NEWBERG & ALBA C. CONTE, NEWBERG ON CLASS ACTIONS, §§5:52-56 (4th ed. 2002).
77 See infra notes 78-81 and accompanying text.
that class counsel’s fees were generally in the traditional range and that the settlement rate for cases filed as class actions was not much different than the settlement rate for civil cases generally.\textsuperscript{79} Hay and Rosenberg assert that the risks of blackmail settlements have been overstated and suggest that existing procedural mechanisms short of decertification provide adequate protection against undue pressure.\textsuperscript{80} Coffee also rejects what he calls “standard critiques of the class action . . . [which state] that securities class actions are frivolous and extortionate, brought by legal shake-down artists seeking a quick payoff.”\textsuperscript{81} He asserts that “the truly ‘frivolous’ securities class action is today relatively rare.”\textsuperscript{82}

That said, class action abuse should not be underestimated. Due to the limits on the availability of state courts’ data and the rareness of current empirical studies about the abuse of class actions in state courts, the extent of class action abuse is unclear.\textsuperscript{83} Moreover, most of the scholars who underestimate class action abuse only address one concern—frivolous lawsuits—


\textsuperscript{82} See id.

and fail to address the other significant concerns such as collusion. Coffee asserts in another article that class action abuse still exists, even if it is different in nature or form. Furthermore, most of these scholars address “strike suits” and securities class action litigation. They do not address frivolous and extortionate claims in other areas of the law. Indeed, concern about frivolous class actions has inspired two of the most significant procedural developments of the past two decades—the PSLRA and CAFA. As this Article demonstrates, the means that were taken to curb class action abuse in the federal court system are ineffective.

A. Rule 23 Certification Prerequisites and Courts’ Increased Scrutiny

In 1966, Rule 23 of the Federal Rules of Civil Procedures was extensively amended and, in doing so, the “modern” class action came to life. Rule 23(a) contains several requirements, each of which must be satisfied before any federal class action can be certified. In addition, a proposed class action must satisfy at least one of the elements of Rule 23(b). This certification procedure is intended to protect the rights of the parties, including the unnamed plaintiffs. The problems discussed above are related mainly to claims certified under Rule 23(b)(3), which permits certification of a claim when questions of fact or

84 See Coffee, supra note 36, at 1367, 1373–84; see also Coffee, supra note 81, at 413.
85 See David L. Shapiro, Class Actions: The Class as Party and Client, 73 NOTRE DAME L. REV. 913, 939 n.68 (1998) (stating that the PSLRA “was evidently designed to help curb perceived abuses in such litigation . . . by trying to assure proper monitoring of plaintiffs’ counsel by a shareholder with the interest and capacity to keep a close watch on the case”); Richard H. Walker & J. Gordon Seymour, Recent Judicial and Legislative Developments Affecting the Private Securities Fraud Class Action, 40 ARIZ. L. REV. 1003, 1023 (1998) (stating that the PSLRA “[wa]s designed to prevent abuses of federal securities class action lawsuits”).
86 H.R. REP. NO. 109-007, at 3 (2005) (“Over the past decade, there have been abuses of the class action device that have—(A) harmed class members with legitimate claims and defendants that have acted responsibly . . . ”). President Bush also remarked that “lawyers went home with huge pay-outs, while the plaintiffs ended up with coupons worth only a few dollars.” White House Press Release, President Signs Class-Action Fairness Act of 2005 (Feb. 18, 2005), available at http://georgewbush-whitehouse.archives.gov/news/releases/2005/02/20050218-11.html.
87 FED. R. CIV. P. 23.
88 Id. 23(b).
GOOD FAITH IN CLASS ACTIONS

law common to the a group of litigants “predominate” over individualized issues and adjudication of the lawsuit as a class action would be the fairest and most efficient manner of resolving the controversy.\textsuperscript{89}

Rule 23(a)’s prerequisites are colloquially referred to as numerosity, commonality, typicality, and adequacy of representation.\textsuperscript{90} For the purposes of this Article, it suffices to mention that both courts and commentators have suggested that the adequacy of the representation prerequisite and the certification procedure as a whole are intended to protect the absent members of the class, who are bound by the final judgment of the class action.\textsuperscript{91} The court is required to monitor the proceedings, make sure the claim continues to meet the prerequisites of class actions, and protect the rights of the absent members of the class. Under Rule 23(a)(4), a court must find that “the representative parties will fairly and adequately protect the interests of the class.”\textsuperscript{92} The adequacy of representation prerequisite encompasses two separate questions: (1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representative will adequately prosecute the action,\textsuperscript{93} through vigorous representation and competency of the representative.

\textsuperscript{89} See id. 23(b)(3).


\textsuperscript{92} FED. R. CIV. P. 23(a)(4).

\textsuperscript{93} See Hansberry v. Lee, 311 U.S. 32, 42–46 (1940) (discussing the requirement of adequate representation); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968) (determining for the first time the test for Rule 23(a)(4)); see also Phillips Petroleum Co., v. Shutts, 472 U.S. 797, 812 (1985) (reiterating that named plaintiff must adequately represent absent class members).
The importance of the “adequacy of representation” prerequisite is evident from the large body of case law that has developed the standards for adequacy. Critics of class actions do not believe that Rule 23 prerequisites are capable of preventing class action abuses. This is why the Rules Advisory Committee amended Rule 23 to make the certification and winning of 23(b)(3) class actions less likely. The amendments include: (1) the addition of a provision for interlocutory appeal of class certification; and (2) the addition of Rule 23(g) as part of the 2003 revisions to the Federal Rules of Civil Procedure, which provides specific criteria that courts need to consider in the appointment of class counsel. Furthermore, federal courts have used increased resistance to prevent abuse of the class action procedure. By imposing more rigorous certification standards, federal courts have refused certification in a larger number of cases. Coffee states that “new barriers have arisen across a variety of contexts where formerly class certification had seemed automatic.”

94 This definition seems to interrelate with the ABA Model Rules of Professional Conduct. Bassett, supra note 91, at 962. Nevertheless, Bassett asserts that courts tend to disregard these rules when considering certification either because they view them as “primarily relevant to disciplinary proceedings [or because they] view the ... Rules as largely inapplicable to class actions.” Id.; see also FED. R. CIV. P. 23(g); Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 282 (7th Cir. 2002) (concerning the adequacy of the proposed class counsel); Culver v. City of Milwaukee, 277 F.3d 908, 915 (7th Cir. 2002) (same).
95 See, e.g., Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997) (finding that the inquiry into adequacy of representation “serves to uncover conflicts of interest between named parties and the class they seek to represent”); Hansberry, 311 U.S. at 45 (rejecting representation as inadequate because it afforded opportunities “for the fraudulent and collusive sacrifice of the rights of absent parties”); Eisen, 391 F.2d at 582 (“[A]n essential concomitant of adequate representation is that the party’s attorney be qualified, experienced and generally able to conduct the proposed litigation. Additionally, it is necessary to eliminate so far as possible the likelihood that the litigants are involved in a collusive suit . . . .”).
96 HENSLER ET AL., supra note 29, at 28–29. Other changes, which also aimed to limit class action filings, were never confirmed. See FED. R. CIV. P. 23.
97 FED. R. CIV. P. 23(g)(1)(A)-(B); FED. R. CIV. P. 23 advisory committee’s notes.
98 FED. R. CIV. P. 23(g)(1). The rule also provides that the class counsel owes a primary duty to the class as a whole. See id. at 23(g)(4).
ruling by the Third Circuit of the U.S. Court of Appeals added to the line of cases requiring a more extensive inquiry into the class certification requirements of Rule 23. In *In re Hydrogen Peroxide Antitrust Litigation*, a unanimous panel vacated the district court's order certifying an antitrust class action and announced stringent standards for class certification procedures. Chief Judge Scirica ruled that the decision to certify a class calls for findings by the court, not merely a “threshold showing” by a party, that each requirement of Rule 23 is met. He added that a class certification decision requires a thorough examination of the factual and legal allegations. Thus, he concluded that “[c]ertification is proper only ‘if the trial court is satisfied, after a rigorous analysis, that the prerequisites’ of Rule 23 are met.” The impact of this decision outside of the Third Circuit and antitrust law remains to be seen.

B. Rule 23(e)—Approval of Settlements

The problems of class actions are at their worst in class action settlements, particularly in settlement-only class actions. As mentioned above, when the parties reach an agreement it is difficult for the court to effectively scrutinize it and make sure that its terms do not harm the rights of the absent members of the class. This is why it was ruled in *Amchem v. Windsor* that when the court deals with settlement-only class actions, it does not need to inquire as to if the case would present intractable

---

26, 2007); see also Coffee, *supra* note 81, at 431 (“Class action certification standards have been significantly tightened across the spectrum of federal court litigation over recent years, and, surprisingly, the most dramatic changes have been in the area of securities class actions.”).

102 552 F.3d 305 (3d Cir. 2008).
103 Id. at 307.
104 Id.
105 Id. at 309 (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 161 (1982)).
problems of trial management—although other Rule 23 prerequisites for certification must still be satisfied.\textsuperscript{108} Rule 23(e) is “an additional requirement, not a superseding direction.”\textsuperscript{109} Rule 23(e) was substantially expanded in 2003 to direct courts on how to conduct an appropriate settlement review. The rule now requires court approval in a fairness hearing, after adequate notice to class members, and with the opportunity to object to the settlement. When settlements are being considered, the court has to make sure that the proposed settlement is “fair, reasonable, and adequate.”\textsuperscript{110} To do that, it must appraise the expected recovery the class would likely obtain in trial—which is equal to the potential judgment multiplied by the probability the class would succeed, minus the expected litigation costs the class attorney would have invested had the case proceeded to judgment.\textsuperscript{111}

There are reasons to believe that these measures are not enough to impede self-dealing between class counsel and defendants. This is why commentators criticize the process as insufficiently protecting the absent members of the class.\textsuperscript{112} This is especially true in “negative value” class actions, in which the unnamed plaintiffs are unlikely to intervene since they usually lack the incentives to come forward.\textsuperscript{113} Therefore, judges depend

\textsuperscript{108} Id. at 609, 620. For situations requiring a higher level of scrutiny when certification and settlement approval are sought simultaneously, see Warfarin Sodium Antitrust Litig., 391 F.3d 516, 534 (3d Cir. 2004), Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998), and Weinberg v. Lear Fan Corp., 627 F. Supp. 719, 722 (S.D.N.Y. 1986). See also MANUAL FOR COMPLEX LITIGATION, supra note 61, § 21.612; Coffee & Paulovic, supra note 101, at S-819.

\textsuperscript{109} Amchem, 521 U.S. at 621.

\textsuperscript{110} FED. R. CIV. P. 23(e)(2).

\textsuperscript{111} Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 285 (7th Cir. 2002).

\textsuperscript{112} See, e.g., HENSLER ET AL., supra note 29, at 86; see also Howard M. Downs, Federal Class Actions: Diminished Protection for the Class and the Case for Reform, 73 Neb. L. Rev. 646, 648 (1994) (criticizing the laxness of judicial review of class settlements); Koniak & Cohen, supra note 54, at 1091–102 (emphasizing risks of collusive settlements); Linda S. Mullenix, Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes, 57 Vand. L. Rev. 1687 (2004) (arguing that courts should improve their examination of the adequacy of class representation at the certification and settlement stages).

\textsuperscript{113} This situation is exacerbated when dueling class actions are pending. See Rhonda Wasserman, Dueling Class Actions, 80 B.U. L. Rev. 461, 474–83 (2000).
on information presented by attorneys, whose self-interest is to
approve the settlement, and who therefore may not provide all
the information needed to assess the quality of the settlement.\footnote{For the same reasons, when judges consider class counsel's fees, they meet with difficulties in assessing the value of the class counsel work. See, e.g., Richard A. Posner, Economic Analysis of Law 616–17 (7th ed. 2007).}

Unlike inquisitorial civil law judges, who may instruct parties to produce documents in their possession, examine witnesses, and appoint experts,\footnote{See John H. Langbein, The German Advantage in Civil Procedure, 52 U. Chi. L. Rev. 823, 826–29 (1985) (discussing the differences between German procedure and Anglo-American civil procedure).} the paradigmatic common law court is passive and relies exclusively on the adversary process.\footnote{See generally Fleming James, Jr. Et al., Civil Procedure §§ 1–2 (5th ed. 2001) (introducing general concepts of adversary systems).} Only the litigants, seeking to convince the court, are supposed to provide the court with the necessary information. To be sure, judges in class action litigation have taken more active roles, instead of assuming the role of passive participant.\footnote{Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1286, 1313 (1976); Linda S. Mullenix, Lessons from Abroad: Complexity and Convergence, 46 Vill. L. Rev. 1, 13 (2001) (“[P]articularly in the realm of complex litigation, the American managerial judge has undertaken roles that are indeed converging with the civil law inquisitorial judge.”); Natalie C. Scott, Don’t Forget Me! The Client in a Class Action Lawsuit, 15 Geo. J. Legal Ethics 561, 571 (2002).} However, up to this point, their procedural tools are still limited compared to those wielded by civil law judges. In addition to this institutional barrier, federal courts are overwhelmed by full dockets.\footnote{According to an empirical study, the average reported time spent on civil cases in federal courts is only 185 minutes per case. See James S. Kakalik Et al., Rand Institute for Civil Justice, An Evaluation of Judicial Case Management Under the Civil Justice Reform Act 249 (1996). Also, in 2000, the number of weighted filings per judgeship was 479 (up from 472 during 1999), of which 311 were civil cases. Admin. Office of the United States Courts, Judicial Business of the United States Courts: 2000 Annual Report of the Director 26–27 (2000). The situation may have worsened due to the enactment of the Class Action Fairness Act, which produced an increase in filing in and removal to federal courts. See Emery G. Lee & Thomas E. Willging, The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals, 156 U. Pa. L. Rev. 1723, 1751 (2008).} Therefore, judges do not have the time or the resources to investigate the quality of the settlement agreement and whether it is reasonable for the members of the class.
C. Rule 11 Sanctions and Inquiring into the Merits

Rule 11 of the Federal Rules of Civil Procedure offers defendants a means to counterattack frivolous lawsuits. In the context of class actions, the rule obligates class counsel to certify that, to the best of his or her knowledge and belief, the pleading is not presented for an improper purpose, and that the claims and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law. If a pleading does not meet the Rule 11 standard, then the court may sanction the filing attorney, the law firm, and the parties responsible for presenting an improper submission. Usually the sanction imposed on the offender is to pay the opposing party's costs, although non-monetary sanctions are also available. However, in most cases, attempts to use Rule 11 as a basis for requesting denial of certification do not succeed. This is especially true since the 1993 amendment of Rule 11, which liberalized the rule.

In addition to Rule 11, which was meant to prevent the filing of meritless lawsuits, federal court judges now address issues involving the merits of the claim before a lawsuit is certified. In the past, application of the Rule 23 prerequisites was fairly superficial, for all courts followed the Eisen ruling, which held that Rule 23 conferred no "authority to conduct preliminary

\[\text{119}\text{ FED. R. CIV. P. 11; see Melissa L. Nelken, Sanctions Under Amended Federal Rule 11—Some “Chilling” Problems in the Struggle Between Compensation and Punishment, 74 GEO. L.J. 1313, 1315–16 (1986) (stating that the Rule was promulgated to prevent baseless lawsuits). The differences in Rule 11 versions before and after 1993 are discussed infra in Part IV.2.A.}\

\[\text{120}\text{ FED. R. CIV. P. 11(c); see also Nelken, supra note 119, at 1315 ("[A] ‘wilfull’ violation of the rule might also lead to ‘appropriate disciplinary action’ against the lawyer.”).}\


\[\text{122}\text{ See id. at 37; FED. R. CIV. P. 11(c)(2).}\

\[\text{123}\text{ See NEWBERG & CONTE, supra note 73, § 3.42, at 537.}\

\[\text{124}\text{ Among the changes was the transition from mandatory to discretionary sanctions, which led to courts choosing to forego sanctions even if Rule 11 was clearly violated. See Barbara Comninos Kruzansky, Note, Sanctions for Non-Frivolous Complaints? Sussman v. Bank of Israel and Implications for the Improper Purpose Prong of Rule 11, 61 ALB. L. REV. 1359, 1369 (1998). In the PSLRA, Congress enacted a provision that essentially restored Rule 11 to its 1983 form in private securities class actions. 15 U.S.C. § 77z-1(c)(1) (2006); see also Corroon v. Reeve, 258 F.3d 86, 92–93 (2d Cir. 2001); Simon DeBartolo Group, L.P. v. Richard E. Jacobs Group, Inc., 186 F.3d 157, 167 (2d Cir. 1997).}\


inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." Several federal courts have recently reinterpreted the Eisen decision and examined the prerequisites more carefully regardless of whether that inquiry involved a review of the merits. In Miles v. Merrill Lynch & Co. (In re Initial Public Offering Securities Litigation), the court overturned the class certification stating that the judge did not sufficiently probe into the plaintiffs' claims to ensure that the requirements of Rule 23 were met. The court ruled that a district court judge may certify a class only after making determinations that each of the Rule 23 requirements was met and that "such determinations can be made only if the judge resolves factual disputes relevant to each Rule 23 requirement and finds that whatever underlying facts are relevant to a particular Rule 23 requirement have been established." The recent decision in In re Hydrogen Peroxide Antitrust Litigation brings the Third Circuit in line with other circuits requiring a rigorous analysis for class certification. In this case, the court rejected a "threshold showing" standard, holding that any factual determination must be made by a preponderance of the evidence. It was held that the court must resolve all disputes relevant to class certification, even if they overlap with the merits—including disputes touching on elements of the cause of action.

---


127 471 F.3d 24.

128 Id. at 29–30.

129 Id. at 41. This test has replaced the more relaxed "some showing" standard previously used as to Rule 23's prerequisites. Coffee & Paulovic, supra note 101, at S-790.

130 552 F.3d 305 (3d Cir. 2009).

131 Id. at 307.
D. The PSLRA

The 1995 Private Securities Litigation Reform Act altered both substantive and procedural practice in class actions brought under the federal securities laws. It was “designed to prevent abuses of federal securities class action lawsuits and to ‘transfer primary control of private securities litigation from lawyers to investors.’” The PSLRA subjected private securities plaintiffs to pleading requirements and created penalties for frivolous lawsuits that were much more demanding “than those applicable to other litigants in federal court.” By stiffening the rules surrounding the certification of federal securities class actions, the PSLRA presented another device that attempts to ensure that only worthwhile lawsuits make it past the certification stage.

Before the enactment of the PSLRA, some argued that there was a problem of abundant securities litigation without merit, and that many securities fraud lawsuits were often filed shortly after a steep fall in stock price, even if there was no evidence of misrepresentation. It was also argued that many of these lawsuits were brought for the purpose of extracting settlements,

---

132 Richard H. Walker & J. Gordon Seymour, Recent Judicial and Legislative Developments Affecting the Private Securities Fraud Class Action, 40 ARIZ. L. REV. 1003, 1023 (1998); see also David L. Shapiro, Class Actions: The Class as Party and Client, 73 NOTRE DAME L. REV. 913, 939 n.68 (1998) (asserting that some provisions of the PSLRA were “evidently designed to help curb perceived abuses in such litigation . . . by trying to assure proper monitoring of plaintiffs' counsel by a shareholder with the interest and capacity to keep a close watch on the case”).


136 Under the current system, lawyers often bring lawsuits immediately after a drop in a company’s stock price, without any further research into the real cause of the price decline. As a result the suits often have no substantive merit, but they have the effect of presenting the company with the unhappy choice between a costly, lengthy discovery process and an exorbitant, unjustified settlement. 141 CONG. REC. E2437-03 (daily ed. Dec. 21, 1995) (speech of Rep. Schumer).
and that plaintiffs would usually settle for a fixed percentage of the claimed damages regardless of the actual strength of the underlying claims.\textsuperscript{137} As Geoffrey Miller notes, existing procedures for preventing frivolous lawsuits had not worked: “Although in theory plaintiffs were required to plead fraud with specificity, . . . courts had not enforced the requirement of specific pleading with sufficient vigor.”\textsuperscript{138} In response to these and other concerns, the PSLRA reformed both the substance and procedure of securities class actions.

Among other reforms created by the PSLRA, each plaintiff seeking to serve as the named plaintiff must submit a sworn statement confirming that he or she has reviewed the complaint and authorized its filing,\textsuperscript{139} that he or she did not purchase the security at the direction of plaintiff’s counsel or in order to commence the litigation, and that he or she is willing to serve as a representative and provide testimony in court. The plaintiff has to disclose the transactions in the security that are the subject of the complaint and identify any other lawsuits during the preceding three years in which he or she has sought to serve as a representative plaintiff in a securities class action. The plaintiff must also state that he or she will not accept any payment for serving as a representative party beyond the pro rata share of any recovery, except for reasonable costs and expenses directly relating to the representation of the class.\textsuperscript{140}

Pertaining to the selection of the named plaintiff, the court is instructed to “appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members.”\textsuperscript{141} The PSLRA establishes a rebuttable presumption

\textsuperscript{137} Janet Cooper Alexander, \textit{Do the Merits Matter? A Study of Settlements in Securities Class Actions}, 43 STAN. L. REV. 497, 500, 523 (1991) (concluding that probably the “merits did not affect the settlement amounts” and that most securities class action claims settle at a rate of around twenty-five percent of potential damages).

\textsuperscript{138} Miller, supra note 42, at 592–93.


\textsuperscript{140} 15 U.S.C. §§ 77z-1(a)(2), 78u-4(a)(2). This is not the case in non-securities class actions. See, e.g., Theodore Eisenberg & Geoffrey P. Miller, \textit{Incentive Awards to Class Action Plaintiffs: An Empirical Study}, 53 UCLA L. REV. 1303 (2006) (arguing that the PSLRA’s limitation on incentive awards to class representatives may have been unwise).

that the class member who comes forward with the greatest financial stake in the litigation is the “most adequate plaintiff” to represent the class.\textsuperscript{142} The underlying assumption is that a class member with a large financial stake will effectively monitor the conduct of class counsel.\textsuperscript{143}

The PSLRA sets forth rules governing “sanctions for abusive litigation.”\textsuperscript{144} The court must make specific findings regarding compliance with Rule 11(b) of the Federal Rules of Civil Procedure as to any securities fraud case. Even though the court is required to impose sanctions if a party or attorney violated Rule 11(b), these sanctions are seldom used.\textsuperscript{145}

Recent empirical research suggests that the success of the PSLRA thus far has been limited. Cox and Thomas assert that “post-PSLRA settlements are not statistically different from those in the pre-PSLRA period,”\textsuperscript{146} and, therefore, “suggest that the enactment of the PSLRA had no significant impact on settlement size.”\textsuperscript{147} Moreover, they find that “[i]nvestors appear to be recovering a smaller percentage of their losses today than they did before the passage of the PSLRA.”\textsuperscript{148}

Proponents of the PSLRA argue that there are indications that it, in fact, serving its purpose of purging the federal system of unfounded class action claims.\textsuperscript{149} It seems, however, that the PSLRA eliminates meritorious cases as well as frivolous ones.\textsuperscript{150} However, this tradeoff is one of dubious merit.

\textsuperscript{144} 15 U.S.C. §§ 77z-1(c), 78u-4(c).
\textsuperscript{145} Stephen J. Choi & Robert B. Thompson, Securities Litigation and Its Lawyers: Changes During the First Decade After the PSLRA, 106 COLUM. L. REV. 1489, 1508 (2006) (“Despite the recurring use of adjectives like ‘mandatory,’ ‘specific,’ and ‘each’ in the sanction provision and the hundreds of class actions brought since the Act was enacted, we find that the sanction provision has been little used as a weapon against possibly abusive class actions.”).
\textsuperscript{146} Cox & Thomas, supra note 143, at 1628–29.
\textsuperscript{147} Id. at 1629; see also Casey, supra note 27, at 1254.
\textsuperscript{148} Cox & Thomas, supra note 143, at 1637.
\textsuperscript{149} See Michael A. Perino, Did the Private Securities Litigation Reform Act Work?, 2003 U. ILL. L. REV. 913, 976 (“[T]here is statistically significant evidence suggesting that the PSLRA improved overall case quality at least in the circuit that most strictly interprets the … heightened pleading standard.”).
\textsuperscript{150} See Stephen J. Choi, Do the Merits Matter Less After the Private Securities Litigation Reform Act?, 23 J.L. ECON. & ORG. 598, 623 (2007) (arguing that the PSLRA reduces meritorious litigation and works less like a selective deterrent
Moreover, since the PSLRA deals only with securities class actions, it cannot reduce class action abuse in other areas of the law.

E. Heightened Pleading Standards and Motions To Dismiss

A recent United States Supreme Court decision has dramatically changed the pleading standards in civil litigation. In *Bell Atlantic Corp. v. Twombly*, the Supreme Court repudiated the well-established decision in *Conley v. Gibson*, according to which “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” In *Twombly*, the Court required greater factual specificity than had been required under Rule 8(a)(2)—“a short and plain statement of the claim showing that the pleader is entitled to relief”—and in the Official Forms to the Federal Rules of Civil Procedure. The Court did so for the purpose of requiring trial courts, in ruling on motions to dismiss, to consider whether the lawsuit states a “plausible” claim, interpreted in *Twombly* to be one in which “the inference of illegality [is] stronger than competing inferences.” As a result of the *Twombly* decision, it is much harder for plaintiffs to successfully defend a motion to dismiss. Since the *Twombly* involved an antitrust class action case, it can be viewed as an

---


152 550 U.S. 544.


154 *Id.* at 45–46; see also Linda S. Mullenix, *Troubling “Twombly,”* NAT'L L.J., June 11, 2007, at 13 (contending that *Twombly* marks “a surprising departure from ingrained federal pleading rules”).

155 FED. R. CIV. P. 8(a)(2).


effort to prevent attorneys from filing non-meritorious class actions. Courts of appeals have been grappling with Twombly’s meaning and scope of application. Their struggles have resulted in various approaches. However, in a recent Supreme Court decision, the Court clarified that Twombly’s “plausibility” standard is now the pleading standard for all civil actions, not a standard reserved for certain claims.

In Tellabs, Inc. v. Makor Issues & Rights, Ltd., the Supreme Court held that to survive a motion to dismiss under the PSLRA, a complaint alleging a violation of Section 10(b) of the Securities Exchange Act of 1934, as amended, and Securities and Exchange Commission Rule 10b-5, must plead facts giving rise to an inference of scienter that is “more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent.” As others have observed, the Tellabs decision demonstrates that the “pressures of the PSLRA’s pleading rules have deformed the Rule 12(b)(6) motion” to dismiss and converted it into “a sort of hybrid between the motion to dismiss and the motion for summary judgment.” Even though the Court in Tellabs chose a rather liberal interpretation of the language of PSLRA, together with Congress’s intended tightening of pleading, it may still reduce the number of class action filings. In this sense,

---

161 “Scienter” refers to a state of mind embracing intent to deceive, manipulate, or defraud. See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976); BLACK’S LAW DICTIONARY 1373 (8th ed. 2004).
162 Tellabs, 551 U.S. at 314.
163 Geoffrey P. Miller, Pleading After Tellabs, 2009 Wis. L. REV. 507, 532. Miller also suggests that the conversion of the motion to dismiss into a quasi-motion for summary judgment gives the “trial judge a degree of discretion to reject cases deemed unsuitable for litigation,” also outside of the boundaries of securities fraud cases. Id. at 534.
164 While this article argues that the Tellabs decision suggests greater willingness to dismiss at the pleading stage, one can validly argue that this decision was more lenient than Twombly’s, and that the Supreme Court in Tellabs could have interpreted the language of the PSLRA even more stringently and imposed a stricter pleading standard, as was advocated by Justices Scalia and Alito. Tellabs, 551 U.S. at 329 (Scalia, J., concurring) (rejecting the Court’s “at least as compelling” test and stating “the test should be whether the inference of scienter (if any) is more plausible
the Twombly, Tellabs, and Iqbal decisions suggest a greater willingness to dismiss cases at the pleading stage. They deter frivolous litigation by requiring the plaintiff to demonstrate at the outset that the lawsuit is likely to be meritorious and not a mere device for extracting unjustified settlements.\textsuperscript{165} However, the new restrictive pleading standard may not only reduce the number of frivolous lawsuits, but may also frustrate meritorious litigation and result in less illegal conduct being redressed.\textsuperscript{166} The new pleading standard may “deny court access to those who...have meritorious” class actions but cannot satisfy the new pleading requirements for reasons such as “informational asymmetries” or because they lack the resources to engage in investigation before they submit the claim.\textsuperscript{167}

\textbf{F. The Class Action Fairness Act}

The Class Action Fairness Act of 2005 can be viewed as another instrument intended to limit class action abuses. One of the declared purposes of CAFA was to protect absent class members from the collusive behavior of class counsel.\textsuperscript{168} CAFA was enacted on the premise that collusion presents a serious problem that occurs mostly in state courts, and hence the Act offers widened access to federal court as its principal solution.\textsuperscript{169} Proponents of CAFA hoped it would eliminate perceived abuses in some states that permitted plaintiffs to commence national class actions and in which the courts and procedures were overly

\textsuperscript{165} See \textit{id.} at 322 (majority opinion).

\textsuperscript{166} See Epstein, supra note 157, at 98.


\textsuperscript{168} See supra note 86.

\textsuperscript{169} Nevertheless, CAFA’s provisions addressing class action abuses are applicable only in federal courts—where arguably they were not needed by 2005—and not in state courts, “in some of which they might still be useful.” Stephen B. Burbank, \textit{The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View}, 156 U. Pa. L. Rev. 1439, 1448 (2008).
plaintiff friendly. Moreover, the Act specifically mentions the misalignments between the interests of class members and those of class counsel as one of the evils that it purports to address.

To curb these so-called abuses, CAFA includes regulatory provisions, one of which was meant to increase judicial scrutiny applicable to settlement agreements that provide coupons to purchase products or services at a discount from the malfeasant. When determining attorney fees, CAFA requires a court to evaluate the real monetary value and the likely utilization rate of the settlement coupons. CAFA also vastly expands federal subject matter jurisdiction for class actions and amends the removal laws to provide federal jurisdiction, at the choosing of the defendant, over class actions that do not satisfy the traditional “complete diversity” and “amount in controversy” requirements.

According to recent empirical studies, in the post-CAFA period, class action litigation has increased substantially in federal courts as the number of monthly filings and removals of class actions increased from about 200 per month in the end of

---

170 See, e.g., NLJ Roundtable: Class Action Fairness Act, NAT'L L.J., May 16, 2005 at 18 (reproducing the remarks of Professor Issacharoff, who noted that, “if you're a defendant, you want to stay away from any county named after a president that's by a body of water”); Issacharoff & Nagareda, supra note 64, at 1655–56 (“[T]he core justification for CAFA stems from the problem of the anomalous court,” which may “be inclined to certify a nationwide class action when... other courts... would be disinclined to certify.”).

171 See Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(3), 119 Stat. 4–5 (“Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where—(A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value.”).

172 28 U.S.C. § 1712 (2006); see, e.g., Coffee, supra note 36, at 1367–68 (discussing the use of coupons as a form of collusion between the class counsel and the defendants).

173 28 U.S.C. § 1712(a). CAFA also ties coupon settlements to attorney fees, and specifies that attorney fee awards be based on value to class members of coupons actually redeemed. Id. According to another important provision, the court may approve a settlement in which class members incur losses to compensate class counsel “only if the court makes a written finding that nonmonetary benefits to the class member substantially outweigh the monetary loss.” Id. § 1713.

174 See id. § 1332(d).

175 See id. §§ 1441(a), 1453.

176 See 28 U.S.C. §§ 1332(d), 1441, 1446, 1453. For a comprehensive description of CAFA’s jurisdictional provisions compared with the default regime, see Burbank, supra note 169, at 1453–59.
GOOD FAITH IN CLASS ACTIONS

2001 to more than 300 per month in 2005–2006.\textsuperscript{177} According to this research, at least one initial purpose of the Act is fulfilled. Commentators disagree as to the extent of success in fulfilling other stated goals. Some believe that many of the abusive practices have been curbed.\textsuperscript{178} Others assert that since “the Act offers no mechanism by which absent class plaintiffs can act independently of class counsel to [re]move their lawsuits [in]to federal court,” the Act fails to solve the problem of misalignment between the interests of class counsel and those of absent members of the class and the problem of sweetheart class settlements.\textsuperscript{179} Put differently, the Act still allows for the parties to shop a settlement to state courts. If class counsel is as unreliable as the Act assumes, he or she clearly cannot be trusted to file lawsuits, especially in settlement-only class actions where federal courts promise to inspect his or her actions more stringently.\textsuperscript{180} Therefore, it does not seem reasonable that CAFA solved any of the aforementioned problems. It may have even exacerbated the situation, since CAFA grants the right to remove to federal court \textit{at any time},\textsuperscript{181} which facilitates a possible extortion: The defendants can remain in state court and threaten class counsel with removal unless class counsel agrees to settle the class members’ rights for less than they are worth.\textsuperscript{182} In other words, it is quite possible that the Act only “achieved” a role reversal—extorted class counsel instead of blackmailed defendants. . Therefore, from the standpoint of class members,

\begin{footnotesize}
\catskip=
\end{footnotesize}
the enactment of CAFA amplified the dangers of class actions. CAFA cannot protect absent class members from the collusive behavior of class counsel.

Moreover, when combined with the current inclination of federal courts to apply stricter standards in certifying class actions, CAFA also impedes class action practice. As noted above, current research suggests that fewer class actions are being certified in federal courts.\textsuperscript{183} Therefore, CAFA has been justly blamed for narrowing corporate tort liability and curbing the use of class actions.\textsuperscript{184} Clearly, CAFA affects class action litigation far beyond the question of venue.

By making certification less likely, CAFA weakened class actions’ positive externalities discussed previously in this Article.\textsuperscript{185} In raising the frequency of non-certification, CAFA has impaired class actions’ deterrence effect. This is particularly alarming given the American legal system’s heavy dependence on litigation as ex post regulation.\textsuperscript{186} In the same vein, CAFA’s removal provisions give rise to more bureaucratization of the federal court system, which presents a problem in a legal system which relies on litigation as an ex post regulator and harms the goals that underlie the class action mechanism.

This Part has examined some of the mechanisms used to curb perceived class action abuses. Various mechanisms have been employed to curb perceived class action abuses, but as has been noted, doubts exist as to whether they have been successful in doing so. Moreover, while some of the mechanisms may help reduce class action abuse, at the same time they eliminate meritorious cases and foil the purposes underpinning the class action procedure. The fact that courts of appeals in different circuits have recently imposed more rigorous certification standards may be the best evidence that prominent members of the judiciary believe current mechanisms do not suffice and that more should to be done to curb class action abuses.

\textsuperscript{181} See supra notes 99–101.

\textsuperscript{184} Id. at 1926.

\textsuperscript{185} See supra text accompanying notes 31-35.

\textsuperscript{186} ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 13 (Harv. Univ. Press, 2001); Burbank, supra note 167.
IV. CURRENT USE OF GOOD FAITH IN AMERICAN AND ISRAELI CLASS ACTIONS

This Part begins with an overview of the important role of good faith as a certification prerequisite in Israeli class action proceedings. The sporadic uses of good faith in federal class action proceedings are then introduced. Even though good faith is not mentioned in Rule 23 as a prerequisite to class action certification, it is not completely absent from the class action landscape. This overview serves as a reference point for later a discussion which argues that a more robust and explicit employment of good faith in federal class actions would be beneficial in curbing class action abuse.

A. Good Faith Prerequisite in Israeli Class Actions

1. Historical Background of the Class Action in Israel

Before addressing the good faith concept in Israeli class actions, it is necessary to briefly describe class action proceedings in Israel. Class actions are not a new phenomenon in Israel, recognized in subsidiary legislation many years ago. However, it is only in the last two decades—with the enactment of subject-matter-specific laws under which class actions could be instituted—that a significant increase in class action filings has occurred. However, despite the increase in filing, at the end of the day, only a small number of these claims were certified.

The first statutory source for class actions in Israel was Rule 29 of the Rules of Civil Procedure. Until 1988 this rule was the only legal vehicle permitting class actions in Israel. However, a Israeli Supreme Court ruling in 1969 prohibited Rule 29 from being employed to commence a class action in its modern sense.


CA 86,79/69 Frankishka Markeka & Co. v. Rabinovitch [1969] IsrSC 23(1) 645. This ruling prohibited Rule 29 from being employed to recover damages in actions
In the absence of trans-substantive law, subject-matter-specific class action provisions have been adopted piecemeal in various legislative enactments over the years. These enactments drew heavily on Rule 23 of the Federal Rules of Civil Procedure. The result was two-fold: (1) there were conflicting provisions due to the variety of legislative enactments involved; and (2) in important areas of activity that were not covered by any of these enactments, there was still no provision for class action proceedings. The 2006 comprehensive Israeli Class Actions Law (“ICAL”) was triggered by *Israel v. E.S.T. Management & Manpower Ltd.*, in which the Israeli Supreme Court urged the Israeli Parliament to promulgate a new law to remedy the unacceptable state of class action proceedings. The new law replaced all of the subject-matter-specific provisions and significantly broadened the scope of potential class actions.

All class action legislation (except for Rule 29) included certification procedures similar to those adopted in the United States. The ICAL incorporates a certification procedure in section 8, whereby a court may certify a claim as a class action only if it is convinced that all of the following prerequisites have been met:

8(a)(1): The suit raises material questions of fact or law common to the class, and there is a reasonable possibility that the decision regarding those will be in favor of the class;

8(a)(2): A class action is the efficient and appropriate means of resolving the dispute in the circumstances of the case.

Based on tort claims held severally by individual class members. Rather, it was only applicable to actions for injunctions or declaratory relief.


193 Leave to CA 3126/00 Israel v. E.S.T. Mgmt. & Manpower Ltd. [2003] IsrSC 57(3) 220, 277–78.

194 This sub-section calls for two notes. First, this requirement is more relaxed than the requirement in the preceding laws, in which the legislature required that the suit raise common questions of law and fact, as a condition to certification. Second, even though the second condition of this prerequisite (pertaining to chances of success of the claim) was only incorporated in some of the laws preceding the ICAL, Israeli Courts have held that they would nevertheless apply it even if absent from the relevant law. See, e.g., CA 6567/97 Bezeq – Israel Telecomm. Corp, Ltd. v. Estate of Gat [1998] IsrSC 52(2) 713, 719–20.

195 This requirement will be satisfied where the size of the putative class is so large as to make joinder impractical, where the management of separate suits would be a waste of judicial resources, or where separate claims may yield contradictory decisions. See, e.g., Alon Klement, *Guidelines for Interpretation of the 2006 Class Actions Law*, 49 HAPRAKLIT 131, 145–46 (2007).
8(a)(3): There exists a reasonable basis to assume that the interests of all the members of the class will be properly represented and managed; the defendant may not appeal or request to appeal a decision in this matter;

8(a)(4): There exists a reasonable basis to assume that the interests of all the members of the class will be represented and managed in good faith.\textsuperscript{196}

In effect, therefore, the ICAL established a two-stage process for the management of class actions: an initial gate-keeping stage in which the court is required to determine whether a class action is appropriate, and a second stage in which, if certified as a class action, the claim is managed, settled, or decided in accordance with the specialized procedures provided by the law. According to an Israeli Supreme Court decision, the plaintiff has to show that his or her claim discloses a prima facie cause of action and fulfills all other prerequisites of a class action before being certified.\textsuperscript{197} The court held that the purpose of imposing a higher standard of proof than in a preliminary motion to dismiss for failure to state a claim is that the class action procedure is different from regular litigation in terms of, among other things, the extensive ramifications for the represented class, the defendant, and the public as a whole.\textsuperscript{198}

2. Good Faith Under the ICAL

Section 8(a) of the ICAL—similar to Rule 23(a) of the Federal Rules of Civil Procedure—contains two types of prerequisites: (1) those relating to the claim itself and whether it may effectively be managed as a class action; and (2) those relating to the plaintiff and class counsel.\textsuperscript{199} If any condition in the first category is not fulfilled, the claim should not be adjudicated as a

\textsuperscript{196} In addition to these prerequisites, the plaintiff must state a cause of action mentioned in the Second Addition to the Law and must have standing according to sections 3(a) and 4(a) of the ICAL.

\textsuperscript{197} This rule was cited both before and after the legislation of the ICAL. \textit{See}, e.g., Leave to CA 4474/97 Tetzet v. Zilbershats [2000] IsrSC 54(2) 577, E.S.T., IsrSC 57(3) 220; Labor Appeal 1154/04 Gross v. Israel – Defense Ministry [2007] (not published).

\textsuperscript{198} CA 2967/95 Magen and Keshet v. Tempo [1997] IsrSC 51(2) 312. The extent to which the burden of proof is higher remains vague, but the court ruled that the plaintiff has to convince the court, according to the appropriate likelihood measure, and not merely according to the facts argued in the pleading, that he or she prima facie fulfills the above-mentioned prerequisites.

\textsuperscript{199} \textit{See} Taussig, \textit{supra} note 7 (comparing Rule 23 certification prerequisites and those of Section 8(a) of the Israeli Class Actions Law).
class action. If any condition in the second category is not satisfied, then the court has discretion to either replace or add to the named plaintiff or class counsel to those who initially brought the claim.200

Israeli courts use the good faith requirement to scrutinize the motives of the representative plaintiff who files a class action.201 The main reason is to prevent frivolous claims, which can impose severe hardships on defendants.202 Israeli courts do not certify class actions that have been instituted for collateral or illegitimate purposes, such as extortion, harming a competitor, or facilitating a hostile takeover. Another goal is to prevent the lawsuit from damaging the rest of the class members, inter alia, due to collusion between the class action plaintiff and the defendants. The good faith prerequisite was integrated into class action proceedings to prevent such abuses.203

It is still unclear just how the good faith prerequisite will be affected by the enactment of the ICAL. According to the language of the new law, the Israeli legislature has broadened the good faith requirement, as this prerequisite no longer relates only to the filing stage of the proceedings, but also to case management and class representation.204 The ICAL creates

---

200 ICAL, § 8(c). The rationale for limiting the remedy to replacement is clear: The Israeli Legislature tried to discourage defendants from unduly objecting to the propriety of the named plaintiff or class counsel.
204 The good faith prerequisite, in various wording, was part of most of the prior subject-matter-specific legislation. See, e.g., § 210(b) of the Companies Law, 1999, S.H. 1711, at 189 ("[T]he court will not certify the class action suit if it finds that the suit was lodged without good faith."); § 35 of the Consumer Protection Law, 1981, S.H. 1474, at 252 (1994) ("[T]he filing of a class action suit requires the certification of the court and he will not certify it unless he is persuaded that the following prerequisites are fulfilled . . . . The claim was lodged in good faith."). Since the good faith prerequisite in the prior laws addressed only the stage of certification, Israeli case law that preceded the ICAL usually addressed this stage alone, and did not address more advanced stages of class action proceedings. In one case it was ruled, though, that the good faith prerequisite should be maintained throughout the
GOOD FAITH IN CLASS ACTIONS

another significant permutation: The new law applies the good faith doctrine—and the proper representation doctrine—to class counsel as well as to the named plaintiff. Thus, courts are now able to scrutinize the behavior of class counsel both before and after the filing of class action lawsuits. Another change under the new law is that the burden of proof on the issue of good faith is imposed on the defendant, who must show that the named plaintiff acted in bad faith when the class action was filed. Otherwise, it would seem that the ICAL does not meaningfully change the role of good faith in Israeli class action proceedings.

Since the ICAL was enacted only fairly recently, there is limited case law and learned commentary available in Israel pertaining to the content of the good faith prerequisite. That said, the good faith requirement occupied the Israeli courts a great deal before the enactment of the ICAL.

3. Good Faith in Class Actions Before Enactment of the ICAL

Israeli courts and legal scholars who have dealt with the good faith prerequisite in the context of class actions have given it various interpretations. Next, the meaning of good faith in Israeli class actions is fleshed out through Israeli case law. Later, a review of Israeli legal literature provides a predictive guidance on the roles that good faith will play under the new Law.

a. The Good Faith Requirement in Israeli Case Law

The meaning of the good faith requirement has long preoccupied the attention of Israeli courts. This Part of the article introduces the main judicial interpretations.

proceedings, not only when the suit is lodged. See CC (TA) 3006/00 Danush v. Chrysler Corp. [2003] Dinim-DC 34(1) 730, aff’d, CA 1509/04 Danush v. Chrysler Corp. [2007] Takdin-SC 2007(4) 2298.

Section 17 of the ICAL expressly states that the class counsel must “act with loyalty and dedication to benefit the group in whose name the request for certification was submitted.” ICAL, § 17.

See, e.g., CC (TA) 2122/04 Katvan v. Otsar Mifaley Yam Ltd. [2007] Takdin-DC 2007(3) 11984, 11993. Most Israeli case law and scholars did not refer to the distinction between the burden of persuasion and the burden of production of evidence concerning good faith. However, it seems like the intention of the courts was to shift the burden of production of evidence alone, while the burden of persuasion remained as always on the shoulders of the plaintiff. In other words, the plaintiff is not required to bring evidence in order to prove his good faith unless the defendant indicates facts that place his good faith in doubt.
Under the Israeli good faith prerequisite, most courts examine the motives of plaintiffs who file class action lawsuits. In Analyst v. Israel, Judge Strusman interpreted the good faith prerequisite as being a tool to prevent frivolous claims where the main aim is to threaten defendants and to exert pressure on them so that they settle despite the fact that they are not liable. He held that the requirements that the court be persuaded that the class action was commenced in good faith and had reasonably good chances of success—requirements that do not exist in the United States—were adopted to prevent class actions from being used to threaten and intimidate defendants. In another case, a court held that the good faith prerequisite is intended to place an obstacle before those claimants who institute their claim for improper motives. The court also mentioned a special instance of a lack of good faith that was discussed before—sweetheart settlements—a collusion between the applicant and the respondent, intended to block the path of potential claimants. In the case of Shemesh v. Reichart, a similar test was upheld. The court held that the term “good faith” in this context is a response to the universal norms of equity and the honest aspiration for restitution and compensation for funds invested in the capital markets with an anticipation to make a profit that was lost because of the


208 See also CC (Jer) 574/93, 1365/93 Weinblat v. Bernstein [1995] Takdin-DC 95(4) 193 (noting that when examining the good faith prerequisite, the court should determine whether the class action is intended to exert pressure and extortion on the defendant, while defendants must show that by instituting the claim, the plaintiff is likely to obtain an unfair advantage, such as commercial competition or the discovery of commercial secrets).

209 CC (Jer) 15/94, 67/94 Gabril v. Alliance Tires Factory Ltd. [1995] (not published). In another case the respondents claimed that, in effect, a competing company lay behind the plaintiffs’ actions. The court did not make any final ruling on the question of whether all cases of involvement of a competing company would disqualify a class action plaintiff due to the lack of good faith, but it did hold that under the circumstances of the case the plaintiffs had indeed acted in bad faith. See CC (TA) 1124/00, 2380/00 Zaltzman v. Tibon Veal Ltd. [2001] (not published).

210 Since the absent members of the class are bound by the settlement, a collusive settlement between the class counsel and the defendants may prevent the filing of new lawsuits by other members of the class. An appeal of this decision was filed and granted, but the scope of the good faith prerequisite was not addressed. See Leave to CA 1561/95 Gabril v. Alliance Tires Factory Ltd. [1996] Dinim-SC 43, 909.

The good faith test is intended to protect both the members of the class and the defendants, and to block those plaintiffs who are animated by motives that are contrary to the aims of the procedure—that is, any aim besides compensation for damages plus costs, which will be determined by the court for the representative plaintiff. Those seeking to harm a corporation—to influence its stock price, to force it to expose business secrets, or to blackmail the company—are acting in bad faith, just like the representative plaintiff who colludes with the defendant in order to benefit himself at the expense of the class. It was further held that instituting a class action for utilitarian considerations does not violate the good faith prerequisite, because the legislature set an economic incentive for instituting class actions; that is, claims that are not brought for altruistic considerations are also permitted.

A different position was taken in the case of Zat v. Teva. Judge Levitt interpreted the good faith requirement in a broad sense, linking it to other prerequisites. In his opinion, a judge must make an objective inquiry as to whether the claim is reasonable and fair, based on a genuine and serious cause of action that might be beneficial to all members of the class and is not intended to obtain aims of the plaintiff that do not fit in with the interests of all the members of the class. This opinion was rejected by other judges, who argued that the good faith test should be subjective—the good faith of the party instituting the

214 Now anchored in ICAL, § 22.
215 These rulings were confirmed by the Supreme Court in the decision on the leave to appeal (Shemesh, IsrSC 55(5) at 297–98), and other district courts have reiterated them. See, e.g., CC (BS) 3273/97 Halevi v. Bezeq Int’l Ltd. [2001] Takdin-DC 2001(2) 41129; CC (TA) 1372/95, 11141/95 Rabi v. Tnuva Collective Ctr. for Mktg. Agric. Prod. Isr. [1996] (not published); CC (TA) 2036/01 Manela v. Mifal Ha’Payis [2002] Dinim-DC 33(5). The district court also reiterated that notion after the enactment of the ICAL. See Hershkowitz, Takdin-DC 2007(2) 11884.
217 That said, the mere fact that Levitt believes that only material omissions—those that “go down to the root of the cause of action”—are relevant in evaluating the plaintiff’s good faith shows that he also believes that the good faith prerequisite’s scope should be limited. Judge Levitt’s opinion was quoted with approval after the enactment of the ICAL in Hershkowitz, Takdin-DC 2007(2) 11884.
claim—while the objective element—the likelihood of the claim’s success—should be examined under the “chances of success” prerequisite. 218

These positions can be divided into two main categories. The first and more common one views good faith as a tool meant to prevent the certification of lawsuits commenced by claimants who institute their claim for improper motives. This position prescribes a solely subjective standard for the good faith prerequisite. The second viewpoint views good faith as an objective standard that addresses the reasonableness of the claim and its chances to succeed.

b. Issues Related to Good Faith in Certification

Various related issues were dealt with under the good faith prerequisite. In some cases, good faith was scrutinized in the examination of whether the plaintiff had exhausted all other options available before submitting the class action. 219 In a recent decision, the Israeli Supreme Court held that the fact that the plaintiffs did not approach the defendant before he filed the class action does not justify the conclusion that they acted in bad faith. This is the case due to the underlying goals of the ICAL. 220

The question of the “sophisticated investor” has also been dealt with in the context of the good faith prerequisite. A plaintiff who is a “sophisticated investor” is an investor who is knowledgeable about securities and the ways of the stock exchange. Some defendants have advanced the argument that the sophisticated investor must expect the damages because he or she is familiar with the ways of the market and having the relevant information. Therefore, the personal cause of action must be rejected and with it the whole class action. It has also been argued that, when dealing with a sophisticated investor,

---

219 See also CC (TA) 65/97 Isr. Consumers’ Ass’n—Indep. Body v. Zeller Evalgon Leasing Ltd. [1997] Dinim-DC 32(1) 530 (stating that the plaintiff did not comply with the good faith prerequisite because he did not approach the defendant before he filed the class action and because the necessary examination of the facts was not done by the named plaintiff but by his agent, who did not file an affidavit and, therefore, could not be cross-examined). But see CC (Jer) 486/97, 5047/97 Kibutz Urim—Agric. Coop. Ltd. v. Israel [1999] (not published) (noting that a failure to first make a demand on the defendant is not enough to form the basis of bad faith).
there is a reason to suspect that the claim was submitted in order to advance the plaintiff’s personal affairs and not to obtain the aims of the entire class. At the same time, most district courts have held that sophistication in itself does not negate the good faith of a named plaintiff. In *Tetzet v. Zilbershatz*, the Israeli Supreme Court ruled that a sophisticated investor complies with the good faith requirement:

The first requirement is that the claim be lodged in good faith. This condition does not exist if the class action was instituted due to *turpis causa*, such as harming a competing company or the desire to “extort” a compromise. It would appear to us that the sophistication of the class action plaintiff does not in itself harm his good faith. A class action plaintiff may sue in good faith, regardless of whether he is a sophisticated investor or not.

Israeli case law has also dealt with the question of whether a “serial plaintiff”—frequently named a “professional plaintiff”—may serve as a representative plaintiff and whether his or her status as such has any significance in the consideration of good faith. A serial class plaintiff might purchase one share in dozens of public companies, at a relatively cheap cost, and in so doing, ensures that he or she will be considered an owner of a security in the company whose actions or failures vest him or her with a cause of action in a class action. Most Israeli district courts used to prefer that a representative plaintiff not be a serial plaintiff. An example of this can be seen in the case of *Global v. Hamisha Yod Jewellers*, in which the court distinguished between a sophisticated investor and a serial plaintiff and held that the former can serve as a named class plaintiff.

---

221 See *Gil Lothan & Eyal Raz, Class Actions* 181–82 (1996).
224 Id. at 778. In the same case, President Barak quoted from Justice Douglas’s opinion in *Scherk v. Alberto-Culver*: “The Act does not speak in terms of ‘sophisticated’ as opposed to ‘unsophisticated’ people dealing in securities. The rules when the giants play are the same as when the pygmies enter the market.” *Id.* at 789. (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 526 (1974)).
225 In the United States, unlike in Israel, the phenomenon of the serial class action plaintiff is quite common. See, e.g., *Denise M. Martin et al., Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions?* Table 12A (Nat’l Econ. Research Assocs. 1996).
226 This is why, regarding securities class actions, the good faith of the plaintiff should be examined as early as the stage of the acquisition of the share.
representative, but the latter cannot because there is a "presumption that such a class action plaintiff does not institute his claim in good faith." This position changed when the Israeli Supreme Court held, in Tetzet, that the fact that a plaintiff is a serial plaintiff does not automatically disqualify him from conducting a class action, and each case must be examined individually; only a serial class action plaintiff who conducts many class actions with improper aims—such as extorting a compromise or submitting frivolous claims—must be disqualified.

Similarly, in a case that was decided after the enactment of the ICAL, a district court held that a history of filing class actions may indicate a lack of good faith, but the mere filing of class actions is not enough, and the court needs to examine its terms, consequences, and circumstances before any conclusion concerning the good faith of the plaintiff is drawn.

A specific genre of serial plaintiff is a plaintiff who is "serial" by virtue of being a lawyer or a plaintiff who is the spouse, relative, or partner of the representing lawyer. A typical decision was given in Goldstein v. Israeli Electricity Corp., where it was held that a class action instituted by a law firm or an attorney working in that firm, serving both as the named plaintiff and as the class counsel, is not necessarily tainted by bad faith. On
GOOD FAITH IN CLASS ACTIONS

the other hand, in the case of Zilbershlag v. El-Al,\textsuperscript{233} where a
class action was instituted on behalf of a lawyer and his wife, the
court indicated that difficulties might be created where a class
action is instituted by a lawyer. The court held that the fact that
a lawyer represents himself might cause him to be more
prepared to compromise, contrary to the interests of the class he
represents.\textsuperscript{234} Therefore, it was held that a lawyer instituting a
class action should not represent himself—although the court
was careful not to hold that this in itself was per se evidence of
bad faith.\textsuperscript{235}

c. The Future Roles of the Good Faith Requirement

Before the ICAL was enacted, there were differing views
among Israeli scholars regarding the content and scope of the
good faith requirement. Some scholars favored vigorous
application of the good faith requirement,\textsuperscript{236} while others
maintained that the requirement was superfluous.\textsuperscript{237} The latter
argued that the good faith requirement may cause obfuscation
and difficulties in interpretation because of its overlap with some
threshold requirements. Those who favored a special level of
good faith, on a higher standard than that accepted in the
general Israeli law argued that the potential for injury to the
defendant and class members required the adoption of an
especially high standard of good faith.\textsuperscript{238}

Israeli legal literature has presented two main positions
regarding the interpretation that can be given to the principle of
good faith in class action proceedings. According to the first, the

\textsuperscript{233} CC (Nz) 749/97 Zilbershlag v. El-Al Air Lines [1998] Takdin-DC 98(2) 2851.
\textsuperscript{234} Id. at 2859.
\textsuperscript{235} Id.
\textsuperscript{236} See Goshen, supra note 203; Sinai Deutsch, Consumer Class Action—
Goldstein and Ephron even suggested that the good faith prerequisite should be
used to file a lawsuit for breach of a statutory duty against a plaintiff who filed a
class action in bad faith. Goldstein & Ephron, supra note 201, at 475–76.
\textsuperscript{237} See LOTHAN & RAZ, supra note 202, at 134–35; JOSEPH GROSS, THE NEW
COMPANIES LAW 264–65 (3d ed. 2003); Noam Sher, Securities Law—Central Trends,
22(1) YIUNEY MISHPAT 265, 287 (1999).
\textsuperscript{238} See, e.g., Leave to CA 4556/94 Tetzet v. Zilbershatz [1996] IsrSC 49(5) 774,
774 (the position of the legal advisor to the government).
representative plaintiff should be viewed as a “public emissary” and must, therefore, act in good faith in the widest sense of this term. According to the second interpretation, the good faith requirement in bringing a class action is much more limited and refers only to the aim of bringing the claim:

[A] claim in which the plaintiff intends to produce the full benefits only by virtue of winning the claim, is a claim instituted in good faith. On the other hand, a plaintiff seeking to produce a benefit which is external to the claim itself—by the mere instituting of the claim and not by hope of winning it—has instituted his claim in bad faith.

This position has found support in the case law. On its face, this position was not accepted by the Israeli legislature in enacting the ICAL, insofar as far as it expanded the good faith requirement to all stages of the process. Rather, the Israeli legislature merely adopted the position expressed in the case law according to which the good faith prerequisite should apply from the start of the process until its end. Since the ICAL was enacted fairly recently, the question of the appropriate scope that should be given to good faith in class actions remains open. Nevertheless, recent lower court rulings seem to be less demanding than what we have come to know. It seems that courts have internalized the aims of the new law to facilitate the certification of class actions.

See Goshen, supra note 213.
Id.
See, e.g., CC (Nz) 785/98 Zilbershlag v. El-Al Air Lines [1999] Takdin-DC 99(3) 1521, 1534 (stating that in a consumer protection class actions the plaintiff does not need to be like a “public emissary,” and it is sufficient if he or she intends to produce a beneficial outcome from the claim, honestly believes in the prospects of the claim, and does not have ulterior motives). Thus, for example, if a corporation files a claim against a competing corporation with the aim to damage its business and disclose its professional secrets during the course of litigation, clearly this corporation desires to benefit merely from the lodging of the claim and not from winning it, thereby not complying with the requirement of good faith.
This is reflected in Section 1 of the new law:
The goal of this law is to set uniform rules in the matter of the submitting and managing of class actions, in order to improve the defense of privileges, and in doing so to particularly promote these: (1) Actualizing the privilege of access to the court house, including the types of the population that find it difficult addressing the court as individuals; (2) Enforcing the law and deterring its breaking; (3) Giving proper assistance to those harmed by the violation of the law; (4) Efficient, fair and exhaustive management of suits.
Concerning the content of the good faith prerequisite, most Israeli legal professionals argued before the enactment of the ICAL that good faith in bringing a class action does not exist where bringing the claim is vexatious and extortionist. Good faith was identified with the motives of the named plaintiff. Judge Levitt presented a different position in his article, which as seen above, was reflected in his court decisions.\textsuperscript{244} His view—that when the court considers whether a claim complies with the good faith prerequisite it must determine, according to an objective test, whether the claim sought is reasonable and fair, and whether it might bring true utility to all members of the class—will probably not be reiterated in the post-ICAL era. An analytical review of Levitt's article clearly shows that his interpretation of the good faith prerequisite has permeated the other requirements which appear in the new law.\textsuperscript{245} Since the new law includes all the requirements formerly embedded in several of the preceding subject-matter-specific laws, an interpretation that blurs the boundaries between the different prerequisites is not likely.

As a whole, the differences in the wording of the ICAL and previous legislation support the conclusion that Israeli courts will broaden the good faith requirement both in terms of to whom it will apply and when in the proceedings it will apply, but it will retain the current narrow test. In other words, good faith's role under the new legislation will change as follows: (1) good faith will be used to monitor class counsel in addition to representative plaintiffs; and (2) good faith will be used to scrutinize the management and representation throughout the proceedings and

\begin{flushright}
Indeed, recent data proves that the percentage of certified claims has increased since the legislation of the ICAL. While in 2007 only 2.6% of claims were certified, in 2008 the number increased to 4.2% and in the first quarter of 2009 to 26%. Similarly, more settlements are being approved: 3.5% in 2007, 10.2% in 2008, and 15.3% in the first quarter of 2009. See Mark Sean, Recognition of Class Actions Is Getting Strength: On the Way to America, CALCALIST, Apr. 6, 2009, at 28–29.
\textsuperscript{244} Ishai Levitt, Class Actions According to the Securities Law, 42(3) HAPRAKLIT 465 (1996).
\textsuperscript{244} This mainly relates to the requirement of a reasonable possibility that the common material questions will be determined in favor of the class. See Class Actions Law, 2006, S.H. 2054, § 8(a)(1). This requirement did not appear in some of the preceding subject-matter-specific laws.
\end{flushright}
not only upon the filing of the class action. On the other hand, the courts will likely apply the narrow subjective test in giving effect to the good faith requirement, consistent with its practice before the enactment of the new law.

B. Good Faith Application in Federal Class Actions

Now, after exploring the use of good faith in Israeli class actions, let us turn to the United States experience to assess whether good faith can be of better use if explicitly integrated into American class action proceedings.

"The recognition and expansion of a pervasive duty of good faith has been possibly the single most significant doctrinal development in American contract law over the past fifty years."\textsuperscript{246} The concept of good faith is widely entrenched in both the Restatement (Second) of Contracts and in the Uniform Commercial Code.\textsuperscript{247} Moreover, it reaches beyond the boundaries of contract law. In American corporate law, for instance, good faith has been defined as requiring "an honest judgment seeking to advance the corporation's interests."\textsuperscript{248} In some cases, courts


\textsuperscript{248} WILLIAM T. ALLEN & REINIER KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 248–53 (2003); see also Smith v. Van Gorkom, 488 A.2d 858, 889 (Del. 1985), overruled in part by Gantler v. Stephens, 965 A.2d 695, 713 n.54 (Del. 2009) (characterizing good faith as whether the board made "an honest exercise of business judgment").
have treated a corporation’s failure to demonstrate good faith as tantamount to a failure to establish compliance with the board’s “primary duty of loyalty.”

Notwithstanding the use of good faith in other areas of the law, and even though good faith has been mentioned in connection with frivolous representative lawsuits for many years, Rule 23 does not include an explicit good faith prerequisite. Good faith is being used in federal class action proceedings in a penumbral manner, not as a required prerequisite as is done in Israel. It is not clear what the reasons for the absence of a formal good faith prerequisite are. Three possible reasons for this absence are: (1) the alleged difficulty in determining the appropriate standard of good faith; (2) the preference for discrete requirements rather than a general principle such as good faith in common law systems; and (3) good faith is already latent in other Rule 23 prerequisites and, therefore, there is no reason to include an explicit good faith prerequisite. That said, one should bear in mind that the good faith doctrine originated in equity, as did group litigation as a

---


250 See, e.g., Note, Extortionate Corporate Litigation: The Strike Suit, 34 Colum. L. Rev. 1308, 1308 (1934) (“A ‘strike suit’ is an action brought by a security holder, not in good faith, but, through the exploitation of its nuisance value, to force the payment of a sum disproportionate to the normal value of his interest as the price of discontinuance.”).

251 Compare this, for example, with Canada, which also does not use good faith as a formal prerequisite, where a bad faith allegation may be used in the certification stage. See Ward K. Branch, Class Actions in Canada 4-1, 4-59 (2000) (“The certification test seeks to weed out those actions which are clearly frivolous or manifestly unfounded.”). Also, the court is required to examine “the good colour of the right,” so as “to ensure that frivolous or manifestly flawed claims are not certified.” Id.

252 Attempted definitions of good faith in the United States have been criticized as “either too abstract or applicable only to specific contexts.” See, e.g., U.S. Genes v. Vial, 923 P.2d 1322, 1325 (Or. Ct. App. 1996).


254 This hypothesis is refuted infra Part VI.
Therefore, it can be argued that good faith can be used in class action procedure even when it is not explicitly mentioned in Rule 23.

The next sections will explore how good faith may be said to operate implicitly within federal class action proceedings in three main categories: Rule 11 motions and the inherent power of federal courts, the rules of ethics, and class action case law.

1. Rule 11 Motions and the Inherent Power of Federal Courts

Rule 11 of the Federal Rules of Civil Procedure is often the flash point for allegations of bad faith in the litigation process. If the defendant has reasonable grounds to question the good faith of the representative plaintiff, the defendant can move for dismissal and sanctions under Rule 11. The rule, which had previously imposed a general good faith requirement on lawyers when they signed and filed court papers, was amended in 1983 to hold attorneys responsible for the question of whether there was a legal and factual basis for the claim and that the allegations were not being presented for an improper purpose. The amendment's purpose was to optimize the litigation process by deterring frivolous litigation through the infliction of sanctions on the lawyers themselves. This is why, unlike the previous version, the 1983 Rule 11 required courts to impose sanctions for violations.

Rule 11 was again amended in 1993 after it was criticized for creating a torrent of satellite litigation mainly on the issue of whether the circumstances of the case warranted the imposition of sanctions. Another criticism alleged that the rule

---

255 See, e.g., Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 560–61 (1949); Hensler et al., supra note 29, at 10–11 (stating that the first provision for group litigation in federal courts was set forth as Equity Rule 48); Stephen C. Yeazell, From Medieval Group Litigation to the Modern Class Action 132–96 (1987); Purcell, supra note 100, at 1860 n.130 (“It was not until 1833, moreover, that the federal courts adopted their first equity rule providing for group litigation.”).

256 See Fed. R. Civ. P. 11. Similar, albeit more specific rules, complement Rule 11. For example, Rule 56 states that when an affidavit is submitted in bad faith, the court must order the submitting party to pay the other party the reasonable expenses. Id. 56(g).

257 See Burbank & Silberman, supra note 10, at 678.

GOOD FAITH IN CLASS ACTIONS

2009

GOOD FAITH IN CLASS ACTIONS

discouraged appropriate but zealous advocacy.259 While the 1983 version of the rule required that the legal document in question was “well grounded in fact and ... warranted by existing law or a good faith argument for the extension, modification or reversal of existing law,”260 the 1993 version requires class counsel to certify that, to the best of his or her knowledge and belief formed after an inquiry, the pleading

is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the the cost of litigation; ... the claims ... and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; ... factual contentions have evidentiary support or ... are likely to have evidentiary support after a reasonable opportunity for further investigation ... .261

Notwithstanding the omission of the words “good faith” in the 1993 amendment, some courts continue to use the good faith standard when considering the certification of a claim.262 Even though the 1993 amendment was perceived as a liberalization of the rule,263 it still addresses in its current form concerns which

261 FED. R. CIV. P. 11(b) (as amended in April 1993).
262 See, e.g., Retired Chi. Police Ass’n v. Firemen’s Annuity & Benefit Fund, 145 F.3d 929, 936 (7th Cir. 1998) (“That portion of the complaint was neither ‘well-grounded in fact’ nor ‘warranted by existing law or a good faith argument ... . Such conduct ... is violative of Rule 11 and provides a sufficient basis for the district court’s decision to impose sanctions.” (quoting FED. R. CIV. P. 11))); see also OWEN M. FISS, THE LAW AS IT COULD BE 125 (2003).
underlie the good faith certification prerequisite: the frivolity of the argument and the nature of the purpose in presenting it.264

That said, Rule 11 in all of its forms cannot function similarly to the Israeli good faith prerequisite for a number of reasons. First, since 1983, the Rule 11 standard has been viewed as an objective, not a subjective, test, which is problematic, assuming one believes that good faith should be subjective.265 Some federal courts have even determined that a litigant may not be sanctioned under Rule 11 when his lawsuit was filed for non-litigation purposes—such as to harass the defendant—so long as it was objectively reasonable.266 Second, in most cases Rule 11 is used to examine the good faith of the representative plaintiff and class counsel ex post, after the case has already been adjudicated and found to be without merit. At this point the harm to the defendants is fait accompli. Moreover, the judge knows more ex post than the plaintiff and class counsel did at ex ante. This hindsight bias may affect the judge’s view of what constitutes a frivolous argument, and what is the nature of the purpose of filing the claim.267 A good faith prerequisite will not

---

264 Kruzansky, supra note 124, at 1368–69 (“Though the 1993 version of Rule 11 is worded somewhat differently than its predecessor, the Rule retains the two essential requirements . . . (1) a filing may not be presented for an improper purpose, and (2) all claims or defenses raised must be warranted by existing law or a nonfrivolous argument for change.”).

265 See, e.g., Sussman v. Bank of Isr., 56 F.3d 450, 458–59 (2d Cir. 1995) (“[T]he court is not to ‘delve into the attorney’s subjective intent’ in filing the paper, but rather should assess such objective factors as whether particular papers or proceedings caused delay that was unnecessary, whether they caused increase in the cost of litigation that was needless, or whether they lacked any apparent legitimate purpose.” (quoting William W. Schwarzer, Sanctions Under the New Federal Rule 11—A Closer Look, 104 F.R.D. 181, 195 (1985))). However, commentators express the view that even a so-called objective test is actually subjective. See William W. Schwarzer, Rule 11 Revisited, 101 HARV. L. REV. 1013, 1016 (1988) (“Although the standard that governs attorneys’ conduct is objective reasonableness, what a judge will find to be objectively unreasonable is very much a matter of that judge’s subjective determination.”); see also Charles M. Yablon, The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11, 44 UCLA L. REV. 65, 77–78, 94 (1996) (“[C]laims which appear frivolous and baseless in the eyes of one judge may seem respectable losers to others.”).

266 See, e.g., Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1362 (9th Cir. 1990); Burkhart v. Kinsley Bank, 852 F.2d 512, 514–15 (10th Cir. 1988); Sussman, 56 F.3d at 459.

267 See Yablon, supra note 265, at 78–80 (1996); see also Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, Inside the Judicial Mind, 86 CORNELL L. REV. 777, 802–03 (2001) (finding that judges are subject to hindsight bias); Jeffrey J. Rachlinski, A Positive Psychological Theory of Judging in Hindsight, 65 U. CHI. L.
work *post factum* and, therefore, better achieve the objective of frustrating frivolous class actions. Third, the most common sanction imposed on the offender under Rule 11 is to pay the opposing party’s expenses.\(^{268}\) This is problematic when class actions are involved: Since the costs incurred in class actions are immense, imposing defendant’s costs on the plaintiff may deter the filing of meritorious class actions and lower the level of enforcement of norms determined by the legislature.\(^{269}\) As Charles Yablon correctly notes, the social cost of deterring a winning case is far greater than the social benefit of deterring a loser.\(^{270}\) The failure of a legal system to enforce its liability rules increases the incentive for defendants to risk violating those rules in the future. Moreover, as the Australian experience proves, fee-shifting may be ineffective in impeding frivolous litigation.\(^{271}\) Fourth, Rule 11 only relates to specific documentation. It does not empower the court to examine the behavior and intent of the named plaintiffs and class counsel and the way they manage the case. These reasons lead to the conclusion that an ex ante screening mechanism is better equipped to deal with unfounded claims than the ex post mechanism anchored in Rule 11.\(^{272}\)
In addition to sanctioning via Rule 11, federal courts have the inherent power to supervise and control proceedings and to sanction counsel or a litigant for bad faith conduct. Among other sanctions, the court may deny certification of a claim. However, when bad faith conduct may be sanctioned under Rule 11, the court should ordinarily rely on the rule rather than on its inherent powers. This means that the inherent power may only be used when the conduct could not be reached by Rule 11. Moreover, since the court is required to exercise its inherent power with restraint and use a more stringent bad faith standard, court's inherent power probably cannot assist in curbing abusive class actions.

2. Ethics Rules

According to Rule 23(g)(4), class counsel “must fairly and adequately represent the interests of the class.” The breach of this professional obligation may result in disciplinary proceedings against class counsel. Some scholars have advocated

---

271 See, e.g., Chambers v. NASCO, Inc., 501 U.S. 32, 44–45 (1991) (noting that a district court has the inherent power to “fashion an appropriate sanction for conduct which abuses the judicial process”); see also Sussman v. Bank of Isr., 56 F.3d 450, 459–60 (2d Cir. 1995); Kovilic Constr. Co. v. Missbrenner, 106 F.3d 768, 772–73 (7th Cir. 1997).

274 Denying certification should be viewed as parallel to dismissing a suit and, therefore, it is under the court’s discretion. Chambers, 501 U.S. at 44 (noting that the district court has an inherent power to dismiss a suit).

275 Id. at 50; Methode Elecs., Inc. v. Adam Techs., Inc., 371 F.3d 923, 927 (7th Cir. 2004); Klein v. Stahl GMBH & Co., 185 F.3d 98, 109–10 (3d Cir. 1999).

276 Kovilic, 106 F.3d at 772–73 (“This Court has recognized the need to be cautious when resorting to inherent powers to justify an action, particularly when the matter is governed by other procedural rules, lest...the restrictions in those rules become meaningless.”). In Chambers the sanctionable conduct was that the defendants had “(1) attempted to deprive [the] Court of jurisdiction by acts of fraud, nearly all of which were performed outside the confines of [the] Court, (2) filed false and frivolous pleadings, and (3) attempted, by other tactics of delay, oppression, harassment and massive expense to reduce plaintiff to exhausted compliance.” Chambers, 501 U.S. at 41–42 (quoting NASCO, Inc. v. Calcasieu Television & Radio, Inc., 124 F.R.D. 120, 138 (W.D. La. 1989)). Because the first and third acts identified as sanctionable conduct could not be reached by Rule 11—which governs only papers filed with a court—the Chambers Court was able to use its inherent power to impose sanctions. Id.

277 See, e.g., Chambers, 501 U.S. at 44–45 (“Because of their very potency, inherent powers must be exercised with restraint and discretion.”); see also Klein, 185 F.3d at 110; Crowe v. Smith, 151 F.3d 217, 226 (5th Cir. 1998).


279 FED. R. CIV. P. 23(g)(4).
the use of rules of legal ethics as a countermeasure to class action abuse.\textsuperscript{280} Professor Koniak argued that the adequate representation prerequisite is insufficient to reduce the possibility of collusion.\textsuperscript{281} She proposed that the ethics rules should serve as a vehicle for protection against class action collusion, and should be read to require an increased duty of candor to the court on the part of lawyers presenting class action settlements for the court’s approval.\textsuperscript{282}

Rule 3.1 of the Model Rules of Professional Conduct employs good faith in a similar fashion to Rule 11 of the Federal Rules of Civil Procedure, providing that a “lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”\textsuperscript{283} Nevertheless, Rule 3.1, like the Model Rules relating to the adequacy of class counsel,\textsuperscript{284} cannot effectively prevent collusive or frivolous class actions. Professional responsibility rules are commonly used ex post as a disciplinary action against the attorney after the litigation has come to an end; therefore, they can only be used as a measure of deterrence.\textsuperscript{285} Moreover, due to the nature of professional responsibility rules, “[o]nly the most egregious misconduct on the part of the plaintiffs’ [attorney] could . . . justify denial of class’” certification.\textsuperscript{286} Furthermore, if the representative plaintiff is not an attorney, he or she is not bound by the rules of ethics.\textsuperscript{287}

\textsuperscript{280} E.g., Bassett, supra note 91, at 958–59 (asserting that the adequacy of class counsel review should be an ethical determination guided by the Model Rules of Professional Conduct). However, other scholars have questioned the applicability of legal ethics rules to class actions. See, e.g., Coffee, supra note 52, at 420–21; Macey & Miller, supra note 54, at 96–97.


\textsuperscript{282} Id. at 1048–49, 1121–22.


\textsuperscript{284} See, e.g., Id. R. 1.7 (prohibiting conflicts of interest).

\textsuperscript{285} But see Macey & Miller, supra note 54, at 96 (explaining that courts sometimes permit the defendant to inquire into the ethics of the plaintiffs’ attorney, and he or she may be disqualified if defense counsel can document conduct that violates or arguably violates applicable ethics rules).

\textsuperscript{286} See, e.g., Underwood, supra note 58, at 816 (quoting Halverson v. Convenient Food Mart, Inc., 458 F.2d 927, 932 (7th Cir. 1972)).

\textsuperscript{287} See MODEL RULES OF PROF’L CONDUCT pmbl., para. 1 (2002) (addressing the rules to lawyers who are “member[s] of the legal profession”).
3. Class Action Case Law

Good faith has been used in a sporadic manner in federal class action proceedings. In the certification process, federal courts have examined similar factors as those analyzed under the auspices of the good faith prerequisite by Israeli courts. However, the use of the good faith standard by federal courts is inconsistent. In most cases, courts have not examined the motives or honesty of the plaintiff and class counsel. Arguably, some of the cases discussed below were unusual and not widely followed in other cases.

One prominent issue discussed in American case law is whether the plaintiff has ulterior motives for filing the claim. In the well-known *Eisen v. Carlisle & Jacquelin* case, the Second Circuit held that, before the court certifies the claim, it is imperative to make sure the plaintiff is not involved in collusion and that his or her interests are not antagonistic to those of the remainder of the class. In Judge Posner’s decision for the Seventh Circuit in *In re Rhone-Poulenc Rorer Inc.*, he rejuvenated the blackmail charge by noting that the class action enables plaintiffs with weak claims to threaten an entire industry with bankruptcy, and he decertified the class to protect the defendants from blackmail.

Other decisions followed the footsteps of *Rhone-Poulenc*: In *Hornreich v. Plant Industries*, the claim was dismissed after it was held that the plaintiff filed the lawsuit only as leverage to achieve settlements in other lawsuits he maintained against the same defendants. Similarly, in another case, the court asserted that class actions “create the opportunity for a kind of legalized blackmail” to extract a settlement far in excess of the

---

288 See supra text accompanying notes 257–258.
289 391 F.2d 555 (2d Cir. 1968).
290 Id. at 562.
291 51 F.3d 1293 (7th Cir. 1995).
292 Id. at 1304. This was not the only basis for the Seventh Circuit reversal decision. It also dealt with the need to instruct the jury on the laws of fifty states, id. at 1300, and with the concern that a bifurcated classwide trial would violate defendants’ Seventh Amendment right to a jury trial, id. at 1303–04.
293 535 F.2d 550 (9th Cir. 1976).
294 Id. at 551–52.
GOOD FAITH IN CLASS ACTIONS

aggregate actual value of the individual claims.\(^\text{295}\) As seen above, the blackmail allegation, which relates to frivolous claims, is examined in Israel under the good faith requirement.\(^\text{296}\)

Under the "adequacy" prerequisite, federal courts have occasionally examined the honesty, conscientiousness, and good character of the representative plaintiff and his or her attorney. In the case of *Kaplan v. Pomerantz*,\(^\text{297}\) the defendants argued that decertification was appropriate because the plaintiff gave false answers in his deposition with respect to his involvement in other lawsuits and his wife's ownership of other stocks.\(^\text{298}\) The court stated in its ruling: "A plaintiff's honesty and integrity are important considerations in allowing him to represent a class. In this case, plaintiff's statements go beyond minor inconsistencies."\(^\text{299}\) The court ruled that the typicality and the adequacy requirements were not satisfied.\(^\text{300}\) The court also found plaintiff's counsel to be inadequate by being at least a silent accomplice in plaintiff's false testimony.\(^\text{301}\) In *Surowitz v. Hilton Hotels*,\(^\text{302}\) a shareholder with a limited ability to read English signed the verification of the complaint as the plaintiff in a derivative action, in reliance on the investigation made by her son-in-law and attorney.\(^\text{303}\) The Supreme Court held that her lack of knowledge of the circumstances described in the complaint should not prevent her from being a representative plaintiff if it was demonstrated to the court that the suit was

\(^\text{295}\) *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.}, 55 F.3d 768, 784–85 (3d Cir. 1995). For a survey of the variations of this charge, see Silver, supra note 51, at 1360–85.


\(^\text{298}\) Id. at 505, 510; see also *Armour v. Anniston*, 89 F.R.D. 331, 332 (N.D. Ala. 1980).

\(^\text{299}\) *Kaplan*, 132 F.R.D. at 510 (internal citations omitted).

\(^\text{300}\) *Id.*

\(^\text{301}\) *Id.* at 510–11; see also *Pope v. Harvard Bancshares, Inc.*., 240 F.R.D. 383, 390 (N.D. Ill. 2006).


\(^\text{303}\) *Id.* at 364–68.
commenced in good faith and not as a nuisance or strike suit. In Deutschman v. Beneficial Corp., the court suggested that one of the features that shows inadequacy of representation is proof of collusion between the representative and the adverse party.

Similar to Israeli courts, federal courts also ascribe importance to the plaintiff's vindictiveness toward the defendants. In Norman v. Arcs Equities Corp., the court held that a personal vendetta of the class plaintiff intrudes upon the fiduciary duty of the class representative in class action litigation. In Green v. Carlson, the court ruled that a plaintiff who engages in a pattern of abuse of the judicial system will not fairly and adequately represent the interests of the class.

What this Article has identified as "issues related to good faith" was also dealt with under Rule 23 prerequisites. The question of the sophistication of the plaintiff is examined within the scope of the typicality and adequacy prerequisites. Some decisions state that sophisticated plaintiffs are not adequate to represent a class of investors, and others have determined that sophistication is not relevant.

---

306 Id. at 381; see also Lo Re v. Chase Manhattan Corp., 431 F. Supp. 189, 197 (S.D.N.Y. 1977) (finding that Rule 23(a)(4) requires lack of collusion).
307 See, e.g., Kayes v. Pac. Lumber Co., 51 F.3d 1449, 1464 (9th Cir. 1995); Larson v. Dumke, 900 F.2d 1363, 1367 (9th Cir. 1990); In re Itel Sec. Litig., 791 F.2d 672, 675 (9th Cir. 1986) (stating that if a litigant "is substantially motivated by vindictiveness, obduracy, or mala fides, the assertion of a colorable claim will not bar the assessment of attorneys' fees" or other appropriate sanction) (internal quotation marks omitted); Davis v. Comed, Inc., 619 F.2d 588, 593–94 (6th Cir. 1980).
309 Id. at 506.
311 See supra Part III.A.
The "professionalism" or "seriality" of the plaintiff is also examined under the adequacy prerequisite and in the context of lack of conflicts of interest. In most cases, courts do not attach particular importance to the seriality of the plaintiff, except in securities class actions in which the PSLRA specifically excludes professional plaintiffs. The PSLRA provides that, except as the court may otherwise permit, a person may be a lead plaintiff in "no more than five securities class actions during any three-year period." In determining this limitation, Congress tried to limit the practice of professional plaintiffs who file frivolous suits to get a bounty.

A unique case of "professionalism"—commonly named dual capacity, in which the plaintiff is also class counsel or related to the class counsel (for example, his partner or a relative)—is also examined under the auspices of the "adequacy" requirement. Many decisions have disqualified relatives of the class counsel, his or her partners, and people who had extensive financial relations with the class counsel from serving as class action plaintiffs. The class counsel and the plaintiff may have conflicts of interest with the rest of the class, since in these cases no one guards the interests of the class. Other cases were decided otherwise, especially when the fees of the class counsel were paid directly by the defendant and not as part of the compensation given to the class.

---

315 Miller, supra note 42, at 595 (citing 15 U.S.C. §§ 77z-1(a)(3)B(v), 78u-4(a)(3)B(v)).
317 See, e.g., Bradburn Parent/Teacher Store v. 3M, No. 02-7676, 2004 U.S. Dist. LEXIS 16193, at *35, *38–39 (E.D. Pa. Aug. 17, 2004) (concluding that, since the majority shareholder of the plaintiff was married to one of the plaintiff’s attorneys, the attorney was unable to adequately represent the class); In re Microsoft Corp. Antitrust Litig., 214 F.R.D. 371, 374–75 (D. Md. 2003) (finding that a representative plaintiff was inadequate to represent the class because she was the sister-in-law of one of the attorneys for the plaintiffs).
318 See, e.g., Susman v. Lincoln Am. Corp., 561 F.2d 86, 90 (7th Cir. 1977) (noting that the majority of courts “have refused to permit class attorneys, their relatives, or business associates from acting as the class representative”).
Good faith is sometimes used when a request to approve a class action settlement is filed. In many decisions, the court approved the class settlement only after finding that it was the “product of extensive arm’s length negotiations . . . undertaken in good faith . . . after substantial factual investigation and legal analysis.” The test courts have used to determine if the Rule 23(e) requirements have been satisfied is whether a class action settlement is “fair, adequate and reasonable and is not the product of collusion between the parties.” This test comprises two queries: (1) a “substantive” query, which examines whether the settlement is fair, adequate, and reasonable; and (2) a “procedural” query, which examines whether the settlement is the product of collusion between the parties or of negotiations conducted in good faith. One commentator asserts that the procedural standard is more frequently used because it is easier to implement. The procedural standard is comparable to the Israeli good faith standard.

With regards to good faith in class action settlements, in addition to verifying the fairness of the settlement, the good faith of the parties decreases “the probability of collateral attack by absentees if the settlement is approved.” As seen, good faith is

---

322 See, e.g., In re Vitamins Antitrust Litig., No. 99-197, 2000 U.S. Dist. LEXIS 8931, at *22 (D.D.C. Mar. 30, 2000). A similar wording was recently suggested by the American Law Institute. See AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, § 3.05(a)(4) (Proposed Final Draft Apr. 1, 2009) (“A court reviewing the fairness of proposed class-action settlement must address . . . whether: (4) the settlement was negotiated at arm’s length and was not the product of collusion.”).


326 NEWBERG & CONTE, supra note 73, § 15:26. If the adequacy of representation was such that some or all of the absent class members could not fairly have been
related to acts of collusion between counsel and defendants, where counsel is generously compensated for arranging a settlement less favorable to the class than suggested by the merits.\textsuperscript{327}

Good faith has also been mentioned with regard to the selection of the lead plaintiff under the PSLRA. In one case, the court ruled that “[t]he lead plaintiff owes a fiduciary duty to all members of the proposed class to provide fair and adequate representation and actively to work with class counsel to obtain the largest recovery for the proposed class consistent with good faith and meritorious advocacy.”\textsuperscript{328}

The next Part of this Article examines the key differences between American and Israeli legal systems and especially the different role that litigation plays in each society. This article concludes that such differences do not justify the differences concerning the application of good faith in class action proceedings.

V. COMPARATIVE ANALYSIS OF THE ROLE OF LITIGATION IN THE UNITED STATES AND ISRAEL

When considering the adoption of a good faith requirement into federal class action certification procedure, it is important to inquire, first, whether the role litigation plays in the American and Israeli legal systems is similar, and second, whether the adoption will not disrupt other parts of the procedural system.\textsuperscript{329}

Concerning the latter, since the certification procedure is particular to class action proceedings, it should not disrupt in any way the federal procedural system as a whole. Even though the former question is not so self-evident, this Article argues that the


\textsuperscript{328} In re Network Assocs. Sec. Litig., 76 F. Supp. 2d 1017, 1032 (N.D. Cal. 1999) (emphasis added); see also In re Cendant Corp. Litig., 264 F.3d 201, 276 (3d Cir. 2001) (“[T]he ultimate inquiry is always whether the lead plaintiff's choices were the result of a good faith selection and negotiation process and were arrived at via meaningful arms-length bargaining.”).

role litigation plays in both systems is similar enough so that a transplant of the good faith requirement should not be problematic.

While the United States and Israel both have adversarial legal systems, the United States and Israel both have adversarial legal systems, some differences still exist. A prominent difference is that Israel has only one homogeneous judicial system as opposed to the state-federal divide in the United States. Also, Israel does not conduct jury trials. However, Israel does share a lot of what Robert Kagan has termed American “adversarial legalism.” As elaborated below, there can be no dispute that litigation plays a fundamental and similar role in Israeli and American societies. The two legal systems rely upon private litigants to enforce substantive provisions of law that, in civil law legal systems, are left mostly to the discretion of public enforcement agencies.

---


331 Indeed, in addition to the general court system, Israel employs a system of religious tribunals. However, these tribunals are subjected to the authority of the secular court system, and they only have jurisdiction in issues that relates to religion (mainly marriage and divorce).

332 See, e.g., Uri Shtrusman, The Naked King or the Dominance of the Jury in Israeli Court, 13(1) YIUNEY MISHPAT 175, 207 (1998).

A. American "Adversarial Legalism"

Professor Kagan argues that the United States is exceptional in comparison to other economically advanced democracies. He coined the expression "adversarial legalism" to describe what he terms the "American way of law." Kagan sees this as a legal style that emphasizes litigant activism and lawyer-dominated litigation in dispute resolution, policy making, and policy implementation. In the United States, Kagan argues, the courts have become a central source of resource allocation due to weak hierarchical control of the judiciary and fragmented political authority. Adversarial legalism refers to the role law plays in policy implementation, to the centrality of the courts in disputes and policy controversies, and the way that so many social, political, and economic issues are refashioned in legal terms.

Adversarial legalism, Kagan claims, is a characteristic of America that other advanced nations do not share, and they are the better for it. Even those who do not concur with Kagan's approach agree that in the United States, more significant issues

334 Id. at 7; see also SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD 17–18 (1996) (stating that American "exceptionalism" has been observed by Alexis de Tocqueville in the 1830s); Stephen B. Burbank, The Complexity of Modern American Civil Litigation: Curse or Cure?, 91 JUDICATURE 163, 165 (2008) ("[P]rivate litigation plays a role in American society that is probably unique in the world."); Chase, supra note 330, at 287–301 (describing characteristics of the American procedural exceptionalism as part of America’s cultural exceptionalism); Geoffrey C. Hazard, Jr., From Whom No Secrets Are Hid, 76 TEX. L. REV. 1665, 1674 (1998) (“The American common-law system... has differences from most other common-law systems that are of equally great if not greater significance [than those separating common-law from civil law systems]. The American system is unique in many respects.”).

335 In his article, On Surveying the Whole Legal Forest, 28 LAW & SOC. INQUIRY 833, 837 (2003), Professor Kagan explains that he used the term adversarial legalism “to refer both to the ‘day-to-day practice of adversarial legal contestation,’ and to a complex of legal institutions, mechanisms, rights, and rules that facilitate or encourage adversarial, party-dominated legal contestation—what might be called ‘the structures of adversarial legalism.’”

336 See KAGAN, supra note 269, at 9.
337 See id. at 9, 40.
338 See generally id. at chs. III–IV.
339 See id. at 6–9.
may be litigated than in other developed countries, so that American courts play a greater role in determining comprehensive government policy.340

Like others,341 Kagan also recognizes that other nations share some aspects of American adversarial legalism,342 but he argues that the American legal system is substantially different in the level of adversarial legalism.343 Americans are “distinctive,” as Kagan has put it, by being “especially inclined to authorize and encourage the use of adversarial litigation to implement public policies and resolve disputes . . . as a matter of day-to-day practice.”344 Moreover, he refers to the fact that in the United States the government has increasingly given private citizens the power to bring lawsuits to enforce statutes.345 While “European polities generally rely on hierarchically organized national bureaucracies to hold local officials accountable to national policies, the United States Congress mobilized a distinctly American army of enforcers—a decentralized,


343 See KAGAN, supra note 269, at 7–8. Kagan identifies thirty-four previous comparative studies covering various policy areas that have deduced that America has a distinctive adversarial legalism. Id.

344 Id. at 13. The litigious nature of the American people is exemplified by Justice Warren Burger’s statement that “mass neurosis . . . leads people to think courts were created to solve all the problems of society.” Arthur R. Miller, The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?, 78 N.Y.U. L. REV. 982, 989 (2003); see also E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 32 (1988); JOHN THIBault & LAUREN WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 107 (1975); Donna Shestowsky & Jeanne Brett, Disputants’ Perceptions of Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study, 41 CONN. L. REV. 63, 93 (2008) (stating that, while nonadjudicative procedures failed to meet disputants’ expectations, those initially selecting adjudicative procedures—such as trial or arbitration—were highly satisfied ex post).

345 See KAGAN, supra note 269, at 51.
ideologically motivated array of private advocacy groups and lawyers. Kagan takes particular aim at tort law in the United States. While most other developed nations have a broad social insurance system to assist injured individuals, the United States relies heavily on private litigation to achieve these ends.

Kagan refers to the disturbing implications of adversarial legalism as a system of law that relies on a politically selected judiciary, lay jury trials, entrepreneurial lawyering, and aggressive pretrial discovery. These features of adversarial legalism are said to generate enormous costs, excessive unpredictability, frequent injustice, and excessive inequality. Kagan contrasts America’s politically selected, decentralized judiciary with the bureaucratically organized, career-management system that homogenizes the judiciaries in Europe and makes their decisions more “legally competent, uniform, and predictable” than decisions rendered by their less regulated American counterparts.

Joseph Sanders argues that nonadversarial responses are rare in the United States due to the interaction of legal culture and legal structure. He compares the United States with Japan, which has been governed by an entrenched, professional national bureaucracy. Unlike the United States, Japan has a more communal and less individualistic culture. The Japanese are less likely to view a person as an autonomous individual than as someone embedded in a social context. The American individualistic culture, on the other hand, supports adversarial

---

348 Id. at 47.
349 See id. at 129–31.
349 See KAGAN, supra note 269, at 103.
350 See id. at 104–25. But see Johnson, supra note 348, at 772 (arguing that Kagan exaggerates when he depicts the implications of American adversarial legalism).
351 KAGAN, supra note 269, at 111–12.
352 See Sanders, supra note 348, at 734–35; see also Chase, supra note 330, at 279 (stating that distinctions in litigation are “traceable to underlying cultural differences”).
353 Sanders, supra note 348, at 734–35.
354 Id. at 735.
355 Id.
legalism for it justifies the choice to pursue one's own best interest even when people believe this choice may harm some other social good.\textsuperscript{356}

Kagan also argues that the American fees rule, requiring each party to bear its own litigation costs, encourages "legally questionable cases" and harms those with "clearly meritorious claims and defenses."\textsuperscript{357} He asserts that American laws involve more costly forms of legal contestation, which he believes is not merely inefficient, but also compels litigants to abandon just claims and defenses.\textsuperscript{358}

B. "Adversarial Legalism" in Israel

The quote "America remains a society profoundly rooted in law,"\textsuperscript{359} describes the Israeli society as well. The Israeli legal system not only shares most of the features of the American adversarial legalism, but the role of litigation in Israel also bears a close resemblance to its American counterpart. Indeed, some legal scholars support the argument that the United States is not exceptional, in many of the attributes of adversarial legalism, as Professor Kagan argues.\textsuperscript{360} First, some of the possible reasons for the similarity between the two legal systems in historical terms will be explored. Next, the common characteristics of American and Israeli litigation will be examined in more detail.

\textsuperscript{356} See id. at 736; Chase, supra note 330, at 281.

\textsuperscript{357} KAGAN, supra note 269, at 239.

\textsuperscript{358} See id. at 117; Nelken, supra note 340, at 828 ("[T]here are few who would doubt that American society is subject to a relatively high and costly level of litigation.").

\textsuperscript{359} LIPSET, supra note 334, at 270.

\textsuperscript{360} Epp, supra note 341, at 766 (stating that "much of the comparative legal research of the last generation demonstrates that the United States is not... exceptional in many of the attributes of adversarial legalism, nor is the limited reach of adversarial legal reforms exceptional"); Nelken, supra note 340, at 811–12, 824 ("The Anglo-American model of law, of party-led negotiated justice is coming to seem the norm even in continental Europe."). Yet, Nelken supports Kagan's view that countries outside the United States are still less subject to legal adversarialism, and that "absent the special conditions which shape law in the United States they will not go the same way." Id. at 824. Kagan himself asserts in a recent article that "politically driven adversarial litigation sometimes occurs in Great Britain, Germany... The Netherlands..., and even in Japan." Kagan, supra note 335, at 837–38, 841–42. Yet, Kagan insists that the United States is still exceptional with regard to "the ways in which laws are articulated and implemented, legal disputes are adjudicated, violations punished, and arguments made and resolved." Id.
In the early years after the establishment of the State of Israel in 1948, collective culture—according to which the individual was seen as an instrument for fulfillment of the State’s goals—was dominant. As a result of the increasing influence of American culture in the 1970s and 1980s, a new parallel framework of values arose based on the values of self-fulfillment and individualism. The reformation of Israeli culture influenced tremendously the Israeli legal system and had a significant impact on the reasoning of the justices on the Israeli Supreme Court. Due to the cultural shifts in Israel from a collective society that valued solidarity to a more individualized society in which the individual and his or her well being is of the utmost importance, the Israeli Supreme Court, which previously based its decisions on formalism, now relies on liberal values. This argument requires clarification: Mautner argues that the reason for the change in the court’s reasoning was intentional and premeditated. Whereas in the first twenty-five years after the establishment of the State, Israeli culture was based on collective values, and the legal culture of the Court was based on liberal values, the Israeli Supreme Court justices had used legal formalism in their decisions. Formalism enabled the Court to conceal the ideological dimension of its decisions and present the judicial process as a mechanical process that leads to inevitable decisions that are not influenced or shaped by ideological values of the members of the Court. Put differently, legal formalism enabled the Court to conceal the cultural gap between Israeli society and the Israeli Supreme Court justices. Due to the cultural change in Israeli society in the 1970s, there was no further need to use rigid legal formalism, which is ostensibly value-neutral, and the Court has openly articulated liberal values in its decisions.

362 Menachem Mautner, The Decline of Formalism and the Rise of Values in Israeli Law 125 (1993); Goldstein & Ephron, supra note 189 at 47.
363 Mautner, supra note 362, at 122–25. According to Mautner, this transition was accompanied by a transition in Israeli jurisprudence, first influenced by England and later by the United States. Id. at 138. Pertaining to the liberalism of the Israeli Supreme Court, see also Shimon Shetreet, Reflections on the Contemporary Trends of Judicial Role in Israeli Society, in The Role of Courts in Society 158, 160–61 (Shimon Shetreet ed., 1988).
364 Mautner, supra note 362, at 122–25.
365 Id. at 122–27.
Therefore, since the late 1970s, the status quo has changed—the Israeli Supreme Court’s legal reasoning has emphasized the ideological content of the law and its social meaning. Since then, the Court has begun to use the law as an educational mechanism and not merely as a vehicle for dispute resolution. This is somewhat similar to Alexis de Tocqueville’s characterization of American democracy as a society in which all political questions are eventually brought for judicial ruling. Therefore, one can argue that the same description also depicts Israel, where central social decisions are ultimately made by the Israeli Supreme Court.

This change in the court’s legal reasoning has had several repercussions. The Israeli Supreme Court has openly intervened in ideological and political questions, which were considered to be non-justiciable before. A few prominent examples are: (1) the overturning of previous decisions of the Court according to which political agreements were determined to be not justiciable, (2) the failure to call Yeshiva students for compulsory army service, and (3) the ruling that the expropriation of land in an area under Israeli military occupation for the purpose of establishing a settlement is unlawful. These decisions on political issues may be parallel to the decision of the United

365 The underlying assumption of American procedure is that judicial discretion is to be preferred to formalism. See, e.g., Burbank, supra note 167, at 543.
367 See AHARON BARAK, THE JUDGE IN A DEMOCRACY 177–89 (2006) (discussing the question of justiciability under Israeli law). Barak believes that in modern democracies, increasingly, political questions are dressed as legal matters and that the court should address these questions. See Aharon Barak, The Role of the Judge in a Democracy, (May 1, 2003), http://www.court.org.il/sun/. Barak believes that the judicialization of politics will continue and that the non-justiciability of legal aspects of politics will decrease. BARAK, supra at 368; see also RUTH GAVISON, MORDECHAI KREMNITZER & YOAV DOTAN, JUDICIAL ACTIVISM, FOR AND AGAINST: THE ROLE OF THE HIGH COURT OF JUSTICE IN ISRAELI SOCIETY 65 (2000).
States Supreme Court to hear Bush v. Gore rather than abstain on the grounds of non-justiciability, which was also widely criticized. The former President, Barak, was perhaps the most prominent supporter of reducing non-justiciability to bridge the gap between law and society and protect the constitution and democracy. It is no wonder that Barak supports the position of the United States Supreme Court, which did not dismiss Bush v. Gore for non-justiciability.

The change in the Israeli Supreme Court’s legal reasoning has also amplified the role of litigation in Israel. The less formal legal reasoning and depreciation of the importance of justiciability issues has invited even more litigation.

Beyond American influences on the Israeli Supreme Court, another reason for the similar role litigation plays in both legal systems comes to mind. Since the two countries share a common law heritage, it should not come as a surprise that similar national traits played on that shared heritage in similar ways. Moreover, the fact that both countries were founded by immigrants, who continue to arrive, could make them more open to cultural and legal changes. It is easier for newcomers to achieve those changes using litigation rather than through political power.

Many of the characteristics of Kagan’s “adversarial legalism” are also present in Israel. Israel, too, is overburdened by excessive civil litigation. Courts’ dockets are full and decisions

\footnotesize{531 U.S. 98 (2000).}
\footnotesize{See, e.g., Jeffrey Rosen, Political Questions and the Hazards of Pragmatism, in Bush v. Gore: The Question of Legitimacy 145, 145–46 (Bruce Ackerman ed., 2002); see also Steven G. Calabresi, A Political Question, in Bush v. Gore: The Question of Legitimacy, supra at 138.}
\footnotesize{BARAK, supra note 368, at 177. Even though Israel does not have a written constitution, it does have “basic laws,” which are treated similarly by the Court. See Amos Shapiro, The Supreme Court as Guardian of the Individual’s Fundamental Freedoms in Israel—A Fortified Bastion or a Paper Tiger, 3 YIUNEY MISHPAT 625, 630 (1978).}
\footnotesize{BARAK, supra note 368, at 188.}
\footnotesize{Mautner, supra note 362, at 105–07.}
\footnotesize{This argument does not explain why the government chooses to use litigation rather than agency enforcement. It does explain, however, why litigation is so often used in both countries.}
are often delayed. Arguably, the Israeli legal system may even be in worse condition, since relatively fewer cases are being settled and more proceed to trial.

Kagan blames American adversarial legalism for high costs and unwarranted delays. These same features exist in the Israeli legal system. Indeed, plaintiff attorney fees in Israel are usually lower, but discovery procedures are extensive as customary in the United States. Israel employs the “loser pays” rule similarly to England. This rule may deter lawyers from filing a frivolous claim and, in doing so, lower the cost imposed on the judiciary. Even though this seems significant due to the

---

378 According to a study commissioned by the Israeli Court System Management, which compared judicial caseload burden in Israel and sixteen other developed countries (United States not included), Israel is ranked third in judicial burden based on the criteria for counting court cases. See RAANAN SULITZEANU-KENAN ET AL., THE BURDEN ON JUDICIARIES: A COMPARATIVE STUDY OF 17 COUNTRIES: SUMMARIZING REPORT 3–4 (2007). In the level of legal activity, defined by the ratio of cases to population size, Israel is ranked first, while in the ratio of population to judges it is ranked sixth. Id. According to the study, in the year 2004 there were 1,016 civil cases per judge, id., while, according to the Administrative Office of the United States Courts, in the year 2000 there were only 311 cases per federal judge, see supra note 118. While the evaluated parameters may be slightly different in both studies, the immense burden on Israeli judges is evident.

379 Even though, to the best of my knowledge, no statistical study was done in Israel pertaining to settlements in “simple” civil cases, it is evident that much more than three to five percent of the cases end with final judgments. See HENSLER ET. AL., supra note 29, at 126 n.52; Michael Heise, Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time, 50 CASE W. RES. L. REV. 813, 823 (2000). Regarding class actions, only 4 out of 215 class actions filed between the years 1995–2000 were either won or settled in favor of the class; this number does not include class actions in which the claim was settled for a nuisance value. See Deutsch, supra note 236, at 310. These numbers may have changed since the legislation of the ICAL in 2006.


381 Attorney fees in Israeli class actions range between five and fifteen percent, which often includes the reward to the representative plaintiff, while in the United States it ranges between twenty and thirty percent in relatively small lawsuits and about ten percent in large ones. See AMICHAi MAGEN & PERETZ SEGAL, THE GLOBALIZATION OF CLASS ACTIONS: NATIONAL REPORT: ISRAEL 46–47 (2007); Theodore Eisenberg & Geoffrey P. Miller, Attorney Fees in Class Action Settlements: An Empirical Study, 1 J. EMPIRICAL LEGAL STUD. 27, 77 (2004).
limited use of Rule 11 since the 1993 amendments,\textsuperscript{382} in fact Israeli courts rarely require the plaintiff to pay the defendant’s costs in class action proceedings.\textsuperscript{383}

Kagan emphasizes the role of American lawyers, their unique drive, and their large numbers relative to other countries as evidence that the law plays a larger role in America’s economy.\textsuperscript{384} However, the number of Israeli lawyers per capita is even higher, and commentators have highlighted this fact as a reason for the growing numbers of class actions filed.\textsuperscript{385}

In Israel, as in the United States, judges had traditionally remained relatively passive.\textsuperscript{386} However, in both the United States and Israel, judges have begun to take a more active role in policy making.\textsuperscript{387} The courts are entrusted with what has been named “structural reform,” where, rather than existing merely to resolve disputes, “courts exist to give meaning to... public values...”\textsuperscript{388} One prominent example is class action proceedings in which judges have necessarily taken a more active role.\textsuperscript{389} “While the court does not fully occupy the inquisitorial role of civil law tradition, it comes close.”\textsuperscript{390} Similar to the 2006 Israeli Class Actions Law, the enactment of the PSLRA and the 2003 amendments to Rule 23 signal an even greater role for the courts in the appointment of class counsel.\textsuperscript{391} As others have have

\footnotesize{\textsuperscript{382} See supra notes 123-124 and accompanying text.  
\textsuperscript{383} See supra note 269; Amir Helmer, Small Calculation—Great Importance, HAARETZ, Feb. 15, 2004.  
\textsuperscript{384} KAGAN, supra note 269, at 55–57.  
\textsuperscript{385} Goldstein & Ephron, supra note 362, at 47–48; Burbank, supra note 334, at 165. Kagan states that in the year 1995 the ratio was 1:307, KAGAN, supra note 269, at 36, while, according to statistics obtained from the Israeli Bar, in the beginning of 2009 there were 40,469 lawyers, a ratio of 1:183. See Ela Levi-Weinrib, Israeli Lawyers Face Increasingly Crowded Field, GLOBES, May 20, 2009, at 10. Indeed, many of these lawyers do not litigate and some do not practice, but the numbers still illustrate the role of the law in Israeli culture.  
\textsuperscript{386} See supra note 116 and accompanying text.  
\textsuperscript{389} See supra note 117.  
\textsuperscript{390} Issacharoff & Nagareda, supra note 64, at 1707.  
\textsuperscript{391} See MANUAL FOR COMPLEX LITIGATION, supra note 61, §§ 10.23, 21.27.}
determined, this phenomenon is part of a larger trend: Israeli and American judges in general are becoming more involved and have obtained a more active role in court proceedings.\textsuperscript{392}

Kagan reasons that since the government in the United States is too weak to deal with the needs of modern society, litigation provides the alternative route for obtaining justice.\textsuperscript{393} The fact that Israel also possesses a weak government\textsuperscript{394} contributed to the Israeli Supreme Court's intervention in purely political matters. Likewise, in Israel, trust in government has declined.\textsuperscript{395} This phenomenon has also fueled the reliance on litigation instead of political leadership.\textsuperscript{396}

Kagan and others argue that jury trials influence American adversarial legalism as well. He argues that a jury is less predictable than professionally trained judges\textsuperscript{397} and that "[o]n average, jury trials take longer than bench trials."\textsuperscript{398} As mentioned above, Israel has never used jury trials, even though they originated in England,\textsuperscript{399} from which Israel drew its Rules of Civil Procedure.\textsuperscript{400} The absence of juries, however, is not a significant factor in comparing the roles played by litigation in the two countries.\textsuperscript{401} First, recent empirical evidence refutes Kagan's argument that jury trials last longer.\textsuperscript{402} Second, the

\textsuperscript{392}Dodson, supra note 329, at 148–50; Stephen Goldstein, \textit{Forty Years of Israeli Civil Procedure}, 19 \textit{Mishpatim} 663 (1989-1990) (describing the softening of traditional principles of classic adversarial concepts, and the controlled adoption of principles from the inquisitorial system).

\textsuperscript{393}KAGAN, supra note 269, at 15–16.

\textsuperscript{394}See, e.g., \textit{A Systemic Problem}, \textit{The Economist}, Apr. 5, 2008, at 13 (analyzing Israel's weak fragmented political system).

\textsuperscript{395}See id.

\textsuperscript{396}See KAGAN, supra note 269, at 35–37; Burbank, supra note 334, at 165; MAUTNER, supra note 362, at 134–36.

\textsuperscript{397}KAGAN, supra note 269, at 116; Sanders, supra note 348, at 727.

\textsuperscript{398}Sanders, supra note 348, at 723.

\textsuperscript{399}Presently, civil jury trials are rarely used in the United Kingdom. See \textit{MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS} 532 (2d ed. 1994).


\textsuperscript{402}Theodore Eisenberg & Kevin M. Clermont, \textit{Trial by Jury or Judge: Which Is Speedier?}, 79 \textit{Judicature} 176, 177–79 (1996); Stephen B. Burbank, \textit{Keeping Our Ambition Under Control: The Limits of Data and Inference in Searching for the Causes and Consequences of Vanishing Trials in Federal Court}, 1 \textit{J. Empirical,


GOOD FAITH IN CLASS ACTIONS

recent United States Supreme Court decision in Twombly, regarding a heightened pleading standard,403 and the more stringent standards for scrutinizing the reliability of scientific evidence,404 can be viewed as part of a trend toward limiting the cases that are allowed to be decided by jury in the United States.

On the face of it, compared with the United States, Israel does have a much more comprehensive social security system, a bureaucratic body which supports the unemployed, injured, and sick, and a no-fault compensation system for motor vehicle accidents. Moreover, as Israel has become more of a welfare state, legislation has been passed to regulate the rights and the duties of citizens and government authorities. Paradoxically, this has resulted in a corresponding increase in litigation against government agencies.405

Furthermore, at least in some aspects, there are signs of decline in American adversarial legalism.406 A prominent example is the September 11th Victim Compensation Fund, which was created by Congress to compensate the victims of the attack in exchange for their agreement not to sue the airline corporations involved.407 At the end of the process, 70 billion dollars were awarded to 97% of the families.408 Only approximately eighty-five people decided not to come into the program and instead decided to sue.409 Also, many United States

LEGAL STUD. 571, 587 (2004) (stating that “the time from filing to disposition is now shorter for jury trials than it is for bench trials”).


408 Interview with Kenneth Feinberg, supra note 407.

409 See id. Mr. Feinberg said that “taking away that right to sue, which is such an inherent part of American culture, heritage, is not an easy thing to do.” Id. He described this program as “a unique response to a very unique event.” Id. Therefore, unless it becomes a reoccurring phenomenon, it may not support a supposed decline in American adversarial legalism.
Supreme Court rulings have consciously sought to depress adversarial legalism. Prominent examples already discussed in this Article include Twombly, Tellabs, and Iqbal. These decisions and others, such as the Daubert decision and its progeny, dictate greater judicial involvement in assessing the merits of plaintiffs’ claims at the early stages of the litigation and can be viewed as an effort to prevent lawyers from filing dubious lawsuits—including class actions. Congress has also curbed class action litigation with, inter alia, the enactment of PSLRA and CAFA, which, as seen, may impede meritorious class action litigation.

These and other indications of decline in American adversarial legalism do not seem to fundamentally change the important role litigation plays in the American legal system. Even though adversarial legalism is still deeply rooted in the American legal system and in American political culture, the Israeli legal system does not seem far behind.

This Article does not argue that the role that litigation plays in American and Israeli societies is identical. It merely suggests that the Israeli legal system reflects many of the characteristics of American “adversarial legalism” and that litigation plays a similar role in both legal systems.

C. Should Differences in the Role of Litigation Influence the Implementation of Good Faith?

As seen, the differences in the roles that litigation plays in American and Israeli societies are not significant and, therefore, probably should not affect the role that a “good faith” requirement can usefully play in each system. In both systems, law plays a similar role in policy implementation, courts’ decisions are key in disputes and policy controversies, and many social, political, and economic issues are refashioned in legal terms. The fact that Israel uses class actions as a mechanism to implement social change—very much in the

10 See supra text accompanying notes 152–163.

11 This does not necessarily mean that the remaining differences should not affect the content that should be given to good faith in each society. This question exceeds the boundaries of this Article and may be part of a future project.

12 See HCJ 4601/95 Sarusi v. Labor Court [1998] IsrSC 52(4) 817, 826 (holding that the law—and therefore litigation—is a social tool). “The concepts of the law were meant to achieve social goals . . . . They are expression[s] for appropriate balances between contradicting values and interests . . . .” Id.
American tradition—demonstrates the effect the American legal system has had on the development of the Israeli system in recent decades.

The questions of whether adversarial legalism is appropriate and whether there is a need to tame it are immense ones, and they have been the subject of many articles. Kagan is right when he recognizes that “American adversarial legalism has both positive and negative effects.” Kagan’s bottom line is that American legalism is more negative than positive. He argues that “[b]y making litigation and adjudication slow, very costly, and unpredictable, adversarial legalism often transforms the civil justice system into an engine of injustice, compelling litigants to abandon just claims and defenses.”

Good faith can be used to limit some of adversarial legalism’s negative effects, as reflected in class action litigation. A good faith prerequisite will prevent the certification of dubious class actions and in this sense will curb excessive litigation and unfair settlements exacted by the threat of nuisance litigation.

Arguably, a good faith prerequisite is needed even more in the United States than in Israel. While in the United States class actions have been certified on a regular basis for many years, in Israel, at least until the enactment of the ICAL, certification of lawsuits as class actions was rare. Good faith was originally integrated in Israeli legislation as a lesson from the American experience, in which the court allegedly is not allowed to examine the merits of the claim and the intentions of

---

413 See, e.g., Epp, supra note 341, at 273; Johnson, supra note 348, at 772–73; Nelken, supra note 340, at 819; Sanders, supra note 348.

414 KAGAN, supra note 269, at 3.

415 See id. at 3, 9, 22–25.

416 Id. at 117.

417 The use of good faith may be appropriate even in legal systems that do not share American adversarial legalism. In Japan, which is on the other side of the spectrum in terms of litigation burden and other features of adversarial legalism, see id. at 236–37, good faith is used to prevent the filing of lawsuits for the sole purpose of harassing the defendant or any other abuse of procedural right. See, e.g., Yasuhei Taniguchi, Good Faith and Abuse of Procedural Rights in Japanese Civil Procedure, 8 TUL. J. INT’L & COMP. L. 167, 173–74 (2000).

418 From 1995 through 2000, less than thirty lawsuits were certified in Israel. See Deutsch, supra note 236, at 310. On the other hand, between February 1, 2008 and February 1, 2009, eleven lawsuits were certified. See Ella Levi-Wienrib, Judges Are Not Afraid from Corporations Anymore, GLOBES, Mar. 12, 2009, at 12. This change stems from the enactment of the ICAL. See id. In the first quarter of 2009, ten lawsuits were certified. See Sean, supra note 243, at 28–29.
the plaintiff and class counsel. Moreover, the fact that in the United States each party pays its own attorney fees enables more risk neutrality and invites attorneys to abuse class action proceedings.

The good faith principle goes hand in hand with the history and social culture of the United States, a nation that values individualism and restrains state control. The differences in the role that litigation plays in American and Israeli societies is not significant and, therefore, the adoption of a good faith prerequisite, similar to the one used in Israel, is feasible.

VI. THE ADDITION OF A GOOD FAITH PREREQUISITE

Under the Israeli good faith prerequisite, courts examine the motives of any plaintiff who files a class action and those of the class counsel. The prerequisite also serves as a vehicle to examine the motives of the parties presenting a class action settlement for the court's approval and asking to certify the claim as a class action only for this purpose. The consideration of both the good faith of the plaintiffs and the chances of success of the lawsuit enable Israeli courts to frustrate the certification of unsuitable class actions.

Most issues that fall under the good faith prerequisite in Israel are dealt with in the United States under the “adequacy of representation” prerequisite. Since Rule 23 does not include a “chances of success” prerequisite—which is now included in the

419 Goshen, supra note 236, at 413–14.
421 See FED. R. CIV. P. 23(a)(4), (g)(1)(A)–(B); see, e.g., Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968).

[A]n essential concomitant of adequate representation is that the party’s attorney be qualified, experienced and generally able to conduct the proposed litigation. Additionally, it is necessary to eliminate so far as possible the likelihood that the litigants are involved in a collusive lawsuit or that plaintiff has interests antagonistic to those of the remainder of the class.

Id.
GOOD FAITH IN CLASS ACTIONS

ICAL—\textsuperscript{422}—the need for a good faith requirement is even more evident.\textsuperscript{423} Without examining the chances of success, the court has limited tools, at least \textit{de jure}, to make sure the lawsuit is not frivolous.

As discussed above, the adequacy of representation prerequisite examines whether any substantial conflicts of interest exist between the plaintiff and the class and whether the plaintiff will adequately prosecute the claim. This includes examining the vigor and competency of the representation by both the class representative and the proposed class counsel.\textsuperscript{424} The hypothetical argument would be that plaintiffs who lack good faith will not adequately represent the interests of the class.

\textbf{A. Is the Addition of a Good Faith Prerequisite Appropriate?}

Some commentators have argued that the most important safeguard from class action abuse is the requirement that the class representative adequately represent the interests of the class.\textsuperscript{425} Yet others have argued that the “adequacy” requirement is not enough in order to curb class action abuse,\textsuperscript{426} an alignment of interests is not enough,\textsuperscript{427} and a heightened duty of loyalty is needed.\textsuperscript{428} Congress agreed and therefore enacted legislation—the declared purpose of which was to curb class action abuse.

\textsuperscript{422} This was not the case before the 2006 enactment of the ICAL, when some of the subject-matter-specific laws did not include a “chances of success” prerequisite. See \textit{supra} text accompanying note 187.

\textsuperscript{423} As mentioned above, some federal courts now address issues involving the merits of the claim, as long as it is required, in order to verify that Rule 23 requirements have been met. See \textit{supra} text accompanying notes 126–129. To be sure, this new approach does not enable courts to assess the chances of success of the claim in the full sense of it. To argue otherwise would be to contradict the \textit{Eisen} decision.

\textsuperscript{424} See, \textit{e.g.}, Bassett, \textit{supra} note 91, at 948–49.


\textsuperscript{426} See, \textit{e.g.}, David J. Kahne, \textit{Curbing the Abuser, Not the Abuse: A Call for Greater Professional Accountability and Stricter Ethical Guidelines for Class Action Lawyers}, 19 GEO. J. LEGAL ETHICS 741, 744 (2006); Koniak, \textit{supra} note 282, at 1115–16.

\textsuperscript{427} See Coffee, \textit{supra} note 52, at 378, 402.

\textsuperscript{428} See id. at 378; Robert H. Klonoff, \textit{The Judiciary’s Flawed Application of Rule 23’s “Adequacy of Representation” Requirement}, 2004 MICH. ST. L. REV. 671, 673 (“[T]he vast majority of courts conduct virtually no gate-keeping function and approve class representatives and class counsel with little or no analysis.”).
Moreover, the “adequacy” prerequisite already includes the problem of structural conflicts of interest, the question of competency, and performance of class counsel and the representative plaintiff. Using the same “adequacy” prerequisite to deal also with such good faith issues as frivolous or extortionate class actions and sweetheart settlements is just too much. Borrowing from Issacharoff and Nagareda, adequate representation is used today “as both a floor wax and a dessert topping.” The use of the same terminology for all manner of representational shortcomings causes the parameters of the adequacy of representation prerequisite to remain ill-defined.

Previous Parts of this Article showed that Rule 23 prerequisites deal with problems that are addressed in Israel under the good faith prerequisite in a less than perfect manner. Thus, the addition of a good faith prerequisite seems appealing. However, a few arguments can be raised against this suggestion. It is possible to argue that adding a good faith prerequisite would obfuscate and overlap with some of the existing threshold requirements. This argument is not convincing. First, possible overlap can be prevented if the court interprets good faith in a way that would not collide with other prerequisites. Second, the same argument can be leveled against existing prerequisites. Third, the sending of a clear message to all the relevant parties that they are required to act in good faith—starting with the class action plaintiff and the class defendants, through their attorneys, and including the court trying the case—does not

429 See Samuel Issacharoff, Governance and Legitimacy in the Law of Class Actions, 1999 SUP. CT. REV. 337, 343 (enumerating some of the conflicts of interest inherent in the structure of a plaintiff class in the context of asbestos litigation).

430 Issacharoff and Nagareda refer to another use of “adequate representation” in connection with “the personal jurisdiction of the . . . court [that initially approves a settlement] over class members who otherwise lack ‘minimum contacts’ with the forum.” See Issacharoff & Nagareda, supra note 64, at 1657. The Supreme Court has also noted a connection between adequate representation and due process. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985).

431 Issacharoff & Nagareda, supra note 64, at 1657.

432 See Coffee & Paulovic, supra note 101, at S-787 (noting that the “commonality and typicality requirements of Rule 23(a) tend to merge”); NEWBERG & CONTE, supra note 73, § 3.41 (discussing the overlapping of the typicality and adequacy requirements).

433 As Judge Posner has articulated in Reynolds, the trial judge—like the class counsel and class representative—is a fiduciary of nonparticipating class members. As such, the court is also obligated to act in good faith while managing class action
undermine the status of the other prerequisites for the certification of the class action, and it does not create any confusion or overlapping. Quite the contrary is true: It contributes to the sharpening of the need for clean hands, maintaining fairness, conducting proceedings for genuine reasons and not for ulterior motives, and marks out the standard required in the whole procedure. Where there are special circumstances, there is a need for special emphasis; where there are special risks, there is a need for appropriate safeguards. At least for now, the measures taken by Congress have not achieved their purposes and, in some cases, have damaged the use of class actions and decreased the enforcement of the law through private litigation.

Another argument that could be raised against a more frequent use of good faith is that it would lead to inconsistent results. No matter what words are used to articulate good faith, arguably the application of good faith to different facts by different judges will yield inconsistent results. Be that as it may, similar allegations could be made against the use of many other more “fluid” or “vague” concepts and doctrines—such as “equality” and “reasonableness”—that are widely used in the United States and other legal systems.435

Indeed, the content that should be given to good faith in the particular context of class actions should be investigated further. For now it suffices to specify two arguments: First, the contents of the good faith norm in litigation proceedings must be different from the use of that norm in contractual matters. Application of the good faith norm in the law of contracts is perceived as an expression of subjugating the parties to a contract to the values of mutual trust, solidarity, and cooperation. On the other hand, the starting assumption in civil procedure is the opposite. In civil procedure, the backdrop of good faith’s application involves

434 The assertion that the good faith prerequisite overlaps with other prerequisites was raised and rejected by the Israeli Parliament. See SUB-COMMITTEE PROTOCOL (Sept. 13, 2005), available at http://www.knesset.gov.il/AllSite/QGenTxt.asp.

435 See, e.g., Oren Perez, The Institutionalisation of Inconsistency: From Fluid Concepts to Random Walk, in PARADOXES AND INCONSISTENCIES IN THE LAW 119, 123 (Oren Perez & Gunther Teubner eds., 2006) (“Legal concepts are deeply fluid; their boundaries and domain of application are highly malleable.”).
parties whose interests are inherently hostile towards each other and, therefore, their behavior must be examined from the point of view of opposing litigants. Second, even if good faith is not accurately defined in advance, in most cases it is easily recognizable vis-à-vis the specific facts of the case. Good faith is a “standard,” not a “rule.” Its flexibility enables judges to use their discretion to give content to good faith according to the facts of the case. Good faith, like other framing concepts, is used to keep pace with changes in society and with varying circumstances, which are hard to regulate with clear legal rules. Clearly, more flexibility equals lower foreseeability. Yet, good faith entails that a just outcome is reached in a particular dispute. Moreover, the current form of the “adequacy” requirement is also a “standard,” which courts have used for different purposes according to changing circumstances.

The more serious threat is that the good faith prerequisite would be used to further erode the potential of class actions. This could be done in a number of ways. First, judges may strictly interpret a good faith prerequisite, which will then make the certification of class actions difficult to an extent which might discourage potentially meritorious claims. Courts that have a negative view of the class action process may, therefore, underestimate the need to effectively enforce provisions of the law, and use good faith in order to prevent certification. Second, courts that have reservations about certain class plaintiffs may use the good faith requirement to make sure they are not nominated as representative plaintiffs. Similarly, judges may use good faith to not certify certain disfavored kinds of claims. Put differently, some courts may not make a good faith use of the good faith concept. That, of course, is a breach of the fiduciary

\[436\] See Menachem Mautner, Rules and Standards: Comments on the Jurisprudence of Israel’s New Civil Code, 17 MISHPATIM 321, 325 (1988) (discussing how a standard is a norm that conditions a certain legal result by the realization of the exercising of a criterion, which usually includes a certain value; thus, being open-ended; and discussing how a rule is a norm that requires the realization of a factual condition for a certain legal result); see also Issac Ehrlich & Richard A. Posner, An Economic Analysis of Legal Rulemaking, 3 J. LEGAL STUD. 257, 258 (1974) (discussing the meaning of “rules” and “standards” in legal analysis).

\[437\] Burbank argues that the Twombly decision can be used by the lower federal courts to screen out complaints in disfavored classes of cases. Burbank, supra note 366, at 554 n.88, 560.
duties of the court to the class. This threat will probably not manifest itself; certainly not in a widespread manner. Indeed, both CAFA and diversity jurisdiction grew out of a mistrust of state court judges. However, state courts, or federal courts for that matter, are otherwise rarely suspected of consistently acting in bad faith. Moreover, any remaining concerns should be diminished by distilling the elements of good faith so as to provide a reasonable prospect of appellate policing. Clearly, it is advisable to set guidelines to limit the discretion of the court and to ensure that class actions will not be dismissed without good reasons.

B. How Should Good Faith Be Added?

Good faith could be added as a fifth prerequisite to certification of class actions, as was done in Israel. However, good faith can also be used by the courts without formally changing the Federal Rules of Civil Procedure. It can be applied and incorporated under current prerequisites.

As Arthur Miller states, “[R]ule 23 really must be thought of as a procedural skeleton requiring fleshing out by judges and lawyers experimenting with it in an ever-increasing range of

---

438 See Reynolds v. Beneficial Nat’l Bank, 288 F.3d 277, 279–80 (7th Cir. 2002) (noting that the court on direct review is “a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries”); In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 805 (3d Cir. 1995) (noting the “fiduciary responsibility” of the court in class settlement review); see also Synfuel Techs. v. DHL Express, Inc., 463 F.3d 646, 652–53 (7th Cir. 2006) (recognizing the “high duty of care” that characterizes the court’s role as a fiduciary); In re Wireless Tel. Fed. Cost Recovery Fees Litig., 396 F.3d 922, 932 (8th Cir. 2005) (explaining the role of the court as a fiduciary); In re Cendant Corp. Litig., 264 F.3d 201, 231 (3d Cir. 2001) (noting that the court acts as a fiduciary and guards the rights of class members).

439 See Burford v. Sun Oil Co., 319 U.S. 315, 336 (1943) (Frankfurter, J., dissenting) (stating that, pertaining to diversity jurisdiction, Congress “believed that, consciously or otherwise, the courts of a state may favor their own citizens”); Howard M. Erichson, CAFA’s Impact on Class Action Lawyers, 156 U. Pa. L. Rev. 1593, 1597 (2008) (“At its core CAFA addresses subject matter jurisdiction, and to the extent federal jurisdiction statutes involve mistrust, they ordinarily involve mistrust of state judges.”).

440 According to Burton, when a judge uses his or her discretion dishonestly or maliciously, he or she is acting in bad faith. STEVEN J. BURTON, JUDGING IN GOOD FAITH 90–91 (1992).

441 A model for determining the appropriate content of the good faith requirement in the relevant contexts will be offered in a forthcoming article.
circumstances and in a variety of innovative ways. The obvious choice for the inclusion of a good faith consideration would be the adequacy of representation prerequisite. As seen, this option is not ideal and may cause the distortion of the prerequisite. A better option is to use good faith without linkage to any specific prerequisite. Both the Federal Rules of Civil Procedure and the good faith concept draw heavily on equity. Therefore, it may be validly argued that good faith is entwined in the process even if it is not explicitly mentioned in Rule 23. Other questions, such as mootness of the claim and the representative's membership in the class, have been addressed by courts even though they are not mentioned in Rule 23.

The inherent power of courts to supervise and control proceedings may also be used to address good faith issues. The certifying court is a fiduciary of the class and, therefore, is subject to the high duty of care that the law requires of fiduciaries. As part of its duties, the court should check the good faith of the plaintiff and class counsel. When examining a settlement-only class action, the court also needs to address the good faith of the defendant.

Even though all of these options may enable a more frequent and less sporadic use of good faith within the certification process, it is advisable to add good faith as a formal prerequisite. This would ensure a more consistent and similar use of the principle by different courts. It will enable a more refined and precise use of the concept of good faith.

---

442 Miller, supra note 37, at 677; see also Owen M. Fiss, The Political Theory of the Class Action, 53 WASH. & LEE L. REV. 21, 29 (1996) (stating that the Supreme Court is not bound by the Federal Rules of Civil Procedure, “because the process by which the federal rules were promulgated was unable to generate rules that might be able to bind the court”).


444 See, e.g., Stewart v. Winter, 669 F.2d 328, 334 (5th Cir. 1982).

445 See Issacharoff & Nagareda, supra note 64, at 1707–08.
GOOD FAITH IN CLASS ACTIONS

CONCLUSION

Class action abuse can interfere with the legitimate business activities of defendants who have not, in fact, violated the legislation that the class action mechanism is designed to enforce. Even though class actions facilitate law enforcement and deter potential violators from future violation of the law, they can also be abused and create substantial unwarranted costs to the judiciary, defendants, and to society as a whole.

On the other hand, when the rights of a large number of people are harmed, courts need to certify lawsuits as class actions in the most efficient manner. This facilitates law enforcement and deters potential violators from future violations of the law.

This Article argues that the addition of a good faith prerequisite to Rule 23 will help achieve a more efficient enforcement of the law and, at the same time, prevent causing harm to blameless defendants through abuse of the process. The addition of a good faith prerequisite will send a message to both defendants and plaintiffs. It will remind the latter that if they bring a frivolous claim or use the class action procedure for collateral purposes, they will have their claims dismissed. When a plaintiff files a class action in bad faith or acts in bad faith after the filing of the lawsuit, courts will be able to deny certification or replace the named plaintiff or class counsel and, in the appropriate cases, consider further sanctions. Unlike other mechanisms that were created to prevent class action abuse, the addition of a good faith prerequisite will protect defendants from class action abuse, but will not operate to bar meritorious class actions. The addition of a good faith prerequisite will also send a message that the motives underlying settlement-only class actions and other collusive agreements will be consistently scrutinized.

The central argument of this Article is that the American legal system would benefit from a consistent use of the good faith concept in class action proceedings, as has been illustrated by an analysis of the Israeli experience. This will benefit both plaintiffs and defendants. Without good faith in the certification process, courts’ rulings may not achieve justice for the class. In other cases, courts distort the operation of existing prerequisites in an
attempt to reach a particular result, which may produce inequity and unpredictability. Adopting a good faith prerequisite will eliminate that mischief.

This Article does not argue that the addition of a good faith prerequisite will completely eliminate class action abuse, for that clearly cannot be the case. For one, it cannot adequately solve the lack of monitoring of the class counsel by the representative plaintiff. However, good faith will assist in maximizing the potential of the class action mechanism and, at the same time, will assist in minimizing the dangers of abuse. As shown in this Article, most mechanisms created to protect against class action abuse do not pass muster and cannot solve the problems which were solved in Israel via good faith. Some of these mechanisms are not used properly, others cannot deter procedure abusers, and some have also caused the removal of meritorious class actions, and hence, “thrown out the baby with the bath water.” Without radically changing contemporary class action practice, good faith can substantially reduce the risks of frivolous class actions, blackmail, and sweetheart settlements. The addition of a good faith prerequisite may also enable courts to abandon some of those mechanisms, which frequently cause the removal of meritorious claims. This position will encourage potential plaintiffs to file claims on the one hand, and will keep frivolous class actions and collusive settlements outside of courts on the other.

The Israeli experience with the good faith prerequisite, beginning in 1988, demonstrates that a good faith prerequisite can promote the purposes of class action proceedings. Worthy class actions facilitate access to courts in a society that depends upon private litigation for the enforcement of important social norms. Good faith class actions will deter the breach of the law and encourage compliance with legal norms. Class actions filed in bad faith, on the other hand, thwart two of the main goals of class action proceedings: enforcement of the law and deterring its breach. Class actions filed in bad faith also over-burdened the courts and adversely affected innocent defendants.

As the Israeli experience illustrates, the good faith prerequisite adds value when used as a condition precedent for the certification of a class action. Israeli courts are able to deny certification of claims—which were frivolous or where the motives for filing the claim were improper—without the need to
distort other prerequisites to do so. In general, most Israeli courts provide coherent interpretations of the good faith prerequisite, and doubts pertaining to the unpredictability of certification decisions have been found to be unwarranted.

This Article argues that litigation has a fundamental role in both Israeli and American societies. Both legal systems rely upon private litigants to enforce substantive provisions of law that in civil law legal systems are left mostly to the discretion of public enforcement agencies. The limited differences between the legal systems should not prevent the transplant of good faith in federal class action proceedings. Quite the opposite is true: A good faith prerequisite is needed even more in the United States than in Israel to tame class action abuse.

The addition of a good faith prerequisite will enable the courts to better scrutinize unworthy representative plaintiffs and class counsel and inappropriate settlement agreements. So equipped, judges would have no need to strain and manipulate existing prerequisites. With good faith explicitly adopted, judges would have the legal support they require.