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The Rule 23(b)(3) Superiority Requirement and Transnational Class Actions: Excluding Foreign Class Members in Favor of European Remedies

By MICHAEL P. MURTAGH

I. Introduction

Much recent discussion of transnational litigation has focused on “foreign-cubed” securities class actions and whether they fall within the subject matter jurisdiction of the U.S. federal courts.¹ In foreign-cubed class actions, foreign purchasers of the stock of a foreign company who purchased their stock on a foreign exchange bring class actions in federal court for violation of U.S. securities laws.² These foreign-cubed cases, and indeed, all class actions containing

¹ Associate, Sullivan & Cromwell LLP. J.D., University of California, Hastings College of the Law, 2010; LL.M., Central European University, 2007; B.A., University of California, Santa Barbara, 2006. The views expressed here are solely those of Michael Murtagh. This Article was written during the course of the Spring 2010 Class Actions Seminar at University of California, Hastings College of the Law, taught by the Honorable A. James Robertson II of the San Francisco Superior Court. Thank you to Judge Robertson for providing very helpful comments and guidance, and Valentina Bratu for support and inspiration. Thank you as well to the editors of the Hastings International and Comparative Law Review for your hard work in editing this piece.

² See supra note 1.


² See supra note 1.
multinational classes and/or foreign defendants, pose significant problems for the U.S. federal courts. This Article focuses on the difficult issues these transnational class actions pose at the class certification stage of a lawsuit.

Perhaps not surprisingly, transnational class actions, despite their reliance on U.S. law, have forced federal courts to decide difficult questions of foreign law. When deciding motions for class certification, courts have considered whether the courts of foreign countries would recognize the class action judgment in order to prevent two undesirable scenarios: (1) the plaintiff wins the suit or settles in the U.S. and tries to enforce the judgment abroad, but the foreign court does not recognize the judgment; (2) the defendant wins the suit in the U.S. (or, absent parties do not like the outcome of a suit or settlement), and members of the class pursue the same claim abroad. This inquiry, which has been conducted as part of the Rule 23(b)(3) superiority inquiry, leads courts to consider whether the courts of other nations would give preclusive effect to the judgment. If not, courts have sometimes excluded plaintiffs from those countries from the class.

This Article proceeds as follows. In Section II, this Article first discusses the reasons why foreign courts may not recognize an opt-out class action judgment. Next, it critically examines the way that U.S. district courts have determined whether foreign courts would give res judicata effect to a class action judgment. It argues that the current solution has generally worked well when it is clear whether a foreign court would give res judicata effect to the judgment, but that it has needlessly exposed the parties (mostly the defendant) to unnecessary risks in cases where the foreign law is unclear on the res judicata effect to be given to a class action judgment. It then discusses

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3. These types of cases will often be referred to as “transnational class actions” in this Article. See Rhonda Wasserman, Transnational Class Actions and Interjurisdictional Preclusion, 86 NOTRE DAME L. REV. (forthcoming 2010), available at http://ssrn.com/abstract=1554472.

4. See Coffee, supra note 1 (discussing this avenue for challenging foreign-cubed class actions).


7. See, e.g., Vivendi I, 242 F.R.D. at 105-06 (excluding German and Austrian class members).
important considerations in crafting a solution and critiques other proffered solutions.

In Section III, this Article first advocates for the exclusion of foreign class members from opt-out class actions where it is unclear whether the foreign courts would give res judicata effect to the judgment. This solution excludes foreign class members from recovering via a Rule 23(b)(3) class action and forces them to pursue remedies in their home countries. It is a clear, predictable, and efficient rule that would end the excessive litigation over future res judicata effect and the inconsistent results it has caused for foreign companies facing lawsuits in the U.S.

This Article next argues that exclusion of foreign class members is further justified in light of the growing body of effective means of resolving mass claims in Europe. This Article will briefly highlight the Dutch Collective Settlement Act of 2005, model case procedures in Germany and Austria, and group litigation orders in the United Kingdom as potential justifications for courts to exclude foreign class members. Because of the ease of recognizing judgments between European countries, European remedies should be considered “superior” to U.S. remedies when classes consist of European plaintiffs and there is a dispute about the res judicata effect of an American judgment. The Amsterdam Court of Appeals recent approval of the settlement of European claims in the Dutch Shell litigation hints at how this remedy may work in practice. Finally, this Article briefly discusses the impact of the Supreme Court’s recent decision in *Morrison v. National Australian Bank*, dispels possible counterarguments, and concludes.

II. Certifying Transnational Class Actions

This Article focuses on transnational class actions brought under

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8. Or, as will be discussed infra, some European plaintiffs may recover under the Dutch Collective Settlement Act. *See infra* Section III.C.; *see also In re Royal Dutch/Shell Transp. Sec. Litig. (Dutch Shell II)*, 522 F. Supp. 2d 712, 723-24 (D.N.J. 2007) (“The Court also emphasizes that this holding does not leave the Non-U.S. Purchasers without an alternative recourse to address their alleged injuries. Significantly, the Non-U.S. Purchasers can seek recovery through the Settlement Agreement entered into before the Amsterdam Court of Appeals or through procedures available within their respective jurisdictions.”).
Federal Rule of Civil Procedure 23(b)(3). In order to be certified, these actions must fulfill both Rule 23(a) and Rule 23(b)(3). As will be shown below, while most of these requirements tend to prove unproblematic, the superiority requirement in Rule 23(b)(3) is more controversial. This Section discusses the issues foreign classes raise at the class certification stage, analyzes the judicial treatment of the superiority inquiry in cases with foreign classes, and discusses important considerations in solving the problems raised by the superiority inquiry.

A. Rule 23(a) and Rule 23(b)(3) Predominance

As a threshold matter, Rule 23(a) is usually easily satisfied in transnational class actions. Rule 23(a) requires a finding of numerosity, commonality, adequacy, and typicality. While not explicitly stated in the rule, courts also require that there be an ascertainable class and that the plaintiff must be a member of it. Numerosity is usually unproblematic because many of these transnational class actions are securities fraud class actions involving many claims and class members in multiple countries; thus, it would be impracticable to bring all claimants before the court. The commonality requirement is also generally met because the plaintiffs all seek relief based on the same allegedly fraudulent acts or omissions.

Typicality and adequacy under Rule 23(a)(3) and 23(a)(4) deal with the qualifications of the named plaintiff: so long as the plaintiff's

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11. See, e.g., Vivendi I, 242 F.R.D. at 102; Coffee, supra note 1 (discussing the superiority requirement and foreign-cubed class actions).
12. These requirements are briefly, but not exhaustively, analyzed here because this Article focuses primarily on the superiority requirement in Rule 23(b)(3), which is where transnational class actions have historically posed problems.
13. See generally FED. R. CIV. P. 23(a).
16. For example, in Vivendi I, 242 F.R.D. at 84, the defendants did not dispute the existence of many common questions.
counsel picks class representatives with claims typical of the class, who can adequately represent the claims of the absent members, these requirements are not especially problematic in cases with foreign class members. Some cases have considered whether a foreign plaintiff can be a lead plaintiff, and in those cases defendants have argued with some success that a foreign plaintiff would not be an appropriate lead plaintiff because that plaintiff's country might not give res judicata effect to the judgment. With a class of foreign purchasers, there are usually also foreign class representatives, helping to satisfy the typicality and adequacy requirements.

Assuming Rule 23(a) is satisfied, Rule 23(b)(3)'s predominance inquiry also poses no special problems in transnational class actions because many of these transnational class actions involve securities fraud claims. Predominance is easily satisfied in securities fraud class actions because plaintiffs may rely on either the Basic v. Levinson presumption or the Affiliated Ute Citizens of Utah v.

17. See, e.g., Robidoux ex rel. Rock v. Celani, 987 F.2d 931, 936-37 (2d Cir. 1993) (“When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims.”).

18. See, e.g., Buettgen v. Harless, 263 F.R.D. 378, 382-83 (N.D. Tex. 2009), where the court held that a Swiss plaintiff was not the most adequate plaintiff because it would be subject to unique defenses, namely, that a Swiss court would not recognize the class action judgment. Id. But see Mohanty v. Big Band Networks, Inc., No. 07-5101 SBA, [Docket Nos. 12, 15, 43], 2008 U.S. Dist. LEXIS 32764, at *19-25 (N.D. Cal. Feb. 14, 2008) (declining to rebut Private Securities Litigation Reform Act's most adequate plaintiff presumption based on mere speculation that courts of Cyprus would not recognize class action judgment). This issue is generally outside the scope of this Article, which assumes that Rule 23(a) has been met and considers the impact of foreign courts not recognizing a judgment in the Rule 23(b)(3) superiority context. However, the solution advocated infra Section III would eliminate these problems.


21. Basic v. Levinson, 485 U.S. 224, 247 (1988). Under Basic, provided that certain features of the market are present, the court presumes reliance in purchasing, which frees the plaintiffs from having to individually prove reliance. Id.; see also KLONOFF ET AL., supra note 20, at 261.
United States presumption to prevent the individualized nature of proving reliance from outweighing the common issues present. Thus, the prospective plaintiff seeking certification of securities class actions with foreign class members generally encounters little difficulty outside of the superiority requirement, which will be treated separately below.

B. The Superiority Requirement

The main battleground for certification of transnational class actions has been Rule 23(b)(3)'s superiority requirement. The argument against certification is that the class action is not superior to other methods of adjudicating the dispute because foreign courts may not recognize the judgment. This Subsection will first discuss the reasons why foreign courts may not recognize a class action judgment, and then discusses the way that courts have treated Rule 23(b)(3)'s superiority requirement in transnational class actions, highlighting the implications of a conflict between two recent cases in the Southern District of New York.

1. Brief Overview of Reasons Why a Foreign Court Might Not Enforce a Class Action Judgment

Before discussing the judicial treatment of the superiority issue, one must first understand the reasons why foreign courts might not recognize an opt-out class action judgment. Under Rule 23(b)(3), any member of a class who wishes to do so may opt-out of the class upon receiving notice. If they do not opt-out, they are bound by

24. See, e.g., Buxbaum, supra note 5, at 32.
25. FED. R. CIV. P. 23(c)(2)(B) ("For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.")
judgment or settlement.\textsuperscript{26} This system stands in stark contrast to methods of collective redress around the world. For example, many European Member States have no such collective redress system, let alone one with an opt-out model.\textsuperscript{27}

Opt-out class actions under Rule 23(b)(3) differ from their foreign counterparts not only in practice, but perhaps more importantly, in underlying theory. While “[t]he opt-out procedure relies on the theory of constructive notice, . . . other systems start from the principle that absent class members who have not had actual notice of the litigation, and who did not participate in that litigation, cannot be bound by its outcome.”\textsuperscript{28} Because of this significant difference, “[s]ome commentators have observed that U.S.-style class actions could not be implemented in Europe because opt-out based group actions would violate the due process rights of European citizens and are incompatible with such constitutionally guaranteed principles as the right to be heard and the right of the parties to control the proceedings.”\textsuperscript{29} The problem with opt-out class actions is not only that they are uncommon in Europe, but also that the very premise of an opt-out class action – that one’s interests can be bindingly resolved without them ever being present in the lawsuit or affirmatively participating – conflicts with some of the most important underlying premises of other legal systems. One commentator described opt-out class actions as “an anathema” in the eyes of Europeans.\textsuperscript{30}

\textsuperscript{26} See FED. R. CIV. P. 23(c)(2)(B)(vii); FED. R. CIV. P. 23(c)(3); Lopez, supra note 10, at 286; Joshua D. Stadler, Note, Ortiz Got It Wrong: Why the Seventh Amendment Does Not Protect the Right to Jury Trial in Class Action Suits Under FRCP 23, 61 HASTINGS L.J. 1561, 1575 (2010).

\textsuperscript{27} Rachael Mulheron, The Case for an Opt-Out Class Action for European Member States: A Legal and Empirical Analysis, 15 COLUM. J. EUR. L. 409, 415 (2009); Buxbaum, supra note 5, at 32; Laurel Harbour & Natasha Northrip, Class Action Climate Change in the United States and Europe, THE 12TH ANNUAL NATIONAL INSTITUTE ON CLASS ACTIONS F-23, F-32 (2008) (observing that only the Netherlands and Portugal have a collective action with an opt-out mechanism); In re Vivendi Universal, S.A. Sec. Litig. (Vivendi II), No. 02 Civ. 5571 (RJH) (HBP), 2009 U.S. Dist. LEXIS 31198, at *35 (S.D.N.Y. May 31, 2009) (discussing the Netherlands, Canadian provinces, Portugal, Finland, and Norway).

\textsuperscript{28} Buxbaum, supra note 5, at 32; see also Samuel Issacharoff & Geoffrey P. Miller, Will Aggregate Litigation Come to Europe?, 62 VAND. L. REV. 179, 202 (2009).

\textsuperscript{29} Harbour & Northrip, supra note 27, at F-31 to -32.

\textsuperscript{30} Mulheron, supra note 27, at 412.
The controversy surrounding opt-out class actions makes the issue of their recognition abroad especially significant. Whereas the judgments of state or federal courts in the U.S. are entitled to full faith and credit in other domestic courts, this is not the case when foreign courts consider whether to enforce judgments purporting to bind absent class members. The crucial differences between American class actions and the legal systems of other countries lead to a risk of the judgment not being recognized because "[v]irtually all countries,... reserve the right to refuse enforcement of judgments that violate local public policy." Indeed, foreign courts closely scrutinize and decline to enforce U.S. judgments – particularly class action judgments – on public policy grounds, because our opt-out class actions offend the public policies of many countries.

Both parties, but especially the defendant, are concerned with the res judicata effect of a class action judgment. While foreign defendants with enough contacts with the U.S. to support jurisdiction tend to also have assets in the U.S. sufficient to support the enforcement of a judgment in the U.S., obviating the need for enforcement abroad,

Whether it wins or loses on the merits, [a defendant] has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as [the defendant] is bound. The only way a class-action defendant... can assure itself of this binding effect of the judgment is to ascertain that the forum court has jurisdiction over every plaintiff whose claim it seeks to adjudicate, sufficient to support a defense of res judicata in a later suit for damages by class members.

When nonrecognition of a judgment is a real possibility, foreign class members have little incentive to opt out of a class action. In the event

32. Buxbaum, supra note 5, at 32.
33. Id.
34. Buschkin, supra note 23, at 1567, 1578.
35. Buxbaum, supra note 5, at 32.
they do not like the result of the litigation in the U.S., they may get a “second bite at the apple” in foreign courts if foreign courts decline to recognize the judgment. At the same time, if plaintiffs win the suit and the defendant has sufficient assets in the U.S., plaintiffs may enforce the judgment in the U.S. Thus, foreign class members who are fortunate enough to have their grievances with foreign companies that have sizeable assets in the U.S. enjoy the benefits of U.S. law if they win, but may also sue under their own law if they lose. However, defendants may have to defend the whole case again if the judgment is not recognized abroad. This is an inequitable result for defendants, who are unsure of the size and scope of their potential exposure and who may face duplicative litigation.

Defendants seek finality after litigating a class action and fear the plaintiff’s potential “second bite at the apple” in foreign courts. The next Subsection discusses the judicial treatment of this issue as part of the Rule 23(b)(3) superiority inquiry.

2. Superiority and the Risk of Nonrecognition

In determining whether a class action is “superior to other available methods for fairly and efficiently adjudicating the controversy,” courts consider a set of nonexhaustive factors, including:

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

In transnational class actions, courts tend to focus on “the desirability or undesirability of concentrating the litigation of the claims in the

38. See Buschkin, supra note 23, at 1581 & n.103.
39. Walker, supra note 31, at 763 (“[I]t is unfair to purport to bind defendants to a result that some plaintiff class members might be free to accept or to reject as they please at some later date. To do so would require a defendant to respond to a claim by a class of indeterminate size and scope.”).
40. FED. R. CIV. P. 23(b)(3).
particular forum," and particularly on the question of whether a foreign court would give res judicata effect to a Rule 23(b)(3) opt-out class action judgment.\textsuperscript{43}

This approach stems from \textit{Bersch v. Drexel Firestone, Inc.},\textsuperscript{44} a 1975 Second Circuit decision written by Judge Henry Friendly. In \textit{Bersch}, the plaintiff brought a securities fraud class action on behalf of "thousands of plaintiffs, preponderantly citizens and residents of Canada, Australia, England, France, Germany, Switzerland, and many other countries in Europe, Asia, Africa, and South America."\textsuperscript{45} The defendant argued the foreigners should be excluded from the class because in all of their home countries, the judgment would be unenforceable.\textsuperscript{46} The Second Circuit "direct[ed] that the district court eliminate from the class action all purchasers other than persons who were residents or citizens of the United States"\textsuperscript{47} based in part on:

[U]ncontradicted affidavits that England, the Federal Republic of Germany, Switzerland, Italy, and France would not recognize a United States judgment in favor of the defendant as a bar to an action by their own citizens, even assuming that the citizens had in fact received notice that they would be bound unless they affirmatively opted out of the plaintiff class.\textsuperscript{48}

The court distinguished between situations where it was merely possible that the foreign court would not recognize the judgment, and cases where it was a "near certainty" that the foreign court would not recognize the judgment.\textsuperscript{49} Under \textit{Bersch}, only in the latter situation should the court exclude the foreign plaintiffs.\textsuperscript{50}

Since \textit{Bersch}, courts have considered the potential res judicata effect of their judgments as part of the Rule 23(b)(3) requirement.\textsuperscript{51} This Article does not purport to exhaustively chronicle cases

\begin{itemize}
\item[42.] FED. R. CIV. P. 23(b)(3)(C).
\item[43.] See, e.g., \textit{In re Vivendi Universal, S.A. Sec. Litig. (Vivendi 1)}, 242 F.R.D. 76, 102 (S.D.N.Y. 2007); Jasilli, \textit{supra} note 23, at 117; Bermann, \textit{supra} note 23, at 95.
\item[44.] Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir. 1975).
\item[45.] \textit{Id.} at 977-78.
\item[46.] \textit{Id.} at 982-83.
\item[47.] \textit{Id.} at 997.
\item[48.] \textit{Id.} at 996-97.
\item[49.] \textit{Id.} at 996.
\item[50.] \textit{Id.}
\item[51.] See \textit{In re Vivendi Universal, S.A. Sec. Litig. (Vivendi 1)}, 242 F.R.D. 76, 95 (S.D.N.Y. 2007) (discussing cases following \textit{Bersch} and noting that "res judicata concerns have been appropriately grafted onto the superiority inquiry.").
\end{itemize}
considering this requirement, but it will analyze many representative cases. One certification decision worth noting is In re Turkcell Iletisim Hizmetler, A.S. Securities Litigation. Turkcell was not a foreign-cubed class action because, while there was a foreign class and Turkcell is a foreign company, the plaintiffs had purchased Turkcell’s American Depository Receipts (ADRs) on the New York Stock Exchange. However, Turkcell argued that certification should be denied because Turkish courts do not recognize class actions. The plaintiffs countered that a Turkish court “would at least look to the merits of any decision reached by this court, rather than rejecting it outright.” The court sided with the plaintiff and certified the class despite the fact that defendants argued that the company had no American assets. The court also discounted the defendant’s res judicata concerns because it seemed unlikely that there would be future litigation in Turkey and other factors in Rule 23(b)(3)(A)-(D) counseled in favor of certifying the class.

The same issue was resolved in a similar manner in In re Lloyd’s American Trust Fund Litigation. In Lloyd’s, Citibank provided:

[D]eclarations of foreign counsel, which in sum conclude that many, if not all, of the foreign Names could sue Citibank a second time in their home jurisdictions on the very same claims, even if they are unsuccessful here. The law surveyed includes five jurisdictions, which are France, England, South Africa, Canada, and Switzerland, and which represent approximately 58 percent of the proposed class.

Despite Citibank’s showing, the court certified the class, including the foreign class members, noting “a foreign court may look to the results achieved here for guidance, thereby contributing to the superiority of

53. Id. at 355-56, 359-60.
54. Id. at 360.
55. Id.
56. Id. at 359-61.
57. Id. at 360.
58. Id. at 360-61.
60. Id. at *43 n.7.
The court also noted that it might discourage relitigation abroad by adopting a "proof-of-claim" mechanism," which only binds class members that "opt-in" to the lawsuit.62

A more recent case illustrating the modern battle of the experts is *Cromer Finance Limited v. Berger.* 63 In that case, the court certified the class including the foreign investors, holding that it was "at most a 'possibility' that a defense verdict will have no res judicata effect abroad."64 In *Berger,* contrary to the "uncontradicted affidavits" in *Bersch,*

> [T]he experts on British and Swiss law for both the plaintiffs and Ernst & Young concede[d] that there is no authoritative law in either jurisdiction indicating whether a class action judgment favorable to a defendant would be given preclusive effect in those countries.65

Despite this uncertainty, the court certified the class, noting, as in *Turkcell,* that it seemed unlikely that there would be future litigation.66 The court also reasoned that the possibility of future nonrecognition did not outweigh other factors in favor of finding the class action superior.67

In contrast to *Berger,* *Ansari v. New York University*68 is a case where the lack of future res judicata effect of a judgment was relevant to the court's decision not to certify the class. In *Ansari,* the plaintiff had not established numerosity, but it was also unlikely that there would be res judicata effect abroad.69 Similarly, in *CL-Alexanders Laing & Cruickshank v. Goldfeld,*70 the court also denied class

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61. *Id.* at *44.
62. *Id.* This solution has also been considered in other cases. See, e.g., *In re U.S. Fin. Sec. Litig.,* 69 F.R.D. 24, 55 (S.D. Cal. 1975). See *infra* Section II.D. for discussion of the merits of this solution, which at least one court has held to violate Rule 23. See Kern ex rel. Estate of Kern v. Siemens Corp., 393 F.3d 120, 126 (2d Cir. 2004).
64. *Id.*
65. *Id.*
66. *Id.* at 135 n.32.
67. *Id.* at 133-35.
69. *Id.*
certification in part because the defendants argued there would be no res judicata effect in the U.K. unless the parties employed an opt-in mechanism.\textsuperscript{71}

The next two cases to be discussed, \textit{In re Vivendi, S.A. Securities Litigation}, and \textit{In re Alstom S.A. Securities Litigation}, further highlight the importance of res judicata concerns in cases with foreign class members. In both of these foreign-cubed cases, the courts focused much of their superiority inquiry on an identical issue – the res judicata effect of an opt-out class action under French law – yet the courts reached opposite results based on the voluminous expert submissions.

In \textit{Vivendi}, the District Court for the Southern District of New York attempted to synthesize previous approaches taken to resolving the res judicata question, and formulated the following "sliding scale"\textsuperscript{72} approach, reasoning that the court should "evaluate the risk of nonrecognition along a continuum."\textsuperscript{73} Specifically,

Where plaintiffs are able to establish a probability that a foreign court will recognize the res judicata effect of a U.S. class action judgment, plaintiffs will have established this aspect of the superiority requirement. Where plaintiffs are unable to show that foreign court recognition is more likely than not, this factor weighs against a finding of superiority and, taken in consideration with other factors, may lead to the exclusion of foreign claimants from the class. The closer the likelihood of non-recognition is to being a 'near certainty,' the more appropriate it is for the Court to deny certification of foreign claimants.\textsuperscript{74}

Applying the foregoing analysis, the court held that French, British, and Dutch class members could remain in the action, but that Germans and Austrians should be excluded because the plaintiffs had not established that recognition in Germany or Austria was more likely than not.\textsuperscript{75} Regarding whether the judgment would be recognized in France, the court held "the class action model is not so

\textsuperscript{71} Id. at 460.

\textsuperscript{72} Jasilli, supra note 23, at 121.

\textsuperscript{73} \textit{In re Vivendi Universal, S.A. Sec. Litig. (Vivendi I)}, 242 F.R.D. 76, 95 (S.D.N.Y. 2007)

\textsuperscript{74} Id. (citation omitted).

\textsuperscript{75} Id. at 105.
contrary to French public policy that its use would likely be deemed an infringement of 'principles of universal justice' or contrary to 'international public policy.'

The next significant case where a court considered the res judicata effect of a judgment in a Rule 23(b)(3) opt-out class action was *Alstom.* Alstom, a French company, along with other defendants, was sued for violations of the Securities Exchange Act of 1934 in the Southern District of New York. The plaintiffs brought suit on behalf of a class consisting of citizens of the U.S., Canada, France, England, and the Netherlands. In considering whether the foreign courts would give res judicata effect to an opt-out class action judgment, the court in *Alstom* reached precisely the opposite conclusion as *Vivendi* with regard to French law. The *Alstom* court held that a French court would *not* recognize the opt-out class action judgment, and excluded all French plaintiffs from the class. While the court in *Alstom* distinguished *Vivendi* on the grounds that there was a valid forum selection clause in Alstom's Articles of Association, which foreclosed suits against Alstom in forums other than France, Alstom was not the only defendant. Thus, with respect to suits against defendants other than Alstom, it is critical that the court in *Alstom* disagreed with *Vivendi* on whether French courts would find that a Rule 23(b)(3) opt-out class action violated French public policy. The court held that

A French court would likely conclude that any judgment rendered by this Court involving absent French class members offends public policy because absent French investors did not consent to this Court's jurisdiction over their claims and the United States' class action procedure would deny them an adequate opportunity to participate in the litigation.

Accordingly, the court held that absent French class members should be excluded from the class even in suits against defendants other than

76. *Id.* at 101.
78. *Id.* at 272.
79. *Id.* at 281.
82. *Alstom*, 253 F.R.D at 272; *see also* Coffee, *supra* note 1.
Alstom. However, the court declined to exclude the Canadian class members in suits against all defendants, and also allowed the Dutch and British class members to remain in the class for purposes of suits against defendants other than Alstom.

After Alstom, the defendants in Vivendi moved for reconsideration of the class certification order, citing "recent information" and arguing that such information shows that a Rule 23(b)(3) class action is not superior because a French court would not give res judicata effect to the judgment. Specifically, the defendants argued "that the 'legal underpinning' of the Court's opinion - a comment that while opt-out actions are not presently permitted in France, 'the ground is shifting quickly' - is no longer correct." Vivendi cited (a) a letter from a member of the French Ministère de la Justice saying that an opt-out class action was incompatible with a Conseil Constitutionnel decision; (b) two French governmental reports supporting an opt-in model of consumer group litigation; (c) the opinions, opposing opt-out class actions, of a French business association and businessperson; and (d) recent commentary in the Cahiers du Conseil, an influential publication, discussing how every "employee [is] free to decide whether or not to take part in [a] strike."

The Vivendi court considered all of these submissions and denied the motion for reconsideration, holding that its original decision was correct and that the "recent information" cited by the plaintiffs was merely a reflection of "the ongoing debate in France and the European Union as to whether class action procedures ought to be

84. Id. at 287.
85. Id. at 291 (holding that Canadian courts would recognize the class action judgment).
86. Id. at 287-90.
88. Id. at *16.
89. Id. at *22.
90. Id. at *23.
91. Id. at *27-28.
92. Id. at *29-30.
93. Id. at *31 (citation omitted).
adopted, with either an opt-in or opt-out feature.\textsuperscript{94} The court also explicitly criticized the \textit{Alstom} court's reading of two French Conseil Constitutionnel decisions,\textsuperscript{95} holding that its own interpretation was correct and that none of the French cases established that an opt-out class action would violate the French constitution.\textsuperscript{96}

\section*{C. The Current Method of Evaluating Superiority in Transnational Class Actions Inefficiently Exposes Defendants to the Risk of Duplicative Litigation}

The cases discussed above demonstrate some crucial points regarding judicial consideration of the risk of future nonrecognition in class certification decisions. This Subsection divides the cases discussed above into three general categories for ease of discussion. The following analysis will demonstrate a problem in cases like \textit{Vivendi} and \textit{Alstom} where costly class certification litigation does not leave either side with a clear picture of the future res judicata effect of the judgment.

\subsection*{1. Category One: 'Uncontradicted' Cases}

First, \textit{Bersch} shows that it is easy for courts to justify excluding the foreign class members when there is no evidence contradicting the conclusion that the foreign courts would not give res judicata effect to the judgment in the U.S. class action. When defendants persuasively oppose certification on these grounds and plaintiffs fail to even argue that the foreign court would recognize the judgment, these foreign class members should be excluded. An opt-out class action is not a superior means of adjudication if the parties will be free to relitigate the merits of the suit because "[p]reclusive effect is the centerpiece of a viable group litigation mechanism. A class action defendant must be able to enter into a settlement, or proceed to judgment, with the assurance that members of the plaintiff class will not later be able to lodge the same claims again in another forum."\textsuperscript{97} Since the plaintiff

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{94} Id. at *15-16.
\item\textsuperscript{95} Id. at *51-52.
\item\textsuperscript{96} Id. at *52-53 ("[N]either Decision finds or implies that individualized consent through an opt-in mechanism is constitutionally mandated or, stated in the alternative, that an opt-out procedure based on implicit consent is constitutionally prohibited, much less offensive to 'fundamental French constitutional values in accordance with principles of universal justice.'").
\item\textsuperscript{97} See Buxbaum, \textit{supra} note 5, at 31; see also Walker, \textit{supra} note 31, at 774 ("[T]he operative feature of a class action regime is the preclusive effect that courts...")
\end{enumerate}
\end{footnotesize}
bears the burden of proving that the class should be certified, the plaintiff's failure to rebut the defendant's showing that the judgment will not be recognized abroad should always lead to the class not being certified.

Accordingly, there is no need for change in these uncontradicted cases. Where defendants present evidence as they did in Bersch and it is not rebutted by plaintiffs, courts should follow Bersch in excluding the putative foreign class members.

2. Category Two: Clear Res Judicata Effect

Second, all of the cases discussed above show that the current approach works well where it is relatively clear that the foreign court either will or will not give res judicata effect to the judgment. For example, the Alstom court excluded French, British and Dutch shareholders from claims against Alstom (as distinct from claims against other defendants in the action) on the grounds that Alstom's Articles of Association contained a valid forum selection clause. The court was convinced that all three of those countries would give effect to the forum selection clause, thus refusing to enforce a U.S. judgment against Alstom. Courts and commentators also generally agree that German and Austrian courts would not give res

98. See, e.g., Fener v. Operating Eng'rs Constr. Indus. & Miscellaneous Pension Fund (Local 66), 579 F.3d 401, 406 (5th Cir. 2009) (“A district court must conduct a rigorous analysis of the Rule 23 prerequisites before certifying a class. . . . The party seeking certification bears the burden of proof.”) (citation omitted); In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 316 n.14 (3d Cir. 2008) (“The burden of proof rests with the movant.”); Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186 (9th Cir. 2001) (“As the party seeking class certification, Zinser bears the burden of demonstrating that she has met each of the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b).”) (citation omitted).


100. Id. This result in Alstom prompted an argument by Professor Coffee to the effect that foreign companies should include such forum selection clauses in their Articles of Association, reasoning that the risks are low and the potential rewards, as seen in Alstom, may be great. See also Coffee, supra note 1.


judicata effect to an opt-out class action judgment. Thus, it is a relatively simple decision for courts to exclude foreign class members when the foreign class members are from Germany or Austria. Additionally, Bersch, categorized above as an "uncontradicted case," could also easily fit into this "clear" category because the defendant's affidavits were uncontradicted that foreign courts would not recognize the judgment.

However, sometimes it is also clear to the court that the foreign courts would recognize a class action judgment. In those cases, foreign plaintiffs justifiably remain in the class. In both Vivendi and Alstom, the courts agreed that British and Dutch courts would more likely than not give preclusive effect to an opt-out class action judgment (although in Alstom, the British and Dutch class members were only allowed to stay in the suit to the extent they were suing defendants other than Alstom). There also appears to be no significant controversy as to whether Canadian courts would give res judicata effect to a U.S. class action judgment: courts and commentators agree they would.

When the courts of the foreign nation will give preclusive effect, this cuts in favor of certifying the class, but when they indisputably will not, as in Germany or Austria, this is a serious factor cutting against certification. Faced with a serious likelihood that foreign courts would not recognize the judgment, "if defendants prevail against a class, they are entitled to a victory no less broad than a defeat would have been." Thus, with respect to countries like Germany or Austria, the near certainty of nonrecognition abroad should tip the scales in favor of excluding the foreigners, whereas with a jurisdiction like Canada, U.S. courts may confidently leave foreigners in the class knowing they will be bound from relitigating their claims. The cases discussed above suggest no need for change where the res judicata effect of a class action judgment is clear and easily ascertained.

103. Id. at 103, 105; Alstom, 253 F.R.D. at 282.
104. See, e.g., Alstom, 253 F.R.D. at 290-91; David I. W. Hamer et al., Class Actions Sans Frontieres, in THE 12TH ANNUAL NATIONAL INSTITUTE ON CLASS ACTIONS F-1, F-14 to -15 (2008).
105. See, e.g., Buxbaum, supra note 5, at 31.
3. Category Three: Unclear Foreign Law and Speculative Decisions

Finally, many of the cases discussed above illustrate the difficulties courts face when the law is unclear as to whether or not the foreign country will give res judicata effect to the judgment. For example, unlike the situation in countries such as Canada, Germany, and Austria, the Alstom and Vivendi cases show that both courts and commentators disagree on whether French courts would give res judicata effect to an opt-out class action judgment. The utter disagreement on whether French courts would enforce class action judgments led to the dissatisfactory results in Vivendi and Alstom, where two courts applied the same French precedents and reached conflicting decisions. This conflict highlights the difficulties faced by district courts when they are forced to opine on difficult, unsettled areas of foreign law that foreign courts may have yet to decide. The Vivendi court described the evidence it reviewed as "a veritable mountain of expert affidavits on foreign law," its decision was then criticized in Alstom, and it was then faced with a reconsideration motion, which it denied. Thus, within a two-year span, two U.S. District Courts in the same district have considered mountains of evidence regarding French law, but in three separate decisions have been unable to agree on the enforceability of an opt-out class action judgment under French law. This inconsistency is not surprising, given that the district courts are ultimately offering their best prediction of what courts in a foreign jurisdiction would decide on a novel issue. The courts' speculation on French law leads to great uncertainty for companies potentially exposed to costly litigation on the merits, not to mention costly litigation over certification.


108. Both the Vivendi and Alstom courts applied the requirements set forth in Munzer v. Munzer, a French Conseil Constitutionnel case, which sets out four requirements for a French court to recognize a foreign judgment. See In re Vivendi Universal, S.A. Sec. Litig. (Vivendi I), 242 F.R.D. 76, 96 (S.D.N.Y. 2007); Alstom, 253 F.R.D. at 283-87. However, both courts reached different results in applying the public policy prong of the Munzer test. See Vivendi I, 242 F.R.D. at 101-02; Alstom, 253 F.R.D. at 287.


Turkcell and Lloyd's demonstrate yet another approach to be avoided. Despite strong evidence that the Turkish courts would not recognize a judgment, the court in Turkcell certified the class because of an ill-defined contention that a Turkish court would “look to the merits of a decision.” The court in Lloyd's similarly disregarded res judicata concerns based in part on a notion that the foreign courts would look to the U.S. judgment for “guidance” because of the case’s connection to New York. Turkcell and Lloyd's are representative of cases that adopt a highly speculative, unclear view of how the foreign court would view the U.S. judgment. Despite this fault, Lloyd's use of the proof-of-claim (opt-in) mechanism may be enough to assuage the fears of nonrecognition held by many class action defendants. However, both cases raise the question of whether courts should keep foreign plaintiffs in the class knowing that recognition of the judgment abroad seems unlikely because foreign courts might look to the domestic cases for “guidance.” Notably, the argument that the defendants in Turkcell had no American assets, if true, would mean that the res judicata issue would be sure to be litigated in Turkey if the plaintiffs won the suit – without U.S. assets, plaintiffs would likely go to Turkey to enforce the judgment. Yet the Turkcell court found the absence of U.S. assets insignificant, and in both cases, the courts’ decision to side with the plaintiffs’ experts and certify the class leaves great uncertainty for both sides as to the res judicata effect of their judgments. Turkcell and Lloyd's also

114. Although, as will be discussed infra Section II.D., this may no longer be permissible in light of Kern ex rel. Estate of Kern v. Siemens Corp., 393 F.3d 120, 126 (2d Cir. 2004).
115. This is in contrast to the situation described by Professor Buxbaum, where a multinational defendant has assets in the U.S. sufficient to enforce the judgment in the U.S. See Buxbaum, supra note 5, at 32.
116. See Turkcell, 209 F.R.D. at 360-61 (“[W]e cannot conclude that a Turkish court would give no weight to a judgment of this court. . . . Defendant's assertion that Turkcell has no American assets does not affect the merits of certification.”) (emphasis added); Lloyd's, 1998 U.S. Dist. LEXIS 1199, at *44 (“Plaintiffs . . . contend that a class action is superior to any other method because it will produce a res judicata effect on any further litigation in the United States, and will have evidentiary value in any subsequent proceedings in foreign courts. . . . [A] foreign court may look to the results achieved here for guidance, thereby contributing to the superiority of the class action procedure.”).
further illustrate how the current approach to considering whether foreign courts would recognize the judgment is a "battle of experts" where it is unclear how or why one expert’s opinion prevails over another’s.

Regardless of whether Alstom or Vivendi was right on the res judicata effect of an opt-out class action judgment in France, at least the courts in those cases carefully defined and considered the issue. In contrast, the courts in Turkcell and Lloyd’s dismissed legitimate nonrecognition concerns and speculated that even if the foreign court did not recognize the judgment, it might consider it relevant or guiding.

Further, when adjudicating the "unclear" cases, some courts problematically weigh nonrecognition concerns with other factors supporting certification. For instance, Berger was another case where there was a battle of the experts. The court declined to exclude the foreign class members; rather, it sided with the plaintiff’s experts with little analysis, then weighed the risk of nonrecognition against the other factors cutting in favor of certification. This approach fails to give the risk of nonrecognition the importance it deserves. Given the importance of res judicata concerns to any form of group litigation regime, one might question whether it is proper to resolve this disputed question in favor of the plaintiffs merely because it seems unlikely to arise in the future or because other efficiencies are present.

Finally, Ansari and Goldfeld, discussed above, are not the focus of this Article because the risk of nonrecognition in those cases was accompanied by other significant problems leading to the denial of

117. See Mulheron, supra note 27 at 445 (citing Buxbaum, supra note 5, at 34); Jasilli, supra note 23, at 121.

118. See generally Jasilli, supra note 23, at 121. While Jasilli does not analyze Turkcell or Lloyd’s, Jasilli argues that “[a]ll of the approaches fail to identify useful criteria for evaluating the potential of non-recognition of U.S. class action judgments by foreign courts and rely too heavily on expert opinions.”


120. See Buxbaum, supra note 5, at 31.


122. Id. at 134-35.
certification. Both Goldfeld and Ansari denied certification for reasons including the lack of res judicata effect abroad, but also including other significant problems.\textsuperscript{123} Even the most ardent supporter of including foreign class members in an opt-out class action should agree with Ansari's holding that the class should not be certified if it fails to meet the numerosity requirement\textsuperscript{124} or Goldfeld's holding that class treatment was inappropriate, not only because of the res judicata concerns, but also "the small number of class members, [and] plaintiff's atypical position as underwriter for the private placement."\textsuperscript{125}

As shown above, in many of the "Category Three" cases, the superiority inquiry is leading to costly litigation over the future res judicata effect and to a risk of inconsistent judgments. Whether the district court thinks a foreign court might look to the merits (e.g., Lloyd's/Turkcell), weigh the risk of nonrecognition against other factors supporting certification (e.g., Berger), or predict the recognition abroad using the "more likely than not" standard (e.g., Vivendi/Alstom), the ultimate result is usually an unpredictable battle of the experts. Thus, a defendant may be forced to defend a class action without being certain that the whole class will be bound.

\textbf{D. Considerations in Crafting a Solution and Critique of Other Proffered Solutions}

These cases raise the question of how courts should handle cases where it is unclear whether the foreign courts would give res judicata effect to the judgment. As discussed above, the current rule seems to work well for the uncontradicted cases and the cases in which the foreign law is clear, but the unclear cases described in Category Three demonstrate the need for a change. This Subsection will highlight some of the problems and some important considerations for any solution, and then briefly discuss and criticize previously proffered solutions.


\textsuperscript{124} See Ansari, 179 F.R.D. at 116; see FED. R. CIV. P. 23(a) (numerosity requirement).

\textsuperscript{125} Goldfeld, 127 F.R.D at 460; see FED. R. CIV. P. 23(a) (numerosity and typicality requirements).
1. The Current Method of Evaluating Superiority Is Inefficient and Uncertain; Any Solution Must Recognize the Fundamental Importance of Res Judicata and the Purposes of Rule 23

First, any solution must lead to efficiency and finality. Some courts that have decided to keep foreign plaintiffs in the suit have emphasized other efficiencies justifying such inclusion, but this apparent efficiency comes at the expense of the all-important guarantee of finality with respect to those claims and flies in the face of the importance of res judicata to any group litigation system, let alone judicial system. The way the superiority inquiry is currently being resolved does not serve the purposes of Rule 23, which are crucial to any superiority inquiry, because it entails costly litigation that does not lead to certainty.

Any solution must also lead to uniform treatment. Besides its endorsement of efficiency and judicial economy, an important policy behind Rule 23 is “promot[ing]... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.” Vivendi and Alstom flout this emphasis on consistent results by treating similarly situated parties differently.

Not only are the results inconsistent and is certainty lacking, but the question of future res judicata effect is also being fiercely litigated in district courts. This issue must be resolved more economically. Vivendi and Alstom generated a motion for reconsideration and a “veritable mountain” of evidence. While Rule 23(b)(3) is explicitly

126. See, e.g., Berger, 205 F.R.D. at 135.
128. While Rule 23(b)(3) is explicitly concerned with “fairly and efficiently adjudicating the controversy,” see FED. R. CIV. P. 23(b)(3), it seems nearly impossible to argue that the Vivendi and Alstom litigation has led to a fair or efficient result because of the inconsistent holdings and the excessive litigation by which they were achieved.
129. Mevorah v. Wells Fargo Home Mortg. (In re Wells Fargo Home Mortg.), 571 F.3d 953, 958 (9th Cir. 2009) (citations and quotations omitted).
concerned with "the fair and efficient adjudication of the controversy,"131 "litigating relitigation concerns may violate one of the fundamental principles of res judicata – judicial economy."132

Finally, the solution should also be predictable and fair. One would think that similarly situated parties would be treated alike, but the current approach leads to just the opposite. Consider the example of a French company after the Alstom and Vivendi decisions. The company may be unsure as to the extent of its liability around the world because Alstom directly conflicts with Vivendi. In addition, the denial of reconsideration in Vivendi further muddies the water by casting doubt on some of the basis for the Alstom holding.133 Thus, French companies now face more doubt as to what their future holds because of the Vivendi reconsideration order.

The large jury verdict in Vivendi reinforces the importance of all these goals. The guarantee of preclusive effect is a crucial factor in any form of group litigation,134 and efficiency without sacrificing uniformity of treatment is an important purpose of Rule 23.135 Yet none of these vital goals can be conclusively guaranteed when foreign class members remain in the suit and it is unclear whether the foreign courts would enforce the judgment despite excessive litigation to predict the res judicata effect abroad. Keeping French plaintiffs in the Vivendi suit, which later proceeded to a jury verdict under which the class may receive up to a 9.3 billion dollar judgment,136 is not in

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131. FED. R. CIV. P. 23(b)(3).
132. Jasilli, supra note 23, at 132-33; see also WRIGHT ET AL., supra note 14, at § 4403 (citing Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979) (noting that res judicata "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation.").
134. See Buxbaum, supra note 5, at 31.
135. See Mevorah v. Wells Fargo Home Mortg. (In re Wells Fargo Home Mortg.), 571 F.3d 953, 958 (9th Cir. 2009) (citations and quotations omitted).
accord with the purposes of Rule 23 when the defendants have no guarantee that the judgment forecloses all future litigation in France. This is especially true because, as discussed supra, just a year after the *Vivendi* class certification decision the *Alstom* court excluded French plaintiffs on the grounds that opt-out class actions violate French public policy.

2. Dissatisfactory Solutions

Some solutions have been advocated to the problem of determining whether foreign courts would recognize a class action judgment, but they are dissatisfactory so long as they lead to foreign plaintiffs remaining in the class with no guarantee of finality. One commentator argues that courts should stop considering res judicata effects at the class certification stage.\textsuperscript{137} This argument posits that wherever the U.S. has a regulatory interest sufficient to justify extending subject matter jurisdiction, an exception to res judicata applies, and thus, the courts need not consider the potential res judicata effect in other countries.\textsuperscript{138} However, the solution to this problem is certainly not to stop considering res judicata altogether.\textsuperscript{139} Up until now, courts have always considered res judicata effects instead of avoiding the question.\textsuperscript{140} This is because res judicata is an extremely important consideration for both plaintiffs and defendants in class action litigation.\textsuperscript{141} If the district court simply declines to consider it, it does not go away.

To illustrate the importance of res judicata, one must only again consider the recent *Vivendi* jury verdict. After the court in *Vivendi* allowed the French class members to stay in the class,\textsuperscript{142} Vivendi lost a jury trial, in which the jury held that Vivendi was liable for fifty-seven misstatements.\textsuperscript{143} If the *Vivendi* court was wrong in its analysis of the

\textsuperscript{137} See generally Jasilli, supra note 23 (making this argument).

\textsuperscript{138} Jasilli, supra note 23, at 135.

\textsuperscript{139} See Bermann, supra note 23, at 95 (discussing how no courts faced with foreign classes have failed to consider the recognition of the judgment abroad).

\textsuperscript{140} Id.

\textsuperscript{141} Sturner, supra note 101; Buxbaum, supra note 5, at 31.

\textsuperscript{142} In re Vivendi Universal, S.A. Sec. Litig. (*Vivendi I*), 242 F.R.D. 76, 105 (S.D.N.Y. 2007).

\textsuperscript{143} The plaintiffs estimate that the verdict could be up to $9.3 billion dollars. See Associated Press, supra note 136.
res judicata effects of its judgment, Vivendi could still be subject to suits in France, despite the potentially multi-billion dollar verdict it now faces from the U.S. class suit. Absent class members may bring suit, arguing they are not bound by the judgment—although it seems hard to imagine absent foreign class members being dissatisfied with their share of a potentially multi-billion dollar verdict. Moreover, French plaintiffs seeking to enforce a judgment against Vivendi, a French company, may seek to enforce that judgment in France, unless they can find assets worth up to 9.3 billion dollars in the U.S. If a French court decides not to enforce the judgment, the Vivendi court is proven wrong, but the shareholders have to start from scratch in France. In either event, the litigation does not end, and focusing only on jurisdiction does not eliminate this problem.

One must also consider another set of hypothetical scenarios: what if Vivendi had (a) been found not liable, (b) managed to have the verdict reversed on appeal, or (c) managed to enter into a low value settlement? In all of these scenarios, plaintiffs are left dissatisfied and may consider suits elsewhere. Vivendi will have successfully defended itself in years of litigation, culminating in a jury verdict, a victory on appeal, or a favorable settlement. However, if absent members of the class are able to bring new actions in France or elsewhere, the litigation may continue. Failure to consider the res judicata effect of the judgment does nothing to counter this concern, and no courts have taken that route.²⁴⁴

Another proposed solution to this problem, that courts should adopt a presumption in favor of including foreign class members, should similarly be avoided.²⁴⁵ This presumption would be a shortcut that, while efficient in its implementation at the certification stage, does little to enhance the certainty for either plaintiffs or defendants. This presumption would deprive both plaintiffs and defendants of any reasoned decision as to whether the judgment will be entitled to res judicata effect abroad. Applying this presumption would mean that plaintiffs seeking to enforce a judgment abroad will not even have a reasoned decision on whether the judgment will be entitled to res judicata effect. Defendants resisting the suit may similarly face the

²⁴⁴ See Bermann, supra note 23.
²⁴⁵ Buschkin, supra note 23, at 1598-99 (arguing for a “presumption in favor of including foreign claimants in small-claim class action lawsuits” which could be rebutted by “presenting concrete evidence that the foreign claimants do, in fact, have adequate alternative remedies or could, from a practical standpoint, sue again in the courts of their home countries.”).
prospect of duplicative litigation with little chance to contest the inclusion of foreign class members. This approach is also insufficient because while the presumption is rebuttable, it impermissibly shifts the burden of proof from the plaintiffs to the defendants at the class certification stage, requiring the defendant seeking to rebut the presumption to offer "concrete evidence that the foreign claimants do, in fact, have adequate alternative remedies or could, from a practical standpoint, sue again in the courts of their home countries." The defendants in these cases should not be forced to rebut such a presumption and prove the content of foreign law because the burden of proof on a motion for class certification is not theirs.

Finally, courts and commentators have discussed the use of an opt-in mechanism instead of an opt-out mechanism. Using an opt-in class action would arguably enhance the likelihood of foreign courts recognizing class action judgments because the class action would only purport to bind plaintiffs who had affirmatively opted into the class, as opposed to absent parties who did not participate in the case in any way. This solution would make for less of a conflict with foreign law, and it is likely an opt-in class action judgment would be less contrary to public policy in many countries. Parties seeking to avoid completely excluding foreign class members or a denial of

146. See, e.g., Fener v. Operating Eng'rs Constr. Indus. & Miscellaneous Pension Fund (Local 66), 579 F.3d 401, 406 (5th Cir. 2009) ("A district court must conduct a rigorous analysis of the rule 23 prerequisites before certifying a class. . . . The party seeking certification bears the burden of proof.") (citation omitted); In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 316 n.14 (3d Cir. 2008) ("The burden of proof rests with the movant."); Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186 (9th Cir. 2001) ("As the party seeking class certification, Zinser bears the burden of demonstrating that she has met each of the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b).") (citation omitted).

147. See Buschkin, supra note 23, at 1598-99.

148. See, e.g., Zinser, 253 F.3d at 1186. Moreover, the burden of proof is high. See Stadtler, supra note 26, at 1595-96 (discussing the "rigorous analysis" required by Supreme Court precedent such as General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 160 (1982)).

certification may argue for an opt-in class.

One potential problem with this solution is that it may be impermissible under Rule 23 to have an opt-in class, as Rule 23 expressly provides for opt-out rights but does not provide for opt-in class actions.\(^{150}\) Indeed, the Second Circuit reversed a class certification decision where the district court had certified an opt-in class.\(^{151}\) That case concerned a fatal ski train crash in Austria, with victims from countries including the U.S., Germany, Austria, the Netherlands, and Japan.\(^{152}\) The defendants argued that a class action judgment would not be enforced abroad, but the plaintiffs countered by seeking certification of an opt-in class whereby all who opted into the class agreed not to litigate their claims in foreign fora.\(^{153}\) The Second Circuit reversed, holding that Rule 23 does not permit an opt-in class.\(^{154}\)

Although some cases previously resolved res judicata concerns by using an opt-in class instead of an opt-out class,\(^{155}\) the Second Circuit's recent rejection of an opt-in class\(^{156}\) casts significant doubt on the validity of this solution. In any event, this solution is not the focus of this Article, which advocates below for the wholesale exclusion of foreign plaintiffs. However, to the extent it would reduce res judicata concerns, an opt-in class action would be a better solution than either presumptively including all foreign class members or ignoring res judicata entirely.

3. A Temporary Problem That Will Eventually Be Solved by Foreign Countries

In fashioning a solution to the problem of determining the res judicata effect of a class action judgment under foreign law, one must also remember that foreign governments and courts will eventually decide for themselves whether a class action judgment is enforceable.

\(^{150}\) See In re U.S. Fin. Sec. Litig., 69 F.R.D. at 54. The court reserved the right to establish an opt-in mechanism if necessary.

\(^{151}\) Kern ex rel. Estate of Kern v. Siemens Corp., 393 F.3d 120, 126 (2d Cir. 2004).

\(^{152}\) Id. at 122.


\(^{154}\) Kern, 393 F.3d at 126-29.


\(^{156}\) Kern, 393 F.3d at 126.
The current uncertainty over whether many foreign countries would recognize an opt-out class action judgment reflects an ongoing debate in many countries as to the proper means of aggregating litigation.\textsuperscript{157} Professor George Bermann notes that "[a]round the globe, law reformers are trying to figure out a way to reap the advantages of collective or aggregate litigation without turning their backs on longstanding and fundamental tenets of their legal order."\textsuperscript{158} As discussed supra, the res judicata effect of a class action judgment has already been well-established with respect to many different countries, and that list will surely continue to grow as time goes on.

There are three simple ways that foreign countries could resolve these issues. The first, clearest way to resolve the controversy over future res judicata effect would be for foreign courts to directly consider the res judicata effect of an opt-out class action. For example, if plaintiffs tried to enforce a judgment from a U.S. class action in a foreign country, or defendants win or settle and then raise res judicata as a shield to prevent relitigation of claims abroad, the result would be a decision that clarifies the uncertainty. Once there are guiding decisions in many jurisdictions, U.S. district courts will no longer have to speculate.\textsuperscript{159}

The next two ways to resolve this issue are less certain, but provide valuable evidence of whether a foreign court would give res judicata effect to a class action judgment. Legal developments in other countries can give U.S. district courts the requisite certainty to include or exclude foreign class members when dealing with class certification motions.\textsuperscript{160} A foreign country might establish an

\textsuperscript{157} See In re Vivendi Universal, S.A. Sec. Litig. (Vivendi I), 242 F.R.D. 76, 101-02 (S.D.N.Y. 2007); see also Bermann, supra note 24, at 99.

\textsuperscript{158} Bermann, supra note 23, at 99.

\textsuperscript{159} See id. ("Have these enactments subsequently been the subject of judicial pronouncements as to their constitutionality - or as to how they would have to be construed in order to be considered constitutional?"); In re Vivendi Universal, S.A. Sec. Litig. (Vivendi II), No. 02 Civ. 5571 (RJH) (HBP), 2009 U.S. Dist. LEXIS 31198, at *29 n.7 (S.D.N.Y. May 31, 2009).

\textsuperscript{160} See, e.g., Vivendi II, 2009 U.S. Dist. LEXIS 31198, at *15-16 (considering legal developments); In re Alstom SA Sec. Litig., 253 F.R.D. 266, 287 (S.D.N.Y. 2008) (considering recent legal developments in France); Vivendi I, 242 F.R.D. at 104-05; see Bermann, supra note 23, at 98-99 (discussing relevant considerations including the group litigation models of other countries). The legislative history of the group litigation scheme may also be relevant. See id. at 99.
aggregate litigation regime (a) similar to the U.S. opt-out regime, which would militate in favor of that country recognizing U.S. class action judgments, or (b) different from the U.S. regime (for instance, an opt-in regime), which would cut against that country recognizing U.S. class action judgments. However, this type of legal development is not dispositive. First, a foreign court must test the constitutionality of its class action regime, which is why judicial decisions either recognizing or declining to recognize class action judgments are crucial. Additionally, a country with an opt-in class action regime could still recognize U.S. opt-out class action judgments: for example, the U.K. has an opt-in class action regime, but both the Alstom and Vivendi courts agreed that British courts would recognize an opt-out class action judgment. Therefore, while legal developments abroad will help, the clearest way to establish the res judicata effect of an opt-out class action judgment is for the foreign courts to decide the issue.

III. Courts Should Exclude Foreign Class Members When the Res Judicata Effect in the Foreign Country Is Unclear

This Section attempts to answer the question of what district courts should do until foreign countries conclusively figure out these questions for themselves. Despite the demonstrated difficulties associated with such an inquiry, courts should continue to consider the res judicata effect of class action judgments in foreign countries as part of the superiority inquiry under Rule 23(b)(3). A significant risk of the judgment not being recognized abroad should be, as it has been for over thirty years, enough to exclude foreign plaintiffs from a class. Companies should not be subjected to costly litigation in the U.S. without certainty that class members are barred from relitigation, and despite the fact that defendants raise the res judicata concern, it

162. See Mulheron, supra note 27, at 427.
163. Vivendi I, 242 F.R.D. at 103; Alstom, 253 F.R.D. at 287-90. Note, however, that this result conflicts with at least one earlier case involving a British defendant. See, e.g., CL-Alexanders Laing & Cruickshank v. Goldfeld, 127 F.R.D. 454, 459-60 (S.D.N.Y. 1989) (denying certification because, inter alia, certifying class would require an opt-in mechanism to be enforceable in the U.K.). The conflicting treatment of British class members from Goldfeld to Vivendi/Alstom further illustrates that the res judicata effect of a judgment abroad evolves over time.
164. See Jasilli, supra note 23, at 133 (citing KEVIN CLERMONT, PRINCIPLES OF CIVIL PROCEDURE 302 (2d ed. 2009) (“[J]ustice demands that there be an end to litigation... every legal system, from its beginnings, generates a common core of res judicata law to make decisions final.”)).
is also of value to plaintiffs seeking to execute a judgment against a foreign company, especially one without assets in the U.S. However, as the cases discussed above show, it is nearly impossible to determine in advance whether a foreign court will recognize a class action judgment, and judicial efforts to balance the risk of nonrecognition with other factors supporting certification have done nothing to diminish the risk of nonrecognition.

As I argue below, courts should exclude foreign class members in cases where the res judicata effect of a class action judgment in the foreign country is unclear. Moreover, even where it appears, after a "rigorous analysis," that a class action judgment would be given res judicata effect in a foreign country, courts may exclude foreign class members because of the emerging availability of methods of mass claim settling in Europe. The risk of nonrecognition abroad, coupled with the growing mechanisms for mass claim settlement in Europe, both support a finding that an opt-out class action is not "superior to other available methods of fairly and efficiently adjudicating the controversy."  

A. Excluding Foreign Class Members: Application to Three Categories of Cases

Potential foreign class members should be excluded whenever the situation in Vivendi repeats itself: dueling, voluminous expert declarations on the effect of a class action judgment in another legal system, with no clear or uncontradicted answer. If the court determines that there is uncertainty as to whether the class action judgment would be recognized in the countries where foreign putative class members reside, the court should exclude them from the class.

Importantly, plaintiffs will have the opportunity to contest the defendant's evidence as to uncertainty. The court may also choose to allow the foreign claimants to remain in the class if, after the required

165. In re Turkcell Iletisim Hizmetler, A.S. Sec. Litig., 209 F.R.D. 353, 360 (S.D.N.Y. 2002) (noting how defendants argued there were no assets in the U.S.); Buxbaum, supra note 5, at 31 ("[T]he defendants in multinational actions generally have assets in the United States sufficient to satisfy any judgment there.").

166. See, e.g., Vivendi I, 242 F.R.D. at 83; Stadtler, supra note 26, at 1595-96 (discussing this requirement).

167. See FED. R. CIV. P. 23(b)(3).
rigorous analysis, it determines that a foreign court actually would enforce the judgment, i.e., that there is no dispute as to the res judicata effect. Defendants seeking to certify the class for settlement purposes may also fail to raise the res judicata concerns in the interest of settling the case. They might consider potential relitigation abroad as yet another factor that would go into the settlement value of the case.

Applying this rule to the three categories of cases described supra, the following would occur. In the Category One, Uncontradicted Cases, the foreign class members would be excluded if the defendants presented uncontradicted evidence that the foreign judgment would not be enforced in those countries. Thus, the result would be the same as it currently is under Bersch.

In the “clear” cases in Category Two, the results should also stay the same as under the current Vivendi approach. Consider England as an example. Defendants seeking to exclude foreign class members might argue that British courts would not recognize a class action judgment, but at least recently, U.S. courts have agreed that British courts would recognize an opt-out class action judgment. In these circumstances, defendants will likely be unable to convince the court that it is unclear whether a British court would recognize a class action judgment. Another example of when courts should allow the foreign class members to stay in the class, despite the rule for which I advocate, is if the foreign class members are from Canada. As discussed supra, there is no dispute as to whether Canadian courts would recognize class action judgments. In contrast, with respect to countries like Germany and Austria, it is relatively clear that courts in those countries would not enforce an opt-out class action judgment. Plaintiffs from those countries should still be excluded from the class.

This rule would bring the most significant change to the “unclear” cases in Category Three, such as Turkcell, Lloyd’s, Vivendi, and Alstom. Rather than examining a “veritable mountain” of expert evidence and casting its own prediction, the court would note that it is unclear whether the judgment would be enforced in the class member’s home countries. Courts would then exclude foreign class members on that basis instead of attempting to predict the likelihood of recognition abroad. Additionally, plaintiffs would no longer be

169. Sturner, supra note 101 (discussing Germany); Vivendi I, 242 F.R.D. at 104-05 (discussing Germany and Austria).
able to rely on a Turkcell or Lloyd's type argument, that perhaps the courts would "look to the merits" of the judgment when there is a serious dispute as to res judicata effect. Nor could courts note the uncertainty, but resolve the issue in favor of the plaintiffs if certification is otherwise efficient, as in Berger. Rather, the foreign class members would be out of the class and the uncertainty would be eliminated.

B. This Solution Is Within the District Court's Discretion and Efficiently Ensures That Relitigation Concerns Disappear

Excluding foreign class members would be the district court's way of erring on the side of caution where it is unclear whether its judgment would have any res judicata effect in a foreign country. The district court is justified in excluding the foreign class members when there is a real risk of nonrecognition for many reasons.

First, excluding foreign class members is well within the discretion of district judges. "A district court has broad discretion in defining the class" and "is not bound by the class definition proposed in the complaint." Over the years, courts have excluded foreign class members many times, for various reasons. As discussed supra, the risk of nonrecognition abroad has justified the exclusion of plaintiffs for the last thirty-five years. Both the Second Circuit in Bersch and district courts have excluded foreign class members or denied certification based on the risk of nonrecognition abroad. As discussed supra, representative district court cases considering this factor include Vivendi, Alstom, Ansari, and Goldfeld.

170. See, e.g., In re Parmalat Sec. Litig., No. 04 Civ. 0030, Master Docket 04 MD 1653 (LAK), 2008 U.S. Dist. LEXIS 64296, at *11 (S.D.N.Y. Aug. 21, 2008) (citing Boucher v. Syracuse Univ., 164 F.3d 113, 118 (2d Cir. 1999); FED. R. CIV. P. 23(c)(4) (discretion to certify particular issues); FED. R. CIV. P. 23(c)(5) (discretion to certify subclasses).


172. To the contrary, sometimes courts keep foreigners in the class because the defendants fail to bring forth sufficient evidence on foreign law. See, e.g., Marsden ex rel. v. Select Med. Corp., 246 F.R.D. 480, 486, 490 n.7 (E.D. Pa. 2007); Jordan v. Global Natural Res., Inc., 102 F.R.D. 45, 52 (S.D. Oh. 1984) (citation omitted). Based on cases like Vivendi and Alstom, one could argue these cases would have turned out differently had the defendants presented stronger evidence.
Courts have also exercised broad power to define the class, even excluding foreign class members for manageability reasons. For example, in In re Daimler Chrysler AG Securities Litigation, the court excluded all foreign class members based on practical difficulties associated with having a class of foreign investors and difficulties in calculating damages to foreign plaintiffs. In In re Parmalat Securities Litigation, the court excluded foreign plaintiffs from the class in part because the court had already determined that there was no subject matter jurisdiction over the foreign plaintiffs’ claims and because of the possibility that the foreign courts would not give res judicata effect to the judgment. Once the class was defined not to include foreign plaintiffs, the court had no trouble finding that the superiority requirement was met.

Once district courts decide to exclude foreign class members, their decisions to do so should be upheld on appeal under the abuse of discretion standard of review. The abuse of discretion standard is a deferential standard under which an abuse of discretion occurs when the district court, in making a discretionary ruling, relies upon an improper factor, omits consideration of a factor entitled to substantial weight, or mulls the correct mix of factors but makes a clear error of judgment in assaying them.

Considering the problems associated with keeping foreign plaintiffs in a class, discussed above, the decision to exclude foreign class members should easily survive appeal. Excluding foreign plaintiffs is crucially tied to the superiority inquiry and helps ensure the efficient adjudication of the dispute by preventing potential plaintiffs from having an opportunity to relitigate their claims abroad. As has been shown above, this has long been considered an important factor in class certification decisions, and courts have attached dispositive weight to it. Excluding foreign plaintiffs from the class

175. Id. at *40. Another case along those lines is In re Scor Holding (Switz.) AG Litig., 537 F. Supp. 2d 556, 579 (S.D.N.Y. 2008), in which the court easily found the superiority requirement met once the foreign plaintiffs were excluded from the class on the grounds that there was no subject matter jurisdiction over their claims.
176. See Parra v. Basha’s, Inc., 536 F.3d 975, 977 (9th Cir. 2008).
178. Parra, 536 F.3d at 977-78.
also helps the court avoid other problems associated with their inclusion in the class. While this Article focuses on the risk of the judgment not being recognized, courts dealing with foreign classes often grapple with difficult questions of subject matter jurisdiction, forum non conveniens, lead plaintiff status, notice, and other manageability concerns.\textsuperscript{179}

The foregoing paragraphs have shown that district courts \textit{can} exclude foreign class members when the res judicata effect of the judgment is unclear. Not only can district courts exclude foreign class members, but they \textit{should} exclude them. In these circumstances, excluding foreign class members furthers the purpose of Rule 23. District judges should be guided by the underlying purposes of Rule 23 in considering whether a class action is superior to other methods of adjudicating the lawsuit. That is, they should “focus on the efficiency and economy elements of the class action so that cases allowed under subdivision (b)(3) are those that can be adjudicated most profitably on a representative basis.”\textsuperscript{180} Moreover,

Rule 23(b)(3)’s predominance and superiority requirements were added to cover cases in which a class action would achieve economies of time, effort, and expense, and promote \ldots uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.\textsuperscript{181}

Against this backdrop, whatever method courts use to determine superiority should not be capable of leading to the results in \textit{Vivendi} and \textit{Alstom}. In those cases, the parties spent considerable resources arguing whether the legal systems of many different countries would recognize a judgment in a Rule 23(b)(3) opt-out class action, but with respect to France, they were left with little more than inconsistent guesses. Both efficiency and fairness – in the sense of treating like situations alike – counsel in favor of excluding foreign class members.

\textsuperscript{179} See, e.g., Buettgen v. Harless, 263 F.R.D. 378, 382-83 (N.D. Tex. 2009); Tracinda Corp. v. DaimlerChrysler AG (\textit{In re DaimlerChrysler AG Sec. Litig.}), 216 F.R.D. 291, 301 (D. Del. 2003); Harbour & Northrip, \textit{supra} note 27, at F-23 to -24; Bermann, \textit{supra} note 23, at 100.

\textsuperscript{180} \textit{Wright et al.}, \textit{supra} note 14, at § 1780; see also Mevorah v. Wells Fargo Home Mortg. (\textit{In re Wells Fargo Home Mortg.}), 571 F.3d 953, 958 (9th Cir. 2009) (“A principal purpose behind Rule 23 class actions is to promote efficiency and economy of litigation.”) (citation and quotation omitted).

\textsuperscript{181} \textit{Mevorah}, 571 F.3d at 958 (citations and quotations omitted).
when there is doubt as to the res judicata effect of a foreign judgment. Why should Alstom be treated differently than Vivendi, and why should other French companies not know what to expect?

My solution, unlike the current approach, offers the advantage of eliminating the costly litigation that the superiority inquiry currently generates and ensuring that like companies – and like absent foreign class members – are treated alike by stopping district courts from having to speculate on the content and import of unclear foreign law. Eliminating the uncertainty and speculation will ensure a more efficient resolution of the case, while consistently erring on the side of caution will ensure that relitigation does not occur. Accordingly, district courts should exclude foreign class members where it is unclear whether their home countries would enforce the judgment.

C. Excluding European Class Members Is Further Justified Because of the Developing Aggregate Litigation and Mass Claim Settlement Procedures in Europe

This Section has already established both that district courts have discretion to exclude foreign class members and that doing so would further the purposes of Rule 23 because it would efficiently lessen the risk of inconsistent treatment. This Subsection argues that particularly when district courts are faced with European class members, exclusion of foreign class members is further justified because there are now effective means of settling mass claims in Europe. This Article will not exhaustively discuss these methods, but will highlight a recent mass settlement under the Dutch Collective Settlement of Mass Damages Act of 2005 (Dutch Collective Settlement Act) as an example of how this could work in practice.

1. Overview of the Dutch Collective Settlement Act

The Dutch Collective Settlement Act uses a “design for collective settlement that can best be described as a composite of a voluntary settlement contract sealed with a ‘judicial trust mark’ attached to the contract.” The Act “permits mass settlement of claims but does not permit class-action litigation.” Unlike U.S. class

actions, the Dutch Collective Settlement Act exists only to help promote settlement, not litigation of claims.\(^4\)

Settling claims under the Collective Settlement Act works as follows. The first step in settling mass claims under the Act occurs when the allegedly liable parties reach an agreement on settlement terms with a “foundation/association acting in the aligned common interest of individuals involved (and injured).”\(^5\) Next, the parties “jointly petition the Amsterdam Court of Appeals to make the settlement binding on all persons to whom damage was caused.”\(^6\) While these persons (like absent class members in Rule 23(b)(3) classes) are not summoned, they are given notice of the proceeding.\(^7\) The Court of Appeals then hears arguments on the merits of the settlement and can amend the settlement if necessary.\(^8\) In reviewing the settlement, the court considers “several points concerning the substantive and procedural fairness and efficiency of the settlement (e.g., amount of compensation, adequate representation of interested parties).”\(^9\) Once approved, the settlement is binding “upon all persons to whom damage was caused and that are accommodated by the settlement.”\(^10\) Injured persons who do not agree with the settlement may opt-out, and are not bound by the settlement.\(^11\)

This significant development in Europe should have a major effect on U.S. class action litigation when the cases include European plaintiffs. When considering whether a class action is superior to other forms of adjudicating the dispute, courts may decide against certification or exclude foreign plaintiffs if there are other methods of adjudicating suits abroad that help to avoid the problems associated with keeping such suits in the U.S. It would not be difficult to justify declining to certify the class or excluding foreign class members when

\(\text{Class Actions Symposium: Transnational Litigation and Global Securities Class-Action Lawsuits, 2009 Wis. L. Rev. 465, 485 (2009).}\)

\(^ {184}\) See id.

\(^ {185}\) Van Boom, supra note 182, at 179.

\(^ {186}\) Id.

\(^ {187}\) Id.

\(^ {188}\) Id.

\(^ {189}\) Id.

\(^ {190}\) Id.

\(^ {191}\) Id. at 184 (“[T]he only remedy available to injured individuals is to opt out of the settlement if they feel it is unfair.”).
the foreign class members have a sufficient remedy in Europe. The Dutch Collective Settlement Act may also be a harbinger of things to come in Europe – it shows that European countries, traditionally reluctant to adopt opt-out group litigation systems, may be moving in that direction.

Adjudicating claims via the Dutch Collective Settlement Act is superior to a class action lawsuit because the Dutch Collective Settlement Act should produce binding settlements of claims without the attendant res judicata concerns that result from settlements or judgments in the U.S. For example, while *Vivendi* and *Alstom* show that there are significant doubts about whether a French court would recognize an opt-out class action judgment, countries within the European Union are required to recognize the judgments of other European Union countries as long as the party seeking enforcement of the judgment complies with basic requirements of the European Union's Brussels I Regulation. Thus, a settlement under the Dutch Collective Settlement Act should be binding in France and elsewhere in Europe. Had Vivendi or Alstom settled with plaintiffs under the Dutch Collective Settlement Act, the settlement could have been binding on all European class members.

The Dutch Collective Settlement Act has already begun to have an effect on U.S. class action litigation. For instance, in *In re Royal Dutch/Shell Transport Securities Litigation*, the district court initially held that there was subject matter jurisdiction over securities fraud claims against a Dutch company based on shares purchased on both overseas and domestic markets. After the court held that there was


subject matter jurisdiction, Shell settled all of its foreign claims under the Dutch Collective Settlement Act, but made the settlement conditional upon the district court dismissing the claims of the non-U.S. purchasers. The defendant moved again to dismiss the claims of the foreign purchasers for lack of subject matter jurisdiction, and was successful because of the case's lack of connection to the U.S.

Significantly, "[t]he court buttressed its decision by noting that the non-U.S. purchasers can seek recovery through the settlement agreement entered into before the Amsterdam Court of Appeals or through procedures available within their respective jurisdictions." Future courts assessing the superiority of a U.S. class action with a global class should take careful note of the availability of the Dutch Settlement Act to potentially resolve the dispute with no risk of nonrecognition.

2. Resolving European Claims Through European Remedies Is More Efficient for U.S. Courts, Satisfies Both Plaintiffs and Defendants, and Alleviates the Res Judicata and "Judicial Imperialism" Concerns Raised by Cases Like Vivendi

The Royal Dutch/Shell case described supra, although it involved a denial of subject matter jurisdiction, offers courts another way of avoiding the problems plaguing district courts in transnational class actions. As Europe's group litigation procedures develop, it becomes less necessary to use scarce American judicial resources on costly class action litigation in the U.S. involving foreign classes.

U.S. district courts should help conserve the "precious resources of U.S. courts" by recognizing that there are alternative ways to resolve these lawsuits, in Europe, that do not have the attendant risk of nonrecognition associated with U.S. class actions. As discussed above, other European courts would recognize a binding settlement achieved under the Dutch Collective Settlement Act. Thus, the company that chooses to settle a dispute under the Dutch Collective Settlement Act at least has assurance that the settlement will be

binding on all the injured parties whose claims it settles. In contrast, as discussed supra Section II, the company settling a case or litigating it to judgment as a Rule 23(b)(3) class action often has little assurance that foreign courts will recognize the judgment.

Parties seeking to resolve disputes may also settle their claims under the Dutch Collective Settlement Act more efficiently than if these claims were resolved in class action litigation because a settlement under the Dutch Collective Settlement Act is like a contract with an opt-out right and court approval. Under the Collective Settlement Act, the parties need not even have a pending lawsuit in order to secure a binding settlement. In contrast, consider the Vivendi litigation, where between the Vivendi certification decision and the Vivendi denial of reconsideration, and the intervening Alstom decision, the parties fiercely litigated the question of future res judicata effect of the eventual Vivendi judgment. If courts exclude foreign class members because of the possibility of these foreign class members settling their claims under the Dutch Collective Settlement Act, the inefficient situation described above is avoided. Not only would U.S. judicial resources be preserved, but the resources of the parties would also be saved and the parties might actually be satisfied with the result of the litigation. For example, in the Dutch Shell settlement, foreign class members received nearly a half a billion dollars, including nearly fifty million dollars in attorney’s fees.

The Dutch Collective Settlement Act may not be a panacea for the perceived ills of transnational class action litigation, nor will it

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200. See Brussels I Regulation, supra note 192, at art. 41 (“The judgment shall be declared enforceable immediately on completion of the formalities in Article 53 without any review under Articles 34 and 35. The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.”); see also id. at arts. 34-35, 53-54.

201. Van Boom, supra note 182, at 179.


203. Goldhaber, supra note 192.

apply in all cases. It is important to note that it is the parties' burden to raise foreign law issues. Thus, if defendants choose to settle or litigate the class action in the U.S., they are free to do so without objecting that there are other available remedies abroad. Nor are defendants obligated to do as the defendants in the Royal/Dutch Shell case did and limit the scope of the litigation in the U.S. by settling their claims abroad. However, based on the results of the Dutch Shell settlement, defense counsel would be well advised to argue that the growing number of effective procedures in the law of European countries should preclude certification. Even if the court certifies the class, defendants may still seek to settle with non-U.S. plaintiffs in Europe.

At the same time, merely recognizing that foreign methods of adjudication may be superior does not leave foreign plaintiffs without remedies in the U.S. in all cases. In accordance with the rule for which I argued above, if plaintiffs can show that a Rule 23(b)(3) class action judgment would be recognized in the foreign country, the district court may certify the class and allow foreigners to remain in the class. However, in light of the Amsterdam Court of Appeals' recent approval of the Dutch Shell settlement, it is hard to justify keeping Dutch claimants in both the Vivendi and Alstom lawsuits when there was an alternative remedy for their claims and possibly other European claims – a settlement under the Dutch Collective Settlement Act that would be binding throughout Europe. Additionally, since the Dutch court in the Dutch Shell litigation asserted jurisdiction over all foreign claims, not just the Dutch claims, this expansive jurisdiction may offer settlement possibilities for litigants from many countries.

If courts deny certification because of the procedures available abroad, they should consider that the Dutch are not the only ones with expanding group litigation possibilities. For example, the exclusion of German and Austrian plaintiffs in Vivendi and Alstom seems all the more justified in light of the emerging procedures for

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205. See Fed. R. Civ. P. 44.1 (requiring notice of intent to raise foreign law issues); Sofie Geeroms, Foreign Law in Civil Litigation 229 (2004) (discussing how it is the parties' burden to raise issues of foreign law).

206. See generally Choi & Silberman, supra note 183 (discussing group litigation mechanisms in Europe).

207. See Goldhaber, supra note 192.
resolving mass claims in those countries. Notably, Germany and Austria have model case, or test case, procedures whereby one plaintiff may sue for "false, misleading, or omitted public capital-markets information." In Germany, "the model case proceeds and then all individual cases are decided on the basis of the model-case decision." This line of reasoning may even induce courts to exclude British plaintiffs because of group litigation orders, which are similar to model case procedures, if the court finds such an action superior to a class action in the U.S.

Finally, courts should exclude European plaintiffs from the class when European remedies are available because doing so would reduce some of the conflict between jurisdictions resulting from the export of U.S. substantive and procedural law. Indeed the U.K., France, and Australia recently submitted amicus briefs in the U.S. Supreme Court, arguing against jurisdiction over foreign-cubed claims, arguing that "if the [defendant] loses, U.S. courts will interfere with the policy choices they have made in regulating securities." The U.K. specifically argued that "claims against companies whose shares were bought in the U.K. should be heard in the U.K." In contrast, European academics have looked favorably on the outcome of the Dutch Shell litigation, noting, "It's appropriate if European courts solve European problems" and "European class actions in U.S. courts might be a nice source of business for American law firms . . . but there is something ugly about judicial imperialism." Accordingly, excluding foreign class members stops plaintiffs from

208. See Choi & Silberman, supra note 183, at 486-88 (discussing Germany and other countries); Harbour & Northrip, supra note 27, at F-31.
209. Choi & Silberman, supra note 183, at 487; see generally Mulheron, supra note 27, at 418-19.
210. Choi & Silberman, supra note 183, at 487.
211. See Buxbaum, supra note 5, at 62-63 (discussing this problem in the subject matter jurisdiction context).
213. Seib & Spence, supra note 1.
214. Goldhaber, supra note 192.
avoiding their country's distinctive regulatory and procedural schemes in order to sue under what plaintiffs consider to be more favorable law in the U.S. courts. The remedies for settling or litigating mass claims in other countries should be highly relevant to the superiority inquiry. Where these foreign remedies are present, they are the superior means by which shareholders should vindicate their rights.

D. Responses to Morrison and Possible Counterarguments

This Subsection first briefly discusses the implications of the U.S. Supreme Court's decision in *Morrison v. National Australian Bank Ltd.* It next briefly addresses and dispels some possible counter-arguments to my proposed solution, including the argument that remedies abroad are inadequate and the argument that excluding foreign class members might lead to an under-inclusive plaintiff class. Ultimately, none of these arguments offer a persuasive justification to leave foreigners in the class when it is unclear that the judgment will have res judicata effect in their home countries.

1. Morrison's Impact

The recent decision in *Morrison v. National Australian Bank Ltd.* necessitates some brief discussion because it drastically changed the subject matter jurisdiction analysis which had allowed some foreign-cubed securities fraud cases (such as *Vivendi* and *Alstom*, discussed supra) to survive jurisdictional challenges. *Morrison* considered the extraterritorial reach of the U.S. securities laws. In *Morrison*, the Court held that "Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the U.S." The Court criticized and repudiated the Second Circuit's long-standing approach of looking at the conduct and/or effects that occurred within the U.S. in order to determine

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216. *Id.*
217. *Id.* at 2883.
218. *Id.* at 2888.
whether there was subject matter jurisdiction. Justice Scalia's opinion prescribes a bright-line approach that will keep many transnational class actions out of the U.S. courts. The Court's holding eliminates the so-called foreign-cubed class actions because by definition, a foreign-cubed claim involves securities listed on a foreign exchange, while the Supreme Court's new test requires the security be listed in the U.S. and the subject of a transaction in the U.S. Under this rule, there would no longer be a cause of action for claims like many of those in *Vivendi* and *Alstom*. Nor would U.S. securities laws apply to foreign-squared cases (cases with a domestic plaintiff who purchased stock from a foreign issuer on a foreign-exchange).

*Morrison* will stop the flow of foreign-cubed and foreign-squared securities fraud cases, but it will by no means put a halt to transnational litigation and the accompanying risk of nonrecognition abroad. As Professor Wasserman notes, "even after *Morrison*, class counsel are likely to keep filing transnational class actions and defense counsel are likely to keep opposing them." Not all transnational class actions involve foreign-cubed or foreign-squared claims, and *Morrison* did not modify the approach courts have used for years in determining whether foreign courts would recognize the judgment in cases involving multinational classes where the defense is unable to successfully challenge subject matter jurisdiction. In the post-*Morrison* era, courts will still have to grapple with difficult questions of foreign law when determining whether the foreign courts would recognize an opt-out class action judgment. My proposed solutions - excluding foreign class members in cases where the res judicata effect of a class action judgment in the foreign country is unclear, and considering the adequate remedies abroad as a further justification to exclude foreign class members - should serve to shift more of this transnational litigation out of U.S. courts. In addition, like the *Morrison* rule, my proposed solution will be predictable and efficient in implementation.

219. *Id.* at 2877-81.
220. *Id.* at 2886 (discussing this "transactional test").
222. Wasserman, *supra* note 3, at 2. Professor Wasserman also argues that *Morrison*’s impact may be of limited duration because Congress may legislatively overrule it. *Id.* at 2 n.2.
2. The Perceived Lack of Alternative Remedies Abroad

One argument against excluding foreign class members from Rule 23(b)(3) opt-out class actions is that there are not effective remedies for the redress of mass claims in other countries.223 Thus, the argument posits that foreign plaintiffs do not have access to any procedural or substantive mechanisms for litigating these claims abroad, and should not be excluded from U.S. courts on the basis of hypothetical concerns about res judicata effect.224 Based on this argument, not only would the foreign plaintiffs not have a chance to seek redress abroad, but they would also not have a chance to test the res judicata effect of a U.S. judgment.225 This argument is one of the main justifications for one commentator’s argument that there should be a presumption in favor of including foreign class members in U.S. class action lawsuits.226

A full and exhaustive response to this concern is beyond the scope of this Article. However, the conception of foreign plaintiffs, particularly European ones, as not having access to effective group litigation procedures may itself be overstated. Because many countries have implemented group litigation procedures in varying forms, European plaintiffs, if dissatisfied with the result of the American litigation, may now have methods of bringing suit elsewhere and testing the U.S. judgment or otherwise seeking redress in foreign countries.227 Additionally, the Dutch Collective Settlement Act, discussed supra, is another means by which foreign plaintiffs could efficiently seek redress for their harms.228 Thus, courts should not lightly assume foreign plaintiffs have no access to means of either testing the res judicata effect of the opt-out class action or achieving

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223. Buschkin, supra note 23, at 1596-99; see also In re U.S. Fin. Sec. Litig., 69 F.R.D. at 48-49 (noting that American form of discovery is unknown under foreign law and that “[s]uccessful prosecution of this complex action, without discovery, would be impossible.”).


226. See Buschkin, supra note 23, at 1596-99.

227. See, e.g., Harbour & Northrip, supra note 27, at F-29 to -32 (discussing recent increase of group litigation and class action-type procedures in Europe).

228. See discussion supra Section III.C.
redress in their own countries.  

3. Under-Inclusive Plaintiff Classes

Another argument against excluding foreign class members, grounded in the efficiency concerns considered by Rule 23(b)(3), is that excluding foreign class members would lead to an “under-inclusive plaintiff class.” These under-inclusive plaintiff classes arguably minimize the regulatory effect of the class action, result in less compensation to plaintiffs, and leave defendants facing unresolved claims that might be brought elsewhere.

This is, of course, a valid set of concerns that might justify including more plaintiffs in a class. As to the first concern, nobody would doubt that a larger class could generate more deterrent effect. Similarly, it is uncontroversial that larger classes lead to more compensation. Finally, the most inclusive class stops all future litigation from occurring in all fora. This Article merely argues that these values should not be pursued at the risk of relitigation because other important values are at stake. For instance, with respect to larger classes generating more deterrence, winning a case against a larger class may also require more resources, but does not necessarily mean the litigation ends if those plaintiffs can sue again in a foreign country. The preclusive effect of the lawsuit is still a crucial component of class actions and is not to be lightly disregarded for the purposes of efficiency, deterrence, or compensation. Finally, with respect to giving defendants closure (an end to litigation), the defendants opposing the inclusion of foreign plaintiffs seem to accept a lack of closure in exchange for avoiding relitigation. Thus, preventing defendants from facing unresolved claims abroad does not justify keeping foreign class members in the class with a risk of nonrecognition.

IV. Conclusion

As litigation increasingly becomes transnational, courts must be
sensitive to whether their judgments will be enforced abroad. Unfortunately, in some cases, it is incredibly difficult to predict whether a judgment will be recognized abroad. The results reached in class certification decisions, where courts have considered whether foreign courts would recognize a judgment, have failed to satisfy the purposes of Rule 23 because they have inefficiently exposed the parties to the risk of the judgment not being recognized.

To the contrary, excluding foreign class members where it is unclear that foreign courts would recognize the judgment is a superior solution that is both within the discretion of the district court and consistent with the purpose of Rule 23. The case is even stronger for excluding foreign class members when they are European. A growing body of European law, particularly the Dutch Collective Settlement Act, gives foreign plaintiffs adequate remedies abroad and exposes neither party to the threat of future relitigation. Keeping foreign class members in the class is not a superior method of adjudication when there are effective remedies for foreigners abroad. When the superior means of adjudication is abroad, plaintiffs should seek redress abroad, not in a U.S. class action.
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