

Index

- abstention, duty of *see* passivity rule
- access to justice
 - contingency fees 187, 207–8
 - in European class actions 315–16
 - constitutional conflicts over 318–20
- action en représentation conjointe* (France) 232, 310–11, 317
- Administrative Code of 1878 (Portugal) 342–3
- aggregate damages *see* damages
- alternatives, to class actions
 - association actions 129–30
 - coupon remedies 29, 84, 90
 - insurance 122–3
 - public enforcement 121–2, 220–22, 240
 - successive civil actions 122–3
- Amchem Products v. Windsor* (1997) *US* 38, 41–3
- antitrust *see* competition
- App. Milano GI* (1994) *Italy* 142
- Arthur Andersen 34
- association actions 129–30
- attorneys
 - see also* contingency fees
 - attorney monitoring 82–3, 229–30
 - auctions/ selection methods 84–5
 - authority relationships 192–4, 214–15
 - as bounty hunters 105–6, 119
 - consumer organizations, influence on 53–4
 - and economies of scale 128–9, 147–8, 154
 - facilitative practices, in class actions 227–8
- fees
 - efficiency criteria 118–19
 - institutional investors, influence on 53–4
 - lack of proportion in 16–17, 20, 29–30, 43
 - lodestar collection method 83
 - percentage of recovery fees 83–5
 - sweetheart settlements 83–4
- incentives 16–17, 20, 29–30, 85–6
 - entrepreneurial spirit 43–4, 104–6, 117–21
 - opportunism 104–6, 228–30
 - personal motivation 181–2, 215–16
- professional behavior
 - barratry, offense of 43–4
 - case cross-subsidization 211–14
 - charitability 208–11
 - class action abuses 29–32, 229–30
 - corruption 45–6
 - and fiduciary duties 181–2, 188–94, 214–15
 - multiple clients, treatment equality 208–11, 215–16
 - pooling damages 211–16
 - restrictions on 43–4
 - risk management 119–21, 128, 186–7
- auctions
 - of class actions, EU proposal 257
 - for lead counsel, in small claims cases 84–5
- Australia, contingency fees 56
- Austria
 - constitutional basis for class actions 316
 - representative test actions 312
- authority relationships 192–4, 214–15
- Bailey, M.J 223–4
- barratry, offense of 43–4
- Basic v Levinson* (1988) 88–9
- Bator, Francis 71
- Becker, G.S. 23
- ‘bills of peace’ 307
- blackmail

- blackmail settlements 17–18, 86–7
- class actions, as 29–32
- judicial blackmail 17–18
- Bone, R.G. 79–81, 86
- In Re Brand Name Prescription Drugs Antitrust Litigation (1996) US* 255–6
- Branded Drug Litigation (ongoing) US* 30–32
- Brandeis, Louis 47
- Brazil
 - class actions 345
 - res judicata* 351
- Brown v. Vermudden (1676)* 307
- burden of proof
 - under Class Action Fairness Act 2005 (US) 19–20
 - in class action model code 359
- CAFA *see* Class Action Fairness Act 2005
- Calabresi, Guido 3
- Canada
 - contingency fees 56
 - Potash Antitrust Litigation (2000) US* 30–31
- Cantillo, Gomez 343–4
- cartels
 - European class actions 260
 - optimal damages 250–51
- Che, Y-K. 148
- civil actions
 - public prosecution limitations 121–2
 - successive actions
 - as alternative to class actions 122–3
 - and free-riding 122–3
- civil law regimes *see also* class action model code
 - class action cases, relevance to 65
 - collectivism, attitudes to 65–6
- civil rights movement, impact on US
 - class action regime 13–15, 308–9
- claims aggregation 11, 104, 368
- Clark, Charles E. 13
- class
 - certification 19–20, 70
 - in class action model code 358
 - cost-benefit analysis 113–17
 - definition 225, 228
 - discrimination between, 73, 116, 136–7
 - giving notice to class members 227–8
 - size, attorney incentives to maximize 85–6
 - Class Action Fairness Act 2005 (US)
 - burden of proof under 19–20
 - certifiability 19–20
 - and choice of law 20
 - impact of 19–20, 35–6
 - limitations 18, 32
 - monetary loss, avoiding problem of 136
 - preamble 28–9
 - purpose 28–9, 32, 90, 102, 229–30
 - class action model code, civil law regimes
 - adequate notice 355–7
 - adequate settlement rules 360–62
 - applicability conditions 352–3
 - basis for 306–9, 351–2
 - burden of proof 359
 - case management 358–9
 - class certification 358
 - class judgments 362
 - corresponding individual suits 363–4
 - cost of proof 359
 - damages
 - calculation 366–7
 - distribution 367–8
 - defendant class actions 368–9
 - expense and fees 364–5
 - group rights
 - aggregate compensation 368
 - funding 366
 - protection 366
 - individual rights
 - aggregate compensation 368
 - damages, calculation 366–7
 - protection 366–7
 - injunctions 363
 - interpretation 369
 - intervention 357
 - lis pendens* 363
 - motion for new proceedings 365
 - object of class actions 357–8
 - partial class judgments 362
 - prerequisites 354
 - priority of class action suits 365
 - purpose 351–2

- res judicata* 363
- standing to bring 353
- statistical proof 359
- statute of limitations 358
- supplementary provisions 369–70
- venue 354–5
- class actions, generally
 - identifying need for 71–2, 107
 - and justice 22, 27–9, 108–9, 218–22, 315–16
 - limitations 4–5, 35–6, 75–6
 - principles of 69–71
 - procedural features 103–6, 153
- club theory
 - and class actions, compared 109–13, 129, 148–9
 - attorney opportunism 228–30
 - cost-victim ratios 112–13
 - homogeneity, economic issues of 111–13
 - opting-in/opting-out 110–112, 120, 226–7
- club, definition 110
- club goods, as public goods 110–112, 226–7
- Coase, R.H. 73
- Code of Civil Procedure (Austria) 312
- competition
 - competitors' actions for damages 249
 - as deterrence 27–8
 - in European law
 - class actions 241–2
 - Damages actions for breach of the EC antitrust rules (Green paper)* 239–43
 - private enforcement vs. public enforcement 239–43
 - optimal sanctions
 - recoverable damages, calculation 252–4
 - social loss factors 251–4
 - perfect competition 179
 - standing rules 254
 - and tortfeasor gains 250–51
- conditional fees *see* contingency fees
- Conference on Jewish Claims against Germany 71
- constitutional law, class action conflicts with 322–3
- defendants' business interests, protection 318
- and human rights 318–22
- opting-in vs. opting-out 319–21
- principles of equality 316, 321
- private abuses of public powers 317–18
- right to fair trial 321–2
- right to legal aid 321
- rights to action and defence 318–22
- and social justice 316–17
- consumer organizations, as plaintiffs
 - agency problems 70–71
 - association actions 129–30
 - case proceeds, entitlement to 56–7
 - class member interests 50–52
 - competency 49–50
 - entrepreneurial attorneys 53–4
 - ideological distortion 51–2
 - limitations of 50–52
 - litigation funding
 - claiming from consumer 57–9
 - private funding 56–7
 - state funding 58
- contingency fees
 - advantages 55–9, 166–8, 176–7, 187
 - and attorney behavior
 - attorney discretion 195–7
 - charitability 208–11
 - conformist preferences 182
 - efficiency and effort 118–19, 185–6, 203–8
 - fiduciary duties 181–2, 188–94
 - incentives 83, 117–18, 199–201
 - proportion, lack of 16–17, 20, 29–30, 43
 - respect and reputation 181–2
 - contractual incompleteness 195–7
 - distributions
 - calculating 204–7
 - social justice and welfare problems 207–8
 - European rules on 54–5
 - fee recovery methods 83–5
 - and information sharing 166–8, 176–7
 - institutional investors, influence on 53–4
 - introduction and development 179–80, 184–5

- and justice 187, 207–8
- and litigation funding companies 56
- lodestar collection method 83
- need for 127–8
- optimal contingent contracts 185–6
- percentage of recovery fees 83–5
- pooling damages 211–16
- and principal-agency model 180–81
 - bounded effort capability 203–8
 - calculating payoff 204–7
 - conflicts of interests 188–9
 - information asymmetry 180, 201–2
 - moral hazard 185, 199–201
 - pooling damages 211–16
 - simultaneous case trade-offs 202–3
 - social justice and welfare problems 207–8
- principles 184
- risk management 119–21, 186–7
- settlements
 - frequency of 167–8
 - sweetheart settlements 83–4
- unavailability of, problems associated with 58–9
- and unforeseen events/ consequences 195–7
- use trends 72–3, 184
- Cooper Industries, Inc. v. Leatherman Tool group, Inc. (2001) US* 142
- Cooperman, Steven G. 94
- corruption
 - in securities regulation mechanisms 300–301
 - trends 45–7
- costs, of class action litigation
 - agency costs 82–5
 - case coordination costs 82
 - claims methods 83
 - in class action model code 359
 - class certification 113–17
 - cost-benefit analysis 113–17, 120–121
 - cost deficits 81–2
 - cost savings 78–81
 - cost-shifting 115–17
 - free-riding 82–3
 - lodestar fees 83
 - monitoring costs 82–3
 - percentage of recovery fees 83–5
 - of public enforcement 294–5, 297–9
 - social costs 11, 77–87
- coupon remedies 29, 84, 90
- Courage v. Crehan (2001) EU* 254
- Cox, James D. 62, 282
- Curran, C. 224
- damages
 - aggregate damages 3–4, 368
 - averaging rule 165–6, 176
 - under class action model code 366–8
 - cost-shifting 115–16
 - court behavior regarding 165–6
 - as deterrence
 - absolute deterrence 142–3
 - administrative fines 256–7
 - assumptions about 248–9
 - choices, management of 244–5
 - class actions as form of 11, 22, 27–8, 64–5, 133
 - coexistence and coordination 256–8
 - disparities between 248–50
 - establishing levels 247–8
 - EU small claims procedure proposal 258–9
 - illegal conduct, defining 244
 - interference vs. alternative 245–6
 - management of consequences 244–5
 - optimal damages 250–51, 254–6
 - private enforcement, in EU
 - competition law 244–58
 - purpose, differences 247–8
 - risk management 244
 - social loss 251–4
- in European takeover shareholder class actions 283–4
- marginal damages 254
- optimal damages
 - seriousness of the offence 254–6
 - social loss 251–4
 - tortfeasors' gain 250–51
- pass-on problem 35–6
- pooling 211–16
- in Portuguese class actions 346
- punitive damages
 - absolute deterrence 142–3
 - class actions, compared 21–5, 135–9
 - conditions for 131

- disappearing defendant problem 136–7
- disgorgement damage 139–42
- efficient uses of 139–44
- environmental damage 142
- first award of 142
- fundamental fairness doctrine 138
- inefficiency of 144–5
- limitations on 138–9
- moral hazard problems 135–6, 140
- multiplier for 22–3, 131–3
- non-pecuniary loss, for 142–3
- as only remedy 143–4
- punishment, basis for 137–9
- purpose 21–2, 131
- and right to vengeance 22, 27–9
- social cost, bearing of 139–42
- split-recovery procedures 140
- tortfeasor insolvency 136–7
- types 22–3
- victims, discrimination between 73, 116, 136–7
- realistically recoverable damages 249
- social compensatory damages 23–4
- Damages actions for breach of the EC antitrust rules (EC Green paper)* 239–43
- De Freitas, Lebre 346
- De Sousa, Miguel Teixeira 344–5
- defective products, punitive damages 138–9
- defense class actions 17–18
- definitions
 - class 225, 228
 - class actions 69–71, 235, 242
 - clubs 110
 - interest groups 225
- deterrence
 - absolute deterrence 142–3
 - class actions as form of 11, 22, 27–8, 133
 - opting-out vs. opting-in, impact of 64–5
 - success, rates of 27–8
- damages/private enforcement
 - administrative fines 256–7
 - assumptions about 248–9
 - choices, management of 244–5
 - class actions as form of 11, 22, 27–8, 64–5, 133
 - coexistence and coordination 256–8
 - disparities between 248–50
 - establishing levels 247–8
 - in EU competition law 244–58
 - EU small claims procedure proposal 258–9
 - illegal conduct, defining 244
 - interference vs. alternative 245–6
 - management of consequences 244–5
 - marginal damages 254
 - punitive damages 142–3
 - purpose, differences 247–8
 - recoverable damages, calculations 252–4
 - risk management 244
 - social loss 251–4
 - tortfeasors' gain 250–51
 - differing qualities of 256–7
 - goals 247–8
 - optimal deterrence 253, 255, 259–60
 - finer, calculating 255–6
 - rebates, treatment of 255
 - overdeterrence and underdeterrence 253, 255, 259–60
 - seriousness of the offence 254–6
 - social loss 251–4
- Deutsche Telekom (2008) Germany* 40
- discovery *see* information sharing
- disgorgement damage 142
- diversity jurisdiction 307–8
- economic effects, of class actions
 - analysis mechanisms 106–7
 - economies of scale 128–9, 147–8, 154
 - negative 147–8, 334–5
 - positive 108–9, 133, 148–50, 226–8
- economists, experts role in class action litigation 32–5
- enforcement *see also* damages
 - generally
 - as deterrence mechanism 282–5
 - discipline, impact on 282
 - game-theory model of 274–82
 - importance 261–4
 - limitations 282–5, 290–93
 - reciprocity preconditions 292–3
 - risk of bias 290–93
 - risk of underinvestment 291–2

- social norms, relevance of 287–92
- private/shareholder enforcement
 - 262, 273–4
 - and causation 249
 - coexistence and coordination 256–8
 - limitations 282–94
 - principles 274–7, 280–82
- public enforcement 277–80, 289–301
 - advantages/ disadvantages 293–301
 - as alternative to class actions 220–22, 240
 - limitations 121–4
 - complementary function of 295–6
 - costs 298–9
 - decentralization, and public policy 248
 - deterrence, scope of 297–8
 - importance 299–300
 - independence and professionalism 296–7, 300–301
 - limitations 121–2
 - monitoring functions 298–9
 - regulator's role 294, 296–7, 300–301
 - social costs 294–5, 297–8
- Enron 34
- environmental damage 142
- European Convention on Human Rights
 - access to justice principle, conflicts with class actions 318–19
- European law
 - see also* passivity rule
 - class actions
 - alternatives to 310–13, 323–4
 - attitudes to 24–5, 37–8, 242, 324
 - in civil law regimes 35, 37
 - common legal features relevant to 49
 - consumer claims, restrictions 49
 - consumer protection actions 324
 - contingency fees, prohibition 54–5
 - definition, lack of clarity in 242
 - deterrence, impact on 64–5
 - harmonizing rules, need for 313–15
 - insufficient finality 63
 - insufficient participation 60–62
 - jurisdictional conflicts over 313–18
 - and justice 315–16
 - litigation funding issues 54–9
 - opting-in vs. opting-out procedures 59–65, 319–21, 336–7
 - organizational standing rules 49–54
 - plaintiffs, limitations on 49–50
 - purpose 37–8
 - small claims procedure proposal 258–9
 - social rights, emphasis on 315–16
 - underdevelopment of 241–2
 - collective redress approaches 323–4
 - compensation, statements on 239–40
 - competition law
 - class actions 241–2
 - Damages actions for breach of the EC antitrust rules (Green paper)* 239–43
 - private enforcement vs. public enforcement 239–43
 - corporate control of markets, views on 269–71
 - first instance court system 48
 - free movement of goods/ service conflicts with 48
 - legal services liberalization 179–80
 - national cultures, influence of 48–9
 - public law, emphasis on 310
 - state powers, and jurisdictional conflicts 313–14
 - subsidiarity, doctrine of 314–15
 - exemplary damages *see* punitive damages *under* damages
- Farmer, A. 223
- Federal Rules of Civil Procedure (US) 12–13
 - civil rights movement, impact on 13–15, 308–9
 - on class actions
 - attitudes to, changes in 18–19, 308–9
 - opting-out 14
 - Rule 23 13–14, 101, 227–8, 308
 - state interpretation differences 13
 - fees
 - see also* contingency fees; settlements arrangements for, impact on litigation 223–4

- collection methods 83–5
- under class action model code 364–5
- fiduciary duties
 - attorney reputation 182
 - attorney respect for 181–2
 - authority relationships 192–4, 214–15
 - and case cross-subsidization 211–14
 - contingency fees, influence on 181–2, 188–94
 - multiple clients, treatment equality 208–16
 - pooling damages 211–16
 - problems with 201–8
- Field Code of New York, 1848 12
- Finland, class actions in
 - applicability 327, 329
 - Consumer Ombudsman, role of 327, 329
 - criticism 331–5, 338–40
 - economic analysis, lack of 332–5, 338–9
 - environmental class actions 335
 - failure, reasons for 334–5, 338–40
 - history and development 327, 329–31, 336–7
 - legislative process 327–8, 339–40
 - limitations 327–9
 - lobbying against 330–31, 340
 - negative economic effects 334–5
 - regulatory emphasis 329
- fluid recovery, doctrine of 73
- Folding Carton Litigation (1985) US* 33
- France
 - collective actions, compared with legislation 232–4
 - organizational actions 232, 310–11, 317
- Frank, John 14
- fraud
 - see also* securities fraud
 - fraud on the market theory 88–90
- free-for-service arrangements 127–8
- free movement of goods/ service, class action conflicts with 48
- free-riding 148, 222, 225–7
 - and successive civil actions 82–3, 122–3
- Friendly, Henry 87
- funding *see* contingency fees; litigation funding
- game theory
 - applicability to law, generally 179
- contingency fees
 - bounded effort capability 203–8
 - calculating payoffs 204–7
 - information asymmetry 201–2
 - moral hazard 199–201
 - simultaneous case trade-offs 202–3
 - social justice and welfare problems 207–8
- and law, generally 179
- and passivity rule, class actions *vs.* public enforcement 274–82
- Germany
 - association actions 129–30, 310
 - Capital Markets Model Case Act 2005 40, 59, 313
 - class actions in
 - constitutional conflicts over 316–18
 - defendant's economical rights 316
 - plaintiff reluctance 59
 - public *vs.* private enforcement 317–18
 - contingency fees 55
- Gladwell, Malcolm 34
- Green Paper on class actions in EU
 - antitrust enforcement *see Damages actions for breach of EC antitrust rules*
- Grimalda, G. 183
- Grimshaw v. Ford Motor Co. (1981) US* 21–2, 143
- Grundfest, J.A. 90–91
- Hayek, Friedrich A. 65
- Hodges, C. 324
- Honda Motor Co. v. Karl L. Oberg. (1994) US* 138
- human rights
 - conflicts with class actions 318–22
 - rights to action *vs.* right to defence 318–22
 - US due process clause 322
- Illinois Brick Co. v. Illinois (1977) US* 35–6
- incentives, for class actions
 - for attorneys 16–17, 20, 29–30, 85–6

- entrepreneurial spirit 43–4, 104–6, 117–21
- opportunism 104–6, 228–30
- personal motivation 181–2, 215–16
- for collective action, generally 225–8, 230
- and contingency fees 83, 117–18
- economic incentives 108–9, 133, 148–50, 226–8, 230
- for information sharing 150–51
- mistaken incentives 182
- and opting-out 60–62, 136
- separate and selective incentives 228
- indirect representation 104–5
 - see also* consumer organizations
- information sharing
 - asymmetries in 148–9, 180, 201–2
 - class action, role in
 - attorney opportunism 228–30
 - beliefs updating rules 155–7
 - benefits of 150–51
 - contingency/ conditional fees 166–8, 176–7
 - discovery process 151, 154–5
 - incentives for 150–51
 - large stake plaintiffs, role of 161–4, 171–5
 - litigation efficiency, influences on 161–4, 171–5
 - stages of 150–51, 154–5
 - passive transmission 150
 - in successive individual actions 150, 157–61
 - anticipated good news 159–61, 170–71
 - expected utility levels, relevance of 157–61
 - one-shot individual offers 157–9, 169
 - uncertainty, resolution of 149, 151–2
- institutional investors 53–4
 - settlement benefits, failure to claim 62
- insurance
 - as alternative to class actions 122–3
 - insurance fraud 123
 - legal expenses insurance 129
 - limitations 122–3
 - and risk management 186–7
 - and shareholder class actions in Europe 284
 - and uncertainty 128
- interest groups
 - see also* consumer organizations
 - definition 225
 - influences of 230–31, 288–9
 - latent interests, motivations for 230–31
 - law, role in 220–21, 223
 - litigation *vs.* legislation, choice between 230–35
 - interests, collective *vs.* private interests 105–6
- Italy
 - opting-in *vs.* opting-out 319–20
 - right to defence, conflicts with 318–22
 - State powers, and jurisdictional conflicts 313–14, 318–19, 323–4
- judicial practices
 - in class actions, facilitative 7, 107, 227–8, 348–9
 - judicial activism, compared with legislative activism 219–22
 - judicial bias 222
 - judicial blackmail 17–18
 - and judicial discretion 42–3, 323
 - and judicial economy 108
 - and judicial market failure 113–14
 - limitations 235
- justice
 - and class actions 22, 27–9, 108–9, 315–16
 - and contingency fees 187, 207–8
 - European constitutional conflicts 316–20, 346
 - human rights conflicts with class actions 218–22
 - right to 22, 27–9
 - rights to action *vs.* right to defence 318–22
- Katz, A. 222–3
- Kaysen, Carl 32
- Koppel, N. 127
- La Porta, R. 281, 299
- ‘laboratories of democracy’ 47
- Landes, W.M. 222
- law
 - see also* legislation; litigation

- economic treatment 220–22
- equilibrium, establishment of 178–9
- functions, separation of 220
- and game theory 179
- influences on 222–3
- interest groups, role in 220–21, 223
- as market process exchange 220
- methods, interchangeable nature of 220
- and perfect competition 179
- principles behind 178–9
- public choice analysis 220–22
- reforms, influences of 179–80
- rent-seeking opportunities in 219–25
- unintended effects 178–9
- Law of Class Action (Law 83/95)(Portugal) 311, 343–6
 - compensatory damages 346
 - public prosecutors' role 345
- Law of Consumers' Protection (Portugal) 347
- Law of Contractual General Clauses 1985 (Portugal) 347
- Law of Cultural Heritage Protection 2001 (Portugal) 348
- Law of Group Proceedings 2002 (Sweden) 312
- Law on the Collective Settlement of Mass Damage 2005 (Netherlands) 312–13
- Lazar, Seymour M. 94
- Learned Hand test 21, 106, 110
- Lee, Emery G. III 92
- legal expense insurance 73
- legal services, European liberalization 179–80
- legislation
 - as choice of forum, compared with class actions 20–22, 230–35
 - cooperation with litigation 232–4
 - economic treatment 220–21
 - impact on class actions 232–4
 - influences on 222–3, 233–4
 - and judicial activism 219–22
 - and politics 233
 - purpose 233
- leniency programs 257–8
- Lerach, William S. 95
- Ley de Enjuicamiento Civil* (Spain) 311
- limited funds 79–80
- Lindblom, Henrik 335–6
- Litan, Robert E. 91–2
- litigation
 - analysis trends 221–2
 - as choice of forum, compared with legislation 220–22, 225, 230–35
 - collective litigation 224–7
 - cooperation with legislation 232–4
 - economic treatment 220–22
 - fee arrangements, relevance 127–8, 223–4
 - and free-riding 222, 225–7
 - investment incentives, limitations on 291–2
 - judicial influences 222–3
 - litigation funding companies 56
 - motivations for 221–2, 230
 - public interest litigation, European forms 310–13
 - rent-seeking, as 222–5
- litigation funding
 - see also* contingency fees
 - in class action model code 366
 - by consumer organizations 56–7
 - for European class actions 54–9
 - free-for-service arrangements 127–8
 - limited funds 79–80
 - litigation funding companies 56
 - political influences on 58
 - private funding 56–7, 127–8
 - public/ state funding 58
- lobbyists *see* interest groups
- lodestar *fee* collection method 83
- Macedonia, Philip of 69–70
- Manfredi v. Lloyd Adriatico Assicurazioni* (2006) EU 254
- Manual of Chancery Practice* (1674) 307
- Marceau, N. 148, 165
- market failure
 - addressing, as government purpose 71
 - class actions, as remedy to 69–73
 - and contingency fees, influence on 72–3
 - self-correction mechanisms, failure of 72–3
- Martins, Payam 344, 347

- Matsushita Electrical Industrial Co. v. Epstein* (1996) US 40–42
- Milberg Weiss* indictments
background 93–5
implications of 90–91, 93–4
- Miles v. Merrill Lynch* (2006) 19
- misrepresentation, fraud on the market theory 88–90
- model code *see* class action model code
- Mongrain, S. 148, 165
- moral hazard
in class actions 136
in contingency fees 199–201
personal injury 142–3
principal-agency model 185, 199–201
and punitive damages 135–6, 140
- Moreira, Vital 343–4
- Mueller, D.C. 225
- negative-expected-value class actions 80–81
- Netherlands, class actions in 40, 312–13
- Norway, class actions in 336–7
- Olson, M. 228
- Olson, Mancur 3, 129
- opting-out 11
class action settlement, claim process following 61–2
and club theory 110–112, 120, 226–7
confusion over 17
under European law 59
constitutional conflicts over 319–21
deterrence, impact on 64–5
influences on 62
insufficient finality 63
insufficient participation 60–62
legal burdens, justification 321
plaintiff reluctance 59–60
of legislation, compared with class actions 228
participation incentives 60–62, 136
passivity rule 261
rights to action *vs.* right to defence 319–21
of strong claims, and adverse selection 85–6
under US law 14, 61, 308–9
- Ortiz v. Fibreboard Corp.* (1999) US 38, 41, 43
- passivity rule, in takeover law
advantages/ disadvantages 270–74
competitive bidding auctions 272–3
compulsory takeovers 271–2
enforcement, generally
as deterrence mechanism 282–5
discipline, impact on 282
game-theory model of 274–82
importance 261–4
limitations 282–5, 290–93
reciprocity preconditions 292–3
risk of bias 290–93
risk of underinvestment 291–2
social norms, relevance of 287–92
generally 261, 275–6
importance of 262–3, 267–71, 301
infringement
managers' motivations for 273–4, 282–7
managers' penalties for 285–7
managers' reputation, relevance of 285–7
- legal practice, US *vs.* Europe, compared 268–71
- managers' duties to shareholders 264–6, 270–71
- mandatory nature 265–6
and market efficiency 264–6, 270–71
opting-out 261, 265–6
private/ shareholder enforcement 262, 273–4
limitations 282–94
principles 274–7, 280–82
- public enforcement 277–80, 289–301
advantages 293–8
complementary function of 295–6
costs 298–9
deterrence, scope of 297–8
disadvantages 298–301
importance, for securities market 299–300
independence and professionalism 296–7, 300–301
monitoring functions 298–9
and public benefit 294
regulator's role 294, 296–7, 300–301

- social costs 294–5, 297–8
- purpose 263–4
- Pecorino, P. 223
- percentage of recovery fee collection
 - method 83–5
- personal injury
 - injury to feelings 142
 - moral hazard 142–3
 - punitive damages 142–3
- Philip, of Macedonia 69–70
- Phillips Petroleum Co. v. Shutts (1985) US* 42
- plaintiffs, in class actions *see also*
 - consumer organizations
 - advantages for 16–17
 - entry strategies
 - beliefs updating rules 155–7
 - discovery process, relevance 154–5
 - entry sequences 152–4
 - information sharing, relevance of 161–4, 171–5
 - and future claimants 87–8
 - knowledge of 10–11
 - one shot bargaining 157–61
- politics, influences of 229–30
 - on legislation 233
 - on litigation funding 58
- Portugal, class actions in
 - access to justice, conflicts with 346
 - Administrative Code of 1878 342–3
 - affected interests 343–4
 - compensatory damages 346
 - consolidation, effects of 348–9
 - constitutional formulation 343
 - contingency fees, prohibition 349
 - corrective class action 343
 - criticisms 345–7, 349
 - enforcement 347
 - history and development 342–3, 348–9
 - judicial powers 348–9
 - Law of Class Action (Law 83/95) 311, 343–4
 - legislation relevant to 347–8
 - litigation trends 349
 - notification rules 345–6
 - obligation to case outcome 346
 - prerequisites 343–5
 - procedure 343–7
 - public prosecutor, role 345
 - representation, adequacy of 344–5
 - right to participation in public policy 342–3
 - statutory time limits 346–7
 - supplementary class action 342–3
 - types of rights 343–4
 - US model, compared with 47, 344–5
- positive-expected-value class actions 78–80
- Posner, Richard A. 86–7, 222
- Potash Antitrust Litigation (2000) US* 30–31
- pressure groups *see* interest groups
- principal-agency model
 - attorney motivation 181–2, 201–3, 215–16
 - multiple clients, treatment equality 208–11, 215–16
 - opportunism 228–30
 - authority relationships 180, 192–4, 214–15
 - basis for 189
 - bounded effort capability 203–7
 - cognitive assumptions 188–92
 - contingency fees 180–81, 185, 197–202
 - calculating payoff 204–7
 - conflicts of interests 188–9
 - moral hazard 185, 199–201
 - pooling damages 211–16
 - simultaneous case trade-offs 202–3
 - contractual incompleteness 195–7
 - economic rationale 184–7
 - ex ante* and *ex post* outcomes 188–92
 - fiduciary duties 181–2, 188–94
 - multiple clients, treatment equality 208–11, 215–16
 - problems with 201–8
 - financing, influences on 127–30
 - information asymmetry 180, 201–2
 - limitations of 188–92
 - social justice and welfare problems 207–8
 - variability, factors influencing 190–92
- private enforcement *see under* enforcement
- Private Securities Litigation reform Act 1995 (US) 53–4, 85, 89–90, 95–6
 - purpose 229–30
- professional behavior *see* attorneys

- public enforcement *see under* enforcement
- public goods
 - class actions as 110–112, 129, 148–9, 226–7
 - club goods as 110–112, 226–7
 - group benefit 129
 - interest groups, definition 225
 - precedents, dilemma of 222, 226–7
 - securities law enforcement as 281–2
- punitive damages *see* damages
- Randall, Thomas 62
- Raz, Joseph 193–4
- regulation
 - see also* takeover law
 - class actions, compared with 121
 - and corruption 300–301
 - failure, as driver for class actions 107, 219
 - gaps in 123
 - indirect representation 105
 - litigation, as substitute for 105
 - and public benefit 294
 - regulators, impartiality and professionalism of 296–7
- remedies
 - alternative remedies 129–30
 - coupon remedies 29, 84, 90
 - reversionary funds 84
- representative action 312
 - diversity jurisdiction 107–8
 - and indirect representation 104–5
 - as origin of class actions 306–7, 309
 - restrictions on 107–8
 - US diversion from 306–8
- res judicata*
 - in Brazil 351
 - in class action model code 363
 - public equivalents to class action 310–11
- Resnik, Judith 44
- reversionary funds 84
- Rhone-Poulenc Rorer, Inc. (1995) US* 86–7
- Rickman, L. 185
- rights to action *vs.* right to defence
 - European conflicts with 318–22
 - opting-in *vs.* opting-out 319–21
 - and right to fair trial 321–2
- US due process clause 322
- risk management 117, 119–21, 186–7, 244
- Robert Ross v. American Express (ongoing) US* 32
- Royal Dutch Shell (2007) Netherlands* 40
- Rubin, P.H. 222–4
- Ryan, Ellen, M. 91–2
- Sacconi, L. 183
- Salop, Steven 29–30
- Sarbanes-Oxley Act 2002 (US) 91
- Schulman, Amy 127
- Schulman, Steven 94–5
- securities fraud class actions 88–9, 286–7
 - law reform 89–90
 - Milberg Weiss* case 90–91, 93–4
 - regulatory investigations 91
 - settlement trends 90–92
 - Tellabs v. Makor Issues* case 95–6
- Securities Litigation Uniform Standards Act 1998 (SLUSA)(US) 89–90
- Sensenbrenner, J. 16–17
- settlements
 - adequate settlement rules, class action model code 360–62
 - blackmail settlements 17–18, 86–7
 - claim trends 62
 - distribution mechanisms 64–5
 - and future claimants 87–8
 - institutional investors, failure to claim 62
 - mass settlements
 - advantages/disadvantages 39–43
 - problems/conflicts with 41–3
 - opting-out, claims process following 61–2
 - securities fraud class actions, settlement trends 90–92
 - settlement class actions 87–8
 - shareholder class actions, settlement before trial trends 287
 - sweetheart settlements 83–4
 - times, influence on 15
- shareholder class actions
 - see also* passivity rule
 - damages, European trends 283–4

- managers' reputation relevance of 285–7
- settlement before trial, trends 287
- Sharkey, C. 23–4
- Shutts (1985) US* 46–7
- Simmons, Laura E. 91–2
- Simon, H. 193
- SLUSA *see* Securities Litigation Uniform Standards Act 1998
- small claims cases, class actions for
 - advantages/disadvantages 80–81
 - counsel auctions 84–5
 - EU procedure proposals 258–9
- Smith, Adam 24
- social costs and benefits 11, 77–87
 - of bearing punitive damages 139–42
 - and contingency fees 207–8
 - of enforcement 294–5, 297–8
 - and legal system breakdown 3–4
 - social compensatory damages 23–4, 251–4
- Spain, group litigation rights 311
- statute law *see* legislation
- Sweden, class actions in
 - case trends 337
 - development 330–31, 336–7
 - group litigation rights 311
 - limitations 330
 - negative economic effects 334
- sweetheart settlements 83–4
- takeover law
 - anti-takeover strategies
 - impact on company value 267
 - regulation of 263–4
 - and capital concentration 269–70
 - competitive bidding auction systems 272
 - compulsory takeover regimes 271–2
 - conflicts of interest in 263–6
 - corporate control, European
 - influences on 288–9
 - efficiency, influences on 267–71
 - government role in 262
 - importance of 267
 - shareholder class actions (*see* passivity rule)
 - stock market attractiveness 270
- Tellabs v. Makor Issues & Rights, Ltd.* 95–6
- Thomas, R.S. 282
- tobacco industry 19, 28, 134–5
- tort law
 - class actions, advantages for 4–5
 - mass toxic torts 354
 - tobacco litigation 134–5
- tortfeasors
 - deterrence, influences on 250–51
 - class actions 133–5
 - punitive damages 131–3
 - disappearing defendant problem 136–7
 - disgorgement damage 139–42
 - insolvency 136–7
 - leniency programs 257–8
 - liability
 - calculating 131–2
 - optimal level of care 132
 - social marginal benefit/cost 131–3
 - unjust enrichment 141
- uncertainty, in class actions 19–20, 128, 149, 151–2
- United Kingdom
 - class actions in 71–2, 306–7, 309
 - contingency fees 55, 184–5, 187
 - group litigation procedures 60, 312
 - passivity rule 268–9
 - punitive damages, first award of 142
 - representative action 306–7, 309
 - Takeover Panel principles,
 - European-wide adoption of 288–9, 309
- United States
 - antitrust law, as deterrence 27–8
 - attorneys, restrictions on 53–4
 - Class Action Fairness Act 2005 18–20, 28–9, 32, 90, 102
 - class actions in
 - centralization 46–7
 - choice of forum 46–8
 - codification 12–15
 - contingency fees 72–3, 184–7
 - corruption 45–6
 - diversity jurisdiction 307–8
 - due process clause 322
 - electoral pressure 18–19
 - history and development 12–16, 101
 - influences on 18–19, 45–6

- limitations 16–20, 38, 66
- mass settlements 40–43
- model, adoption of 5, 309, 335–8
- opting-in *vs.* opting-out 14, 61, 64–5, 308–9
- pro-rata distributions 64–5
- procedural features 103–6
- purpose 22, 27–9, 102, 309
- recovery rates 43–5
- reform 88–90, 307–9
- representative actions 307–8
- settlement claim processes 61–2
- state actions *vs.* national/federal actions 11–12, 18, 40–41, 46–8
- trends 16, 29–30, 62
- uncertainty 19–20
- corporate control of markets, views on 268–9
- finances, excessive, constitutional prohibition 138
- fluid recovery, doctrine of 73
- fundamental fairness doctrine 138
- legal system differences 75
- mass settlements
 - and judicial discretion/intuition 42–3
 - procedural conflicts 41–3
- passivity rule 168–271, 261
- Private Securities Litigation reform Act 1995 (US) 53–4, 85, 89–90, 95–6
- punitive damages 21–3
- right to vengeance 22
 - securities fraud actions 88–90
 - Securities Litigation Uniform Standards Act 1998 (US) 89–90
 - unjust enrichment 141
 - US v. United Shoe Manufacturing Corp.* 32–3
- vengeance, right to 22, 27–9
- victims
 - and absolute deterrence 142–3
 - and club theory 112–13
 - compensation, full *vs.* partial 114–15, 120–21
 - cost-benefit analysis 113–17
 - cost-shifting 115
 - cost-victim ratios 112–13
 - discrimination between classes 73, 116, 136–7
 - litigation property rights of 108
 - moral hazard 135–6
 - non-pecuniary loss 142–3
 - participation incentives 60–61, 136
 - public prosecution, conflicts between 121–2
 - and punitive damages 116, 142–3
 - underprotection 4–5, 123
 - vengeance, right to 22, 27–9
- White, Lawrence J. 29–30
- Willging, Thomas 92
- Young, Robert 106