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## Exporting United States Tort Law: The Importance of Authenticity, Necessity, and Learning from Our Mistakes

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# Exporting United States Tort Law: The Importance of Authenticity, Necessity, and Learning from Our Mistakes

Victor E. Schwartz\* & Christopher E. Appel\*\*

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## I. INTRODUCTION

Over the past several decades, a major effort has been underway abroad to modernize the civil justice system of foreign countries by patterning and effectively exporting the legal devices and strategies of the United States.<sup>1</sup> Foreign countries, eager to improve upon the perceived inability of some individuals to obtain legal recourse for certain harms, often look to elements

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1. This Article was prepared for the *Pepperdine Law Review* symposium, “Does the World Still Need United States Tort Law? Or Did it Ever?,” which was held April 16, 2010. It is the latest in a lineage of symposia and articles discussing exportation of United States law to foreign countries. See, e.g., John C. Reitz, *Introduction to the Symposium on Export of the Rule of Law*, 13 TRANSNAT’L L. & CONTEMP. PROBS. vii (2003); Stephan Landsman, *Introduction*, 52 DEPAUL L. REV. 253 (2002) (introducing the Eighth Annual Clifford Symposium on Tort Law and Policy, “Export/Import: American Civil Justice in a Global Context”).

of the United States tort system as a model.<sup>2</sup> Exporting tort law components of what may be perceived to be a comprehensively-developed and battle-tested United States system, however, can rarely be accomplished by a simple “copy and paste” into foreign tort law. The United States tort law system is comparatively more complex than in other countries, making it difficult to carve out select, portable pieces. Of equal importance is that there is no “national” United States tort law, but rather a system of tort principles developed by courts in different jurisdictions.<sup>3</sup> Because of the often misunderstood complexities of our tort system, the core objectives of the exported law can become distorted and perhaps even counterproductive when separated and randomly inserted into a new and different system. Critical legal concepts run the risk of being lost in translation.<sup>4</sup>

Equally important from the perspective of a foreign tort law importer is selecting the most appropriate law to borrow. Incorporating a new law can be like releasing an animal into a foreign environment; it may find a sustainable role, or it may dramatically unbalance the existing system. Such adverse effects are also heightened when a foreign country either seeks to mimic law that is not fully fleshed out in the United States or fails to account for subsequent refinement by American courts. Our mistakes and missteps are then doomed to be repeated. As this Article will show, all of these mistakes have happened. The fundamental purpose of the Article is to assure that they do not do so again.

In that regard, this Article approaches the exportation of United States tort law by exploring three key issues that foreign countries should carefully consider when deciding whether to import any aspect of the American system: 1) whether the importer is obtaining the authentic tort or procedural law product and not an over-simplified or exaggerated version; 2) whether, if it is the genuine article, the importer accounts for legal developments that occurred since it was introduced in the United States and learns from our mistakes; and 3) whether the imported law fits what may be a very different legal, political, and social culture and is needed to effect the desired change. To illustrate these issues, this Article discusses four examples of tort and procedural law concepts exported from the United States.

Part II begins with a discussion of the European Community’s (“EC”) adoption of “strict” products liability law and the EC’s use of the template provided by the *Restatement (Second) of Torts*. Part III addresses, through

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2. See, e.g., *Cook v. Cook* (1986) 162 CLR 376, 390 (Austl.) (“The history of this country and of the common law makes it inevitable and desirable that the courts of this country will continue to obtain assistance and guidance from the learning and reasoning of . . . other great common law courts.”).

3. See Guido Calabresi, *Remarks of Hon. Guido Calabresi*, 65 N.Y.U. ANN. SURV. AM. L. 435, 436 (2010) (discussing the wide-ranging values within America and in contrast to Europe, and concluding that it is “not surprising that we have not had a national tort law in the United States.”).

4. See Jane Stapleton, *Bugs in Anglo-American Products Liability*, 53 S.C. L. REV. 1225, 1255 (2002) (“Comparative law can be illuminating, but it has many limitations, not the least of which are the language barriers and prejudices most of us labour under when seeking to learn from the experience of other systems.”).

Argentina's experience, foreign importation of law providing for punitive damages. Part IV examines England's contingency or "conditional" fee system and the influence that litigation financing in the United States had on that design. Lastly, Part V analyzes foreign importation of class action law, using Brazil and China as examples.

In each of these examples, the foreign importers either failed to obtain and pattern the authentic United States law or failed to incorporate later developments by courts that corrected mistakes or elucidated key legal concepts. Instead, they adopted a distorted, modified, or incomplete approach, which may not respond to crucial issues likely to arise or fully achieve the desired objectives of the new law. These examples serve as a caution to foreign countries that wine grapes that may thrive in the United States might wither in a foreign land.

## II. EXPORTING "STRICT" PRODUCTS LIABILITY

When the *Restatement (Second) of Torts* section 402A was finalized in 1965, it represented a major shift in legal theory regarding the manufacture and sale of products.<sup>5</sup> Until this time, the law in the United States relied principally on the existence of a contract and express or implied warranties to permit legal recourse for harms caused by a product.<sup>6</sup> Section 402A abandoned this approach, stating that "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property."<sup>7</sup>

Little case law at the time supported the *Second Restatement's* pronouncement of "strict liability" for defective products; it was certainly not a "restatement" of a clear majority rule.<sup>8</sup> In fact, section 402A was drafted three different times.<sup>9</sup> When the first draft appeared in 1961, it was applicable only to food and drink, where some case law support existed.<sup>10</sup> The second draft extended section 402A to include products for "intimate bodily use" in 1962.<sup>11</sup> The *Restatement* drafters refrained from a more

5. See Victor E. Schwartz, *The Restatement (Third) of Torts: Products Liability—The American Law Institute's Process of Democracy and Deliberation*, 26 HOFSTRA L. REV. 743, 745–46 (1998).

6. See William Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); William Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966). The case *Henningesen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 83–84 (N.J. 1960), signaled the demise of the privity doctrine.

7. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

8. See Schwartz, *supra* note 5, at 746; John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 829 (1973).

9. See Schwartz, *supra* note 5, at 746.

10. See RESTATEMENT (SECOND) OF TORTS § 402A (Tentative Draft No. 6, 1961).

11. RESTATEMENT (SECOND) OF TORTS § 402A (Tentative Draft No. 7, 1962).

inclusive product approach because a fundamental principle behind “Restatements” is that they must restate *existing* case law.<sup>12</sup> The Reporters and advisory committee are not permitted to write their own “tort code,” no matter how compelling; at least a scintilla of existing case law must be the source of each black letter rule.<sup>13</sup>

Then, in 1963, one of the *Restatement (Second) of Torts* Advisors, the Chief Justice of the Supreme Court of California, Roger Traynor, wrote *Greenman v. Yuba Power Products, Inc.*,<sup>14</sup> giving the *Restatement* Reporters the case support they needed to extend strict liability in tort to all products. Justice Traynor declared that “[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.”<sup>15</sup> He then stated that to establish liability, a plaintiff need only prove that “he was injured while using the [product] in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the [product] unsafe for its intended use.”<sup>16</sup> The *Restatement* drafters embraced this approach and ushered in a new era of strict liability in United States tort law.

Meanwhile, the EC, having seen from afar this significant legal development, and understanding its potential to remediate injured parties and improve consumer safety, set out to “import” strict products liability to Europe.<sup>17</sup> This effort was bolstered by great public support for reform following linkage of the popular sedative thalidomide to severe birth defects in tens of thousands of children whose mothers ingested the drug during the late 1950s and early 1960s.<sup>18</sup> The first major step in designing a product liability regime occurred in 1976 when the Council of Europe adopted the Strasbourg Convention on Products Liability in Regard to Personal Injury and Death.<sup>19</sup> It was not until 1985, however, that the Council of the

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12. See Schwartz, *supra* note 5, at 746.

13. *Id.* The ALI’s purpose is “educational” and includes “promot[ing] the clarification and simplification of the law and its better adaptation to social needs . . . .” A.L.I., BYLAWS § 1.01 (1994), reprinted in 74 A.L.I. PROC. 521, 521 (1997).

14. 377 P.2d 897 (Cal. 1963). *Greenman* was a case involving a power tool that could be used as a saw, drill, and wood lathe. The plaintiff was using the tool as a lathe when the piece of wood being turned suddenly flew out of the machine, struck him on the forehead, and inflicted serious injuries. See *id.* at 898. Expert witnesses testified that inadequate set screws were used to hold the machine together so that normal vibration could cause the lathe to move away from the piece of wood being turned and “let go” of it. See *id.* at 899.

15. *Id.* at 900.

16. *Id.* at 901.

17. See S. Mark Mitchell, *A Manufacturer’s Duty to Warn in a Modern Day Tower of Babel*, 29 GA. J. INT’L & COMP. L. 573, 579–89 (2001) (discussing the modern development of European products liability law).

18. See Geraint G. Howells & Mark Mildred, *Is European Products Liability More Protective Than the Restatement (Third) of Torts: Products Liability?*, 65 TENN. L. REV. 985, 1021 (1998). Germany, for example, created a special liability regime for medicine in 1976 as a result of the injuries caused by ingesting thalidomide. See *id.* at 992.

19. See European Convention on Products Liability in Regard to Personal Injury and Death, Jan. 27, 1977, 1977 Europa T.S. No. 91 (1977); see also WARREN FREEDMAN, INTERNATIONAL

European Union adopted Directive 85/374 (“Product Liability Directive”), governing strict products liability for member countries.<sup>20</sup>

Despite nearly nine years of debate and refinement, the Product Liability Directive shares many similarities with the Strasbourg Convention’s original proposal. Both borrowed heavily from the *Restatement (Second) of Torts* section 402A. The Product Liability Directive, similar to the Strasbourg Convention’s adopted proposal, subjects a producer to strict liability for any damage caused by a product “defect”<sup>21</sup> and provides that “[a] product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account.”<sup>22</sup> This language closely tracks the “unreasonably dangerous” provision of section 402A.<sup>23</sup>

Absent from the Product Liability Directive is recognition of the subsequent developments in the theory of strict products liability that occurred between 1965, when Section 402A was finalized, and 1985, when the Product Liability Directive was adopted.<sup>24</sup> While section 402A generally provides for strict liability in all cases of alleged product defect, this interpretation evolved significantly in American courts to incorporate certain fault-based determinations.

For example, the Michigan Supreme Court in *Prentis v. Yale Manufacturing Co.*<sup>25</sup> recognized that “strict” products liability did not work as well with cases based on failure to warn or defective design as it worked with cases based on mismanufactured products. The court painstakingly reviewed precedent and demonstrated that, while the term “strict liability” was sometimes used in design and warning cases, in hindsight, courts did not apply strict liability in those areas.<sup>26</sup> Rather, the analysis undertaken was based on the fault of the manufacturer. The court also showed that there were sound public policy reasons not to apply strict liability in an absolute sense:

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PRODUCTS LIABILITY 277 (1986).

20. See Council Directive 85/374, 1985 O.J. (L 210) 29 (E.C.) [hereinafter Council Directive 85/374].

21. *Id.*, art. 1.

22. *Id.*, art. 6.

23. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

24. See Andrew C. Spacone, *Strict Liability in the European Union—Not a United States Analog*, 5 ROGER WILLIAMS U. L. REV. 341, 344 (2000) (“[A]lthough the doctrine which emerged under the Directive embodied aspects of Chief Justice Traynor’s version of strict liability, it is far from a mirror image of strict liability in the United States.”).

25. 365 N.W.2d 176, 182 (Mich. 1984).

26. *Id.* at 182–84 (“Although many courts have insisted that the risk-utility tests they are applying are not negligence tests . . . [t]he underlying negligence calculus is inescapable.” (citations omitted)).

[A] fault system incorporates greater intrinsic fairness in that the careful safety-oriented manufacturer will not bear the burden of paying for losses caused by the negligent product seller. It will also follow that the customers of the careful manufacturer will not through its prices pay for the negligence of the careless. As a final bonus, the careful manufacturer with fewer claims and lower insurance premiums may, through lower prices as well as safer products, attract the customers of less careful competitors.<sup>27</sup>

Other courts, recognizing that the “strict” liability rule in design and warning cases was a “paper tiger,” restricted its actual application to mismanufactured products.<sup>28</sup>

In addition, the drafters of the Product Liability Directive had the benefit of the Model Uniform Product Liability Act of 1979,<sup>29</sup> which similarly delineates the intrinsic differences in American products liability for design and warning defects. As the Model Act states, “No court, in spite of some loose language that has been used, has imposed true strict or absolute liability on manufacturers for products which are unreasonably unsafe in design.”<sup>30</sup> With regard to design defects, the Model Act also notes that “[t]he approach has its roots in the law of negligence and has been put into modern and appropriate product liability terminology by some courts in their attempt to resolve the defective design dilemma.”<sup>31</sup> Likewise, for defective warnings, the Model Act expressly provides that “[t]he standard is reasonableness, not absolute or strict liability.”<sup>32</sup>

The Product Liability Directive, in comparison, imports only the first draft of United States “strict” products liability law. The Directive distinguishes liability for defects in design and “presentation” (i.e., warnings),<sup>33</sup> yet provides European courts with little direction as to how the analysis should proceed or how fault is treated.<sup>34</sup> As a result, courts—especially in countries where other factors exist making product liability

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27. *Id.* at 185.

28. See David G. Owen, *Defectiveness Restated: Exploding the “Strict” Products Liability Myth*, 1996 U. ILL. L. REV. 743, 744–53 (1996); see also David G. Owen, *The Fault Pit*, 26 GA. L. REV. 703, 704 (1992) (“From the vantage point of the law’s maturity, gained by its awkward, fitful, and ultimately unsuccessful effort to make sense out of a broad doctrine of strict products liability, fault’s true position at the center of tort law is becoming clearer by the day.”).

29. MODEL UNIFORM PRODUCT LIABILITY ACT, reprinted in 44 Fed. Reg. 62,714 (1979).

30. *Id.* at 62,723 (citing Henderson, *Manufacturers’ Liability for Defective Design: A Proposed Statutory Reform*, 56 N.C. L. REV. 625, 634–35 (1978)).

31. *Id.* (footnote omitted) (citing *Hagens v. Oliver Mach. Co.*, 576 F.2d 97, 99–100 (5th Cir. 1978); *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066, 1071 (4th Cir. 1974); *Jeng v. Witters*, 452 F. Supp. 1349, 1356 (M.D. Pa. 1978)).

32. *Id.* at 62,725.

33. See GERAIN T HOWELLS, *COMPARATIVE PRODUCT LIABILITY* 37–38 (1993).

34. See Stapleton, *supra* note 4, at 1228 (noting that the Product Liability Directive is only four pages in length compared with the 382-page Restatement (Third) of Torts, and that one of the first cases to apply the Directive was 113 pages as compared with an eight-page case first applying the Restatement (Third) of Torts).

cases rare<sup>35</sup>—are more likely to experience confusion or reach a harsh and unjust decision.<sup>36</sup> They lack the benefit of learning from America's tort law development;<sup>37</sup> wisdom which is almost universally accepted by courts throughout the United States and recognized prominently in the *Restatement (Third) of Torts*.<sup>38</sup>

The example of Europe's importation of American product liability law is not meant to suggest that the Product Liability Directive is not a welcomed addition to European law. Rather, it is intended to illustrate how essential concepts can be lost when using a model law that does not account for subsequent interpretations by courts and legal scholars, or other information relevant to the practical use of the borrowed law. To be sure, the Product Liability Directive includes several important differences from the United States system, which make the law a better fit for what is a different litigation culture.<sup>39</sup> For example, the Product Liability Directive provides several affirmative defenses for producers, including a compliance with regulatory standards defense, a "state of the art" defense, and a component parts defense.<sup>40</sup> In addition, the Product Liability Directive fits into the European landscape by not including pain and suffering or punitive damages, and by having judges, not juries, decide the issues of liability and damages.<sup>41</sup>

35. See Geraint Howells, *The Relationship Between Product Liability and Product Safety—Understanding a Necessary Element in European Product Liability Through a Comparison with the U.S. Position*, 39 WASHBURN L.J. 305, 306 (2000) (noting that in Europe, "[f]ew European lawyers can make a living out of products liability and only a few more will ever come across a products liability case"); Mark A. Behrens & Daniel Raddock, *Japan's New Product Liability Law: The Citadel of Strict Liability Falls, but Access to Recovery Is Limited by Formidable Barriers*, 16 U. PA. J. INT'L BUS. L. 669 (1996) (discussing cultural barriers as a reason why product liability litigation is rare in some countries); Li Han, *The Product Quality Law in China: A Proper Balance between Consumers and Producers?*, 6 J. CHINESE & COMP. L. 1, 16 (2003) (same).

36. See Stapleton, *supra* note 4, at 1231 (stating "the Directive is one of the high-water marks of Euro-fudge and textual vagueness"); Mathias Reimann, *Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?*, 51 AM. J. COMP. L. 751, 755 (2003) ("[Comparative products liability] is fraught with dangers of misunderstanding, lagging behind changes, and getting drowned in detail on the one hand while overgeneralizing on the other.")

37. Even the European Court of Justice, the highest court in the EU, has criticized the Product Liability Directive as difficult to interpret. See Case C-300/95, *Comm'n v. United Kingdom*, 1997 E.C.R. I-2649.

38. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, § 2 cmt. a (1998) ("In general, the rationale for imposing strict liability on manufacturers for harm caused by manufacturing defects does not apply in the context of imposing liability for defective design and defects based on inadequate instruction or warning.")

39. See Council Directive 85/374; see also *supra* note 35.

40. See Council Directive 85/374, art. 7(d)–(f). The Product Liability Directive also provides a three-year statute of limitations and ten-year statute of repose. See *id.*, arts. 10, 11; see also Geraint G. Howells & Mark Mildred, *Is European Products Liability More Protective Than the Restatement (Third) of Torts: Products Liability?*, 65 TENN. L. REV. 985, 986 (1998).

41. See Patrick Thieffry, Philip Van Doorn & Simon Lowe, *Strict Product Liability in the EEC:*



Nevertheless, the EC's delay in enacting a product liability regime may be in part due to an over-reliance on the United States system and the *Second Restatement* as the model to guide it.<sup>42</sup> This poses the question of whether Europe really "needed" United States product liability law, or if it would have been better served, in terms of expediency and developing a uniquely European framework, had drafters pursued their own devices rather than attempt to graft United States product liability law onto a foreign system and add on distinctly European elements. Other foreign countries seeking to establish or modify product liability rules can learn from such an example.<sup>43</sup> United States tort law is not a magic bullet, especially when the imported law is still early in its development, and it can lead foreign countries down a very different path when subsequent judicial interpretations are not considered.<sup>44</sup>

### III. EXPORTING PUNITIVE DAMAGES

A comparatively unique feature of the United States tort law system is the availability of punitive damages.<sup>45</sup> These damages, also called exemplary damages, are "damages awarded in addition to actual damages when the defendant acted with recklessness, malice or deceit; . . . by way of penalizing the wrongdoer or making an example to others."<sup>46</sup> Punitive damages have existed in America since its founding and represent an early import of the common law of Great Britain.<sup>47</sup> The availability and development of punitive damages jurisprudence in the United States, however, has taken a decidedly different course than in Great Britain.<sup>48</sup> Today, a majority of the United States allows recovery for punitive damages, and in greater frequency and amounts than in any other country.<sup>49</sup>

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*Implementation, Practice and Impact on U.S. Manufacturers of Directive 85/374*, 25 TORT & INS. L.J. 65, 89 (1989) (discussing the impact on damage amounts in Europe by having most judgments made by three-judge panels).

42. See Mitchell, *supra* note 17, at 581 ("The long delay in adoption may best be explained by Europe's inclination to look to the [W]est with respect to products liability laws.").

43. See Reimann, *supra* note 36, at 757–58 (noting that all of Western Europe, most of Eastern Europe, areas of the Pacific Rim, and Australia have adopted products liability statutes).

44. See Jane Stapleton, *Products Liability in the United Kingdom: The Myths of Reform*, 34 TEX. INT'L L.J. 45, 46 (1999) ("Comparative products liability is a dangerous business.").

45. See John Y. Gotanda, *Charting Developments Concerning Punitive Damages: Is the Tide Changing?*, 45 COLUM. J. TRANSNAT'L L. 507, 508 (2007); see also Reimann, *supra* note 36, at 786.

46. BLACK'S LAW DICTIONARY 418 (8th ed. 2004).

47. See Norman T. Braslow, *The Recognition and Enforcement of Common Law Punitive Damages in a Civil Law System: Some Reflections on the Japanese Experience*, 16 ARIZ. J. INT'L & COMP. L. 285, 350–51 (1999).

48. See The Right Honourable The Lord Griffiths, M.C., Peter De Val & R.J. Dormer, *Developments In English Product Liability Law: A Comparison with the American System*, 62 TUL. L. REV. 353, 394 (1988) ("In England, awards of punitive damages may be made only in exceptional cases."). See generally Michael L. Wells, *A Common Lawyer's Perspective on the European Perspective on Punitive Damages*, 70 LA. L. REV. 557 (2010).

49. See Alison F. Del Rossi & W. Kip Viscusi, *The Changing Landscape of Blockbuster Punitive Damages Awards*, 12 AM. L. & ECON. REV. 116, 117–18 (2010); Victor E. Schwartz, Mark A.

Most countries do not allow punitive damages of any kind.<sup>50</sup> Generally speaking, punitive damages are more common in countries based upon a common law system,<sup>51</sup> such as the United States and Great Britain, as opposed to civil law countries which are based upon a code system.<sup>52</sup> Nevertheless, in recent years, several civil law countries have looked to the United States system when contemplating adoption of a new law that would provide for punitive damages.

In 2008, for example, the civil law country of Argentina adopted a consumer protection law permitting punitive damages for the first time.<sup>53</sup> The law broadly states that if a party fails to comply with a legal or contractual obligation towards a consumer, a court may award punitive relief in the form of a civil fine, independent of any other penalties that may apply.<sup>54</sup>

Punitive damages may be applied against offensive conduct in view of the vicious or malicious motives of the defendant, or because of the defendant's negligence towards the rights of third parties, taking into account: the defendant's actions; the nature and extent of the prejudice or loss which the defendant tried to cause to third parties; and the defendant's fortune.<sup>55</sup>

In addition, punitive damages can be awarded in cases where public or collective consumer interests or rights are harmed by a given action. The Argentine law provides that such damages will be based upon consideration of multiple factors, including: the behavior and motive of the defendant; the benefit obtained by the defendant; the economic wealth of the defendant; the

Behrens & Joseph P. Mastro Simone, *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1008–10 (1999).

50. See Reimann, *supra* note 36, at 786. Numerous countries are reluctant to even enforce foreign judgments of punitive damages. See Braslow, *supra* note 47, at 285.

51. The common law countries of Ireland, Cyprus, and New Zealand, for example, each allow punitive damages. See Gotanda, *supra* note 45, at 511; Thomas Rouhette, *The Availability of Punitive Damages in Europe: Growing Trend or Nonexistent Concept?*, 74 DEF. COUNS. J. 320, 321 (2007).

52. The civil law countries of South Africa and the Philippines allow for punitive damages. See Rouhette, *supra* note 51, at 324.

53. See Law No. 26,361, Apr. 3, 2008, [LIII-D] A.D.L.A. 4125 (Arg.) [hereinafter Law No. 26,361]. The incorporation of punitive damages in the Consumer Defense Law was initially proposed in the project of the Civil Code of 1998. See Agustin Cerolini, *The New Argentine Consumer Defense Law. Punitive Damages: The Main Star*, 15 L. & BUS. REV. AM. 437, 439 (2009).

54. See Law No. 26,361, art. 52.

55. Ricardo Richolet III, *Argentina—Punitive Damages: Coming Soon to IP Rights Cases?*, IP VALUE 2009: BUILDING AND ENFORCING INTELLECTUAL PROPERTY VALUE, 2009, at 80 (bullet points omitted), available at <http://www.iam-magazine.com/issues/Article.ashx?g=6a147c3d-c1bb-46d7-9052-50dee553b626>.

social consequences of the defendant's conduct; the possibility that the defendant's conduct could be repeated in the future if no penalty were imposed; the nature of the parties' relationship; the possibility of further penalties, which could turn the punitive damages into an excessive punishment; the existence of other injured parties who may rightfully claim damages; and the defendant's attitude after the harm was caused.<sup>56</sup>

Such considerations pattern helpful efforts by many American courts to qualify the definition and purpose of punitive damages.<sup>57</sup> Yet, these qualifications do not address some of the most important and challenging issues regarding punitive damages. As the experience of the United States has shown, clear standards are needed for courts to impose punitive damages in a responsible, consistent, and judicially manageable way. These standards include a specific standard of conduct (i.e., intentional or reckless behavior), a clearly defined evidentiary threshold (i.e., clear and convincing evidence), and limits to the proportionality of the award and number of awards that may be decided against a defendant, among others.<sup>58</sup>

In the United States, most jurisdictions apply an intentional conduct standard in order to award punitive damages, and many require clear and convincing evidence of such conduct.<sup>59</sup> Even so, the country has experienced considerable difficulty reigning in unfair punitive damage awards that, according to the United States Supreme Court, had by the early 1990s "run wild."<sup>60</sup> Such out of control punitive damage awards have prompted the Supreme Court to weigh in repeatedly on the issue and guide lower courts as to how these damages must be evaluated.<sup>61</sup>

Beginning in 1991, the Court in *Pacific Mutual Life Insurance Co. v. Haslip* first explained that punitive damage awards are subject to constitutional due process limitations.<sup>62</sup> The Court rooted its decision in the adequacy of procedural protections.<sup>63</sup> It found that the instructions given to the jury, the post-trial review procedures, and the appellate review procedures "impose[d] a sufficiently definite and meaningful constraint on the discretion . . . [to award] punitive damages."<sup>64</sup> In *TXO Production Corp. v. Alliance Resources Corp.*, a plurality of the Supreme Court suggested that

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56. *See id.* at 81.

57. *See* Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into "Punishment,"* 54 S.C. L. REV. 47, 50–52 (2002).

58. *See, e.g.,* *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (finding that an appropriate punitive damage ratio should be single digits).

59. *See, e.g.,* CAL. CIV. CODE § 3294(a) (West 1992) (requiring proof by clear and convincing evidence for punitive damage award); GA. CODE ANN. § 51-12-5.1(b) (West 2010) (same).

60. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1990).

61. *See* Victor E. Schwartz, Cary Silverman & Christopher E. Appel, *The Supreme Court's Common Law Approach to Excessive Punitive Damage Awards: A Guide for the Development of State Law*, 60 S.C. L. REV. 881, 886–91 (2009).

62. *See Haslip*, 499 U.S. at 18.

63. *See id.* at 19–22.

64. *Id.* at 20–22.

there were substantive due process limits on punitive damages as well.<sup>65</sup> This was followed by *Honda Motor Co. v. Oberg*,<sup>66</sup> in which the Court held that, under procedural due process, states must allow for judicial review of the size of punitive damages awards.<sup>67</sup> Although the Court's decision centered on procedural issues, it took the opportunity to reiterate that punitive damages awards that are so large as to be "grossly excessive" are unconstitutional.<sup>68</sup>

In 1996, the Court returned to the open question in *TXO* to provide guidance on how to determine whether the size of a punitive damage award falls outside the limits of due process.<sup>69</sup> In *BMW of North America v. Gore*, an Alabama jury returned a four million dollar verdict, which was reduced to two million dollars by the Alabama Supreme Court.<sup>70</sup> In that case, the plaintiff, who purchased a new BMW sedan, suffered \$4000 in compensatory damages related to the unauthorized repainting of his car during detailing by the distributor.<sup>71</sup> Ultimately, the U.S. Supreme Court decided that the two million dollar award still imposed a punishment that exceeded Alabama's legitimate interests in protecting the rights of its citizens because it relied on out-of-state conduct and was, therefore, unconstitutionally excessive under substantive due process standards.<sup>72</sup> The Court's decision also provided three "guideposts" for determining whether a punitive damages award is "unconstitutionally excessive."<sup>73</sup> These guideposts include the "degree of reprehensibility of the defendant's conduct;"<sup>74</sup> the ratio of actual damages to punitive damages;<sup>75</sup> and a comparison to "civil or criminal penalties that could be imposed for comparable misconduct."<sup>76</sup> These guideposts serve both to "prohibit[] a state from imposing a grossly excessive punishment on a tortfeasor"<sup>77</sup> and ensure that "a person receive[s] fair notice not only of the conduct that will

65. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 453–54 (1993) ("[T]he Due Process Clause of the Fourteenth Amendment imposes substantive limits 'beyond which penalties may not go.'" (quoting *Seaboard Air Line Ry. v. Seegers*, 207 U.S. 73, 78 (1907))).

66. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420 (1994).

67. *See id.* at 432.

68. *See id.* at 420 ("Our recent cases have recognized that the Constitution imposes a substantive limit on the size of punitive damages awards.").

69. *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996).

70. *See id.* at 565, 567.

71. *See id.* at 563–65. The jury apparently calculated the \$4 million punitive damage award by multiplying the plaintiff's damage estimate (\$4000) by 1000, the number of cars BMW allegedly sold throughout the country under its nondisclosure policy. *See id.* at 567.

72. *See id.* at 585–86.

73. *See id.* at 568, 574–83.

74. *Id.* at 575.

75. *See id.* at 580.

76. *Id.* at 583.

77. *Id.* at 562 (internal quotation marks omitted).

subject him to punishment, but also of the severity of the penalty that a State may impose.”<sup>78</sup> In *Cooper Industries, Inc., v. Leatherman Tool Group Inc.*, the Supreme Court clarified that American courts must consider all three *Gore* factors when reviewing a punitive damages award for excessiveness and must do so through de novo review.<sup>79</sup>

In *State Farm Mutual Automobile Insurance Co. v. Campbell*—a \$145 million punitive damage award stemming from claim of bad faith, fraud, and intentional infliction of emotional distress, all based on State Farm’s initial refusal to settle a case—the Court further refined the *Gore* factors.<sup>80</sup> First, the Court reminded lower courts that the “most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.”<sup>81</sup> The Court indicated that juries must be instructed that they “may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.”<sup>82</sup> The Court also stated that punitive damages may not be calculated based upon the hypothetical claims of other claimants because “[p]unishment on these bases creates the possibility of multiple punitive damage awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.”<sup>83</sup>

In addition, the *State Farm* Court closely considered the permissible ratio between compensatory and punitive damages awards. While the Court declined to create a “bright-line ratio which a punitive damages award cannot exceed,” it indicated that “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”<sup>84</sup> The Court noted that, in exceptional cases, a higher ratio may be justified where “a particularly egregious act has resulted in only a small amount of economic damages.”<sup>85</sup> The Court, however, observed that “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.”<sup>86</sup> The Court further reminded lower courts that the “wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award,” such that it would allow an otherwise impermissible ratio.<sup>87</sup> More recently, the Court in *Philip Morris USA v. Williams* ruled that juries can consider harm to others in assessing the reprehensibility of the defendant’s conduct, but courts must adequately instruct the jury that it cannot punish the defendant specifically for harm

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78. *Id.* at 574.

79. *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 436, 440 (2001).

80. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

81. *Id.* at 419 (quoting *Gore*, 517 U.S. at 575).

82. *Id.* at 422.

83. *Id.* at 423.

84. *Id.* at 425.

85. *Id.* (quoting *Gore*, 517 U.S. at 582).

86. *Id.*

87. *Id.* at 427.

done to others.<sup>88</sup>

Argentina's punitive damages law, in comparison, lacks such critical safeguards. Also, because the law marks the first appearance of punitive damages in the country, there is no case law which ensures that similar precautions are taken and that meaningful judicial review is applied. The law caps a punitive damages award at five million pesos, but contains no specific standard of conduct, no greater evidentiary showing to make out a punitive damages claim, and no clear limit to the proportionality of the harm to the damages or to the number of awards arising out of the same events that may be decided against a defendant.<sup>89</sup> The law also specifically instructs Argentine courts to take into account the defendant's wealth, which is something the United States Supreme Court has warned cannot justify an otherwise unconstitutional punitive damages award.<sup>90</sup>

Without adequate procedural and substantive standards, such as those due process safeguards expressed by the United States Supreme Court, Argentina's punitive damages law risks over-punishing defendants. There is, for instance, no basic safeguard preventing a court from finding a wealthy defendant who committed negligence, yet acted with no malicious purpose, liable for the maximum amount of punitive damages. Similarly, there is no safeguard to prevent an individual causing 500 pesos worth of harm from ultimately paying up to five million pesos in damages, a 10,000:1 ratio of punitive to compensatory damages.

Further, even assuming Argentine courts show restraint and issue only modest punitive damage awards, the American experience illustrates how quickly the imposition of punitive damages can escalate. As the United States Supreme Court recognized, up until the 1960s, "punitive damages were 'rarely assessed' and usually 'small in amount.'"<sup>91</sup> But by the late 1970s and early 1980s, "unprecedented numbers of punitive awards in product liability and other mass tort situations began to surface,"<sup>92</sup> and the size of punitive damage awards "increased dramatically."<sup>93</sup> While a number

88. 549 U.S. 346, 356–57 (2007).

89. See Law No. 26,361, art. 47.

90. See *id.*; *Campbell*, 538 U.S. at 427.

91. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting) (quoting Dorsey D. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 2 (1982)); see also RICHARD L. BLATT ET AL., *PUNITIVE DAMAGES: A STATE BY STATE GUIDE TO LAW AND PRACTICE* § 1.2, at 5 (1991) ("[G]enerally before 1955, even if punitive damages were awarded, the size of the punitive damage award in relation to the compensatory damage award was relatively small, as even nominal punitive damages were considered to be punishment in and of themselves.").

92. John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 142 (1986); accord Philip Borowsky & Jay Nicolaisen, *Punitive Damages in California: The Integrity of Jury Verdicts*, 17 U.S.F. L. REV. 147, 148 (1983) (noting trend of "juries . . . award[ing] substantial punitive damages with increasing frequency").

93. George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. CAL. L. REV. 123, 123

of states have, similar to Argentina, placed an upper limit on the amounts of punitive damages that may be awarded,<sup>94</sup> it has not had the effect of eliminating disproportionate or excessive awards.

Countries looking to the United States when designing law providing for punitive damages should exercise considerable caution. A major factor curbing excessive punitive damage awards in the United States is constitutional protections, which do not exist to the same extent in many foreign jurisdictions. For this reason, there is comparatively less statutory language by which to model a foreign law; the major developments involving punitive damages come from courts, namely the United States Supreme Court. This lack of neat and portable model law creates a serious risk that the foreign importer will neither impose meaningful objective standards and limits on the amount of punishment nor address the problem of multiple impositions of punitive damages for the same or similar conduct.<sup>95</sup> This failure can in turn open the door to unpredictable and excessive punitive damage awards, repeating the errors of many American courts.

Moreover, only through a comprehensive understanding of the United States' constitutional due process protections relevant to punitive damage awards can a foreign country import the authentic law. Armed with this knowledge, the importer must then make the informed decision of whether punitive damages are really "needed" such that the perceived benefits in terms of punishment and deterrence<sup>96</sup> outweigh the risks of unjust application.<sup>97</sup> In determining whether punitive damages are desirable,

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(1982).

94. See, e.g., ALA. CODE § 6-11-21(a), (d) (Mitchie, LEXIS through 2010 Legis. Sess.) (allowing the greater of 3:1 or \$1.5 million in most personal injury suits and 3:1 or \$500,000 in most other actions); ALASKA STAT. § 09.17.020(f) (2008) (allowing the greater of 3:1 ratio or \$500,000 in most actions); COLO. REV. STAT. § 13-21-102(1)(a) (LEXIS through 2010 Legis. Sess.) (allowing only a ratio of 1:1); MO. REV. STAT. § 510.265(1) (LEXIS through 95th Gen. Assembly, first Reg. Sess. 2009) (allowing the greater of 5:1 or \$500,000 in most cases); N.D. CENT. CODE § 32-03.2-11(4) (LEXIS through 2009 Legis. Sess.) (allowing the greater of 2:1 or \$250,000); OHIO REV. CODE ANN. § 2315.21(D)(2)(a) (LEXIS through 128th Gen. Assembly) (providing a 2:1 ratio of punitive to compensatory damages in most tort cases); VA. CODE ANN. § 8.01-38.1 (LEXIS through Reg. Sess. 2010) (establishing a \$350,000 punitive damages cap).

95. See *Philip Morris USA v. Williams*, 549 U.S. 346 (2007) (holding that a jury may not base an award of punitive damages upon its desire to punish the defendant for harming persons not before the court); Victor E. Schwartz & Leah Lorber, *Death by a Thousand Cuts: How to Stop Multiple Imposition of Punitive Damages*, BRIEFLY, Dec. 2003, at 1.

96. See Dan B. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 ALA. L. REV. 831 (1988).

97. For example, France, another civil law country, is presently deciding whether to authorize punitive damages. See Pascal Clement, *Avant-projet de réforme du droit des obligations (Articles 1101 à 1386 du Code civil), et du droit de la prescription (Articles 2234 à 2281 du Code civil) [Draft Reform of the Law of Obligations (Articles 1101 to 1386 of the Civil Code) and the Right of Prescription (Articles 2234 to 2281 of the Civil Code)]*, art. 1371, at 162 (Sept. 22, 2005) (Fr.), [http://www.justice.gouv.fr/art\\_pix/RAPPORTCATALASEPTEMBRE2005.pdf](http://www.justice.gouv.fr/art_pix/RAPPORTCATALASEPTEMBRE2005.pdf). The most current draft of Article 1371 imposes a higher "premeditation" conduct standard but does not place any limit on punitive damages. See Helmut Koziol, *Punitive Damages—A European Perspective*, 68 LA. L. REV. 741, 750–51 (2008).

foreign importers should also consider whether existing law, which includes the criminal law, acts as an adequate deterrent and whether there is substantial evidence that plaintiffs are unable to recover fairly for harms such that an auxiliary civil system of monetary penalty is essential.

#### IV. EXPORTING CONTINGENCY FEES

Beyond borrowing law intended to create new legal remedies (such as products liability) or to expand the range of available recovery (such as through adoption of punitive damages), several foreign countries have looked to the United States to design an improved system for financing litigation. In particular, a handful of European countries have debated whether and how the United States' contingency fee system might fare within their civil justice systems.<sup>98</sup> The American contingency fee system generally provides that a prevailing attorney is awarded an agreed-upon percentage of any recovery—for example, one-third of a judgment—but recoups nothing if the plaintiff loses.<sup>99</sup> The debate on whether to allow contingency fees centers on the fee's potential to improve access to courts for certain groups of plaintiffs; it is counterbalanced by the potential for adverse public policy effects, such as inappropriate fee amounts or encouraging marginal or speculative litigation.<sup>100</sup>

In the United States, contingency fee agreements are widely available. They were once viewed as illegal<sup>101</sup> but gained grudging acceptance in the late nineteenth century.<sup>102</sup> The principal reason for this reversal was the recognition that contingency fees can have a worthy purpose, namely providing access to the legal system regardless of a person's ability to pay.<sup>103</sup> At the same time, the fees can provide lawyers with legitimate

98. See Reimann, *supra* note 36, at 823. Forms of contingency fee arrangements presently exist at least to some extent in Australia, Greece, Finland, Israel, Spain, Korea, South Africa, and some Canadian provinces. See *id.*

99. See MODEL RULES OF PROF'L CONDUCT R. 1.5 (2007).

100. See Richard L. Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 DEPAUL L. REV. 533, 548 (1999) (stating that in the context of medical malpractice suits, "[l]imiting contingent fees would reduce frivolous suits and unrealistic settlement demands"); Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark*, 37 UCLA L. REV. 29, 47–48 (1989); Charles E. Hyde, *Conditional Versus Contingent Fees: Litigation Expenditure Incentives*, 26 INT'L REV. L. & ECON. 180, 181 (2006).

101. See, e.g., *Butler v. Legro*, 62 N.H. 350, 352 (1882) ("Agreements of this kind are contrary to public justice and professional duty, tend to extortion and fraud, and are champertous and void.")

102. See, e.g., 33 ANN. REP. A.B.A. 80, 579 (1908) (Canon 13 of the Canons of Ethics, approving of contingency fees but carefully noting that they "should be under the supervision of the court, in order that clients may be protected from unjust charges").

103. See Brickman, *supra* note 100, at 43–44. Contingency fees can benefit society because they can "provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim . . ." MODEL CODE OF PROF'L RESPONSIBILITY EC 2-20 (1976) (amended 1980).



financial incentives to maximize recovery for their private clients, aligning the goals of the attorney and client and creating a sustainable market for the fee's use.<sup>104</sup>

Although contingency fee agreements are generally accepted in the United States today, there remain prohibitions based on public policy. For example, contingency fees are not permitted in criminal defense cases.<sup>105</sup> The bar against contingency fee arrangements in criminal cases exists because they can create disincentives that threaten to corrupt justice. For instance, if a lawyer's recovery is based on his or her client's acquittal, the incentive is to win at any cost, possibly by suborning perjury.<sup>106</sup> In addition, contingency fee agreements in divorce cases are facially invalid because they would discourage reconciliation.<sup>107</sup> In matters of public litigation, such as claims brought on behalf of a state or local government, the use of contingency fees may also be prohibited because a private attorney's profit-maximizing motives can conflict with the interests of achieving justice.<sup>108</sup> The federal government, for example, prohibits financing public litigation on a contingency fee basis.<sup>109</sup>

Outside of these specific instances, America's contingency fee system operates relatively unrestrained. Attorneys are ethically limited on the reasonableness of the fee they charge, but often there is no bright-line rule for the maximum percentage contingency fee they may charge or total amount they may collect from a case.<sup>110</sup> For this reason, contingency fees have become the preferred method of litigation financing for large populations of attorneys, most notably personal injury attorneys.<sup>111</sup> These attorneys often advertise the opportunity for "no upfront costs" or use the word "free," and state that they will only receive payment if the plaintiff prevails. In doing so, they may avail themselves to potential clients who may not have the financial resources or inclination to rightfully sue.<sup>112</sup> These attorneys, however, might not disclose in their advertising that costs

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104. See, e.g., *Lewis v. Casey*, 518 U.S. 343, 374 n.4 (1996) ("the promise of a contingency fee should also provide sufficient incentive for counsel to take meritorious cases").

105. See Brickman, *supra* note 100, at 40–41.

106. See *id.*

107. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.5(d) (2007) (prohibiting contingency fees in domestic relations or criminal matters).

108. See Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Can Governments Impose a New Tort Duty To Prevent External Risks? The "No-Fault" Theories Behind Today's High-Stakes Government Recoupment Suits*, 44 WAKE FOREST L. REV. 923, 931–34 (2009) (discussing public litigation brought on a contingency fee basis as not being in the public interest).

109. See Exec. Order No. 13,433, 72 Fed. Reg. 28,441 (May 16, 2007).

110. See MODEL RULES OF PROF'L CONDUCT R. 1.5 (2007) (stating that a "lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses," and providing factors to determine the reasonableness of a fee).

111. See Richard L. Abel, *How the Plaintiffs' Bar Bars Plaintiffs*, 51 N.Y.L. SCH. L. REV. 345, 350 n.26 (2006–2007) ("virtually all personal injury cases are taken on contingent fees"); Lester Brickman, *The Market for Contingent Fee-Financed Tort Litigation: Is It Price Competitive?*, 25 CARDOZO L. REV. 65, 68 (2003) ("Virtually all tort claiming is financed by plaintiff lawyers through the medium of contingent fees.").

112. See Brickman, *supra* note 100, at 43–44.

may be added to the contingency fee and that contingency fees may result in lesser total recovery for plaintiffs as compared with traditional hourly fee counsel. Thus, while the contingency fee attorneys may improve access for the poor to the court system, in some states the lack of regulation and oversight can leave consumers of legal services with only a “buyer beware” protection.

In many foreign countries, access to the judiciary is impaired by political, cultural, and financial barriers. In an effort to at least relax the financial burden, some countries—most notably England—have looked to litigation financing in the United States.<sup>113</sup> During the late 1980s and 1990s, England engaged in a fiery debate over allowing lawyers to enter contingency fee agreements.<sup>114</sup> The end result was authorization of a form of contingency fee (commonly called the “conditional fee”), which is very similar to the American approach yet which ultimately furthers a very different public policy goal.<sup>115</sup>

For centuries, contingency fees were strictly prohibited in England, much like they were initially in the United States.<sup>116</sup> They were regarded as a champertous agreement by which an unrelated party obtains a direct financial stake in a litigant’s claim.<sup>117</sup> In England, such agreements constituted a criminal offense and were unenforceable on public policy grounds.<sup>118</sup> By the 1960s, however, the prosecution of champerty as a criminal offense had fallen into disuse, prompting some legal authorities, such as the Law Commission, to conclude that it was “dead letter” in English law.<sup>119</sup> This position was made official by the Criminal Law Act of 1967, which removed criminal and tortious liability for champerty.<sup>120</sup> Even so, champertous agreements remained unlawful and unenforceable on public policy grounds.<sup>121</sup> Over the next two decades, England remained committed to this prohibition on champertous contingency fee agreements. In 1979, for example, the Royal Commission on Legal Services unanimously rejected

113. See generally Michael Zander, *Will the Revolution in the Funding of Civil Litigation in England Eventually Lead to Contingent Fees?*, 52 DEPAUL L. REV. 259 (2002).

114. See Richard L. Abel, *An American Hamburger Stand in St. Paul’s Cathedral: Replacing Legal Aid with Conditional Fees in English Personal Injury Litigation*, 51 DEPAUL L. REV. 253, 261–68 (2001); Geoffrey Woodroffe, *Loser Pays and Conditional Fees—An English Solution?*, 37 WASHBURN L.J. 345, 352–54 (1998); Zander, *supra* note 113, at 261–64.

115. See Peter Melamed, *An Alternative to the Contingent Fee? An Assessment of the Incentive Effects of the English Conditional Fee Arrangement*, 27 CARDOZO L. REV. 2433 (2006).

116. See Zander, *supra* note 113, at 259–60.

117. See *id.*

118. See *id.*; see also Woodroffe, *supra* note 114, at 349–50.

119. See LAW COMMISSION, PROPOSALS FOR REFORM OF THE LAW RELATING TO MAINTENANCE AND CHAMPERTY, para. 7, at 4 (1966).

120. See Criminal Law Act, 1967, c. 58, § 14(2) (Eng.).

121. See Zander, *supra* note 113, at 260.

contingency fees as a way of financing litigation on the ground that they would have a corrupting influence on lawyers.<sup>122</sup>

In 1989, the debate whether to allow contingency fees was reignited by the Thatcher government's publication of controversial green papers, which endorsed litigation financing reform more in line with free market ideals and the United States system.<sup>123</sup> This proposal was ultimately incorporated into the Courts and Legal Services Act of 1990, which first authorized the "conditional fee agreement."<sup>124</sup> This law generally permits fees to be contingent upon the outcome of a matter "only in specified circumstances" and where the agreement complies with any rules imposed by the Lord Chancellor.<sup>125</sup> It specifically prohibits contingency fee agreements where the agreement is a "contentious business agreement" as defined under the 1974 Solicitors Act, where the agreement involves representation in a criminal proceeding and in certain family and domestic matters where public policy strongly counsels against such a fee arrangement.<sup>126</sup> These caveats closely resemble those of the American system.<sup>127</sup>

A key division of England's conditional fee approach under the 1990 law was that a lawyer still could not charge a fee expressed as a percentage of the damages obtained. Rather, the prevailing attorney could recover an agreed-upon "uplift" or "success fee" stated as a percentage of the attorney's normal fee.<sup>128</sup> For example, if an attorney won her case and ordinarily would collect fees of €1000 (including profit), she would, pursuant to a 25% success fee agreement, be entitled to an additional €250. She could not contract to take 25% of the final judgment.

Such a stringent fee agreement creates different incentives for attorneys bringing cases in England. Unlike the American system, in which the attorney's incentive is to maximize the amount of damages, the primary motivation under the English system is for the attorney to maximize the probability of winning the case, regardless of the expected judgment.<sup>129</sup> This can have the positive effect of discouraging attorneys from bringing false or illegitimate claims. On the other hand, it can discourage attorneys from bringing riskier claims that are nevertheless meritorious, thereby defeating the United States' fundamental justification for permitting

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122. See 1 ROYAL COMMISSION ON LEGAL SERVICES, FINAL REPORT, 1979, Cmnd. 7648, at 176.

123. See Abel, *supra* note 114, at 257–60; Michael Zander, *The Thatcher Government's Onslaught on the Lawyers: Who Won?*, 24 INT'L LAW. 753 (1990).

124. See Courts and Legal Services Act, 1990, c. 41, § 58 (Eng.), available at <http://www.legislation.gov.uk/ukpga/1990/41/section/58>.

125. See *id.* Section 58(1) of the Courts and Legal Services Act provides that "a conditional fee agreement . . . shall not be unenforceable by reason only of its being a conditional fee agreement; . . ." *Id.* § 58(1).

126. See *id.* at §§ 58(5), 58A(1).

127. See *supra* notes 105–07 and accompanying text.

128. See ADRIAN A.S. ZUCKERMAN, CIVIL PROCEDURE 907, 911 (2003).

129. See Winand Emons, *Playing It Safe with Low Conditional Fees Versus Being Insured by High Contingent Fees*, 8 AM. L. & ECON. REV. 20, 29 (2006); Melamed, *supra* note 115, at 2435 (noting the "misalignment of interests" that can be created by contingent fees).

contingency fees to increase access to the court system.

The English conditional fee system also prioritizes attorney case selection over judicial access by expressly limiting fee awards. The Courts and Legal Services Act provided that a maximum permissible level of uplift or success fee would be set by subsequent legislation.<sup>130</sup> In 1995, regulations were passed that limited the amount of a success fee to 100%.<sup>131</sup> Hence, attorneys in England can be rewarded for taking on riskier cases but not to levels that approach the relatively unrestricted contingency fee awards of the United States.<sup>132</sup>

In addition, England's "loser pays" system reinforces the emphasis placed on attorney case selection. Unlike the United States, in which attorneys may advertise "no upfront costs" and "no win, no pay," such a scheme does not truly exist in England because a losing plaintiff must still pay the defendant's legal costs.<sup>133</sup> The losing plaintiff must also typically pay his own court fees and any expert fees.<sup>134</sup>

The end product in England is, therefore, a system of litigation financing designed on multiple levels to encourage the filing of cases with a relatively high chance of success. The system is not designed principally to increase access to justice, which is the core purpose behind the creation of a contingency fee system in the United States. By importing a modified version of American law, England's system may not even further the objective of improving access to justice.<sup>135</sup> Indeed, in certain circumstances, England's contingency fee system may discourage access to the judiciary. For example, if a plaintiff prevails, but the amount of damages awarded is small, the attorney's fee plus the uplift may exceed the amount of damages obtained, resulting in a net loss for the plaintiff.<sup>136</sup> In contrast, a prevailing plaintiff under the American system, which ties a contingency fee to the judgment, will virtually always receive a net positive amount of the recovery.<sup>137</sup> Such greater uncertainty under England's system provides less

130. See Courts and Legal Services Act, 1990, c. 41, § 58(4).

131. See Conditional Fee Agreements Order, 1995, S.I. 1995/1674 (repealed by Conditional Fee Agreements Order, 1998, S.I. 1998/1860, art. 2); Conditional Fee Agreements Regulations, 1995, S.I. 1995/1675 (repealed by Conditional Fee Agreements Regulations, 2000, S.I. 2000/692).

132. See *supra* notes 110–12 and accompanying text.

133. See Woodroffe, *supra* note 114, at 352, 355.

134. See *id.* at 352.

135. See Evelynne Gilvarry, *Society Dismisses "Half-Hearted" No-Win-No-Fee Scheme*, L. SOC'Y GAZETTE, May 12, 1993, at 5 (questioning the English conditional fee system as improving access to justice); *Not So Uplifting*, 137 SOLIC. J. 443, 443 (1993) (calling the conditional fee system "a fraud on the client").

136. See Woodroffe, *supra* note 114, at 354–55 ("The problem with the new English system is that if the amount of damages is small, the fee plus the uplift may exceed the amount of damages obtained.").

137. See *id.*

incentive for parties to pursue a claim than in the United States and is, therefore, less likely to promote access to the court system.

The comparison between the American and English litigation financing system, as explained in the earlier discussion regarding strict products liability, is not intended to impose judgment on which system is preferred, but rather to highlight how relatively minor modifications to borrowed law can dramatically affect the purpose and use of that law. Both countries' systems of litigation financing undoubtedly further legitimate goals. That England retains tighter controls and absolute limits on its contingency fees reflects a conscious effort to curb frivolous, highly speculative, and abusive litigation—problems that are viewed by many as very serious in America.<sup>138</sup> England chose a balance in its contingency fee system more likely to ensure only meritorious cases proceed, even if the system did so by sacrificing increased access to courts and failing to fully achieve the primary objective of the American law. This example demonstrates the importance of identifying the clear objective for the imported law to determine if it is truly needed in the foreign country, and it can help guide other countries contemplating adoption of contingency fees.

## V. EXPORTING CLASS ACTIONS

A final example of exported United States legal traditions is the class action. Similar to strict products liability, punitive damages, and contingency fee agreements, class actions represent a “phenomenon” and a hallmark of the American civil justice system.<sup>139</sup> Over the past two decades, foreign countries have increasingly examined collective actions.<sup>140</sup> They have looked to the class action device as a means to protect consumers from comparatively small harms, which, in the aggregate, amount to substantial harms, and ensure that wrongdoers do not escape liability and act with impunity.<sup>141</sup> For example, the European Union has recently mulled over the adoption of United States class actions in multiple contexts.<sup>142</sup> Thus far,

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138. See Abel, *supra* note 114, at 264 n.55, 57 (citing Lord Benson, *The Character of a Profession*, FIN. TIMES, May 31, 1989, at 21; *Letters to the Editor*, TIMES (London), June 9, 1989; Poor “Lose Out” in Contingency Fees Lottery, L. SOC’Y GAZETTE, June 7, 1989, at 7).

139. Samuel P. Baumgartner, *Class Actions and Group Litigation in Switzerland*, 27 NW. J. INT’L L. & BUS. 301, 308 (2007).

140. See *id.*; Antonio Gidi, *Class Actions in Brazil—A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311, 312–13 (2003); Note, *Class Action Litigation in China*, 111 HARV. L. REV. 1523, 1523 (1998) [hereinafter *Class Action*].

141. See Tiana Leia Russell, *Exporting Class Actions to the European Union*, 28 B.U. INT’L L.J. 141, 142, 144 (2010) (discussing benefits of collective actions).

142. See Tiffany Chieu, *Class Actions in the European Union?: Importing Lessons Learned from the United States’ Experience into European Community Competition Law*, 18 CARDOZO J. INT’L & COMP. L. 123, 124–25 (2010); Russell, *supra* note 141, at 142–43; Christopher Smithka, *From Budapest to Berlin: How Implementing Class Action Lawsuits in the European Union Would Increase Competition and Strengthen Consumer Confidence*, 27 WIS. INT’L L.J. 173, 173–74 (2009); Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179, 179 (2009).

however, the reception of class actions in the EU and in other countries has been modest. Only a few countries, two of which are discussed below, have incorporated collective actions into their laws.<sup>143</sup> In each, the imported product is significantly simplified from the American model, and safeguards on the law's effective use are limited or nonexistent.

The modern class action lawsuit in the United States represents the culmination of nearly two centuries of legal development. Class action lawsuits originated at common law in state courts of equity,<sup>144</sup> and during the first half of the nineteenth century, the federal class action evolved out of gradual changes to federal equity rules.<sup>145</sup> In 1938, when the Federal Rules of Civil Procedure were adopted, combining courts of law and equity into a single "civil" action, federal class actions were set forth in Rule 23, which remains the class action rule today.<sup>146</sup> Rule 23 was substantially amended in 1966 to, among other things, ensure more adequate procedural safeguards in class actions.<sup>147</sup> States soon revisited their class action rules to incorporate standards and safeguards similar to the federal rule.<sup>148</sup> Although Rule 23 has undergone modest additional revisions since 1966, the core provisions of the rule remain unchanged.<sup>149</sup> It continues to provide the seminal class action law of the United States.

Under Rule 23, a class action can only be brought if four requirements are met. The first requirement, commonly called "numerosity," states that the proposed class must be so numerous that joinder of all members is impracticable.<sup>150</sup> For example, if 500 plaintiffs sought damages against a common defendant, joinder of each individually represented party in a combined action might prove overly burdensome such that the dispute would not be resolved expeditiously. Therefore, class treatment would be appropriate so long as the other requirements are met.

The second requirement, known as "commonality," provides that a class action can only be brought where there are questions of law or fact common

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143. See Baumgartner, *supra* note 139, at 308–09.

144. See *Arias v. Angelo Dairy*, 209 P.3d 923, 934–35 (Cal. 2009) (Werdegar, J., concurring); Raymond B. Marcin, *Searching for the Origin of the Class Action*, 23 CATH. U. L. REV. 515, 516 (1974).

145. The oldest predecessor to the class action rule was Equity Rule 48, promulgated in 1833. It was replaced with Equity Rule 38 in the early twentieth century, and when federal courts merged their legal and equitable procedural systems in 1938, Equity Rule 38 became Rule 23 of the Federal Rules of Civil Procedure. See DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 10–11 (2000).

146. See *id.* at 11.

147. See FED. R. CIV. P. 23 (1966 Amendment).

148. See LINDA S. MULLENIX, STATE CLASS ACTIONS: PRACTICE AND PROCEDURE xi (2000) (“[A]fter the Advisory Committee amended Federal Rule 23 in 1966, many states amended their class action rules, adopting provisions similar to the revised federal class action rule.”).

149. See FED. R. CIV. P. 23.

150. See FED. R. CIV. P. 23(a)(1).

to the entire class of plaintiffs.<sup>151</sup> Stated plainly, plaintiffs are not permitted to cobble together similar claims (such as negligence) that are not based on similar facts, circumstances, and actions taken by a defendant or group of defendants.

The third requirement, generally referred to as “typicality,” states that the claims or defenses of the representative parties must be typical of the claims or defenses of the class.<sup>152</sup> An example might be where some members of a proposed class allege strict liability for a mismanufactured product, while other members allege deceptive advertising of that product in violation of consumer protection laws. A class action involving both of these distinct claims would be inappropriate because neither claim is representative of the entire class.

The final requirement is adequacy of representation.<sup>153</sup> This rule requires that each member of a proposed class must fairly and adequately protect and represent the interests of the class.<sup>154</sup> Class members cannot have any conflicts of interest with other members of the class.<sup>155</sup> In addition, adequacy of representation requires that the counsel representing the class be experienced with class action litigation and must similarly not have any conflicts with any class members.<sup>156</sup> These basic protections allow class actions only in carefully drawn circumstances involving similarly situated parties.

Despite such safeguards, the United States experienced an explosion of class actions in the 1980s and 1990s. Part of this may have been due to an under-appreciation by the drafters of Rule 23 of the highly lucrative potential of prosecuting class actions. Class actions were developed mainly for civil rights litigants seeking injunctions in discrimination cases;<sup>157</sup> it was believed that class actions would rarely, if ever, apply to personal injury cases such as products liability.<sup>158</sup> In the 1980s, some plaintiffs’ lawyers tried to persuade judges to expand the use of class actions to mass tort cases, especially those involving latent injuries allegedly caused by exposure to a

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151. See FED. R. CIV. P. 23(a)(2).

152. See FED. R. CIV. P. 23(a)(3).

153. See FED. R. CIV. P. 23(a)(4).

154. See *id.*

155. See *id.*

156. STEPHEN C. YEAZELL, CIVIL PROCEDURE 800 (7th ed. 2008).

157. See *The Class Action Fairness Act of 1999: Hearing on S. 353 Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 106th Cong. 60 (statement of John P. Frank, Partner, Lewis and Roca (“If there was [a] single, undoubted goal of the committee, the energizing force which motivated the whole rule, it was the firm determination to create a class action system which could deal with civil rights and, explicitly, segregation.”)). Mr. Frank was a member of the Civil Procedure Committee when the present Rule 23 was promulgated. See *id.* at 57.

158. See *id.* at 60–61. Class action status was disfavored even for simultaneous injury cases such as airplane crashes or hotel fires. As the Advisory Committee on the Federal Rules of Civil Procedure explained: “A ‘mass accident’ resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways.” FED. R. CIV. P. 23 advisory committee’s note.

product over time.<sup>159</sup> Plaintiffs' lawyers argued that the class action rules needed broad interpretation; otherwise, mass tort cases could slow or stop the judicial system in its tracks.<sup>160</sup> Some courts subsequently began to bend or ignore the rules and expand the types of claims they were willing to certify as class actions.<sup>161</sup> This was further compounded by the fact that not all states had adopted all of the rules and rational limits that are embodied in the federal rule.

During the 1990s, the dramatic increase in class action filings continued, primarily in state courts.<sup>162</sup> A survey of Fortune 500 companies, for instance, found that from 1988 to 1998, class action filings against those companies increased by 338% in federal courts and by more than 1000% in state courts.<sup>163</sup> Class action litigation also became increasingly lawyer-driven, with some attorneys seeking very modest remedies on behalf of their class "clients." While very modest rewards went to the class action clients, plaintiffs' attorneys collected millions of dollars in legal fees.<sup>164</sup> Some of the most egregious examples were so-called "coupon" settlements, in which prevailing class action plaintiffs were awarded a coupon redeemable for all or a percentage of the very product for which they claimed damages, for instance a box of cereal<sup>165</sup> or bottled water.<sup>166</sup> Again, the attorneys were awarded millions of dollars in fees. Meanwhile, significant forum shopping took place as plaintiffs' attorneys used "every trick in the book"<sup>167</sup> to hold huge multi-state litigation in plaintiff-friendly state courts and not in federal

159. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1356 (1995).

160. See *id.* at 1358; Victor E. Schwartz, "Class Action" Reform: Endless Clashes of Values or Constructive Results?, 19 TRIAL DIPL. J. 231, 232 (1996).

161. See Coffee, *supra* note 159, at 1356–58, 1363–64.

162. See The Federalist Society, *Analysis: Class Action Litigation—A Federalist Society Survey, Part II*, 1 CLASS ACTION WATCH, Spring 1999, at 1, 5, [http://www.fedsoc.org/doclib/20070321\\_classaction12.pdf](http://www.fedsoc.org/doclib/20070321_classaction12.pdf); DEBORAH HENSLEY ET AL., PRELIMINARY RESULTS OF THE RAND STUDY OF CLASS ACTION LITIGATION 15 (1997).

163. The Federalist Society, *supra* note 162.

164. See Steven B. Hantler & Robert E. Norton, *Coupon Settlements: The Emperor's Clothes of Class Actions*, 18 GEO. J. LEGAL ETHICS 1343, 1344 (2005); see also J. Brendan Day, *My Lawyer Went to Court and All I Got Was This Lousy Coupon! The Class Action Fairness Act's Inadequate Provision for Judicial Scrutiny over Proposed Coupon Settlements*, 38 SETON HALL L. REV. 1085, 1086 (2008) (criticizing the Class Action Fairness Act as not going far enough in procedural protections for consumers).

165. See Ameet Sachdev, *Coupon Awards Reward Whom?*, CHI. TRIB., Feb. 29, 2004, at 1 (discussing class action lawsuit against the maker of Cheerios, which alleged that certain pesticides approved for other grains, but not oats, came into contact with the cereal's oat grains); David Zizzo, *Lawsuit Can Mean Big Bucks for Tiny Tort*, DAILY OKLAHOMAN, Sept. 17, 1995, at 1.

166. See Marguerite Higgins, *Class Members Get Little in Suits*, WASH. TIMES, July 8, 2004, <http://www.washingtontimes.com/news/2004/jul/8/20040708-121754-4808r/print/>.

167. For example, a common practice emerged of naming a nominal local retailer to break up the total diversity of citizenship rule between plaintiffs and all defendants that is required to bring a case in federal court.



courts.

In response to such class action abuses, Congress passed the Class Action Fairness Act of 2005 (CAFA).<sup>168</sup> This law established new procedural and jurisdictional protections on federal class actions, including the requirement that the class action consist of at least one hundred plaintiffs to be certified (i.e., numerosity), greater restrictions on the use of, and fees collected from, coupon settlements, and easier removal of state class actions to federal court where, generally speaking, greater protections already existed.<sup>169</sup> These additional, complimentary safeguards are designed to permit class actions only where they provide the most efficient and effective means of dispute resolution, target specific and well-documented abuses, and prevent “forum-shopping.”<sup>170</sup>

The few foreign countries that have adopted the class action or other form of collective action have almost universally ignored the safeguards developed in the United States. Two of these countries, Brazil and China, allow very different forms of collective action, neither of which retains the same safeguards to curb abuses that evolved and continue to evolve in the United States.<sup>171</sup> The very basic and minimal language of these laws portends a troubling future which repeats America’s missteps; it is an issue that will only become more problematic as these countries contemplate importation of other characteristics of the American civil justice system.

In 1990, Brazil, a civil law country, enacted the Consumer Code, which established broad and wide-ranging protections for consumers in the legal system.<sup>172</sup> In addition to establishing a products liability regime comparable to that of Europe,<sup>173</sup> and consumer protection laws for unfair and deceptive trade practices,<sup>174</sup> the law introduced group actions to Brazil.<sup>175</sup> The Consumer Code states simply that the defense of the interests and rights of consumers and victims may be exercised either individually or collectively.<sup>176</sup> The law confers standing to sue only upon select groups of government entities specifically charged with defending the interests at issue in the case and associations legally constituted for at least a year who include among their institutional purposes the protection of the interests and rights at issue.<sup>177</sup> Individuals, absent very narrow circumstances, are not

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168. See Class Action Fairness Act of 2005, 28 U.S.C. §§ 1453, 1711–15 (2005).

169. See *id.*

170. See Smithka, *supra* note 142, at 179.

171. See, e.g., Gidi, *supra* note 140, at 341–43.

172. See C.D.C., Lei No. 8078, de 11 de Setembro de 1990 [hereinafter Consumer Code] (English translation on file with author); see also Gidi, *supra* note 140, at 328.

173. See Consumer Code, *supra* note 172, arts. 10, 12–14; see also Jorge Mosset Iturraspe, *General Trends in South American Product Liability Law: An Overview*, 20 ARIZ. J. INT’L & COMP. L. 115, 118–19 (2003).

174. See Consumer Code, *supra* note 172, arts. 29–41.

175. See *id.*, arts. 81–82; see also Gidi, *supra* note 140, at 328.

176. See Consumer Code, *supra* note 172, art. 81.

177. See *id.*, art. 82; see also Gidi, *supra* note 140, at 366.

authorized to pursue a class action.<sup>178</sup>

The Consumer Code divides the types of rights suitable for class action treatment into three categories: 1) “diffuse rights” that are indivisible in nature and may be held by unidentifiable persons; 2) “collective rights” which are also indivisible, but belong to a more specific group of persons linked to each other or to the opposing party by a legal relationship; and 3) “homogeneous individual rights” which are divisible individual rights with a common origin.<sup>179</sup> These classifications, in effect, determine the procedure applied to the class action.<sup>180</sup> They share some similarities with the original 1938 version of Federal Rule of Civil Procedure 23, which categorized class actions as “true,” “hybrid,” and “spurious” actions; a confounding design which was dismantled by the 1966 amendments.<sup>181</sup>

Beyond these basic rules for standing and the types of actions which may be brought, class actions in Brazil contain few, if any, procedural safeguards designed to combat abuse.<sup>182</sup> Discounting what might be considered more common abuses of the American system as, in part, a result of other uniquely American civil justice system features, there still appears to be wide latitude for injustice. For example, there is no requirement under Brazil’s law that the lead plaintiff and all members of the class suffer an actual injury, or any mechanism to assure that consumers’ interests are prioritized over the associations bringing such claims on their behalf.<sup>183</sup> Brazil’s law also expressly provides that its scope is “trans-substantive,” meaning that it is available to remedy controversies in environmental, antitrust, torts, tax, and any other area of the law.<sup>184</sup> Nevertheless, there are no corresponding protections applicable to any of these specific types of litigation. Even general protections comparable to Rule 23(a)’s requirements of numerosity, commonality, typicality, and adequacy of representation, or CAFA, are nonexistent.<sup>185</sup>

Less than a year after Brazil’s importation of class actions, China, another civil law country, entered the foray as well through enactment of its Civil Procedure Law.<sup>186</sup> The result was markedly different. The law

178. See Gidi, *supra* note 140, at 366.

179. See Consumer Code, *supra* note 172, art. 81. For an in-depth explanation of each type of right for group action, see Gidi, *supra* note 140, at 349–60.

180. See Gidi, *supra* note 140, at 349. The specific procedures are set forth by Brazil’s Public Civil Action Act. See Lei No. 7853 de 1989; Lei No. 7913 de 1989; Lei No. 8069 de 1990.

181. FED. R. CIV. P. 23 (1938) (repealed 1966).

182. See Gidi, *supra* note 140, at 341–43.

183. See *id.* at 376.

184. See *id.* at 328.

185. See *id.* at 367, 367 n.167.

186. See Zhonghua Renmin Gongheguo Minshi Susong Fa [Civil Procedure Law of the People’s Republic of China] [hereinafter Civil Procedure Law] (promulgated by the Standing Nat’l People’s Cong., Apr. 9, 1991), *English translation available at* <http://www.newsgd.com/business/laws/20030>

provides that individuals could join together to pursue claims for harm and that the adjudication of such claims would be binding on other members of a class.<sup>187</sup> Therefore, unlike Brazil's narrow conception of class actions brought by consumer-oriented associations, China adopted an approach closer to the American system in which an individual has standing to sue on behalf of a class.<sup>188</sup>

The China Civil Procedure Law also provides a few important class action safeguards. First, the law requires that the parties to a joint lawsuit have "common rights and obligations with respect to the object of action."<sup>189</sup> This standard resembles the American requirement under Rule 23 of commonality and typicality<sup>190</sup> and gives Chinese courts a basis to deny class treatment where plaintiffs or claims are not sufficiently related. Second, the Civil Procedure Law provides mechanisms to help ensure the adequacy of class representation.<sup>191</sup> It provides that a class action may be initiated by representative members of the class who are duly elected by the class.<sup>192</sup> If such representatives, or lead plaintiffs, cannot be identified through selection, they may be decided on by the court through negotiation with the claimants who have filed the lawsuit.<sup>193</sup> Further, unlike the American system in which the class action attorney generally controls the litigation and makes many of the key decisions, the Chinese law requires any modification or waiver of claims, or confirmation or compromise by the representatives, to be approved by the represented class members.<sup>194</sup>

Taken together, the Chinese law contains class action standards resembling Rule 23(a)'s commonality, typicality, and adequacy of representation requirements.<sup>195</sup> These requirements are not as explicit or as developed as the American standards but, at the very least, provide Chinese courts with means to prevent some class action abuses. Brazil, in contrast, imported class actions from the United States without any meaningful safeguards, relying instead on very limited standing to bring suit as its main screen on abuse.

These examples are, again, not to judge the propriety of class action laws in Brazil, China, or any other country which has opened the door to such collective action, but rather to show how different countries can import vastly different versions of the same United States law, neither of which replicates the authentic or complete version of the American law. The modified approaches taken exclude safeguards that have evolved in the

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187. *See id.*, art. 53.

188. *See id.*

189. *Id.*

190. *See* FED. R. CIV. P. 23(a).

191. *See* Civil Procedure Law, *supra* note 186, art. 54.

192. *See id.*

193. *See id.*, arts. 54–55.

194. *See id.*, art. 55.

195. FED R. CIV. P. 23(a).

United States to protect both plaintiffs and defendants and which have been instituted as a direct response to specific and well-documented types of abuse.<sup>196</sup> While the decision of countries such as Brazil and China not to impose similar class action standards may, in part, reflect a belief that other cultural and political factors exist which limit the use and potential abuse of class actions,<sup>197</sup> experience shows how quickly circumstances can change. This is especially true where a country adopts other legal devices that enhance the attractiveness of class actions, such as punitive damages, attorney contingency fees, or, as in the case of Brazil, greater opportunity for individuals to file class actions. Such broader, long-term considerations are crucial in evaluating the “need” for class action laws or any other potential import of the American civil justice system. Otherwise, foreign countries, acting with the best of intentions, may ultimately import the worst elements of United States law and find themselves facing a litigation crisis.

## VI. CONCLUSION

Importing United States tort and procedural law is a task not to be undertaken lightly by any country. It requires thorough research, careful evaluation, and meticulous execution to accomplish in a manner in which the importer obtains not only the correct, authentic version of the American law, but also learns from the benefits and failures of the tort rule or civil procedure process in the United States. As the four examples discussed illustrate, it is often not so easy for foreign nations to obtain the authentic tort law product. It appears to be even more challenging for government officials and their advisors to adequately account for material developments and interpretations by American courts. As a result, foreign importers can unintentionally worsen their own country’s civil justice system. Only through a faithful evaluation of United States law and of the law’s public policy impacts can a foreign country answer the fundamental question, “Do we really need United States law?”

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196. See *supra* notes 150–53, 167–70 and accompanying text.

197. See Gidi, *supra* note 140, at 319 (stating that Brazilian society has “lost hope” in the legal system); Han, *supra* note 35, at 16 (discussing cultural barriers to litigation in China); see also *Class Action*, *supra* note 140, at 1535 (discussing “[t]ension between the government policy of increasing the courts’ role in resolving disputes and the numerous barriers to effective use of the courts”).

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