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The Globalization of Entrepreneurial Litigation: Law, Culture, and Incentives

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Introduction

The 50th anniversary of Rule 23's adoption in 1966 provides an opportunity to consider how legal change occurs. Clearly, law, culture, and incentives all play a role. But which dominates? The adoption of Rule 23 preceded a significant surge in the use of the class action,[1] and some fields of litigation (e.g., securities litigation, antitrust litigation, and, for a time, mass torts litigation) came to depend on its availability.[2] Perhaps even more importantly, Rule 23 spurred the growth of the plaintiff's bar, enabling small firms with a handful of lawyers to develop into major institutional firms of one hundred or more attorneys. Where once plaintiff's firms handled mainly personal injury cases, they grew to the point that they could finance and sustain major class action litigation for years and incur millions of dollars in

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[1] That surge began to be first noticed in the early 1970s, but it was the product not only of Rule 23's amendment, but also the recognition of a private cause of action under SEC Rule 10b-5 and the development of private antitrust litigation in the wake of the Justice Department's criminal prosecution of General Electric, Westinghouse and other major manufacturers of heavy electrical equipment in the 1960s for price fixing. As I explain elsewhere, this litigation taught plaintiff's attorneys how to network and share information, but it also showed courts and policy-makers the attractions of the class action as a means of economizing on the costs associated with the thousands of individual cases filed against these antitrust defendants. See John C. Coffee, Jr., ENTPRENEURIAL LITIGATION: Its Rise, Fall and Future (Harvard University Press 2015) at 56-60. The plaintiff's bar responded to the new incentives to bring class actions, but the response was not immediate and took some lag time. For a close analysis of the drafting of Rule 23 (by a participant in that process), see Arthur S. Miller, Of Frankenstein Monsters and Shining Knights: Myth, Reality and the "Class Action Problem", 92 Harv. L. Rev. 664 (1979).

[2] Private antitrust litigation began to surge before, but increased further after, the amendment of Rule 23, as private plaintiffs brought follow-on actions in the wake of Department of Justice prosecutions. For early cases certifying class actions prior to Rule 23's amendment, see Union Carbide & Carbon Corp. v. Nisley, 300 F. 2d 561 (10th Cir. 1962); Nagler v. Admiral Corp., 248 F. 2d 319 (2d Cir. 1957). Securities class actions came to dominate the class action field from the mid-1970s on, but it was first necessary for courts to resolve the scope of the private cause of action under Rule 10b-5 and to recognize the "fraud on the market" doctrine (which eliminated the need to prove individual reliance). Mass tort class actions enjoyed a brief period of popularity in the 1990s. See John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343 (1995). But these came to a screeching halt with the Supreme Court's decisions in Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) and Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999), both restricting the use of the class action device in mass torts.

expenses in the hopes of receiving an ultimate, but contingent, class action fee award.[3] With this metamorphosis also came the full-scale appearance of "entrepreneurial litigation." For our purposes, "entrepreneurial litigation" can be defined as litigation in which the attorney acts as a risk-taking entrepreneur, both financing and managing the litigation for numerous clients, who necessarily thus have smaller stakes in the litigation than the attorney.[4] Put another way, the attorney acts less as an agent and more as a principal. In this world, it is truer to say that the attorney hires the client than that the client hires the attorney.

This style of litigation predated Rule 23's amendment in 1966,[5] and thus raises the question: What really explains the explosion of class action litigation in the United States? Was it a legal change alone (i.e., Rule 23)? Or, is the U.S.'s unique level of aggregate litigation better explained by a preexisting legal culture that Rule 23 energized, thereby enabling private enforcement of law to increase exponentially?[6] This brief article cannot fully resolve these issues, but it believes considerable perspective and insight into the relative impact of law, culture, and incentives is gained by looking at how entrepreneurial litigation is currently spreading globally. In contrast to the American experience, the global expansion of class action litigation pits economic incentives against local culture and thus provides a basis for testing ideas about causation.

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[3] In the Enron securities litigation, the lead plaintiffs counsel incurred a "lodestar" of $127 million, reflecting 289,593.35 hours of work on the action at a blended hourly rate of $456. See Newby v. Enron Corp., 586 F. Supp. 2d 732, 741 (S.D. Tex. 2008). This is an extraordinary investment of time and effort on a contingent fee basis, and it shows the scale of entrepreneurial litigation. The fee award in Enron was ultimately $688 million (Id. at 828), and thus shows that this investment paid off.

[4] For a fuller description, see Coffee, supra note 1, at 18-32.

[5] Earlier in the 20th century, the derivative action developed as the initial context in which a risk-taking plaintiff's attorney represented a largely nominal client (a small shareholder) in order to sue corporate officers and directors in the hopes of receiving a court-awarded fee, if successful. Although these cases were smaller in scale, they had the essential attributes of entrepreneurial litigation. For a brief history of the development of derivative litigation, see Coffee, supra note 1, at 33-51.

[6] In ENTREPRENEURIAL LITIGATION, supra note 1, I attempt to delineate the specific elements of this culture, including the contingent fee, the common fund doctrine, the strong preference for jury trials, and the American rule against fee-shifting. Id at 12-17, 18-31. In my view, the appearance of the class action would not have had the impact that it has had on private enforcement of law, but for the background existence of these other factors, which the class action catalyzed.

Before beginning this tour, a word of caution is needed: we must recognize that entrepreneurial litigation was and remains highly controversial. Periodically, both Congress and the Supreme Court have attempted to curb it.[7] Unsurprisingly, major scandals erupted in the U.S. as the size and settlement value of class actions grew over recent decades. Symptomatically, the law firm that was (at least for a time) the leading practitioner of this style of litigation saw its principal name partners indicted and convicted in 2006 for their practice of using and compensating in-house clients.[8] Nonetheless, entrepreneurial litigation survives in the United States, even though it has had a history of cliff-hanging narrow escapes.[9]

Much of the rest of the world remains skeptical of American-style "entrepreneurial litigation," and only Australia, Canada, and Israel have developed systems that approximately parallel the U.S.'s "opt-out" class action.[10] Elsewhere, the trio of legal rules that support and sustain entrepreneurial

[7] The Private Securities Litigation Reform Act of 1995 ("PSLRA") curbed securities litigation by enhancing the pleading standards for securities litigation and creating a safe harbor for "forward-looking" information. See Sections 21D and 21E of the Securities Exchange Act of 1934, 15 U.S.C. §78u-4 and 78u-5. The Supreme Court has repeatedly made class certification more difficult in recent years (and expanded the ability of defendants to impose mandatory pre-dispute arbitration clauses on their clients and customers). See Wal-Mart Stores, Inc. v. Dukes, 131 U.S. 2541 (2011); AT&T Mobility LLC. v. Concepcion, 131 S. Ct. 1746 (2011).

[8] The name of the Milberg, Weiss firm changed periodically over the last twenty years, but Melvin Weiss, William Lerach, David Bershad and Steven Schulman were all "name" partners in the firm's title, and all pled guilty to criminal felonies in connection with the firm's practice of compensating small plaintiffs to serve as their class representatives in class actions. See Coffee, supra note 1, at 76-77; see also Patrick Dillon & Carl M. Cannon, CIRCLE OF GREED: The Spectacular Rise and Fall of the Lawyer Who Brought Corporate America to Its Knees (2010) (biography of William Lerach) at 376-378; Peter Elkind, "The Law Firm of Hubris, Hypocrisy & Greed," Fortune, Nov. 13, 2006, at 154-156.

[9] Among these narrow escapes have been: (1) the passage of the PSLRA, which in it is original draft versions would have been far more restrictive than the version ultimately adopted; (2) the Supreme Court's recent decision to reconsider the "fraud on the market" doctrine, which doctrine it ultimately let stand without serious change (See Halliburton Co. v. Erica P. John Fund, Inc. 134 S. Ct. 2398 (2014)) ; (3) the Delaware Supreme Court's even more recent decision to permit the adoption of a "loser pays" bylaw amendment in ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A. 3d 554 (Del. 2014), which the Delaware legislative overruled a year later after it became clear that cases might flee Delaware. For review of this and other crises in class litigation under Rule 10b-5, see John C. Coffee, Jr. "Loser Pays": The Latest Installment in the Battle-Scarred, Cliff-Hanging Survival of the Rule 10b-5 Class Action, 68 S.M.U. L. Rev. 689 (2015). Had the result in any of these cases come out the opposite way, the future of the class action would have become uncertain. I do not mean to suggest that all varieties of class actions continue to flourish in the United States. Only securities class action shave recently experienced a significant increase in filings. See Cornerstone Research, Securities Class Action Filings –2016 Midyear Assessment at p. 4, Figure 2 (showing increases to 102 and 119 filings during the second half of 2015 and the first half of 2016, respectively, which is well above the average of 94 semiannual filings from 1997 to 2015). In sharp contrast, other varieties of class actions, particularly those challenging antitrust violations or employment discrimination, have encountered greater obstacles.

[10] Both Canada and Australia have an "opt-out" class action (meaning that the plaintiff's attorney can define the scope of the proposed class and the proposed class members can choose, if they wish, to exit the class by "opting out"). Canada permits the contingency fee, but Australia permits it only to a very limited degree; both have a "loser

litigation in the U.S.—the opt-out class action, the contingent fee, and the "American rule" under which each side bears its own legal expenses—remain conspicuous by their absence.[11] Instead, around most of the world, plaintiffs' attorneys may not receive contingent fees; a "loser pays" rule chills the incentive to litigate; and "opt-in" class actions prevail and limit class size (in addition, there are often strict rules limiting who can serve as the representative plaintiff for the class[12]).

Now comes the surprise: despite the apparent hostility of other jurisdictions to entrepreneurial litigation, that system has leaped the national boundaries of the United States and recently moved to both Europe and Asia.[13] Moreover, this has happened without any legislative or judicial changes to welcome it. The focus of this brief article will be on how this has happened and the forces that have driven it. In overview, it will argue that a demand arose for legal services in which someone other than the client assumed the costs and downside risks of the litigation in return for a contingent fee. If lawyers could not

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pays" rule but the amount so shifted is regulated by the courts and consists of less than all the winning side's expenses. For overviews of class action law in these three countries, see Stuart Clark and Christina Harris, The Push to Reform Class Action Procedure in Australia: Evolution or Revolution, 32 Melbourne U.L.R. 775 (2008); Adam C. Pritchard & Janis P. Sarra, Securities Class Actions Move North: A Doctrinal and Empirical Analysis of Securities Class Actions in Canada, 47 Alta. L. Rev. 881 (2009); Amichai Magen & Peretz Segal, "The Globalization of Class Actions, National Report: Israel" (2007) (available at http://globalclassactions.stanford.edu/sites/default/files/documents/Israel_National_Report.pdf).

[11] The United Kingdom has recently adopted an "opt-out" for antitrust class actions, but otherwise does not permit such a class. South Korea authorizes an opt-out class, but exclusively for securities class actions. With the exceptions of Australia, Canada and Israel, these are the only examples in which developed nations permit the American-style opt-out class. The Netherlands, of course, authorizes an opt-out settlement class action (see text and notes 12 to 13 infra), but a settlement is a precondition to its use. As later discussed, China has refused to approve class actions and it has imposed severe procedural preconditions on securities litigation, but it does permit the contingent fee. The result has been that a significant population of entrepreneurial lawyers are now promoting aggregate litigation in the securities law context. See text and notes infra at notes 63 to 69.

[12] In a number of European countries, the class representative must be a public official or a nonprofit organization approved by the government. This is a limitation on standing that may deny many plaintiff's attorneys the practical ability to bring a class action. See Deborah Hensler, The Future of Mass Litigation: Global Class Actions and Third Party Litigation Funding, 79 Geo. Wash. L. Rev. 306, 307 (2011); Note, Going Dutch: The Effects of Domestic Restriction and Foreign Acceptance of Class Litigation on American Securities Fraud Plaintiffs, 53 Boston College L. Rev. 1847, 1868 (2012).

[13] In the wake of Morrison v. National Australia Bank Ltd., 561 U.S. 247 (2010), some commentators have predicted that interjurisdictional competition would arise to obtain the cases that could no longer be heard in the United States. See, e.g., Wulf A. Kaal and Richard W. Painter, Forum Competition and Choice of Law Competition in Securities Law After Morrison v. National Australia Bank, 97 Minn. L. Rev. 132 (2012); Tiana Leia Russell, Exporting Class Actions to the European Union, 28 B.U. Int'l L.J. 141 (2013). But what seems to be happening is something different. Little evidence shows European or other jurisdictions competing to obtain cases that were formerly brought in the U.S. Rather, entrepreneurs located in the U.S., are organizing teams to try or settle cases in the E.U., most notably in The Netherlands or Germany. See text and notes infra at notes 17 to 41. Other cases have recently been exported to Japan, sometimes after an initial and smaller case was settled in the U.S.

receive a contingent fee, others could. Entrepreneurs, mainly from the U.S., have found ways to design around the legal barriers in at least some jurisdictions, and clients are now taking their cases to those jurisdictions. The result is not a perfect substitute for the U.S. system (indeed, the legal services are provided at much higher cost), but plaintiffs do obtain what they want most: a forum in which their claims can be asserted on an aggregate basis and without liability for costs if they lose.

To be sure, there could yet be a counter-reaction, but creative lawyering has seemingly developed substitute relationships that achieve a functionally similar form of entrepreneurial litigation in which (1) the risk capital is provided by hedge funds and other "third party funders," and (2) the problem of "loser pays" fee-shifting is dealt with through insurance. All this will be examined in more detail later, but the point to be made at the outset is that the role of legal rules can be overstated. This article will survey recent developments in both Europe and Asia to underscore that point. This survey will show (based largely on the recent European experience) that when both clients and entrepreneurs want to shift risks away from the client, means can be found to accommodate that desire. Then, looking to Asia, it will find that the authorization of the class action does not necessarily make a significant difference in how litigation is conducted in a jurisdiction, but conversely that, even where such authorization is lacking, entrepreneurial litigation can still develop if the local culture is receptive.

As with many legal innovations, the spread of entrepreneurial litigation abroad was a response to a crisis. When the U.S. Supreme Court ruled in 2010 in Morrison v. National Australia Bank Ltd.[14] that U.S. courts could not hear the securities fraud claims of plaintiffs who had purchased their securities outside the United States, this faced extraterritorial plaintiffs with a crisis. They had come to rely on a U.S. forum and on U.S. plaintiff's attorneys willing to take their cases on a contingent fee basis. The result was a search, led by U.S. plaintiff's attorneys, for an alternative forum in which claims could be broadly aggregated, contingent fees could be charged, and the risks of adverse fee shifting under a "loser pays" rule could be mitigated. All this took some creative legal engineering, as next described.

[14] 561 U.S. 247 (2010).

I. The European Front: Barriers Outflanked

For some time, the European Union has recognized the need for an aggregate litigation remedy. The key rationale for such a remedy is the existence of "negative value" claims—that is, claims where the costs of litigation would exceed the recovery, even if victory were certain. Take for an example a defective consumer product—hypothetically, a toaster that cost $50 dollars. No individual can afford the likely legal costs of establishing the toaster's defects on an individual basis (assuming that the defendant would not concede them). The answer to this problem is broad claim aggregation; that is, if 1,000 plaintiffs could combine to litigate in a single case, they could afford the costs of the litigation. This does not necessarily require the American "opt-out" class action; an "opt-in" class in which class members expressly opt to join in the litigation could also work, but then it would be necessary for someone to play the role of "claim aggregator"—soliciting person who may have been injured and inviting them to join the action. This is costly and there may be ethical restrictions in some jurisdictions on attorneys soliciting business. The point here is that the "opt-out" class action may be the lowest-cost mechanism for aggregating claims, but it is not the only mechanism.

Desiring a mechanism for "collective redress," but apprehensive about creating a system of entrepreneurial litigation that resembled that of the United States, the European Union in June 2013 published a "recommendation" (the "E.U. Recommendation"), setting forth the principles that E.U. member states should adopt in order to create collective redress mechanisms.[15] As is customary, the E.U. Recommendation was non-binding, but clearly rejected most of the key elements of the U.S. system. Specifically, the E.U. Recommendation insisted on:

(1) An "opt-in" principle requiring the "express consent" of all claimants to be represented in the class;

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[15] See "Commission Recommendation of 11 June 2013 on principles for injunctive and compensatory collective redress mechanisms in the Member States concerning rights granted under Union Laws," Official Journal of the European Union (2013/386/EU), L. 201/60. This Recommendation does not apply to all possible causes of action, but only to "rights granted under Union law," which would include cases asserting consumer protection, antitrust, environmental protection or financial service claims. Under E.U. law, a Recommendation has no binding effect and simply suggests a course of action without imposing any obligation.

(2) A prohibition on contingent fees;

(3) A "loser pays" rule under which the winning party is paid its legal costs by the losing party;

(4) A prohibition on punitive damages;

(5) Mandatory use of non-profit entities to lead the class action (in order to minimize the danger of lawyer-controlled classes); and

(6) Close regulation of litigation funding by third parties (with a special requirement of its disclosure to the court).[16]

These restrictions show a pronounced fear that in attempting to design a "collective redress" remedy, Europe could catch the "American disease." Whether a remedy designed in compliance with these limitations would prove feasible is open to question, but revealingly no one has tried to follow this route. Instead, plaintiffs have innovated, using other means to achieve broad claim aggregation, contingent claim financing and protection from "loser pays" fee-shifting.

(1) <u>The Fortis Litigation</u>

In 2008, incident to the general global financial collapse, Fortis, the Dutch/Belgian banking and insurance conglomerate, failed and had to be bailed out by The Netherlands, Belgium, and Luxembourg at an estimated cost of over $11 billion.[17] As in the U.S., the general public was angered by expensive bailouts (and by various acts of alleged malfeasance that attracted substantial press attention and political criticism in Europe). Fortis's shareholders sued its officers and directors, initially in a U.S. court. Even prior to <u>Morrison</u>, however, that U.S. court found that it lacked jurisdiction and dismissed the action,

[16] For a careful review of this Recommendation, see Astrid Stadler, "The Commission's Recommendation on common principles of collective redress and private international law issues," NIPR 2013 (4) at p. 483 (available at http://www.nipr-online.eu/pdf/2013-463.pdf). This author concludes that the effort was disappointingly modest: "With its Recommendation on collective redress, the Commission has backed down after strong opposition in some Member States to even a moderate reform of private enforcement tools." Id at 488. [Note to editors: "NIPR" is the acronym for "Nederlands international privaatrecht."]

[17] See Kaal and Painter, supra note 13, at 170.

because it found that too little "conduct or effect" had occurred in the United States to support subject matter jurisdiction, even under the more liberal U.S. standard of that era.[18]

Actions were filed by Fortis investors in both The Netherlands and Belgium early in 2011,[19] but they moved slowly, in large measure because neither jurisdiction authorized plaintiffs to sue in a class action. Meanwhile, two American plaintiff's law firms, who had represented some of the clients in the unsuccessful U.S. action, appeared on the scene to represent largely these same clients. To do so, they faced multiple obstacles. Put simply, they had to find a mechanism that achieved broad claim aggregation, secured contingent funding of the action, and obtained protection against "loser pays" fee shifting. To accomplish the first goal—broad claim aggregation—they used the device of the "stichting"—a Dutch legal entity with limited liability.[20] The stichting had regularly been used in The

[18] Copeland v. Fortis, 685 F. Supp. 2d 498, 500 (S.D.N.Y. 2010).

[19] The essential claims in both jurisdictions were that Fortis had misrepresented its exposure to the decline in the American subprime mortgage market. At the time, Belgium had no class action procedure for collective redress. See Paul G. Karlsgodt, WORLD CLASS ACTIONS—A Guide to Group and Representative Actions Around the Globe (Oxford University Press 2012) at 13.2.2 (page 274). Mr. Mischael Modrikamen, a prominent Belgian attorney who had earlier successfully challenged Fortis's sale of assets to BNP Paribas, brought suit on behalf of over 2,000 institutional and individual shareholders in the Commercial Court of Brussels against Fortis and various other persons (Fortis's investment banker, Merrill Lynch, and its accountant, PriceWaterhouse & Co). Bringing such coordinated individual actions was procedurally cumbersome because, for example, each of the individual plaintiffs' names had to appear on the briefs. Other lawyers also brought suit on behalf of numerous clients, and a few institutions sued individually, all in the Commercial Court of Brussels. Deminor, a European firm specializing in investor protection, also brought suit on behalf of numerous shareholders that it represented. Thus, multiple lawyers had a role, with no individual lawyer in charge of the action or able to coordinate strategies. Meanwhile, in The Netherlands, actions were filed in the Court of Utrecht by VEB (Vereniging van Effectenbezitters), the official Dutch shareholders association, and by two assocations ("stichtings" in Dutch), which were formed for the special purposes of representing Fortis shareholders. One of these "StichtingFortisEffect",”appears to have been organized by Deminor, and the other, Stichting Investor Claims Against Fortis (or "SICAF") was organized by two American law firms, Grant & Eisenhofer and Topaz Kessler Meltzer & Check, LLP, for the sole purpose of representing Fortis investors. The American-organized stichting ("SICAF") represented 140 institutional investors and 2,000 individuals from the United States, Europe, the Middle East and Australia (http://investorclaimsagainstfortis.com). See Press Release, "International Investors Join Forces in Support of Lawsuit Against Fortis Over Massive Interpretation Ahead of Bank's Collapse in 2008" (Jan. 10, 2010) by Grant & Eisenhofer, P.A.

[20] The "stichting"—the Dutch word for foundation—has a long history in Dutch law and is frequently utilized for a variety of purposes, including providing a vehicle for shareholder groups. Technically, it is a legal entity that has no owner or shareholders and is controlled by a board of directors. It may acquire and dispose of assets, borrow and grant security, and make guarantees. See Robert Profusek, Ferdinand Mason, Floris Pierik, and Bastiaan K. Kout, "Shedding Light on the Dutch 'Stichting': The Origins and Purposes of an Obscure but Potentially Potent Dutch Entity" 20 No. 3 The M&A Lawyer NL3 (March 2016). The "stichting" received much publicity in 2015 when it was used by Mylan N.V., a company incorporated in The Netherlands, as a device for defending against a takeover. See Shayndi Raice and Margot Patrick, "The Rise of the 'Stichting,' an Obscure Takeover Defense," The Wall Street Journal, April 12, 2015 (available at http://www.wsj.com/articles/the-rise-of-the-stichting-an-obscure-takeover-defense-1429716204).

Netherlands as a vehicle for litigation, as it essentially permits the separation of ownership and control.[21] Plaintiff shareholders transfer their legal claims to the stichting, while still holding title to their shares. The stichting is governed by a board of directors appointed by the instrument that creates it (typically a deed). As a result, the stichting board has full power to litigate, settle the litigation, or seek funding for the litigation, but the proceeds of any settlement revert to the shareholders. The net result is to permit a broad consolidation of claims and centralized control of the litigation, without the need for a class action, but every plaintiff must opt into the stichting. In effect, the stichting is the functional equivalent to an "opt-in" class action.[22]

Although the stichting provided a useful vehicle, the stichting by itself could not approach the goal of full claim aggregation. First, someone had to solicit the investors in Fortis to join in the action. Second, the stichting could not bind absent parties that did not join it (either because of apathy, lack of notice, or intentional decision). To some extent, the American law firms already had contacts with injured institutional investors from the earlier U.S. action. To reach additional investors, the American law firms joined forces with two European organizations, which had also sought to organize a collective action: (1) Deminor, a Brussels-based firm that specializes in representing minority shareholders,[23] and (2) VEB, the Dutch shareholders association.[24] Both had broader contacts and credibility with European investors, and thus they could expand the number of clients who joined in the stichtings. Together, the two law firms, VEB, and Deminor formed the negotiating team that settled with the Fortis defendants. But the issue of absent parties still remained.

To obtain financing, the American law firms went to a hedge fund, which agreed to advance the costs of the litigation in return for a percentage of the recovery. This was a contingent fee, but European

[21] In fact, the two U.S. law firms did not organize the first stichting to sue the Fortis defendants. An earlier stichting—"StichtingFortisEffect"—was formed by Deminor and others.
[22] The Netherlands, however, does not authorize an "opt-in" class action.
[23] Deminor's web site describes it as "since 1990, the leading European consultancy firm whose core businesses encompass the defense of shareholder interests, corporate governance and investor protection through collective damage recovery claims." See "About Deminor" at www.deminor.com (visited 9/7/16). Clearly, it is an intermediary specializing in matching clients with collective damage recovery actions.
[24] VEB stands for Vereniging van Effectenbezitters. See http://www.veb.net/actiecontent/actie-fortis.

rules only prohibit lawyers from being compensated on this basis. The hedge fund also agreed to advance the cost of the insurance premium that protected the plaintiffs from "loser pays" fee shifting (which cost apparently came to several million dollars). Fee-shifting posed a lesser risk in The Netherlands, where the fees subject to fee-shifting are regulated and more modest than in other countries, such as, most notably, the United Kingdom. It has not been disclosed what percentage of the recovery the hedge fund and the American lawyers contracted to receive for their services, but "third party funders" in Europe sometimes contract to receive 50% or more of the recovery.

The two American law firms—Grant & Eisenhofer, located in Delaware and New York, and Kessler, Topaz, Meltzer & Check LLP, based in Philadelphia—played an essentially entrepreneurial role. Although both firms are highly experienced in securities litigation, neither was admitted to practice in The Netherlands. Necessarily, they hired local counsel to represent the plaintiffs, and such counsel was compensated on an hourly basis out of the funds advanced by the hedge fund. Thus, the prohibition against contingent fees was sidestepped, because the American law firms did not practice law in the Netherlands and the Dutch lawyers did not receive a contingent fee.

The Fortis case was not the first experience these American firms had had with securities litigation in The Netherlands. Several years earlier in 2009, Grant & Eisenhofer had settled a major securities class action against Royal Dutch Shell for $382 million—then a record European securities litigation settlement.[25] That action had followed on the heels of a parallel, but earlier, U.S. securities class action against the same defendant,[26] and Grant & Eisenhofer undertook to represent only the non-U.S. plaintiffs in the European settlement. In overview, it appears that Royal Dutch Shell decided that it was in its interest to settle the securities litigation in two parts, settling with the U.S. plaintiffs in the U.S. action and with all others in The Netherlands action. Although the U.S. law firm representing the U.S.

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[25] See Hof's-Amsterdam 29 Mei 2009, JOR 2009, 197 M.Nt. AJIA Leitjen [ECLI:NL:GHAMS:2009:B15744](Shell Petroleum NV/Dexia Bank Nederland NV). For discussions of this settlement, see Legal Alert, "Shell Landmark Decision Regarding International Collective Settlement of Mass Claims," De Brauw Blackstone Westbroek, 3 (June 2, 2009); Kaal and Painter, supra note 12, at 167; Note, supra note 11, at 1875-1876.
[26] See In re Royal Dutch/Shell Transport Sec. Litig., 552 F. Supp 2d 712 (D. N.J. 2007).

plaintiffs had initially objected to this division, the U.S. court decided that, even under the pre-Morrison law then in effect, it might not have jurisdiction over the foreign investors and further found the existence of The Netherlands settlement to be a reason for it to exclude the foreign investors from its settlement.[27] Eventually, after some friction, the two rival teams of plaintiffs attorneys compromised and bifurcated the settlement between them, so that the U.S. investors settled in the U.S. and the others in The Netherlands.

To cover absent parties, the plaintiff law firms in Fortis turned to a unique Dutch statute, the "Act on Collective Settlement of Mass Claims" (or "WCAM").[28] Enacted in 2005 in response to a mass torts crisis involving a defective drug that caused birth defects,[29] the WCAM statute permits the Amsterdam Court of Appeals to approve a settlement class action, but no Dutch statute authorizes plaintiffs to bring a class action for litigation purposes (even an "opt-in" class action). In short, you can settle on a class-wide basis in The Netherlands, but you cannot sue on either an opt-in or opt-out basis. Thus, although plaintiffs in The Netherlands can use one or more stichtings to achieve considerable aggregation of claims, they could not represent all persons allegedly injured by the defendant's conduct—unless the defendant consented to a settlement class action. It is thus up to the defendant to decide if the settlement should cover everyone (including those who declined to join the stichting).

But why would a defendant consent to such a settlement class action? In both the Royal Dutch Shell case and the Fortis litigation, the defendants did consent to a settlement class action, and their motivation would appear to be that they wanted the settlement to bind "absent" class members. That is,

[27] Id at 723-724.
[28] "WCAM" stands for Wet Collectieve Afwikkeling Massaschade. For the fullest review of this statute, see Helene van Lith, The Dutch Collective Settlements Act and Private International Law (Dutch Ministry of Justice 2010); see also, Bart Krans, The Dutch Act on Collective Settlement of Mass Damages, 27 Pac. McGeorge Global Bus. & Develop. L. J. 281 (2014).
[29] The drug was DES and it caused serious injuries to the daughters of women who took the drug. The defendants resisted liability on causation grounds, because few of the injured daughters could establish which manufacturer produced the drug that their mothers had taken years (or decades) earlier. The WCAM statute was intended to facilitate a settlement of this litigation, but the Dutch Ministry of Justice, which drafted it, wanted to avoid ad hoc legislation that addressed only one dispute. WCAM was the result. See Krans, supra note 28, at 284. Looking at American mass torts, the Dutch Ministry of Justice concluded that mass torts were usually resolved by settlement and not by trial (so that only permission for a settlement class was needed). This history of the WCAM statute's origins is inconsistent with the interpretation offered by some academics that The Netherlands wanted to attract litigation in an interjurisdictional competition. See text and notes infra at notes 70 to 72.

defendants wanted to cover all persons who had not affirmatively sued, but who would be covered by a U.S.-style "opt-out" class action. Why? The defendants may rationally want universal coverage, either because they wanted global peace or because they feared that these absent persons might eventually sue in some other court. For example, if the settlement with the initial plaintiffs attracted attention, other lawyers (and in other jurisdictions) may sue for greater damages. One way to forestall this is to cover everyone in The Netherlands. A WCAM settlement class action can cover all similarly situated persons with claims against the defendant (subject to these absent class members having a right to opt out). But few are likely to exercise that opt-out right. More importantly, if one assumes that absent class members will remain passive, their claims can be extinguished in a global settlement class, without the defendant necessarily increasing the size of the settlement proportionately. In effect, such global settlement may come cheap. Thus, both sides can gain from a global settlement: the plaintiff's side will gain a larger recovery (much or most of which will go to the third party funder and the other entrepreneurs) and the defendants will be able to extinguish the claims of absent class members (at least if they do not opt out).

In March, 2016, Ageas (the successor to Fortis), the various D&O insurers, and the two stichtings announced a settlement pursuant to the WCAM statute for $1.337 billion.[30] This was by far the largest settlement of shareholder claims in Europe (nearly four times the earlier Royal Dutch Shell settlement). The settlement attracted much publicity and alerted those not yet aware of it to the potential for large-scale settlements under the WCAM statute. Although the approval of the settlement is still pending, the Amsterdam Court of Appeals has approved nearly all the prior WCAM settlements presented to it.[31]

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[30] See Ageas Press Release, March 14, 2016 "Ageas, Deminor, Stichting FortisEffect, SICAF and VEB reach agreement aiming at settling all Fortis civil legacies." In this press release, Ageas explained the settlement as allowing "the company to regain its full strategic and financial flexibility and to focus entirely on its insurance business." See also, Oliver Ralph "Ageas to pay Fortis shareholders €1.2 bn over financial crisis," Financial Times, March 14, 2016 (available at https://www.ft.com/content/fa130ada-e9d2-11e5-888e-2eadd5fbc-4a4); Kevin M LaCroix, "Massive $1.3 Billion Settlement of Fortis Investor Actions Under Dutch Collective Settlement Procedures," The D&O Diary, March 14, 2016 (describing it as "by far the largest investor settlement ever under the Dutch collective settlement procedure").

[31] Since the enactment of the WCAM statute, seven applications have been made to the Amsterdam Court of Appeals for approval of a WCAM settlement, and six have been approved. See Kraus, supra note 28, at 282. If the settlement is approved, no appeal is possible. Id at 288. Conversely, if the settlement is not approved, the parties may jointly appeal to the Supreme Court of the Netherlands.

Under established European law, any settlement approved by the Amsterdam Court of Appeals is enforceable throughout Europe and will extinguish all covered European claims.[32]

Equally important, the Fortis settlement suggested the desirability of a two-step strategy: (1) sue first through one or more stichtings and demonstrate the viability of the plaintiff's claims, and (2) then once a settlement becomes likely, expand the action under the WCAM statute to cover all absent plaintiffs in Europe (and potentially elsewhere). The latter step may increase the size of the settlement, but may protect the defendant from expensive litigation in other jurisdictions.

(2) The Volkswagen Litigation

No sooner had Fortis settled, than the same American law firms began litigation against Volkswagen. Again, as in Fortis, the facts of the case were well known throughout Europe: Volkswagen had used hidden "defeat devices" to hide the emissions from its diesel engines, and had conceded these actions to regulators in the United States. Although Volkswagen had a variety of defenses available to it in Europe, it was still an inviting target for the plaintiff's bar.

In March, 2016, almost simultaneous with the Fortis settlement, Grant & Eisenhofer and Kessler, Topaz caused a suit alleging securities fraud against Volkswagen to be filed in Germany on behalf of 278

[32] Within the E.U., all member states are required by the Brussels I Regulation to honor and enforce legal judgments from other member states' courts. See Council Regulation 44/2001. "Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters," arts. 33-34, 38,41, 2000 O.J. (L 12) 1 (EC). To satisfy this standard, the Amsterdam Court of Appeals labels its approvals of a settlement under WCAM as a "judgment." See van Lith, supra note 28, at 125.

As a matter of Dutch law, under the Dutch Code of Civil Procedure, Dutch courts can assert jurisdiction over non-Dutch persons so long as at least one petitioner is domiciled in The Netherlands. See van Lith, supra note 28, at 33-34; Note, supra note 12, at 1879-1880. This condition is always seemingly met because the WCAM statute requires that a Dutch association (or "stichting") serve as the lead plaintiff.

The one area where serious doubt remains as to the enforceability of a WCAM judgment involves whether U.S. courts will recognize and give effect to a WCAM settlement with respect to covered U.S. plaintiffs. The Full Faith and Credit Clause of the U.S. Constitution (art. IV § 1) does not apply to judgments of foreign courts. Although principles of comity are recognized by U.S. courts, they are trumped by the Due Process Clause. Thus, if U.S. persons were included in the plaintiff class, but did not receive adequate notice or an opportunity to opt out, they could likely resist the enforcement of the judgment against them in U.S. courts. Exactly what adequate notice would require in this context is beyond the scope of this article.

institutional investors from around the globe.[33] Damages of over $4 billion are sought. Again, the American law firms retained a local German law firm,[34] which will not receive a contingent fee. Litigation funding is being provided by various "third party funders,"[35] and again firms in Europe and the U.S. are providing "claims aggregation" services, seeking to find institutional plaintiffs.

Once again, the German action is not an American-style class action. Instead, Germany has a special statute—the German Act on Model Procedures for Mass Claims in Capital Market Cases (or the "KapMuG" law, as it is popularly known)—under which consolidated cases can be resolved through a "bellwether" trial.[36] This procedure is essentially applicable only to securities litigation, and it does not bind absent parties. Although the Volkswagen case is still at an early stage, Volkswagen has already lost the first round, as the initial court, following the German procedure, referred the matter to an appellate court, which will select a representative case for a bellwether trial.[37]

Still, it is far from clear that this action will be resolved in Germany. The plaintiff's strategy may be to sue in Germany (which likely is the only European country with jurisdiction over the case, as Volkswagen's stock trades only on the German stock exchange), but then to settle in The Netherlands under the WCAM statute. An important case in The Netherlands has approved a global settlement in

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[33] William Boston, "Institutional Investors Sue Volkswagen Over Fall in Share Price," The Wall Street Journal, March 15, 2016. For the 278 number, see Press Release, KesslerTopazMeltzerCheck, "Global Institutional Investor Group Files Large-Scale German Securities Suit against Volkswagen AG over Diesel Emission Scandal," March 15, 2016. Many of these were U.S investors, such as CalPERS, the California pension fund, which had bought shares abroad.

[34] The local German firm is TISAB, which filed suit in the district court of Braunschweig (which court has jurisdiction over the German city where Volkswagen is based). Id.

[35] Claims Funding Europe, Ltd., an Ireland-based litigation funding company, is providing the financing to the American law firms. See Press Release, supra note 33. Other third party funders are also funding German litigation against Volkswagen. See Kevin M. LaCroix, "Litigation Funding Firm Announces German Securities Actions on Behalf of Volkswagens German Shareholders," The D&O Diary, October 4, 2015 (describing role of Bentham Europe Limited, a joint venture of IMF Bentham, a publicly listed third party funder based in Australia, and Elliot Management Corporation, a U.S.-based investment advisor and hedge fund manager).

[36] For an overview, see Astrid Stadler, Developments in Collective Redress: What's New in the 'New German KapMuG'?, 24 European Business Law Review 731 (2013); see also Kaal and Painter, supra note 13, at 161.

[37] See William Boston, "German Court Allows Lawsuits Against Volkswagen to Move Forward," The Wall Street Journal, August 8, 2016 (available at http://www.wsj.com/articles/german-court-allows-lawsuits-against-Volkswagen-to-move-forward-1470664803); Carmen Germaine, "Volkswagen Must Face € 4B German Investor Suits," Law360, August 8, 2016.

which all the defendants and virtually all the plaintiffs were foreign to The Netherlands.[38] Apparently, no more than a token Dutch presence may be necessary for WCAM to become applicable. For the long-term, one may speculate as to whether the Amsterdam Court of Appeals will retreat from this position if The Netherlands began to become a magnet for the resolution of European, or even global, claims.

The attraction of the Dutch approach is again that the settlement could have a far broader scope than the German action and could cover all absent plaintiffs (other than the few that might opt out). However, the two American firms (Grant & Eisenhofer and Kessler, Topaz) face competition in the Volkswagen litigation, as other American law firms have appeared on the scene and are apparently lining up clients in The Netherlands. In particular, Bernstein, Litowitz, Berger & Grossman and Labaton Sucharow, both experienced and well-known plaintiff's firms that specialize in securities litigation, have reportedly formed stichtings in The Netherlands with a view to structuring a WCAM-style settlement.[39] Given competition in The Netherlands and potentially rival stichtings, the original plaintiffs in Germany might prefer to settle there to avoid a contest over control of the WCAM litigation in The Netherlands. Alternatively, the existence of competition on the plaintiff's side could increase the leverage available to Volkswagen. It could elect between settling in Germany or in The Netherlands, depending on which plaintiff's team agrees to a cheaper settlement. At this point, it is too early to predict what strategy—the German approach, the Dutch approach, or a reverse auction[40]—will dominate.

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[38] In 2012, the Amsterdam Court of Appeals approved a settlement under WCAM in the Converium/SCOR case. See Hof. Amsterdam (SCOR Holding, Switzerland) AG/Lichtensteinsche Landesbank AG). The defendants had no contacts with The Netherlands and only a small minority of the plaintiffs were domiciled there. This case stands as the strongest demonstration that a case can be exported to The Netherlands, so long as a nominal plaintiff is resident there. Interestingly, a U.S. court had first dismissed all the foreign investors from a U.S. class action against the same defendant. See In re SCOR Holding (Switzerland) AG, Litigation, 537 F. Supp 2d 556, 559 (S.D.N.Y. 2008). The American plaintiffs law firms in that case then essentially escorted these clients to The Netherlands for a settlement.

[39] Alison Frankel, "Fortis' $1.3 billion settlement in Netherlands: Roadmap for VW" BLOG REUTERS (March 16, 2016) (available at http://blogs.reuters.com/alison-frankel/2016/03/16/fortis-1.3-billion-settlement-in-Netherlands-roadmap-for-VW/).

[40] A "reverse auction" involves the defendant playing off rival plaintiff's attorneys to see which will make the lower settlement offer. Because the class action settlement will effectively preclude similar litigation, the low bidder is rewarded, but the class members are prejudiced. This term was coined by this author. See John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343, 1370-73 (1995).

For the future, the new playbook may be to sue on a consolidated basis (using aggregative devices such as the stichting), but then settle on a global basis in The Netherlands to assure the defendant that other plaintiffs do not later come out of the woodwork. But competition within the plaintiff's bar is likely, as entrepreneurial lawyers are nimble and quick to seize new opportunities. This factor could alter tactics in unpredictable ways. In the United States, these problems are largely mitigated by the existence of the Judicial Panel on Multidistrict Litigation, which assigns a case to a particular federal district court, thereby minimizing inter-jurisdictional competition.[41] Europe has not yet faced the problem of dueling mass actions or reverse auctions, but it is on the horizon.

II. Asia: A Shift Towards Entrepreneurial Litigation

Asia stands today near the midpoint between the U.S.'s acceptance of entrepreneurial litigation and Europe's rejection of it. Of the Asian nations with significant securities markets, none authorizes the American "opt-out" class action, with the significant exception of South Korea (which authorizes it only for securities-related actions).[42] However, "opt-in" class actions (or a functional equivalent) are generally permitted.[43] Most of these Asian nations also permit contingency fees,[44] even though the same practice is rejected as scandalous in most of Europe. All the major nations in Asia have "loser pays" rules, but most soften that rule's impact by limiting the fee-shifting to a court fee only.[45] Also, Japan and Korea permit

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[41] For a description of the events leading up to the adoption of the JPMDL, see Mark Herrmann and Pearson Bownas, The Problem of Multidistrict Litigation: An Uncommon Focus on Common Questions, 82 Tul. L. Rev. 2297 (2008)

[42] See text and notes infra at notes 55 to 58.

[43] Japan and Taiwan permit "opt-in" class actions (and China permits a functional equivalent of the "opt-in" class action). Nonetheless, neither Japan nor Korea has seen more than a modest increase in class actions. See text and notes infra at notes 47 to 51. As later discussed, China with a very large securities market has a higher volume of aggregate litigation in the securities context. See text and notes infra at notes 61 to 69. This may be evidence for the proposition that culture counts more than law.

[44] The exception is Hong Kong, which prohibits the contingency fee, apparently because its legal origins derive from England. It also follows the strong "English Rule" on fee-shifting, requiring the loser to compensate the winner. For an overview, see Daisuke Oda & Arutu Kagan, "Class/Collective Actions in Japan: Overview" in DISPUTE RESOLUTION GLOBAL GUIDE (2015) (available at http://us.practicallaw.com/9-618-0825); Jing-Huey Shoo Class Action Mechanisms in Chinese and Taiwanese Contexts—A Mixture of Private and Public Law, 28 Emory Int'l Law Rev. 237, 262-275 (2014).

[45] This is the case in Japan, China and Taiwan. Hong Kong, however, has the "English Rule," which requires full fee-shifting. In South Korea, the loser pays a court fee but also must reimburse a portion of the winner's legal expenses. See Jin-Yeong Chung, et al., "Class/Collective Actions in Korea: Overview" in DISPUTE RESOLUTION

legal expense insurance, which can cover fee-shifting liabilities.[46] In short, with opt-in classes prevalent, contingent fees permitted, and "loser pays" softened, Asia does not share Europe's hard-line opposition to entrepreneurial litigation.

But this does not mean that class actions are common in Asia. In fact, only two Asian jurisdictions—Japan and Korea—have had any experience with large-scale class action litigation (and even that experience is limited). The greater receptivity of Japan and Korea to the class action may reflect legal cultures that were strongly influenced by the U.S., either during the U.S.'s occupation of Japan or the U.S.'s close alliance with Korea during the Cold War. Uniquely, China has seen the evolution of entrepreneurial, "lawyer-driven" litigation, even in the absence of the class action, but this may reflect its acceptance of the contingent fee. Each of these counties has had a different experience, but each today stands on the verge of a potentially significant increase in aggregate litigation.

1. Japan

The 2004 reform of Japanese securities law intentionally invited more securities litigation, particularly in the secondary market context.[47] Under these amendments, plaintiffs no longer had to establish individual reliance on the misstatement or omission, and this amounted to at least a partial adoption of the "fraud-on-the-market" doctrine (which had earlier caused an acceleration in securities

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GLOBAL GUIDE (2015) (available at http://us.practicallaw.com/5-617-3110?source=relatedcontent.); Gyooho Lee, Cost and Fee Allocation in Civil Procedure in Korea, 58 Am. J. Comp. L. 195 (2010).

[46] Legal expense insurance has been available in Japan since 2000. See "Craig I. Celriker, Chie Yakura, Steven E. Comer and Louise C. Stoupe, Morrison & Forrester LLP., "Litigation and enforcement in Japan: overview," Practical Law (July 1, 2015) (available at http://us.practicallaw.com/9-502-0319). Its availability was important to the Olympus litigation discussed infra at notes 49 to 52, where the plaintiffs obtained such insurance.

[47] In 2004, an amendment to Japan's Financial Instruments and Exchange Act ("FIEA") loosened the burden of proof for plaintiffs by eliminating the need to prove individual reliance. Effectively, this amounted to at least a partial adoption of the U.S.'s "fraud on the market" doctrine. See Gen Goto, "Growing Securities Litigation Against Issuers in Japan: Its Background and Reality" (available at http://ssrn.com/abstract=2714252) (2016); Michael J. Maderra, The New Class Action in Japan, 23 Pac. Rim. L & Pol'y J. 795 (2014).

litigation in the United States as well). The number of securities lawsuits rose in the early-2000s, from almost none to double-digit numbers.[48]

Although the number of cases fell again between 2010 and 2015, one major case may signal a coming increase in securities litigation in Japan.[49] Once again, that case reflects the impact of the Morrison decision. In the Olympus securities litigation, the initial action was filed in the United States.[50] But the defendant only had American Depository Receipts (ADRs) traded on any U.S. exchange, and these reflected only a small portion of its total capitalization. Morrison implied that U.S. investors who had bought their shares abroad could not sue in the U.S. The ADR action was resolved with a favorable, but modest, settlement in 2014, and this may have motivated legal entrepreneurs to look for an alternative forum where the holders of Olympus's common stock could sue. As with Fortis, an American law firm organized a class action, which was to be filed in Japan by undisclosed Japanese lawyers. The parties reached a preliminary settlement in October 2013, but the settlement process was slowed by a mediation that extended for 16 months. Eventually, in April 2015, the parties settled for $92 million in an out-of-court settlement, which was vastly in excess of the $2.6 million settlement reached on the ADRs in the U.S. litigation.[51]

Olympus is distinctive from Fortis in that it was parallel litigation that succeeded in both jurisdictions (whereas Fortis resulted in a plaintiff's defeat in the U.S.). The two settlements in Olympus were also less than two years apart (whereas five years separated the U.S. action and The Netherlands settlement in Fortis).

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[48] Id.; see also Asa Shinkawa, Securities Litigation After Olympus: Liability Through an Olympus Lens, Int'l Fin. L. Rev. (April 1, 2012) (available at http://www.iflr.com/Article/3007093/Securities-litigation-after-Olympus-Liability-through-an-Olympus-lens.html).

[49] For this prediction, see Anna Zhang, "Torts Trouble Ahead? A barrage of accounting fraud claims against Olympus Corp. may help set off a litigation boom in Japan," The Asian Lawyer, July 1, 2014. Olympus had apparently hid losses for 13 years, until this came to light in 2011.

[50] That case was Graham v. Olympus Corporation, filed in 2011 and settled (with court approval) in 2014. See Stanford Law School, Securities Class Action Clearinghouse, ("Olympus Corporation").

[51] See Cara Salvatore, "Olympus to Pay Investors $92 M over Alleged Fraud," Law360, April 2, 2015.

The key entrepreneur in Olympus was a Miami-based law firm, DRRT, which advertises itself as focused on global litigation.[52] Because contingent fees are permissible in Japan (whereas "third party funding" is not), DRRT presumably received a significant contingent fee for its efforts. Apparently it was more than satisfied with its success, because it has subsequently caused two class action cases to be filed in Japan against Takata Corp. and Toshiba.[53] In some of these cases (including Olympus), the Japanese class action followed on the heels of an earlier U.S. class action covering securities sold in the United States. Possibly, this suggests that there may be a synergy in parallel class actions, with plaintiffs obtaining discovery in the U.S. under the more liberal U.S. rules and utilizing it in the later Japanese action. Alternatively, a successful recovery in the U.S. is at least some evidence that the case is meritorious, and thus a follow-on class action in a foreign country may carry less risk.

On its website, DRRT advertises that it has recovered over $1 billion for its clients and represents over 400 institutional investors.[54] Much like Deminor in Europe, DRRT seems to be more of an intermediary and matchmaker than a traditional law firm. This role of the American law firm as an entrepreneur and legal innovator is the most interesting common denominator between Fortis and Olympus, and both cases represent an extraordinary recovery for their respective jurisdiction.

2. Korea

Adopted in 2005 in response to financial scandals, Korea's "Securities-Related Class Action Law" (or "SRCAL") was a deliberate attempt to emulate the American class action model.[55] Uniquely in

[52] DRRT's web site advertises "Global Institutional Investor Protection" and "Global Claims Filing Services," adding that it is "uniquely positioned to serve institutional investors in all aspects of global securities litigation, loss recovery, and claims filing." See http://globalsecuritieslitigations.drrt.com.
[53] DRRT discusses its efforts in both of these cases on its "Current Cases" page of its website. See "Current Cases/Global Securities Litigation/drrt.com. Both actions were filed in 2016.
[54] See, http://globalsecuritieslitgiation.drrt.com. The website further states that DRRT "is active in 11 countries and currently handles cases of investor loss recovery exceeding $10 billion." DRRT also participated in the Fortis litigation, suggesting that the major international players all know each other.
[55] SRCAL became effective on January 1, 2005. See Financial Supervisory Service, A PRIMER ON KOREA'S NEW SECURITIES CLASS ACTION SUIT LAW (January 1, 2005); see also, Sheron Korpus, Is Korea's Securities Class Action Law Working?, 25 Int'l Fin. L. Rev. 53. (2006); Dae Hwan Chang, Introduction to South Korea's New Securities-Related Class Action, 30 J. Corp. L. 165 (2004); Stephen J. Choi, The Evidence on

Asia, it authorizes an American-style "opt-out" class action (but only with respect to securities-related claims). SRCAL also contains several measures to curb nuisance suits, which similarly seem to have been modeled on the U.S.'s Private Securities Litigation Reform Act.[56]

Yet, despite the wholesale legislative adoption of the U.S. approach by Korea, only a few class action suits have been filed under SRCAL, and, as of the close of 2015, only one case has apparently settled.[57] Why? The answer may be that Korea has fewer multinational corporations in which global institutional investors hold equity stakes. Accordingly, the demand for a new remedy in the wake of Morrison is less pressing in Korea. In addition, there are up-front costs in Korea that are based on the size of the claim (a tax of approximately 0.5% of the claim must be paid on filing).[58] Standing to bring such a suit is also limited.[59] Third party funding is strongly discouraged in Korea. Hence, Korean procedural law may to a degree undercut the announced purpose of SRCAL.

To date, one law firm has brought the majority of securities class actions filed in Korea,[60] and no American legal entrepreneur appears to have attempted to bring or organize a class action in Korea. This may be a further evidence of a lack of demand among institutional investors for a Korean venue. In short, legal rules, even if intentionally friendly to class actions, do not necessarily produce a marked increase in their use. More is required—namely, a demand side interest on the part of investors. This interest is more likely to arise with respect to global companies with a high percentage of institutional ownership.

3. China

Securities Class Actions, 57 Vand. L. Rev. 1465, 1520-1522 (2004) (covering Korea's securities market and proposed legislation).

[56] Korpus, supra note 55, at 53.

[57] See Lee, "Court Gives First Approval for Lawsuit by Equity-Linked Securities Investors," THE HANKYOREH (Sept. 12, 2013) (available at http://english.hani.co.kr/arti/english_edition/e_international/603193.html).

[58] See Gyooho Lee, supra note 45.

[59] At least fifty shareholders must join in the suit's filing, and they must hold in the aggregate 0.01 percent of the equity in the corporation. See Choi, supra note 55, at 1521. In the case of a large corporation with a multi-billion dollar market capitalization (say, Samsung), this could require an investment of several hundred thousand dollars to confer standing.

[60] This is the Hannuri Law Firm, which maintains an active web site (Hannuri Law). A number of the class actions that it has filed have been certified by the Korean courts, but there is no report of a settlement of any of these.

China has existing legal rules that both encourage and discourage entrepreneurial litigation. On the one hand, it does not permit an "opt-out" class action[61] and, in the case of securities litigation, China also requires that any private action be preceded by a criminal action or civil public enforcement action,[62] thereby deliberately subordinating private enforcement to public enforcement. On the other hand, China does permit the contingent fee.[63] Close observers report that China has many lawyers utilizing such fees who seem already well-adapted to entrepreneurial litigation.[64] Although private securities actions must follow a prior public action (civil or criminal), a number of such private actions have been recently filed in China,[65] and some have obtained settlements amounting to a very high percentage of the potential damages.[66] Still, the filing rate appears to be low, possibly because regional courts appear to protect local companies from "outside" litigation.[67]

Practices in China appear to be evolving, and China could well eventually remove some of the procedural barriers to entrepreneurial litigation in the foreseeable future.[68] Even at present, one careful

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[61] See Robin Hui Huang, Private Enforcement of Securities Law in China: A Ten-Year Retrospective and Empirical Assessment, 61 Am. J. Comp. L. 757, 762-63 (2013). Investors can instead sue either in the form of an individual action or a joint action. Id. at 763. Earlier authors have referred to these permissible "joint" actions as class actions because they represent a close equivalent to the "opt-in" class action. See Benjamin L. Liebman, Class Action Litigation in China, 111 Harv. L. Rev. 1523 (1998). Nonetheless, they only cover those who take an affirmative act to be included and thus tend to be much smaller in size. See also Donald C. Clarke, The Private Attorney-General in China: Potential and Pitfalls, 8 Wash. U. Global Stud. L. Rev. 241, 248 (2009) (preferring the term "group action" to "class action" because "China does not have true class actions in the American sense…").

[62] See Huang, supra note 61, at 762. The private civil enforcement action would have to be brought by the China Securities Regulatory Commission ("CSRC").

[63] Id. at 767-768 (noting that contingency fees, known as "risk agency fees" in China, "have long been used in the context of securities civil actions").

[64] Id. at 768 (noting that "there is no shortage of entrepreneurial lawyers in China, and they race to represent as many investors as possible in the area of securities civil cases"). During December, 2016, this author visited Hong Kong and interviewed a number of legal scholars there, including Professor Huang. They generally confirmed the discussion in the text.

[65] Professor Huang counts sixty-five private securities civil suits that have been brought in China since such actions were first authorized in 2002 and 2011. Id. at 764 and 766.

[66] Id. at 770-771 (finding the ratio of compensation recovered to provable losses to have a mean of 78.6% and a median of 83.1%). Of course, if the issuer has already been criminally convicted, any effective defense may be impossible in this setting.

[67] Id. at 794-795.

[68] There has been much criticism in China of the procedural requirement that a private action must follow a prior criminal or public enforcement action. See Huang, supra note 61, at 764 (noting that "many commentators" have advanced the criticism that this procedural prerequisite "may unduly limit the number of securities civil suits"). See also Sanzhu Zhu, Civil Litigation Arising from False Statements on China's Securities Market, 31 N.C. J. Int'l L. & Com. Reg. 377, 427 (2005).

analyst finds that "China's securities civil actions are…lawyer-driven, and there is no shortage of entrepreneurial lawyers in China."[69] Although China is unwilling to accept the "American-style" class action, it does see the need for some measure of entrepreneurial litigation to curb the recurrent scandals in its securities markets.

III. Implications and Analysis

1. How Should we Understand This New Phenomenon? As we have just seen, some non-U.S. jurisdictions have developed (or at least tolerated the appearance of) a second-best substitute to the American opt-out class action: namely, a joint action that is the de facto equivalent of an opt-in class action. Cases may be migrating to these jurisdictions when plaintiffs are excluded from the U.S. by the impact of the Morrison decision. The clearest example is The Netherland's WCAM statute, but opt-in class actions in Japan and Korea may eventually produce a functionally similar result to the extent that institutional investors hold the vast majority of the stock of multinational corporations. The following chart summarizes the key differences:

Element	U.S. System	Non-U.S. alternative
Claim Aggregation	Opt-out Class	WCAM settlement class or aggregative mechanisms (such as the stichting)
Litigation Finance	Contingent Fee	Third Party Funding
Fee-Shifting	American Rule (no fee-shifting normally)	Liability Insurance or Reduced Fee-Shifting

What is driving this activity? Some academics have suggested that it is regulatory competition, as European or other states seek to acquire the cases and plaintiffs that the U.S. lost with the Morrison

[69] Huang, supra note 61, at 798.

decision.[70] Although such a theory may enable academic theorists to use models of regulatory competition that they learned in graduate school, this theory does not comport well with the actual facts. As we have seen, in 2013, the European Union rejected most of the key elements of the American model for entrepreneurial litigation.[71] Conceivably, an outlier jurisdiction (such as, possibly, The Netherlands) could dissent from that consensus and seek to garner revenues from filling the void left by the United States. But the actual facts suggest otherwise. The WCAM statute was passed in 2005, after a much publicized mass tort crisis involving birth defects caused by a specific drug, and thus its enactment preceded the 2010 decision in Morrison. WCAM's design is apparently based on the Dutch Ministry of Justice's belief that the American experience with mass torts for defective drugs showed that these cases settled naturally, without any need for a trial.[72] Further, if The Netherlands had wanted to attract litigants, it could have enacted at least an "opt-in" class action (which it has not done). Indeed, if the goal were to implement a system that can litigate "negative value" claims, The Netherlands could have adopted a number of other U.S. rules, which provide a significantly lower-cost alternative. To give but one example, abolishing the "loser pays" rule would be far more encouraging to plaintiffs than simply permitting insurance of the liabilities that a "loser pay" rule creates. But The Netherlands did not move in this direction. Put simply, The Netherlands' only clearly discernible goal was to facilitate settlement, not encourage entrepreneurial litigation.

Europe continues to believe that the U.S. system may create an excessive incentive to litigate,[73] and nothing suggests that The Netherlands is an outlier to this consensus. Authorizing settlements under WCAM can be viewed as a "pro-corporate" stance (as leading Dutch companies like Royal Dutch/Shell and Fortis have used WCAM). Conversely, enacting even an "opt-in" class action statute authorizing

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[70] See Kaal and Painter, supra note 13; Russell, supra note 13. This idea is also implicit in Pamela K. Bookman, Litigation Isolationism, 67 Stan. L. Rev 1081 (2015).
[71] See text and notes supra at notes 15 to 16.
[72] See Krans, supra note 28, at 284 n. 36 (Dutch Minister of Justice in the Explanatory Memorandum to the WCAM Act surveyed the American experience with mass torts and "stated that the vast majority of the 'mass tort class actions' do not lead to a final judgment, but end with a settlement.").
[73] For a similar view, see Manning G. Warren III, The Prospects for Convergence of Collective Redress Remedies in the European Union, 47 The International Lawyer 325 (2013) (predicting that it is "highly unlikely" that Europe will move closer to the American model).

plaintiffs collectively to sue Dutch corporations would hardly be "pro-corporate" (and, revealingly, The Netherlands has not done this).

These observations lead to a simpler explanation for what we are observing in Europe and Japan: namely, that legal entrepreneurs have discovered an unmet market demand (institutional investors who want to recover market losses) and they are experimenting with substitute forums for their former U.S. base. Although conceivably these plaintiffs could use consolidated proceedings (as they did in fact do in Belgium early in the Fortis litigation[74]) as an alternative to class resolution, they have rationally preferred the jurisdiction (The Netherlands) that offers both a device for broad aggregation (i.e., the stichting) and a means for expanding that device into a global settlement (WCAM, at least if the defendants will settle). From this perspective, it was essentially fortuitous that The Netherlands supplied the latter need with its WCAM statute, but resourceful entrepreneurs will predictably scour the legal landscape to find what opportunities exist. The bottom line then is that jurisdictions have been passive, while entrepreneurs have been active. Ironically, the three jurisdictions that did change their law after 2000 expressly to permit securities litigation in response to local scandals—namely, Japan, China and Korea—have not seen any significant influx of foreign litigants or foreign attorneys (with only Japan seeing some examples). This appears to be because, unlike The Netherlands, they have not created a mechanism that permits a global consensual resolution (as the WCAM statute does).

2. New Patterns and New Issues. As litigation moves to Europe and elsewhere, new patterns, new players, and new issues are emerging, including the following.

A. New Players. When only an opt-in class action is permitted, the plaintiff's legal team needs to find a "claim aggregator." These are agents that have relationships with institutional investors (or other groups of potential plaintiffs) and can solicit them to join the opt-in class or an alternative aggregative mechanism (such as the stichting). In the Fortis litigation, both Deminor and VEB performed

[74] See text and note supra at note 19.

this function, based on their long-time roles as a shareholder champions. Law firms themselves generally have less capacity to play this role (although DRRT in the United States may now be attempting to specialize in claim aggregation). The lesser ability of law firms to perform this role is clearest when the law firm is attempting to litigate on a global scale and hence will be bringing or organizing cases far from its home base where it is better known. Plaintiff law firms obviously have a self-interest in "selling" their proposed law suit, and the intermediaries who act as aggregators probably can provide a more objective assessment to clients of the costs and benefits of joining the litigation. Of course, to the extent that the intermediary is compensated by the plaintiff's law firm (or some other entrepreneur), its perceived objectivity may be illusory.

B. The Third Party Funder: Superior or Inferior? On the one hand, a hedge fund (or other financial intermediary) has better access to the capital markets than a law firm, and it can pick and choose among numerous cases presented to it and thereby exercise some objective judgment. Necessarily, a plaintiff's law firm has a more limited number of cases which it can finance and litigate on a contingency fee basis. But third party funding seems to be more expensive (sometimes charging as much as half the prospective recovery). Why? One answer is that the third party funder always faces the problem of adverse selection. Plaintiff's lawyers have the incentive to bring to the third party funders cases that they would not dare to finance themselves. If a law firm can obtain financing from others for a case which, it privately estimates, has less than a 50% chance of success, it may be entirely rational for it to proceed. If it loses, it still is compensated for its time at its hourly rate; if it wins, it gains reputational capital and may find a way to receive a "success fee" without violating the rules of the local jurisdiction. Knowing this, third party funders need to demand a larger share of the recovery to compensate for this risk.

Conceivably, as the market develops, competition may drive down the cost of "third party" litigation finance, but the problem of adverse selection will never disappear.

C. Reverse Auctions. If parallel litigation covering overlapping groups can be brought in different jurisdictions and the first action to settle will preclude the others (as will often be the case in Europe because of the WCAM statute), defendants may be able to exploit this pattern and induce rival plaintiff teams to bid against each other, with the low bidder winning the right to reach a preclusive settlement with the defendant. Because the WCAM statute permits a European-wide settlement of claims (which other European courts will generally respect[75]), this strategy may soon be exploited. Although the other plaintiff's attorneys thereby precluded can object to the settlement's approval, the WCAM statute does not permit them to appeal the settlement's approval.[76]

In the United States, a partial answer to this problem has been the Judicial Panel on Multidistrict Litigation, which typically puts one judge in charge of the litigation and thereby limits defendants' ability to run an auction.[77] Europe lacks such a body, and no substitute mechanism is in sight.

D. Unequal Distribution? In the U.S., a class action settlement will basically be disbursed on a per share basis, possibly modified by when the class members made their purchases (which can affect the strength of their claims). But in the Fortis settlement, "active" shareholders will receive significantly more than those who joined only by virtue of the WCAM settlement.[78] "Active" shareholders included those who initiated the litigation or joined either of the two stichtings before the global settlement was reached. If latecomers can be paid less, this increases the attractiveness of a WCAM global settlement to the defendant, as it enables defendants to cover the absent parties at low cost. Although justifications can be advanced for such a disparity, equality of treatment within the class is

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[75] See text and note supra at note 32.
[76] See Kraus, supra note 28, at 288.
[77] In addition, the Class Action Fairness Act ("CAFA"), enacted in 2005, has greatly reduced the once broad dispersion of class actions between state and federal court, by generally enabling defendants to remove class actions in state court to federal court. See Emery G. Lee III and Thomas E. Willging, The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals, 156 U. Pa. L. Rev. 1723 (2008).
[78] The original press release announcing the Fortis settlement stated that:

> "The Parties have agreed to take into account within the compensation principles the concept of "Active" and "Non-Active" claimants."

See Ageas Press Release, March 14, 2016 ("Ageas, Deminor, Stichting FortisEffect, SICAF and VEB reach agreement aimed at settling all Fortis civil legacies" at p. 5. Under the settlement, an "active claimant" is any Eligible Shareholder who initiated legal actions or actively adhered to a collective action before 31 December 2014, and hence has for a substantial period endured membership, legal and/or administrative expenses." Thus, those who joined either of two stichtings that sued Fortis would be "active" claimants, while those who are only covered by the WCAM action's inclusion of absent parties would not be "non-active" claimants and would receive less. Although quietly stated, this provision allows the settling parties to sweep the absent class members into the WCAM settlement at a lower cost. Schedule 2 to the Settlement Agreement shows that "non-active" claimants initially receive 0.38 Euros "per Buyer 1 share held," while "active" claimants receive 0.56 Euros "per Buyer 1 share held." See Settlement Agreement, dated 14 March, 2016, as amended (copy on file with University of Pennsylvania Law Review).

apparently not yet a goal recognized in Europe, and the parties will often have their own private reasons for deviating from equality.

E. Will the American entrepreneurs fade away? In the recent cases of Fortis and Olympus, and also in the pending Volkswagen litigation, U.S. plaintiff law firms have played a critical organizing role. But is this only a transitional phenomenon? Arguably, European firms (such as Deminor or VEB) or investment banks could play this same entrepreneurial role and negotiate financing with third party funders. On the other hand, most of these early cases have involved litigation that began in the United States. Even in the Volkswagen case, there is ADR litigation pending in the U.S., and the plaintiff's law firm handling that case is also seeking to open a European front in The Netherlands. Conceivably, there is lower risk in seeking to file a follow-on litigation in Europe or Asia than commencing a totally new case in the foreign jurisdiction. No prediction is made here, but this will be one of the issues to watch.

F. Counter-reaction? It is still early. Europe may yet find the invasion of American plaintiff's lawyers distasteful or even shocking. The E.U. could in time take the non-binding principles announced in its 2013 Recommendation and make them mandatory. But to be effective, this would require the E.U. to overrule The Netherlands' WCAM statute, and that seems less than likely. After all, WCAM only permits the parties to settle. In many cases, a defendant may not want a global settlement; that is, it may be happy to settle with those who sue it by means of a stichting or in an opt-in class action, and it will not opt to cover absent parties as well. The choice effectively is the defendant's. European attitudes towards the WCAM procedure are still unclear, but the concept of fostering settlements is not antithetical to the European mind.

Much may depend on the public's reaction to these early cases. Both Fortis and Volkswagen are recognized in Europe as legitimate scandals, and there is relatively little sympathy for either defendant. But that could change if the press reports that the American law firms received allegedly "obscene" fees while the class members obtained little. On this question, the jury is still out.

G. Future Directions. To date, the major cases in which a global resolution has been attempted in Europe and Asia have all involved securities claims: Fortis, Royal Dutch Shell, Volkswagen, and Olympus. Although the United Kingdom has authorized an opt-out class action for antitrust claims (and only them), that area has not yet seen much activity.

Why have securities law claims so dominated? One answer may be that large holders (i.e., institutional investors) own most of the stock in Europe (where the middle-class individual is less likely than in the U.S. to own shares directly). Large shareholders are less apathetic and easier to organize, because they suffer larger losses and are professionals. But if this is the reason for the dominance of securities claims, an irony results: The class action and other aggregate litigation remedies have not yet begun to serve "negative value" claimants outside the United States. This is virtually definitional, as those able to join a stichting or opt-in to a class in a foreign jurisdiction are not small economic actors. Nor are claims aggregators searching for small investors. Only those with large claims have adequate incentive to participate. As a result, Europe still seems a long distance from its goal of developing an aggregate litigation remedy for "negative value" claims.

Conclusion

Let's return to the anniversary of Rule 23 and the law-versus-culture debate on which this article began. Did Rule 23 initiate a major revolution in the structure of U.S. litigation? Such a conclusion may overstate. More accurately, the amendment of Rule 23 catalyzed a number of preexisting and distinctive elements in the U.S. legal system and thereby held out heightened economic incentives to those willing to assume the role of private attorneys general. The key actors in the U.S. were the legal entrepreneurs that responded to these new incentives. Here, it is highly relevant that, in the U.S., the contingent fee had been recognized and accepted by the turn of the 20th Century, as it had already come to finance the personal injury litigation that an industrializing nation produced in volume.[79] During the late 1930s, an entrepreneurial plaintiff's bar developed in the U.S., concentrating mainly on derivative actions.[80] In the 1960s, they and new entrants moved to private antitrust litigation, responding to the Department of Justice's vigorous enforcement of price-fixing cases, and they initially brought largely follow-on

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[79] See Coffee, supra note 1, at 19-22 (describing early controversy and eventual acceptance of the contingent fee in the U.S.)
[80] Id at 33-52.

actions.[81] Then, in the 1970s, with the judicial recognition of a private cause of action under Rule 10b-5, many shifted to securities litigation.[82] This is not to deny the impact of Rule 23, but to recognize that its impact may have been largely attributable to a preexisting professional culture that was already comfortable with contingent fee litigation and risk taking. Further, the concept of the "private attorney general" afforded an intellectual rationale to plaintiff's attorneys that was well understood and respected in the United States, but not elsewhere.[83]

Consistent with this picture, new legislation intended to encourage securities litigation as a reform in the wake of scandals was enacted in Japan and Korea, but has had only a modest impact in terms of the volume of litigation. In China, although the authorities imposed obstacles to securities litigation by conditioning it on a prior public enforcement action, the acceptance of the contingent fee has produced a real increase in securities litigation, even in the absence of favorable legislation.[84]

Today, legal entrepreneurs are moving to the global stage and have effectively invented a "synthetic" class action. Still, they are seeking to export this technology beyond the domain of their own culture. Although they have had early success, they may still encounter greater resistance abroad (where the culture is at least skeptical and arguably hostile to entrepreneurial litigation). Nonetheless, they do have a clientele that wants their services, strong economic incentives to sue, and no shortage of scandals to litigate. In other countries—most notably China—, a local legal culture tolerant of entrepreneurial litigation seems to have developed, and, while nothing is certain, the size and scale of the Chinese securities market could soon encourage and support a sizable indigenous population of entrepreneurial litigators.

[81] Id at 56-59

[82] Id at 64-73.

[83] The term "private attorney general" was coined by Justice Jerome Frank in 1943. See Assoc. Indus. of New York State v. Ickes, 134 F. 2d 649,704 (2d Cir. 1943) But the practice of authorizing "private attorney generals" to protect the public's interests dates back to the Civil War. See Coffee, supra note 1, at 14-15.

[84] Of course, in a nation as large as China, which also has the second largest securities market in the world, the opportunities to sue will be considerable. Even so, the behavior in China is different than that, for example, in Japan, as lawyers in China advertise to attract securities cases, compete actively for plaintiff clients, and closely follow all administrative actions of the Chinese securities regulator in order to identify potential new cases. This aggressive marketing behavior in order to attract clients on a contingent fee basis defines an entrepreneurial culture.

All in all, it is still early, but some generalizations do suggest themselves: First, legislation (including rule amendments) will not alone produce major change. Second, entrepreneurs (domestic or foreign) will scour the legal landscape for opportunities to exploit, and this characteristic is probably what best explains the popularity of the WCAM statute. Third, even in the absence of favorable legislation, if the local culture supports legal entrepreneurs, entrepreneurial litigation can develop in the face of significant legal obstacles (as the recent experience in China seems to show). For the future, movement may occur in both directions. That is, some countries (possibly in Europe) may attempt to chill entrepreneurial litigation, while others (possibly including China) could repeal existing obstacles and witness an explosion of litigation. All that is safely predictable today is that so long as opportunities exist (such as that afforded by the WCAM statute), they will be exploited by legal entrepreneurs.