

**33rd International
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Institutional Economics –
Beyond Privity**

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Cost–Benefit Analysis of Class Actions: An Israeli Perspective

by

Alon Klement and Keren Weinshall-Margel*

We propose an analytical framework for evaluating the effectiveness of class actions, in which their costs are estimated against the benefits they produce in attaining three objectives: law enforcement and deterrence; access to courts; and compensation. We outline parameters for measuring the social costs and benefits relevant to these objectives and evaluate them for Israeli class actions, based on original data including all class actions filed between 2006 and 2012 ($n = 2,056$). Findings indicate that class actions did not substantially facilitate access to courts and compensation, and that they had limited success in realizing law enforcement and deterrence. (JEL: K40, K41)

1 Introduction

The class action is a unique procedure. It addresses a problem where violation of a legal duty results in dispersed harm to numerous individuals. When each individual's loss does not justify pursuing its recovery in court, producers of mass harm might not be sufficiently deterred from violating their legal duties. The class action addresses this problem by aggregating the small individual claims into one lawsuit. It creates a procedural mechanism that renders the aggregate harm “marketable,” thus incentivizing representing plaintiffs and attorneys to identify suitable causes of action and to pursue them in court.

Absent a preexisting organizational framework that addresses the problems of collective action (like the one pertaining to corporations or labor unions), the class action mechanism must not only incentivize litigation, but also stipulate procedures for controlling and monitoring it. The self-appointed agents – the class representative and her attorney – must be prevented from exploiting the class for their own benefit.

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At the same time, defendants must also be protected against frivolous litigation. Indeed, the problems of agency, on the one hand, and of frivolous litigation, on the other, are often considered to be the main impediments of the class action procedure, undermining its ability to realize its objectives (Hensler et al., 2000).

Agency problems and frivolous litigation affect both the objectives of the class action and its costs, but are very difficult to measure. Our study measures, instead, the end products of class action litigation – its benefits and its costs. The paper identifies and explains the relevant parameters for empirically assessing these benefits and costs, using observational data and analysis. However, we also note the inherent difficulties of such an empirical evaluation and, consequently, the limitations of an overall observational–empirical assessment of the effectiveness of class actions.

We propose an analytical framework for examining the effectiveness of class actions. For this purpose, we define their three main objectives: (1) enforcing the law and deterring future violations; (2) exercising the right of access to the court, especially for disadvantaged groups or individuals; (3) providing compensation for injured parties. Against these objectives, we analyze the private and public costs of class action litigation. Optimal class actions must fully realize their goals, while at the same time minimize their costs.

Using the analytical model, we examine the application of the Israeli 2006 Class Action Law (“the CAL” or “the law”). Starting in the late 1980s, the Israeli legislature has incorporated class action procedures into substantive laws in various sectors such as consumer protection, banking, and securities. In 2006, these arrangements were replaced with a uniform arrangement stipulated in the CAL. The study examines empirical findings of the implementation of the CAL since it entered into effect in April 2006 and through the end of the 2012 court term (August 31, 2012).

The research method is primarily based on a quantitative analysis of all motions to certify a class action filed during the period under study (hereinafter – “class action cases”) (2,056 cases). We created a unique database that includes over 200 variables measuring different aspects of all class action cases, including characteristics of plaintiffs, defendants, their lawyers, the represented groups, the causes of action, and all court proceedings and decisions in each case. Trends and data from analyzing class action cases are compared with findings from a reference group that includes a random sample of civil cases heard during the same period in Israeli district courts ($n = 278$ civil cases). The comparison provides a point of reference to the findings and is intended to facilitate a deeper understanding of the costs and benefits of class actions, as opposed to ordinary civil litigation.

The paper proceeds as follows: Following the introduction, section 2 analyzes the costs and benefits of the class action in light of its objectives, as well as the inherent risks in the mechanism. We present a model for evaluating the effectiveness of class actions and discuss the empirical parameters relevant for assessment, as well as their limitations. Section 3 outlines the historical and legal background for the 2006 CAL in Israel. Section 4 presents our research method and sources of information. Section 5 discusses the empirical findings: in the first subsection, we analyze key trends and characteristics in motions to certify class actions; in the

second subsection, we focus on case outcomes and evaluate the extent to which they realize the objectives of the class action; the third subsection includes an in-depth analysis of the use of monitoring tools stipulated by the CAL for contending with the unique challenges of class actions – the principal–agent dilemma and the danger of frivolous lawsuits; the fourth subsection analyzes the costs of class actions in Israel. Section 6 concludes.

2 *The Effectiveness of Class Actions: An Analytical Framework*

2.1 *The Social Objectives of Class Action Litigation*

We divide the objectives of the class action mechanism into three main categories: exercising the right of access to court; providing compensation for injured parties; and enforcing the law and deterring against its violation. We discuss each of these objectives in turn.

2.1.1 Exercising the Right of Access to Court

By its very nature, a class action does not allow all represented plaintiffs to fully exercise their right of due process in court. A represented plaintiff is not a party to the class action proceeding, and she may intervene in it only with the court's explicit permission. Moreover, the outcome of the class action can be binding upon the represented plaintiff as *res judicata*, thus denying her future individual access to courts. However, the class action does facilitate class members' access to court, especially in cases where the value of their individual claims, net of their costs, is negative. Therefore, a class action substitutes class members' right of *collective* access to the court for their *individual* respective rights.

Class actions should therefore be distinguished according to the value of class members' individual rights. When violated rights have low importance for each plaintiff, pursuing them in court has no inherent value as well. This is the case, for example, in consumer lawsuits pertaining to deception or overcharging, where the only damage caused is monetary damage of low value. On the other hand, other class actions aggregate claims whose value for each plaintiff is likely to be high – for example, discrimination and disabled-accessibility lawsuits. Such individual lawsuits might, nevertheless, be economically unfeasible, and therefore they would not be filed absent an aggregating mechanism. Others may be individually filed, but, given the economies of scale enjoyed by defendants, the litigation would be tilted in their favor.

When the class action substitutes viable individual claims, its value in facilitating collective access to courts must be weighed against its cost in denying individual access. The importance of a class action in realizing the right of access to courts is thus highest when the claim has significant value for the individual, but she cannot exercise her litigation right – either because she lacks the necessary information and

resources, or because she fears the defendant's retaliation if she sues him (e.g., in employment litigation).

2.1.2 Compensating Injured Parties

Monetary compensation is a mere transfer of money from the defendant to the plaintiffs. The latter's gain is identical to the former's loss. Therefore, a significant social value of compensation inheres in its reallocation of risk, from risk-averse plaintiffs to risk-neutral (or, at least, less risk-averse) defendants (Shavell, 2004).

Examination of the insurance market indicates that people do not insure against small losses. For example, most people do not insure themselves against the risk of suffering a minor injury while on a trip or the risk of losing a very small amount of money. In other words, they refuse to pay any premium for such insurance. Similarly, people do not insure themselves against nonmonetary damages (such as pain and suffering or an infringement of their autonomy). Therefore, the value attributed to future compensation for such damages cannot be high.

Hence, compensation is socially valuable mainly for individual monetary losses that are sufficiently high, yet individuals are not insured against them. If individual lawsuits are not filed in such cases, then class actions may be necessary to serve this social goal. Still, the social value of class actions is obviously not the *ex post* measure of losses, but the *ex ante* (discounted by the probability of loss) risk premium that individuals would be willing to pay for being compensated.

2.1.3 Enforcing the Law and Deterring against its Violation

When the individual value for each plaintiff is high, a class action may serve as an effective mechanism for law enforcement and deterrence. However, the primary importance of enforcement and deterrence is in cases where the value of the individual remedy is low. In these cases, enforcement of the law and deterrence against its violation are the principal, and often sole, objectives of the class action. The small damages sustained by each member of the group of plaintiffs, which are not significant for any of them individually, amount to substantial social loss when added together. Consequently, there is social value in enforcing the law, averting ongoing violations and deterring future ones. Since these lawsuits would not be filed by individual plaintiffs, the defendant would have lower incentives to comply with the law absent the class action mechanism.

It is important to distinguish between the objectives of enforcement and the objective of deterrence: Enforcement of the law and prevention of its violation are usually accomplished through injunctive remedies. In this way, the court rectifies an existing situation in which the law is violated, starting from the time the injunction is issued. Deterrence is attained through monetary remedies. A defendant who expects to be sued for the losses he causes will internalize these losses and take efficient steps, in advance, to avoid such violation. In order to achieve deterrence, compensation does not necessarily need to be paid to plaintiffs (Eisenberg and Engel, 2014). It is

only necessary that defendants pay it, and that it equal the actual losses they caused. This is important, as we explain below, in cases in which it is difficult to identify and compensate injured plaintiffs.

2.2 *The Social Costs of Class Action Litigation*

A class action makes it possible to aggregate numerous claims in a single proceeding. When each of these claims would have been individually litigated, combining them into one aggregate litigation saves resources for the plaintiffs, the defendant, and the court. Hence, in such cases, the saving of litigation costs in itself may justify using the class action procedure. However, in all cases in which individual lawsuits would not have been filed, introducing a class action entails additional costs. This is true for most class actions.

Class actions impose additional costs not only because they render litigation viable, but also because they require special procedural mechanisms to overcome the principal–agent and frivolous-litigation problems. The three mechanisms designed to overcome these problems are certification of a lawsuit as a class action, approval of a settlement or a voluntary dismissal, and compensation of the class representative and the class attorney. Courts actively supervise and monitor class actions through these mechanisms. Yet, these procedures are resource-intensive and time-consuming – for the parties and for the court.

2.3 *An Analytical Framework for Evaluating the Effectiveness of Class Actions*

What is the net social surplus from class actions? We present an analytical framework that can be empirically estimated, subject to limitations we explore below. The challenge is to create a single metric for evaluating both the costs and the benefits of the class action.

Absent class actions, defendants’ spending on satisfying their legal duties is denoted C_p^0 ; given these costs, defendants decide on a level of activity (private, business, or public), whose social benefit is denoted U^0 ; and despite these means of precaution, individuals suffer losses as a result of intentional or unintentional violations, negligent or not, whose total cost is denoted D^0 . Assuming that in this situation individual claims would not be filed, the overall social welfare, denoted W^0 , would be equal to the benefit from the activity minus the costs of precaution and the losses caused:

$$(1) \quad W^0 = U^0 - C_p^0 - D^0 .$$

When class actions are available, we denote their overall litigation costs by C_L^1 . These costs consist of plaintiff, defendant, and court costs. Defendants’ spending on satisfying their legal duties is C_p^1 , and the benefit from their activity is U^1 . Consequently, the social losses, given these costs of care and levels of activity, are D^1 . Three additional social benefits are the value of duties enforced through injunctive remedies, denoted E^1 , the value of collective access to court, denoted A^1 ,

and the insurance value of compensation, denoted I^1 . Therefore, the overall social welfare when class actions can be filed is

$$(2) \quad W^1 = U^1 - C_p^1 - D^1 + A^1 + I^1 + E^1 - C_L^1.$$

Class actions are socially beneficial if they raise overall net social welfare, that is, if

$$W^1 > W^0.$$

Substituting from (1) and (2), denoting by ΔX the difference in the variable X between its value with class actions and its value in their absence, and rearranging, we get

$$\Delta U - \Delta C_p - \Delta D > C_L^1 - E^1 - A^1 - I^1.$$

The left-hand side equals the deterrence value of class actions. The right-hand side consists of all ex post costs and benefits of class actions.

While the analytic model is straightforward, trying to empirically estimate it using observational data is much less obvious. In particular, the deterrence value can only be estimated by observing the change in defendants' behavior in expectation of being subject to class actions. Such observations are difficult to obtain. Indirect observations, such as stock market data or opinion survey data, may be collected to estimate the deterrence effect. However, this study focuses on case characteristics and outcomes and therefore may only qualitatively estimate to what extent these outcomes could affect defendant behavior.

The right-hand side is more conducive to empirical estimation using observations of case files and their outcomes. *On the cost side*, we observe different parameters that indicate the amount of time spent in court (such as number of hearings, length of proceedings, case weights, etc.). Absent direct data on litigation spending by the parties, we can only estimate it based on these observations.

On the benefit side, we observe various characteristics of the cases that indicate their *access to court* value. In particular, we can identify cases in which individual harm or causes of action is substantial, so that taking such cases to court may serve class members' rights of access to court. *Enforcement* value can be estimated by observing case outcomes, and in particular the injunctive remedies awarded. Finally, *compensation* value, although measured based on its ex ante insurance premium value, which cannot be directly observed, can nevertheless be estimated by observing case characteristics and outcomes, focusing on monetary remedies. We elaborate on our estimation methodology for each parameter in the next section.

2.4 Previous Empirical–Observational Studies of Class Actions

Most empirical research on class actions has been conducted in the U.S., where the class action mechanism has been in effect in its current form since 1966. Two projects conducted a comprehensive observational analysis to evaluate the implementation of class actions in general: Hensler et al. (2000) aggregated descriptive statistics on U.S. class actions from various sources and conducted qualitative case studies

of ten class actions, and Willging, Hooper, and Niemic (1996) analyzed all cases terminated within a two-year period in four federal district courts.¹ Few empirical studies have focused on class action settlements and explored their outcomes (e.g., Fitzpatrick, 2010); on attorney fees in class action settlements (e.g., Eisenberg and Miller, 2004b, 2010); and on the role of opt-outs and objectors (e.g., Eisenberg and Miller, 2004a).

Other studies have attempted to evaluate the effects of specific reforms such as the Securities Litigation Reform Act of 1995 (e.g., Choi, 2007) and the Class Action Fairness Act of 2005 (e.g., Lee III and Willging, 2008), or significant Supreme Court decisions like *Amchem* and *Ortiz*, which imposed substantial limitations on class action settlements (e.g., Niemic and Willging, 2002).

Finally, significant empirical research has focused on class actions and other aggregative mechanisms in specific substantive areas, such as securities litigation (e.g., Choi, 2007) and mass torts (e.g., Carroll et al., 2005).

Outside the U.S., no jurisdiction except Canada and Australia has had sufficient numbers of class actions to conduct a meaningful quantitative study. For an empirical study of class actions in Australia, see Morabito (2009, 2010); and in Canada, see Pritchard and Sarra (2010) (focusing on securities class actions). As mentioned above, this is the first study presenting and analyzing data on Israeli class action filings and outcomes.

3 *Class Actions in Israel – A Legal Background*

The Israeli parliament (the Knesset) enacted the CAL on January 1, 2006. The new law superseded all previous statutory arrangements, which allowed class actions for specific causes of action, and it set a comprehensive procedure for filing and litigating class actions. The legislation responded to the Supreme Court's call for comprehensive and uniform regulation of class actions in *LCA 3126/00 State of Israel v. E.S.T. Management and Manpower, Ltd.*, 57 P.D. 220 (2003).

The new law was modeled after the American FRCP Rule 23.² This model is based on several fundamental principles. First, in order to pursue a class action, a plaintiff must motion the court to certify it as such, and certification is conditioned on various statutory requirements. Second, all plaintiffs who are members of the class defined in the certification decision are bound by its outcome, unless they actively opt out of the class action. Third, the possible remedies in a class action include monetary compensation, even if such compensation is not uniform among all class members. Fourth, the attorney's fee is contingent upon winning the case or a settlement, and it depends, *inter alia*, on the value of the remedy awarded.

¹ One should note, however, that Willging, Hooper, and Niemic (1996) pertain only to federal courts. The scope of state class actions remains uncertain, since state courts do not separately docket these cases.

² This choice was first made in enacting the specific statutory arrangements preceding the CAL, and applied in the CAL as well.

Although the CAL adhered to the basic features of the U.S. class action, it deviates from the American model in various respects. Most significantly, the Israeli legislature, concerned about the potential adverse ramifications of class actions, has opted for a substance-specific framework by designating the possible causes of action that may be brought as a class action.³ It thus departed from the trans-substantive American rule 23, which allows a class action to be filed on any ground. As of today, the CAL specifies 13 causes of action for submitting class actions. These include consumer claims (including insurance and banking), corporate lawsuits pertaining to securities and antitrust, claims related to environmental hazards, employment-related claims, lawsuits aimed at providing equality for the disabled or for minority groups, and restitution claims for unlawful fees collected by state authorities.

Furthermore, the CAL has also incorporated various arrangements that deviate from the U.S. model. Thus, the CAL allows for representation by nonprofit organizations and a few (specified) state regulators; it provides the court with an option to certify an opt-in class action, in which class members should explicitly express their willingness to join the lawsuit in order to be bound by its outcome; it explicitly allows for cy-près remedies; it allows for government funding of class actions; and it provides specific defenses for the state as a defendant.

Finally, the CAL also departs from the American model in some of its specific certification requirements. Most importantly, it requires the court to examine the merits as a condition for class certification, whereas the American procedure does not favor that (*Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974)).

4 Research Method and Data

We coded *all* motions to certify a class action (“cases”) filed in Israel during the period starting in April 2006 (when the CAL entered into effect) and ending in August 2012 (the end of the 2012 court term). Our data set includes 2,056 such cases. An analysis of *all* class actions in a “census study” method allows for in-depth statistical analysis, subject to minimal reliability tests that are required for smaller samples.

For each case, we coded over 200 variables, including information regarding the class representatives and their attorneys, the defendants and their attorneys, causes of action and other characteristics of the motion to certify a class action, remedies requested, and more. By August 2013, 1,397 of the 2,056 cases were resolved (“resolved claims”). For these cases the database also includes information about case outcomes and other characteristics of the proceedings.

The cases were drawn from computerized court records and were coded by law students who read all pertinent documents: pleadings, motions, hearing protocols, closing arguments, and court decisions. A second tier of encoders randomly sampled approximately 10% of these cases for accuracy and internal reliability. Coding

³ See details in the explanatory remarks for the class action legislation, in Governmental Law Proposals 211, pp. 251–257 (Hebrew).

was found to be consistent in over 95% of the variables coded. Since the Israeli court records were computerized only in 2006, there is no reliable information on class actions filed before the CAL. It is clear, however, that class actions were not frequently used in Israel before the CAL.

When possible, we compared class action data with a reference group of individual lawsuits filed during the same period in the district courts. The comparison aimed to provide a comparative perspective and context to our findings. The comparison group included a representative sample of civil lawsuits filed in the district courts as a court of first instance ($n = 278$).⁴ (The overwhelming majority of class action cases are filed in the district courts.)

5 Findings

To analyze the costs and benefits of class actions, it is necessary to distinguish among different types of claims, remedies, and represented plaintiff classes. This section examines the characteristics as featured in motions to certify a class action.

5.1 Trends in Filing Requests for Certification of Class Actions

5.1.1 Number of Motions to Certify a Class Action

Over 2,000 motions to certify a class action were filed from the enactment of the 2006 law until the end of August 2012. During this period the number of class actions increased dramatically, as shown in Figure 1.

The number of individual lawsuits filed during this period remained constant.⁵ This holds true, in particular, for lawsuits that could have been substituted by class actions, such as consumer small claims against businesses or employment claims.⁶ Thus, there is no indication that enactment of the CAL had any substitution effect on individual litigation by aggregating numerous individual claims in a single procedure. Apparently, class actions mostly aggregated claims that would not have been individually filed otherwise.

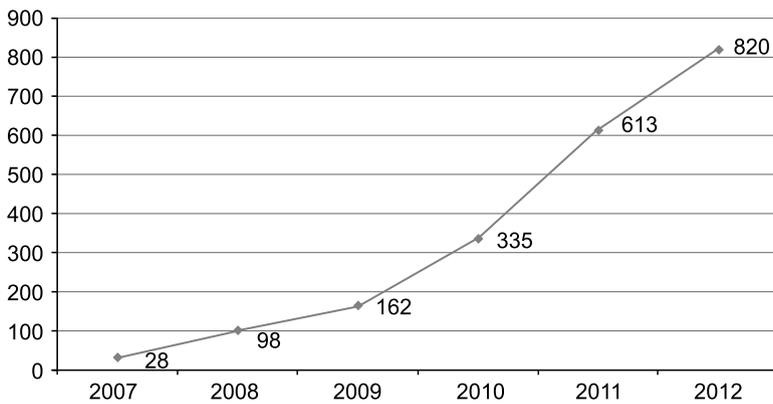
Two implications follow: First, the CAL has increased the litigation caseload as well as the overall costs of litigation by plaintiffs, defendants, and courts. In section 5.4 we estimate these additional costs. Second, the CAL had no adverse impact on individual access to courts. The law has facilitated collective access to the courts in cases that would not have been filed otherwise.

⁴ These cases involved claims of over 2.5 million NIS, or pertained to real estate ownership. They are included in a broad database of information on civil cases in various courts. See Weinshall-Margel and Taraboulos (2014).

⁵ See the Israeli judiciary reports: http://elyon1.court.gov.il/heb/haba/dochot/doc/hofesh_meida2013.pdf (last accessed August 7, 2015).

⁶ This is based on samples taken from cases in the labor courts and small claims courts, as well as administrative cases between 2006 and 2012, together with data on all cases filed in these courts from 2000 to 2012. See note 11.

Figure 1
Number of Class Actions Filed, 2006–2012



5.1.2 Type and Categories of Motions to Certify a Class Action

As noted, a class action may be certified only if its cause of action is listed in the CAL's second appendix. There are 13 causes listed, and Table 1 presents the frequency of motions to certify a class action, according to these causes of action.

Our findings indicate that about 78% of the motions to certify a class action were consumer claims: About 68% were filed under Article 1 of the appendix, which refers to all claims customers may have against businesses ("dealers" as this term is defined in section 1 of the Consumer Protection Law). These include, among others, consumer protection, contracts, and even tort actions against businesses. About 6% were filed under Article 2 of the appendix, which refers to insurance-related claims. And about 4% were filed under Article 3 of the appendix, which refers to customer claims against banking institutions. An additional 14% of the motions to certify were filed against state authorities, under Article 11 of the appendix, which refers to claims against government or local authorities for the restitution of unlawfully collected payments. Only a small minority of the motions were based on corporate or securities law, antitrust law, environmental law, employment law, or antidiscrimination laws.

To facilitate our cost-benefit analysis, we divided the causes of action into five categories. Our categorization is similar to conventional international categorization in the field:⁷ The first category, *consumer claims*, includes all claims of customers against businesses, insurers, and banks (Articles 1–3), as well as a small number of motions filed against advertisers for sending "spam" messages in violation of sec-

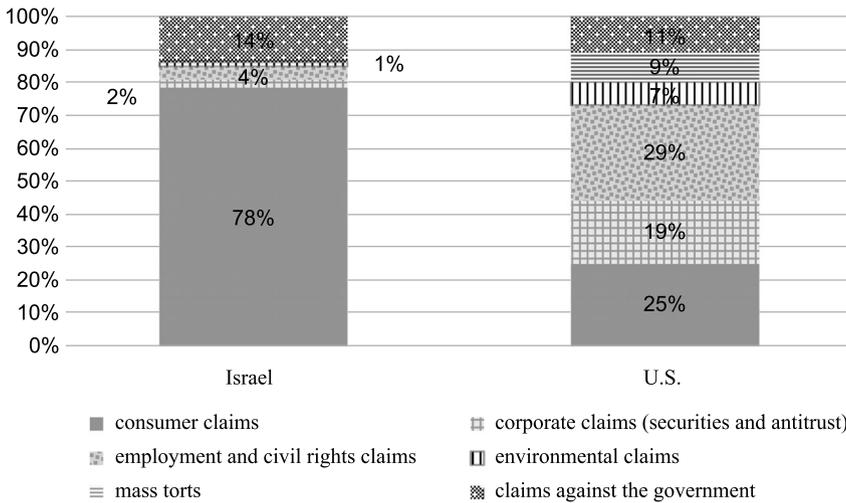
⁷ See categorizations in various countries on the website <http://globalclassactions.stanford.edu/about> (last accessed August 7, 2015), as well as different ways of categorization in the U.S. in Hensler et al. (2000, pp. 52–58).

Table 1
Class Actions Filed by Cause of Action

Cause of action specified in the application for certification of the class action claim (in accordance with the categories defined in the CAL)	Frequency
Article 1 – A claim against a “dealer,” as defined under the Consumer Protection Law, in matters between a dealer and a customer	67.7%
Article 2 – An insurance-related claim against an insurer, insurance agent, or provident fund management company	5.5%
Article 3 – A claim against a banking corporation pertaining to client–bank relationships	3.8%
Article 4 – A claim pursuant to the Antitrust Law	0.7%
Article 5 – A claim arising from the ownership, possession, sale, or purchase of a security, as defined in the Corporation Law and in the Securities Law	1.7%
Article 6 – A claim regarding an environmental nuisance	1.1%
Article 7 – A claim of discrimination under the Prohibition of Discrimination in Products, Services and Entry into Places of Entertainment and Public Places Law, 2000	0.1%
Article 8 – A labor discrimination claim, under the Equal Opportunities at Work Law or under the Equal Pay for Male and Female Employees Law	0.1%
Article 9 – A claim under the Equal Rights for Disabled Law	1%
Article 10 – A labor-related claim	2.9%
Article 11 – A claim against governmental or local authorities for the restitution of amounts collected unlawfully	14.0%
Article 12 – A claim against an “advertiser,” as defined in the Communications (Telecommunications and Broadcasts) Law	1.4%
Article 13 – A claim against a company operating a central pension clearing system, regarding transmission of data or finances via that system	0
Total	100% 2004

tion 30A of the Communications Law (Article 12). The second category, *corporate claims*, includes all claims based on either corporate, securities, or antitrust laws (Articles 4–5). The third category includes *claims against a governmental authority*, where, due to specific defenses allowed by the CAL to the state, restitution is often unavailable or limited, and therefore the remedy often awarded is an injunction against further unlawful collection of payments and overcharges (Article 11). A fourth category, *employment and civil rights claims*, aggregates causes of action related to employment (Article 10) and discrimination, either in a labor context or otherwise (Articles 7–9). The two categories were combined due to the low number

Figure 2
Class Actions by Categories, Israel versus U.S.



of lawsuits in them, and because the right of access to the court is particularly dominant in both, given the type of claims and the vulnerability of the plaintiffs. The fifth category includes *environmental claims* filed against a defendant who is responsible for an environmental hazard (Article 6). This category is similar to the *mass torts* category in the U.S.

Figure 2 compares the distribution of class actions filed in Israel with the markedly different distribution in the U.S.⁸ About 78% of class actions in Israel are consumer claims. This high percentage remained stable throughout the years examined. In the U.S., consumer claims consist of only 25% of the total number of class actions filed, and the other two significant categories are corporate (securities and antitrust) claims (19%) and employment and civil rights claims (29%). Corporate claims in Israel comprise only about 2% of all class actions, and claims related to civil rights and employment together account for only 4% of the class actions. While in the U.S. mass torts consist of 9% of class actions, environmental claims in Israel are particularly infrequent, comprising only about 1% of the total. The only category with similar distribution in both countries is claims against the government – 14%

⁸ Distribution data from the U.S. is from Deborah R. Hensler et al. (2000, p. 53). The distribution includes an analysis of all 1,020 judicial decisions in class actions reported in the years 1995–1996 in federal and state courts. We did not find a more up-to-date report of the distribution of all of the class actions. However, it seems that changes stemming, *inter alia*, from the enactment of the Class Action Fairness Act, 28 U.S.C. §§ 1332(d), 1453, 1711–1715, in 2005 may have led to an increase in the number of consumer claims in the U.S. (see Lee III and Willging, 2008).

of the class actions in Israel and 11% of the U.S. total. The different distribution of claims indicates that class actions are not necessarily serving the same goals in the two legal regimes, even though the procedure is similar in both.

5.1.3 Characteristics of Motions to Certify a Class Action

In order to best identify the class action goals in practice, this section summarizes various characteristics of motions to certify a class action, by case category.

Table 2 presents descriptive data on the identity of defendants, the estimated number of class members, and the remedies sought, by class action category. The table does not include information on the type of class representative. This is because nearly all of the class representatives – 99.3% – were plaintiffs who had a personal cause of action, and were part of the class they sought to represent.⁹ The CAL allows nonprofit organizations to represent a class when the court is convinced that filing the class action by a class member would prove difficult (section 4(a)(3) of the CAL). Yet, only 13 such class actions were filed. Furthermore, although the CAL specifically empowers three public regulators to submit motions to certify a class action on grounds of discrimination and environmental hazards,¹⁰ none of them had used this power as of August 2012.

The first column in Table 2 describes the type of class action defendants. As expected, the vast majority of consumer and corporate claims are filed against companies (94% and 99% respectively), and all governmental claims are submitted against government authorities. Government authorities are also sued in 38% of employment and civil rights cases and in 21% of environmental claims.

The second and third columns in Table 2 denote the type of remedy sought. Nearly all motions to certify (96.2%) seek monetary compensation. In 56.3%, an injunction or declaratory remedy is sought, usually in addition to monetary compensation. A breakdown by class action category indicates, as expected, that monetary compensation is particularly common in consumer lawsuits (97%), and that it is slightly less common in employment and civil rights claims (84%) and in environmental class actions (82%). Injunctive or declaratory reliefs are most frequent in consumer claims, and in employment and civil rights claims (57% in each category).

The fourth column displays statistics about the estimated number of class members, according to the certification motion. The representative attorney often makes these estimations without any concrete information regarding the exact number. Nonetheless, the data indicates significant and expected variation among the different class action categories. The represented class is smallest in cases of employment and civil rights (a median of 6,070 members and an average of 34,448) and largest in

⁹ The analysis includes data on the first three class representatives in each request. Over 80% of the requests were filed by a single representative, and 5% included more than three.

¹⁰ The Commission for Equal Rights of Persons with Disabilities, the Israel Nature and Parks Authority, and the Equal Employment Opportunities Commission.

Table 2
 Characteristics of Certification Requests, by Category of Class Action

Type	Defendant type	Monetary compensation	Injunctive or declaratory remedy	Estimated no. of members in the represented group	Individual gross sums (NIS) in representing plaintiff's claim	Total compensation requested for the class – gross NIS amount
Consumer Claims	Company	94%		100,620	193	30,000,000
	Governmental	4%		546,955	4,386	359,865,918
	Nonprofit organization	1%	57%	1,225,025	35,034	3,682,724,972
				<i>n</i>	1,397	1,426
Corporate Claims	Company	99%		1,000,000	4,670	54,109,871
	Governmental	1%	30%	1,221,135	102,453	595,440,522
				1,225,025	338,413	1,722,646,540
			<i>n</i>	11	32	38
Employment and Civil Rights Claims	Company	61%		6,070	3,017	23,271,972
	Governmental	38%		34,448	11,675	294,256,345
	Nonprofit organization	1%	57%	72,983	25,820	6,009,111,034
			<i>n</i>	52	55	79
Claims against a Governmental Authority	Governmental	100%		10,300	726	6,000,000
				98,560	6,170	31,108,206
			43%	420,098	19,485	91,301,936
			<i>n</i>	99	242	225
Environmental Claims	Company	74%		75,000	2,000	33,996,613
	Governmental	21%		210,446	5,174	273,891,403
	Nonprofit organization	5%	35%	492,069	9,385	636,628,691
			<i>n</i>	16	18	17
Total	Company	80%		100,000	250	25,450,000
	Governmental	19%	56.3%	482,252	6,715	435,275,100
	Nonprofit organization	1%		1,144,349	57,060	3,566,396,932
			<i>n</i>	1,108	1,753	1,794

environmental and consumer lawsuits (in consumer lawsuits the median is 100,620 and the average is 546,955).

In the fifth column, we examine the class representative's claim as an indicator for class members' average claim value. Unlike the number of class members, which is based on mere speculation, the value of the representative's claim must be supported by real evidence. The bottom row in the table shows that the median representative's claim value is NIS 250. We note that in over 70% of the motions this value is less than NIS 1,000, and that in about 22% it ranges between NIS 1,000 and NIS 10,000.

Comparison of the class representative's claim value in the various categories shows that it is lowest in consumer lawsuits, followed by class actions against governmental authorities, environmental claims, civil rights, and work-related cases; it is highest in corporate class actions, in which the variance is also considerable.

Although the individual claims are low, the total compensation requested for the class is very high, as shown in the last column in Table 2. The median class compensation requested in all cases is NIS 25,450,000, and the average is NIS 435,275,100. This average is 36 times higher than the average compensation demanded in a reference group of civil cases in the district courts. Note however the very high standard deviation for the total amount of compensation requested ($SD = 3,566,396,932$).¹¹ There are no significant differences among claim categories, except for in-class actions against government authorities, which are characterized by a relatively low estimated class compensation – with a median of NIS 6 million and an average of about NIS 31 million. This is in line with the Israeli law, which limits the period for which plaintiffs can receive compensation in this category to two years prior to the date of filing the certification motion. The high class compensation in other categories is not explained by the estimated number of class members, the class representative's claim, or the interaction between them. We developed various regression equations in an effort to understand the total compensation sum, but these did not yield any significant results or explanations. It should be observed, however, that whereas in standard civil cases plaintiffs must pay a court fee that equals 2.5% of their claim, class actions are exempt from such fees. Therefore, class representatives bear no direct cost for overestimating the total class claim. Class actions' outcomes, which we discuss below, reinforce our conclusion that motions to certify highly overstate total class compensation.

5.1.4 Discussion

Our analysis of the motions to certify a class action indicates the following: most of these motions are filed for consumer-related causes of action (78%); the primary remedy in these cases is compensation; the value of individual lawsuits is particularly low; the estimated number of group members represented in the class action is high, and the total compensation sum demanded is also high. Such lawsuits may serve primarily one objective – enforcement of the law and deterrence against its

¹¹ The range is NIS 1–10 million in 38.4% of the requests.

violation. Their utility in exercising the right of access to the courts and in providing compensation to injured parties is minimal.

On the other hand, there is a very low number of certification motions in lawsuits in which the objectives of access to courts and compensation are important. Only 4% of the motions are filed for employment and civil rights causes of action. These lawsuits are characterized by a low number of plaintiffs relative to consumer claims, as well as relatively high individual value and a relatively high frequency of requests for declaratory remedies and injunctions, which are likely to have significant economic repercussions.

About 14% of the class actions are claims against governmental authorities for unlawful collection of payments. The CAL allows the authority to cease the allegedly unlawful collection and thus prevent certification of the class action. In addition, even when the government authority does not take advantage of this option, restitution to the class is limited to 24 months preceding the filing of the certification motion. Therefore, the primary objective these class actions serve is law enforcement and prevention of future infringement.¹²

Finally, the percentage of motions to certify a class action in the categories of corporate and environmental lawsuits was very low. Therefore, the objectives of the CAL were hardly attained in these categories during the period under study.

5.2 *Outcomes of Class Action Proceedings*

5.2.1 Decisions in Motions to Certify a Class Action

To litigate a case as a class action, the court must certify it as such. Only after the certification motion is accepted can the case proceed to the next stage of litigation. To certify the case as a class action, the court must find that the following conditions are satisfied: There are common issues of fact or law pertaining to the class; there is a reasonable likelihood that these issues will be decided in favor of the class; litigating the case as a class action will be efficient and fair; the class will be adequately represented and its representation will be in good faith (section 8(a) of the CAL). In addition, the court must find that the cause of action is listed in the CAL's second appendix

Thus, class certification constitutes a significant sorting mechanism aimed at guaranteeing that the law realizes its objectives, and that it minimizes the problems of agency and frivolous litigation. Its implementation affects not only judicial resolution of the cases filed, but also their voluntary or consensual termination in dismissal or settlement, before or after class certification (Klement, 2011, p. 32). At the same time, certification imposes significant costs on the court and the parties.

¹² This category may realize the citizens' right of access vis-à-vis the authority, even if the individual sums of the lawsuit are low and even if the authority is ultimately released from its obligation to repay the sums it collected in a class action. The authority is still subject to individual lawsuits that are not precluded by the CAL.

Our findings indicate that in the overwhelming majority of cases, the court did not render a decision on the motion to certify a class action. Courts decided the motion to certify in 171 cases, which was less than 10% of all 1,397 resolved cases. Of these 171 cases, the class action was certified in only 49 cases (about 29%). Since the average time from filing to rejection of a motion to certify is shorter than the average time from filing to certification,¹³ we also examined the outcomes in cases opened before 2010 (a total of 102 cases). We found that a similar fraction – about one-third of the motions to certify (34%) – were accepted, whereas the remaining two-thirds were rejected. We found no significant difference in the rates of certification among the various class action categories.

A study of the U.S. federal courts found that a judicial decision on the motion to certify was made in over one-third of the cases, and two-thirds of the motions to certify were approved (Willging and Wheatman, 2006). Thus, Israeli courts make class certification decisions in a much lower percentage of the cases, and their certification rate is much lower, compared with U.S. federal courts.

The most common grounds for rejection pertain to the plaintiff and his attorney – 41% of the requests were rejected after the court determined that the class representative lacked personal grounds, and 20% were rejected after the court found that the plaintiff did not adequately represent the group. Yet, in all of these cases the court found at least one additional cause for not certifying the class action.¹⁴ In 34% of the rejected requests, the additional reason for rejection was that the likelihood of the collective questions being decided in favor of the class was not sufficiently high.

5.2.2 Closing Decisions

Class action proceedings may be resolved in a number of ways, listed in Table 3. Overall, 1,397 cases were resolved between 2006 and 2012.¹⁵ No significant differences were found in the distribution of closing decisions among the various categories of class actions, with the exception of claims against a government authority, as we explain below.

Over 57% of the cases were concluded by the class representative's voluntary dismissal of her lawsuit prior to certification as a class action. Voluntary dismissals have no binding (*res judicata*) effect over class members, but they must nevertheless

¹³ On average, 539 days from filing to rejecting decisions ($n = 121$ cases, $SD = 334$ days) versus 626 days from filing to a decision to certify ($n = 49$, $SD = 357$ days).

¹⁴ Consequently, the court did not exercise its authority to certify the request conditional upon replacing the class representative, according to section 8(c) of the CAL.

¹⁵ In order to verify that the data does not include distortions stemming from the fact that the duration of the proceeding is different in each of the forms of closure, we checked the distribution of the forms of closure only among 639 cases that opened by 2010. This comparative examination showed a rather similar distribution of cases, the salient difference being the higher rate of settlement prior to certification of the lawsuit as a class action (22.4%) and a lower rate of dismissal (49.8%).

Table 3

Closing decision	Frequency
Voluntary dismissal before the suit's certification as a class action	57.3%
A settlement before the suit's certification as a class action	14.7%
Involuntary dismissal following a motion for dismissal (before certification)	3.6%
The court accepted the governmental authority's cease and desist notice	6.2%
Rejection of the motion to certify the suit as a class action	8%
Dismissal for plaintiff's lack of action	4.3%
Voluntary dismissal after the suit's certification as a class action	0.1%
Settlement after the suit's certification as a class action	0.3%
A judgment after the suit's certification as a class action	0.8%
Other (consolidation of proceedings, technical)	4.8%
<i>Total</i>	<i>100%</i> <i>1,379</i>

be approved by the court. If the court finds it proper, it might reject the motion for voluntary dismissal, and replace the class representative or attorney. Yet, our findings indicate that courts approved the voluntary dismissal in more than 99% of these cases.

Motions for voluntary dismissal were coded according to the reasons provided by the plaintiff. In about 20% of the motions (158 motions), the plaintiff stated that the case became moot because the defendant satisfied his legal obligations *after* the case was filed.¹⁶ In these cases, the class action mechanism seems to have proved effective in realizing the objective of law enforcement, using lower resources compared to full-blown litigation.

On the other hand, about 60% of the motions for voluntary dismissal (455 motions) were submitted after the plaintiff recognized that the likelihood of a favorable decision for the class was low. Thus, about a third of all class action cases that were concluded could be considered frivolous lawsuits.¹⁷ Clearly, these cases served no social objective. The same could be said about the 3.6% of the cases ending with involuntary dismissal following a motion for dismissal (before certification) and the 4.3% of the cases that were dismissed due to the class representative's lack of action.

¹⁶ The remaining 20% are due to various other reasons.

¹⁷ This conclusion should be qualified, as the plaintiff might realize the low probability of success after discovery. However, discovery procedures are rare before class certification, and therefore cannot explain most voluntary dismissals.

14.7% of the cases were settled before the suit’s certification as a class action. These settlements are binding upon all class members as *res judicata*, deny future access to courts, and thus require the court’s approval. In practice, of the 222 motions to approve a settlement, the court approved without change 73% of the settlements (in 163 cases), 20% were approved after making amendments (in 43 cases), and 7% were completely rejected (in 16 cases). Most approved settlements included relief for the represented class, thus realizing to different degrees compensation objectives (see elaborate data below).

Only 0.3% of the cases – 4 cases – ended with a settlement after the suit was certified as a class action, and 0.8% of the cases were adjudicated on the merits after the suit’s certification as a class action. The latter refers to only 10 cases, of which plaintiffs prevailed in nine and defendants prevailed in only one.

In 32% of the claims against governmental authorities (87 cases, which constitute 6.2% of all resolved cases), the court accepted the authority’s cease and desist notice, thus resolving the case before certification. These cases promote law enforcement, yet they do not compensate class members and are limited in their ability to realize deterrence. (However, the court may award compensation for the class representative and attorney fees – see below.)

5.2.3 Remedies Awarded

Remedies were awarded in 250 class actions resolved through settlements before and after certification (176 and 4 cases respectively), cease and desist notices (36 cases), voluntary dismissals (25), or judgments (9). In an additional 176 cases, the defendant satisfied his legal obligations *after* the case was filed, presumably as a result of the filing. Considering the latter, in 426 cases – 30.8% of all resolved cases – the class or public benefited from the class action. This percentage was significantly lower than in ordinary civil lawsuits, where plaintiffs received remedy in 78% of the cases (including those ending in settlements).

Table 4 features descriptive data on the various types of remedies granted. Note that in 50 of the 250 cases, more than one type of remedy was awarded.

These findings demonstrate the limited effectiveness of the Israeli class action in realizing its objectives:

Compensating Injured Plaintiffs. In over 77% of the cases in which some monetary remedy was awarded, there was only a partial overlap between class members who were allegedly harmed, and those receiving the remedy. This was mainly true for discounts, coupons, and *cy-près* distributions.

The CAL allows the court to award discounts, coupons, and *cy-près* donations as a class remedy. It nevertheless sets strict requirements for using them, including a requirement that identifying class members and compensating them would prove impractical (section 20(c) of the CAL). Nonetheless, our findings indicate that these remedies were frequently used, undermining the goal of compensation.

Table 4
Type of Awarded Remedies

	Monetary compensation	Discounts or coupons	Cy-près donations	Injunctions	Declaratory remedy
<i>n</i> of claims in which the remedy was awarded	49	72	96	99	10
AVE remedy value in NIS	3,786,889	14,661,525	304,900	–	–
SD	8,177,351	74,218,786	522,927	–	–
MED	1,500,000	500,000	90,000	–	–

In 96 cases the remedy was a cy-près donation, transferred to a public cause rather than to members of the class. Furthermore, 85% of the donations were channeled to nonprofit institutions devoted to assisting the infirm, the poor, or children, even though there was no proximity between the interests of the recipients and those being pursued by class members.¹⁸

In 72 cases the remedy awarded was discounts or coupons, which are mostly received by the defendants' future customers, independently of their membership in the represented class. It should be noted that the use of discounts and coupons appears to be more widespread in Israel than in the U.S. (For example, they were awarded in less than 10% of class settlements in federal courts (Fitzpatrick, 2010).)

Enforcing the Law and Deterring against its Violation. Law enforcement is realized through injunctive and declaratory relief, awarded in a total of 109 cases. Additionally, voluntary dismissals after the defendants satisfied their legal duties were registered in 158 cases. Most of these cases were consumer class actions. Finally, 87 of the class actions filed against governmental authorities were dismissed when the defendants agreed to cease their allegedly unlawful fee collection. Therefore, overall 25.6% of all concluded class actions were resolved with some law-enforcement remedy.

The findings about deterrence are less satisfactory. Unlike compensation, deterrence does not require any overlap between harmed class members and those who receive the class action remedy. However, it is presumably affected by the monetary value of this remedy. Table 4 displays the median and average total amount awarded in class actions, by type of remedy. The average compensation when direct monetary remedy was awarded (49 cases) is about NIS 3.8 million, and the median is NIS

¹⁸ Compare the requirement in the American Law Institute's Principles of the Law of Aggregate Litigation, section 3.07.

1.5 million. These are relatively low sums, only four times higher than the respective remedies awarded in civil proceedings in the comparison group, and much lower than the sums cited in requests for class certification (on average NIS 435 million; see Table 2).

Furthermore, initial findings indicate that the actual costs for defendants of discounts and coupons are much lower than their reported values. The relatively high value of the discount and coupon arrangements displayed in Table 4 assumes their full realization. However, the defendant was ordered to report the actual distribution of coupons and discounts in only 36% of the 72 cases involving these remedies, and the few reports that were actually submitted feature a realization rate of less than 25%. Indeed, the low realization ratio of discounts and coupons may be attributed to lack of incentive mechanisms. For example, in about half of the cases in which this remedy was awarded, its realization was not automatic but required additional action by customers. Moreover, the attorney's fee was contingent upon the actual realization of the remedy in only 27% of the cases where monetary relief was awarded.

In regard to *cy-près* donations, defendants often enjoy reputational benefits when making these donations. Furthermore, in many instances, the donations would have been made anyway, regardless of the class action. Thus, it is questionable to what extent such remedies indeed create a deterrent effect.

Table 5 shows the results of a linear regression model examining the factors influencing the monetary value of the awarded remedy. The dependent variable is the recovered remedy in NIS, transformed to logs, in all cases in which monetary remedies were awarded. We used logs to satisfy the regression's normality assumption, as remedy amounts were positively skewed. The model is significant at an adjusted R^2 of 0.34. As expected, the class compensation sought in the motion to certify was positively correlated with the awarded remedy, but the individual remedy shows no such correlation. The highest level of compensation is awarded in class actions against a governmental authority. This finding is surprising, given the CAL's two-year limit for total compensation in these class actions, as compared to the usual seven-year limitation period.

5.2.4 Discussion

Examination of the outcomes of class actions demonstrates their mixed results in realizing their goals. About one-third of the cases ended in voluntary dismissals, in which plaintiffs recognized that their likelihood of prevailing was low. Only 3.5% of the cases ended with direct monetary compensation to class members, and the average total compensation per class action was small. An additional 12% awarded discounts, coupons, or *cy-près* donations, whose realized cost to defendants and value for plaintiffs is doubtful. Thus, class actions seem to have had limited impact on compensation and deterrence.

At the same time, 25.6% of class actions provided some form of regulatory enforcement, either through future-looking injunctive and declaratory remedies,

Table 5
Linear Regression for Remedy Amount

Length of proceeding	0.001** (0.000)
Number of court hearings	-0.04 (0.087)
Voluntary dismissal	-1.721* (0.837)
Judgment or settlement after certification	-0.420 (0.761)
Monetary remedy	1.218** (0.417)
Donation	-1.165*** (0.354)
Consumer	2.163* (1.09)
Work and discrimination	1.467 (1.39)
Against a governmental authority ^a	2.79** (1.348)
Remedy sought for the represented group (log)	0.252** (0.108)
Individual remedy claimed (log)	0.95 (0.68)
Constant	5.458** (2.36)
Model sig.	0.0001
Observations	112
Adj. R^2	0.3

Notes: Dependent variable is remedy amount in NIS transformed to log. * Significance at 10%; ** significance at 5%; *** significance at 1%; standard errors in parentheses. ^a The reference category for the case type dummy variables is “environmental claims.” There were not enough observations to include corporate claims in the regression model.

through agreement by private (mostly corporate) defendants to satisfy their legal duties, or by consent of government authorities to cease their allegedly unlawful collection of fees. This seems to be the most significant social objective satisfied by Israeli class actions.

5.3 Attorney Fees, Class Representative Compensation, and Cost Shifting

To realize the objectives of deterrence and compensation, courts must use incentive schemes that minimize the principal–agent problem and discourage frivolous suits. This requires attorney fees and representative compensation to increase with their *input* of resources, their *output* of class remedy, and the *social value* (not necessarily measured as its economic value) of the class action. In addition, costs may be shifted to the class representative in cases where lawsuits are evidently frivolous. Yet, our findings indicate that Israeli courts fail to implement these principles.

5.3.1 Attorney Fees and Class Representative Compensation

Attorneys and class representatives received fees and compensation in 513 cases. Class remedies were awarded in only 250 cases, and an additional 176 cases ended with voluntary dismissals after the defendants satisfied their legal duties. Thus, the class representatives were awarded fees in 87 cases in which the class gained no benefit. This indicates either that these representatives misused the class action threat for their own benefit at the expense of class members, or that those lawsuits had no value for class members, yet defendants were willing to compensate class representatives to dispose of them.

On average attorney fees were NIS 102,551 (median = 40,000, SD = 382,442), and compensation for class representatives was NIS 32,367 (median = 10,000, SD = 209,364). As a percentage of the remedy (when monetary remedy was awarded), the class representative's share averaged nearly 17% and the attorney's fee was about 28%. The fee percentage is similar to the percentage reported for class settlement in U.S. federal courts (Eisenberg and Miller, 2004b; Fitzpatrick, 2010).

Table 6 displays the distribution of amounts and percentages of attorney fees and class representatives' compensation, according to case resolution. Fees and compensation were paid in 234 cases that terminated in voluntary dismissal prior to certification of the class action. One-third of these cases were resolved without any benefit for the represented group or the public. The table also shows that the average amount and percentage of compensation and fees were highest in cases resolved in settlement prior to class action certification. These findings do not accord with the *input* principle for awarding compensation and fees. Moreover, they encourage early settlements and dismissals, instead of discouraging them to overcome the inherent agency problem. They are therefore inconsistent with the *output* principle as well.

In order to test the prevalence of this pattern, we created four regression models for examining the amount and percentage of fees and compensation. Table 7 presents these models. Dependent variables in models 1 and 3 are fee or compensation amounts transformed to logs; the fee or compensation percentages in models 2 and 4 are transformed to square roots. The independent variables include indicators that correspond with input and output factors.

Table 6
 Compensation for Class Representative and Attorney's Fees, by Type of Remedy

Case outcome	Class representative's compensation (NIS)	Class representative's compensation (% of remedy)	Attorney's fee (NIS)	Attorney's fee (% of remedy)
Voluntary dismissal	13,605 (<i>n</i> = 234 SD = 25,589 M = 5,000)	17.1% (<i>n</i> = 17 SD = 82% M = 15.4%)	35,260 (<i>n</i> = 234 SD = 33,998 M = 25,000)	15% (<i>n</i> = 3 SD = 12.2% M = 18.7%)
Settlement before certification	58,930 (<i>n</i> = 195 SD = 341,188 M = 20,000)	16.9% (<i>n</i> = 129 SD = 28.5% M = 6%)	189,761 (<i>n</i> = 193 SD = 612,654 M = 70,000)	28.1% (<i>n</i> = 107 SD = 28.2% M = 20%)
Settlement after certification	21,666 (<i>n</i> = 3 SD = 33,998 M = 25,000)	15.9% (<i>n</i> = 2 SD = 12.8% M = 15.9%)	51,667 (<i>n</i> = 3 SD = 28,431 M = 60,000)	35.3% (<i>n</i> = 2 SD = 20.8% M = 35.3%)
Judgment	34,250 (<i>n</i> = 8 SD = 30,311 M = 25,000)	8.1% (<i>n</i> = 5 SD = 5.5% M = 7.7%)	152,500 (<i>n</i> = 6 SD = 180,354 M = 92,500)	22.8% (<i>n</i> = 6 SD = 27.3% M = 19.8%)
Cease and desist notice	23,436 (<i>n</i> = 73 SD = 30,920 M = 12,000)	–	85,225 (<i>n</i> = 74 SD = 33,998 M = 25,000)	–

Direct input factors are positively correlated with the fee and compensation amounts. Thus, the amounts of attorney fees and representative compensation are positively correlated with the number of court hearings and the number of days from filing to closure of the case.

As for output factors, our regressions feature positive correlation between remedy value and fee and compensation *amounts*, and a negative correlation between remedy value and fee and compensation *percentages*. These findings are similar to those found in federal class action settlements in the U.S. (Fitzpatrick, 2010; Helland and Klick, 2007; Eisenberg and Miller, 2004b). In other words, the *amounts* of attorney fees and class representative's compensation rise as the remedy to the class increases, whereas their *percentages* decline.

However, findings pertaining to the correlation between representative fees and class action resolution reinforce our conclusion from the descriptive analysis in Table 6. Even after allowing for the value of remedy and duration of proceedings, the attorney's fee and compensation in settlements concluded prior to the stage of

Table 7
Regression Models of Fee and Compensation Amounts and Percentages

	Model 1: Fee amount	Model 2: Fee %	Model 3: Compensation amount	Model 4: Compensation %
Gross remedy in NIS (log)	0.02** (0.009)	-0.162*** (0.017)	0.024** (0.01)	-0.109*** (0.009)
Length of proceeding	0.001*** (0.000)	0.000* (0.000)	0.001*** (0.000)	0.0008* (0.000)
Number of court hearings	0.087** (0.032)	-0.006 (0.017)	0.101** (0.034)	-0.004 (0.000)
Voluntary dismissal	-0.462** (0.151)	0.964*** (0.188)	-0.257* (0.158)	0.676*** (0.106)
Judgment or settlement after certification	-0.901** (0.303)	-1.94 (1.48)	-0.732** (0.382)	-0.08 (0.079)
Cease and desist notice ^a	0.461 (0.288)	–	-0.091 (0.382)	–
Constant	10.126*** (0.322)	2.5** (0.230)	8.84*** (0.336)	1.66*** (1.32)
Model sig.	0.0001	0.0001	0.0001	0.0001
Observations	512	112	497	112
Adj. R^2	0.321	0.578	0.328	0.662

Notes: Dependent variables are fee or compensation amount transformed to logs, and fee or compensation percentage transformed to square roots. Dummy variables for case categories are included in the model but not reported. A joint test of their significance and each dummy variable fails to reject the null hypothesis. * Significance at 10%; ** significance at 5%; *** significance at 1%; standard errors in parentheses. ^a The reference category for case resolution variables is precertification settlement.

class certification are higher than in class actions that terminate after certification – whether through settlement or judgment. Moreover, the percentage of attorney’s fees and compensation in models 2 and 4 is higher in cases that were resolved in dismissal than for settlements in the precertification stage. Regression models show, therefore, that the earlier the class action is resolved, the higher the percentage of compensation and fees. This might encourage inefficient settlements and frivolous litigation.

5.3.2 Costs Shifted to Losing Class Representatives

Israeli courts enjoy broad discretion *whether* to order losing plaintiffs to reimburse prevailing defendants for their expenses (including attorney fees) and if so, to

determine the amount of such reimbursement. Our findings indicate that the class representative was ordered to pay the defendant's expenses in only 161 cases. This represents about 16.6% of the cases in which no remedy was awarded. In comparison, court expenses were awarded to the defendant in a similar proportion (20%) of the civil cases in the district courts when the plaintiff did not win any remedy. The amount of costs awarded was also similar in class actions and in the comparison group of civil cases – a median of NIS 15,000 in both; the average amount in class actions was about NIS 40,000 ($SD = 197,222$), compared to about NIS 27,000 in other civil cases ($SD = 33,212$). We found no correlation between the costs awarded and defendants' actual legal costs, as reflected in the indicators regarding filings of responses to class certification motions.

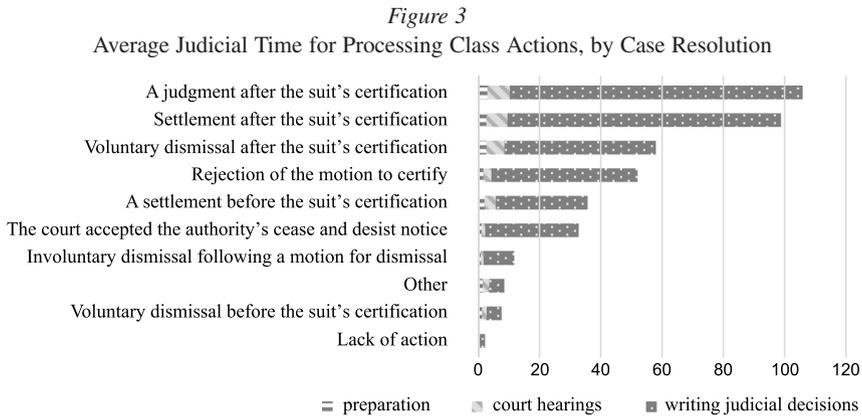
Although it is impossible to know what percentage of the class actions that conclude without remedy are indeed frivolous lawsuits, it seems reasonable to assume that many of the 455 class actions that ended in voluntary dismissal after the plaintiff declared that the likelihood that the case will be decided in favor of the class is low may be regarded as frivolous. The court ordered fees to be shifted to the plaintiff in only 33 such cases.

5.4 Court Resources Invested in Class Actions

We do not have direct information about the costs of class action proceedings. One indicator of these costs, however, is judicial time spent on these proceedings. We combined our findings regarding the number of class action proceedings with other studies that pertain to the judicial workload in Israeli class actions. A recent study examining judicial workloads in various types of cases found that class actions are one of the five most time-consuming case types (of more than 100 case types in the Israeli judiciary). For example, a district court judge invests an average of about 21 hours in a civil case and about 34 hours in a class action (Weinshall-Margel, Galon, and Taraboulos, 2015). Figure 3 shows the average time a judge invests in class actions according to case resolution and different stages in processing the case.

The figure indicates that judges invest a lot of time in cases ending after the suit's certification as a class action – 106 and 99 hours on average when the case ends with judgment or settlement, respectively. Yet, judges also invest a substantial amount of time in cases that end without serving many of the class objectives. For example, it takes a judge 12 hours to process cases ending with involuntary dismissals, and 7 hours for the majority of cases ending with voluntary dismissals before certification. In fact, in voluntary dismissals due to the plaintiff's recognition of the small chance of winning, the judicial time invested was even higher, with 1.3 lengthy hearings on average compared to 0.9 such hearings in other cases ending with voluntary dismissals.

Our data indicates that class actions are conducted largely via written motions. An average of 12 motions are submitted in class actions (median = 10, $SD = 5$), compared to 10 motions in civil cases. Judges also report a significant difference in the amount of time invested in each motion: nearly two hours of work for class action



motions, compared to less than an hour in civil cases.¹⁹ It seems that lawyers too invest considerable resources in litigating class actions. For example, as an indicator for the time invested by lawyers, we found that the average number of pages in motions to certify a class action is 17.9 (median = 15, SD = 10.6), compared to 7.9 pages submitted to courts on average in a district civil claim (median = 7, SD = 5.6). We do not have other indicators for the time invested by the sides in class actions, but we assume it correlates with the high judicial inputs.²⁰

Our findings indicate that class actions impose a disproportionately heavy workload on the justice system. In 2012, class actions comprised less than 0.5% of the number of civil and administrative cases in the justice system, but imposed a workload that was six times that size – 3% of the total workload.

6 Conclusion

Six years after its enactment, the CAL has generated a significant amount of class action litigation. However, our findings indicate that its success in realizing its goals is limited. The law's main contribution lies in facilitating some regulatory enforcement as well as a potentially low level of deterrence, mostly in consumer law and in

¹⁹ See the method of measuring judicial invested times in Weinsall-Margel, Galon, and Taraboulos (2015, pp. 20–26).

²⁰ When calculating the costs of class actions it is also necessary to take into account the secondary litigation they generate – and appeal cases in particular. Most of these appeals are heard by the Israeli Supreme Court. Data provided by the courts indicates that from August 2010 through August 2013, 26 appeals were filed on interim decisions in class actions and 37 appeals were submitted on final class action judgments. Appeals of final judgments are especially costly, as they are decided by a panel of three Supreme Court justices. However, we do not have information on the results of these proceedings or the precise input invested in them.

restitution lawsuits against government authorities. Yet, during these first six years, the CAL has failed to produce a significant amount of litigation in the important categories of corporate (including antitrust), employment and discrimination, and environmental lawsuits.

The costs of class actions during these six years was not insubstantial, as their litigation consumed resources by plaintiffs, defendants, and courts. Moreover, about one-third of the cases were recognized by plaintiffs as having no merit, and were thus voluntarily dismissed. These cases produced a net social loss.

In order to improve the benefit–cost ratio of Israeli class actions, courts should take steps to encourage filings in categories that may provide significant social value – in deterrence, compensation, and access to courts. At the same time, courts should better screen and discourage frivolous lawsuits. These policy goals may be obtained using the procedural mechanisms of class certification, settlement approval, attorney fees, and plaintiff compensation, as well as cost shifting. Our findings indicate that court practices in implementing these mechanisms do not always conform to principles that would guarantee their effectiveness in generating greater net social value from the CAL.

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