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Solving the Puzzle of Transnational Class Actions

KEVIN M. CLERMONT*

Zachary Clopton's article¹ does an excellent job of sketching this puzzle: how should a U.S. class action treat proposed foreign class members in a circumstance where any resulting judgment will likely not bind those absentees abroad? Two approaches occupy opposite ends of the spectrum of ways to treat the foreign absentees: the exclusionary and the inclusionary approaches. He capably surveys the case law and the commentary, which generally lean toward excluding those absentees from the class.² He then properly stresses both the fairly low risk of relitigation³ and also the values of deterrence and compensation that the exclusionary approach sacrifices.⁴ Finally, he proposes an inclusive solution to retrieve those values.⁵ That final step is where I believe his fine article goes somewhat astray.

The puzzle appears most starkly in a Federal Rule 23(b)(3) class action for antitrust or securities damages from a foreign defendant. Given a favorable territorial reach of substantive law and an otherwise proper class action, the proposed class might include, in addition to American plaintiffs, some foreigners who dealt with the foreign defendant outside the United States.⁶ A class recovery normally covers the whole class with finality, while a loss by the class binds all members of the certified class. If a class member were to sue again, *res judicata* should ensure these results. But if the class member subsequently sues in a foreign court, these results would depend on the foreign court recognizing the American class judgment and applying American notions of *res judicata*. Unfortunately, most courts of the world do not so preclude a passive class member who has not accepted a payout.⁷ The foreign court usually refuses recognition either on the ground of public policy or on the ground that the U.S. court lacked the personal jurisdiction required to bind a passive class member. The foreigners can thus threaten to sue again abroad and extort a sizable nuisance, individual, or group recovery there, either by settlement or by judgment.

* Ziff Professor of Law, Cornell University. I thank Zach Clopton for his reactions and insights.

1. Zachary D. Clopton, *Transnational Class Actions in the Shadow of Preclusion*, 90 IND. L.J. 1387 (2015). His article's marvelous country-by-country appendix appears online at <http://ssrn.com/abstract=2609339>.

2. *Id.* at 1392–400.

3. *Id.* at 1400–06.

4. *Id.* at 1409–10.

5. *Id.* at 1414–20.

6. The puzzle is usually stated in terms that use “foreigner.” Clopton usefully observes that the real concern is any passive class member who could effectively bring the same cause of action in a foreign court. *See id.* at 1403–04, 1415 n.159.

7. *See, e.g.*, Richard Fentiman, *Recognition, Enforcement and Collective Judgments*, in CROSS-BORDER CLASS ACTIONS: THE EUROPEAN WAY 85 (Arnaud Nuyts & Nikitas E. Hatzimihail eds., 2014); Andrea Pinna, *Recognition and Res Judicata of US Class Action Judgments in European Legal Systems*, 1 ERASMUS L. REV. 31 (2008).

USUAL SOLUTION

In 2003, I consulted on this puzzle in an antitrust class action. Strangely, the puzzle had rarely blipped on anyone's radar screen.⁸ So, on the basis of a few cases⁹ and oblique scholarly comment,¹⁰ I concluded that even if the U.S. class-action court were willing to certify a class that included foreign claimants, the risk of relitigation should render defendants unwilling to settle for big bucks. In 2014, I advised in a securities class action presenting this puzzle. In the intervening decade between these forays into research, two developments had transpired: scholars had written a lot more on the now-discovered puzzle,¹¹ and foreign countries had

8. For explanation of why the puzzle had not come to much attention, see Clopton, *supra* note 1, at 1392 n.18, 1398 n.62.

9. *See, e.g.*, *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 996 (2d Cir. 1975) (excluding foreigners from class action, after quoting the district judge: "if defendants prevail against a class they are entitled to a victory no less broad than a defeat would have been"); *In re Lloyd's Am. Trust Fund Litig.*, No. 96 CIV. 1262 (RWS), 1998 WL 50211, at *15 n.7 (S.D.N.Y. Feb. 6, 1998) (certifying class with foreigners, while conceding that "Citibank provides as evidence the declarations 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."); *In re U.S. Fin. Sec. Litig.*, 69 F.R.D. 24, 48–54 (S.D. Cal. 1975) (certifying class with foreigners, while conceding that many expert affidavits, including affidavits treating France, West Germany, Luxembourg, Norway, Great Britain, Belgium, Switzerland, and Italy, said that a class-action judgment, without an opt-in procedure, would have no res judicata effect abroad).

10. *See, e.g.*, John C.L. Dixon, *The Res Judicata Effect in England of a US Class Action Settlement*, 46 INT'L & COMP. L.Q. 134, 150 (1997) (predicting rosily that a U.S. class action judgment has a "good chance of being upheld in England" as long as the absentee received actual notice of the opt-out right); Richard O. Faulk, *Armageddon Through Aggregation? The Use and Abuse of Class Actions in International Dispute Settlement*, 37 TORT & INS. L.J. 999, 1005–15 (2002) (discussing the incompatibility of the U.S. class-action device with civil-law judicial traditions and noting that the "group actions" in some civil-law countries are not class actions in the Rule 23 sense).

11. Most of the literature aligns with the exclusionary viewpoint. *See, e.g.*, Michael P. Murtagh, *The Rule 23(b)(3) Superiority Requirement and Transnational Class Actions: Excluding Foreign Class Members in Favor of European Remedies*, 34 HASTINGS INT'L & COMP. L. REV. 1, 3 (2011) (advocating "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"); Rhonda Wasserman, *Transnational Class Actions and Interjurisdictional Preclusion*, 86 NOTRE DAME L. REV. 313 (2011); Gary W. Johnson, Note, *Rule 23 and the Exclusion of Foreign Citizens as Class Members in U.S. Class Actions*, 52 VA. J. INT'L L. 963 (2012); John C. Coffee Jr., *Global Class Actions*, NAT'L L.J., June 11, 2007, at 12. *But see* Ilana T. Buschkin, Note, *The Viability of Class Action Lawsuits in a Globalized Economy—Permitting Foreign Claimants to Be Members of Class Action Lawsuits in the U.S. Federal Courts*, 90 CORNELL L. REV. 1563, 1600 (2005) ("Given the difficulties of bringing small-claim lawsuits in the courts of most foreign countries, the presumption must

moved to adopt their own pallid versions of class actions.¹² However, as Clopton agrees, neither development has changed judges' and litigants' approaches in the United States, except to make all persons more aware of the puzzle and hence more wary of including foreign claimants.¹³ Nor have these developments changed my view that, one way or another, transnational class-action damages usually do not accrue to the foreign claimants. The exclusionary approach thus dominates.

Exclusion conforms to modern U.S. class-action theory, built on the idea that the class and the defendant should face equal risks and rewards. The court should not award recovery to a class member who is not bound. Although the Constitution permits¹⁴ or sometimes even requires¹⁵ unequal treatment of the parties, the rule makers decided the aggregation idea in Rule 23 should not go so far as to transgress the equal treatment typical of civil process.¹⁶

Moreover, the court should not award huge damages just to deter. I am not saying that the class action cannot embody deterrent aims that go beyond compensatory aims.¹⁷ Courts can and sometimes do pursue deterrent aims, as in the

be in favor of permitting the foreign claimants to join the class.”); *cf.* Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 14, 69 (2007) (including only foreigners who purchased securities in the United States).

12. *See* MULTI-PARTY REDRESS MECHANISMS IN EUROPE: SQUEAKING MICE? (V. Harsagi & C.H. van Rhee eds., 2014); WORLD CLASS ACTIONS (Paul G. Karlsgodt ed., 2012); Hannah L. Buxbaum, *Class Actions, Conflict and the Global Economy*, 21 IND. J. GLOBAL LEGAL STUD. 585, 586–87 (2014); Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DEPAUL L. REV. 401, 402 (2002) (surveying several countries and concluding that their class-action “procedures fall short of the broad sweep of the contemporary American class action with its incentives to litigate on behalf of a class”).

13. *See* Clopton, *supra* note 1, at 1396–98 (collecting cases).

14. *See* *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (authorizing nonmutual issue preclusion).

15. *See* *Santosky v. Kramer*, 455 U.S. 745 (1982) (requiring clear and convincing evidence when terminating parental rights).

16. One of the principal aims of the 1966 amendment to Federal Rule 23 was to extend preclusion to all class members while eliminating so-called one-way intervention, by which some courts had allowed otherwise-unbound absentees to intervene after a favorable decision on the merits. *See* FED. R. CIV. P. 23(c)(3) advisory committee's note (1966). Likewise, in recognition of the principle of even-handedness, courts deny nonmutual issue preclusion to absentees who chose to opt out of the class. *See* *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n*, 814 F.2d 358 (7th Cir. 1987); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 391 n.136 (1967) (“[I]t would be anomalous to give one who opts out collateral estoppel benefits of the action from which he deliberately removed himself.”).

17. *Compare* Kenneth E. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937 (1975), with Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47 (1975).

arguably authorized process of fluid recovery,¹⁸ but they do not currently have the authority to pursue those deterrent aims at the expense of equal treatment.¹⁹

Exclusion does not solve the puzzle, of course. It just decides how we will live with it. Courts and parties can take additional steps to mitigate the deleterious effects of the puzzle. The exclusionary approach thus might come with minor variations, which move toward the inclusionary approach:

First, the court could, and often does, examine the range of class members and include in the class those foreigners who would face preclusion abroad or who, as a practical matter, are not likely to sue again.²⁰ But this approach requires a lot of research to reach a result that ultimately will give the defendant cold comfort.²¹

Second, the court could create an opt-in class, so that foreigners who want to benefit from the class action must consent to party status. The court would then exclude all non-opt-in foreigners from the class. Foreign law is more likely to recognize any resulting judgment when foreign parties consent to inclusion in the class.²² But U.S. law does not favor opt-in classes.²³ In any event few foreigners

18. See RICHARD H. FIELD, BENJAMIN KAPLAN, KEVIN M. CLERMONT & CATHERINE T. STRUVE, *MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE* 919 n.h (11th ed. 2014).

19. This same idea of Rule 23 as using only a portion of broad constitutional authorization explains the cases that interpret the Rule as more demanding than the Constitution on adequate representation. See KEVIN M. CLERMONT, *PRINCIPLES OF CIVIL PROCEDURE* 412, 483–85, 498–505 (4th ed. 2015).

20. See, e.g., *Anwar v. Fairfield Greenwich Ltd.*, 289 F.R.D. 105 (S.D.N.Y. 2013) (taking the analysis down to the level of class members from the Pitcairn Island), *rev'd on other grounds sub nom. St. Stephen's School v. Pricewaterhousecoopers Accountants N.V.*, 570 F. App'x 37 (2d Cir. 2014). But see Tanya J. Monestier, *Transnational Class Actions and the Illusory Search for Res Judicata*, 86 TUL. L. REV. 1, 20 (2011) (“It is submitted, however, that U.S. courts are not positioned to predict accurately the preclusive effect of U.S. class judgments abroad owing to both the litigation and structural dynamics of class proceedings.”).

21. See Linda Sandstrom Simard & Jay Tidmarsh, *Foreign Citizens in Transnational Class Actions*, 97 CORNELL L. REV. 87, 124 (2011) (broadening the focus from preclusion to the general question of incentive to sue abroad, and doing a cost-benefit analysis to create a complicated approach that begins with the rule that the U.S. “court should presumptively include foreign citizens when they assert small-stakes claims”).

22. See Monestier, *supra* note 20, at 7 (“An opt-in class action for foreign claimants eliminates the res judicata problem altogether because a foreign claimant who has affirmatively evidenced his intent to be bound to a result (through the act of opting in) cannot later challenge the authority of the adjudicating court to render judgment against him. An opt-in mechanism for foreign plaintiffs also provides several advantages over the current opt-out mechanism: it allows all foreign claimants to participate in U.S. litigation if they so choose; it provides additional due process protections for absent foreign claimants; it respects international comity; and it sufficiently deters defendant misconduct.”).

23. See 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE* § 1787, at 522–25 (3d ed. 2005); cf. John Bronsteen, *Class Action Settlements: An Opt-in Proposal*, 2005 U. ILL. L. REV. 903 (arguing in favor of opt-in for class settlements but not for class adjudications, in order to discourage both parties' collusion and frivolous suits).

will come forward to opt in, and thus the class action will still seriously underdeter.

Third, the court might offer the defendant the protection of releases from the foreigners. This route would involve accepting the unfairness of including the foreigners in the class. After recovery by way of adjudication or settlement, those foreigners who submit a proof of claim or accept payment should be bound, even in foreign courts.²⁴ The court would also require a release from each of these participating class members.²⁵ This approach adds a contractual defense to the *res judicata* defense, working to stop any new suit brought by those members who not only participated in the payout but also signed a release.²⁶ But this step retains the inclusionary defect of requiring the defendant to pay full damages without precluding further action by the vast number of foreign class members who do not participate or sign a release.

Fourth, as the price for any inclusionary approach, the defendant could seek indemnity from the plaintiffs against any follow-up suits, payable out of the plaintiffs' class recovery. But, unsurprisingly, plaintiffs are not eager to embrace that liability.

Fifth, the defendant could seek an antisuit injunction to stop class members from suing again. Although U.S. law would overcome its usual disfavor of antisuit injunctions when a court is trying to effectuate its judgment,²⁷ and under U.S. law the court would have sufficient jurisdiction over the class members,²⁸ the defendant needs to find a way to enforce the injunction against persons and assets in the United States because foreign countries would no more recognize the injunction than the class judgment. The injunction might therefore do little more than inhibit some U.S.-based class members from suing again.

Sixth, the defendant could conceivably launder a class judgment rendered by a U.S. court ("F1") that included foreign class members. The defendant could sue on the judgment in a receptive foreign country ("F2") for a declaration of preclusion against a class of those foreign class members, and then seek to enforce the foreign judgment in another country ("F3") bound to recognize F2's judgments. But there are few countries that would serve as F2, and even European Union countries as F3

24. The idea is that voluntary settlement overcomes the foreign courts' public policy reticence, and that voluntary appearance provides personal jurisdiction over the foreign claimants. See Debra Lyn Bassett, *U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction*, 72 *FORDHAM L. REV.* 41 (2003).

25. See 3 WILLIAM RUBENSTEIN, ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 13:3 (5th ed. 2011). A better discussion appears in § 12.15 of the book's third edition in 1992.

26. See, e.g., CODE CIV. art. 2052 (Fr.) (speaking of settlement agreements, the statute provides: "*Les transactions ont, entre les parties, l'autorité de la chose jugée en dernier ressort.*").

27. See GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 567 n.38, 586–87 (5th ed. 2011).

28. See *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 177 F.R.D. 216, 229 (D.N.J. 1997) (involving huge class action against life insurer for fraudulent sales practices).

would likely invoke public policy in refusing to recognize fellow-member F2's judgment based on a U.S. class action.²⁹

CLOPTON SOLUTION

Despite all these suggested half measures, the puzzle remains unsolved. This situation moves Clopton to suggest another solution, for which he jumps to the inclusionary end of the solution spectrum and proposes what he calls "private preclusion."³⁰ However, we can better understand the proposal as a kind of release. It is a contractual solution, not one that uses the law of preclusion.

Clopton sees the parties using their superior knowledge to price a release, usually at certification but perhaps at termination, whereby the foreign class members would relinquish their right to sue again. For example, based on a supposition that the risk of relitigation in Austrian courts is higher than in Germany, Clopton contrasts offers promising Austrian option holders "a thirty percent premium on top of the U.S. recovery in exchange for a release" with offers of "only a ten percent premium to German option holders."³¹ The court would notify the foreigners of these offers by normal class-action notice procedure.

His solution, then, has two key features. First, the U.S. court would certify a class that includes the foreigners. Second, the defendant would offer the foreigners a bounty to sign a release. Those two features produce two major defects in the proposal.

First, Clopton rejects any exclusionary approach in favor of inclusiveness. That is, the recovery provides damages calculated for all the foreigners. Distributing those damages will be a problem, necessitating some kind of fluid recovery.³² Some foreigners will sign releases. Yet nonsigning and nonclaiming foreigners can sue again. In other words, almost all the unfairness, overcompensation, and overdeterrence of inclusion survives under Clopton's solution.

Second, to provide greater relief from repetitive litigation, Clopton suggests that the defendant offer a bribe to the foreigners to sign a release against suing again. This proposal highlights the unfairness and other defects in a number of ways.

29. See Brussels Reg., No. 1215/2012, 2012 O.J. (L 351/1) art. 45(1)(a).

30. See Clopton, *supra* note 1, at 1414. He also suggests a couple of alternative solutions, but they will seldom be available. They include pre-dispute forum selection, *see id.* at 1413–14, and judicial cooperation between the U.S. court and foreign courts, *see id.* at 1421.

31. *Id.* at 1415.

32. See 7AA WRIGHT ET AL., *supra* note 23, § 1784, at 336–43 (describing judicial hostility); *cf.* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 (2010) (arguing that a greater judicial power exists to approve such cy pres relief by settlement than exists to order such relief by adjudication, and rejecting the option of returning unclaimed funds to the defendant because it "would undermine the deterrence function of class actions and the underlying substantive-law basis of the recovery by rewarding the alleged wrongdoer simply because distribution to the class would not be viable").

In the event of a recovery in the U.S. action, signing foreigners will receive the base recovery, which presumably was set as a fair compensation; indeed, the U.S. recovery probably exceeded the level of recovery obtainable in any foreign court system. In addition, these foreigners will get a generous percentage bonus for signing away the right to sue again, a right that had vaporized upon their appearing in the U.S. action (remember that the only foreigners able to sue again are those who were absent class members and who did nothing to join the class). To my mind, it is hard to champion a solution that awards *more than fair* compensation.

Meanwhile, the defendant pays full recovery to the class that includes all the foreigners plus the bonuses to the signing foreigners. This is unfair. The defendant is buying releases from a subset of the foreigners. Basically, Clopton's release scheme is no more than a cumbersome, if not prohibitively impractical, way to settle up front on overly generous terms the subsequent foreign suits that the signing foreigners might, or might never, have brought had they not signed. In return, the defendant gets little protection from subsequent suits by nonsigning and nonclaiming foreigners, so that the defendant who funded their unclaimed recoveries in the U.S. suit still bears the risk of paying again and again upon threats or filings of foreign suits.

In sum, the exclusionary and inclusionary approaches constitute opposite ends of the spectrum of ways to address the puzzle of transnational class actions. The pro-defendant exclusionary approach evolved from a concern that inclusion of foreigners just ignored unfairness to defendants. Yet Clopton embraces the inclusionary approach and then appears to go beyond this spectrum by facilitating bounties paid by defendants for contractual release of some foreign plaintiffs' claims.

BETTER SOLUTION

The defendant deserves a better deal than the variation on inclusion that Clopton offers, as long as the better deal adequately treats the class members with fairness and serves the public interest. The exclusionary approach is, however, too favorable to the defendant, coming at the expense of class members and society at large. It seems that the answer *must* lie in a middle approach between these two extremes.

As the first step in my proposed compromise, I would recommend an inclusionary approach, so that all the foreigners would become members of the class in transnational class actions. Unlike an opt-in class action, this approach would enhance the compensatory and deterrent effects of the class action, while the defendant would receive whatever benefits of preclusion that exist under U.S. and foreign law. Incidentally, those foreigners who opt out could not use issue preclusion offensively.³³

As the second step, in order to get more protection for the defendant and to avoid the risk of overcompensation and overdeterrence, I would recommend creating a subclass in damages actions for the foreign claimants, but only for those

33. See *supra* note 16.

who might have an incentive to sue again.³⁴ The presumption would be to subclass the foreigners, unless the plaintiffs could show that some of them should remain in the main class because they would have no legal opportunity or practical incentive to sue abroad, as would be the case with small-stakes claimants who could not take advantage of a foreign class action.³⁵ Both sides and their attorneys would therefore have motivation to submit to the court their information on the risk of relitigation. The subclass would proceed by the accepted technique of claims-made recovery.³⁶ If there were a recovery, the subclass members could recover only by submitting a proof of claim along with a release. The defendant would have to pay only those claims, not damages calculated to cover all potential foreign claimants in the subclass. Incidentally, to the extent that the attorney's fee for class counsel turns on the paid recovery, the fee would be scaled back to reflect the actual recovery.³⁷

The details of my proposal would work this way. Those foreigners who file a proof of claim are precluded from filing a new claim, here or abroad. Regardless of the class action's outcome, the judgment also binds those foreigners who do not file a proof of claim: they could not sue here in the United States under our *res judicata*

34. See FED. R. CIV. P. 23(c)(5).

35. Cf. Simard & Tidmarsh, *supra* note 21, at 115–18, 123–28 (proposing a more intensive inquiry into incentives, which by their proposal would lead to exclusion of incentivized foreigners from the class action).

36. See 3 RUBENSTEIN ET AL., *supra* note 25, § 13:7:

A “claims-made” settlement is a settlement that does not have a fixed settlement fund, but rather provides that the defendant will pay claims of class members who file them, usually up to some fixed ceiling. A “claims-made” settlement is, therefore, different than the more familiar “common fund” class action settlement. In a common fund case, a defendant contributes the settlement amount, say \$100 million, into a settlement fund; the fund is distributed to the class directly or after a claims process. If the class does not claim the full \$100 million, the unclaimed funds do not necessarily go back (or “revert”) to the defendant; they may be distributed pro rata among the class members who made claims, or sent to a charity via a cy pres award, or to the government via escheat.

If unclaimed funds in a common fund settlement are not returned to the defendant (which they rarely are), then that settlement will disgorge the defendant of the full amount of the fund. By contrast, in a claims made settlement, the defendant's liability is never greater than the precise amount the class claims. The parties may announce a settlement by which the defendant “agrees to pay claims up to \$100 million,” but if it is a claims-made settlement, that statement means very little as the class may claim no more than \$10 million, or \$1 million, etc. A claims-made settlement is, therefore, the functional equivalent of a common fund settlement where the unclaimed funds revert to the defendant. As reversionary fund settlements became more disfavored, claims-made settlements replaced them, although the two are fully synonymous.

A critical feature of a claims-made settlement is that although it only pays the claims of class members who file them, it releases the claims of the entire class. It is not, therefore, the functional equivalent of an “opt-in” settlement. By releasing the claims of nonclaiming class members, a claims-made settlement, like most class action settlements, requires a class member to opt out to escape its binding effect.

See also *id.* § 12:29 (extending discussion of this concept to adjudicated judgments).

37. See *id.* § 13:7.

law; abroad, the defendant could at least argue for recognition of the U.S. judgment. This relatively broad *res judicata* effect, as compared to the exclusionary approach's effect, offsets the opportunity extended to the foreigners to claim damages in the U.S. court. Indeed, this approach fully serves the compensatory purpose of the class action.

The defendant's wider exposure to paying damages enhances the deterrent purpose of the class action as well. Indeed, the large potential exposure will produce a desirable *in terrorem* deterrence. Admittedly, my approach does not create as big a deterrent as a pure inclusionary approach with its award of damages for the whole class. But that deterrent effect goes too far. My central contention is that the class-action rule never intended to create a risk of loss for the defendant bigger than the risk of loss for the class.

CONCLUSION

One cannot establish the superiority of any middle course without a full cost-benefit analysis.³⁸ But here is a simplistic but promising start of one. This table compares a generally exclusionary approach and a generally inclusionary approach with my proposal of inclusion with a claims-made subclass of foreigners who might sue again:

	Exclusionary	My Proposal	Inclusionary
Treats foreigners fairly		X	X
Treats the defendant fairly	X	X	
Tends to neither over- nor under-compensate		X	
Tends to neither over- nor under-deter		X	
Reduces risk of more lawsuits		X	X
Reduces administrative costs in class action	X		

38. See Simard & Tidmarsh, *supra* note 21, at 106–09.