

2017

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

John C. Coffee Jr.
Columbia Law School, jcoffee@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship



Part of the [Comparative and Foreign Law Commons](#), and the [International Law Commons](#)

Recommended Citation

John C. Coffee Jr., *The Globalization of Entrepreneurial Litigation: Law, Culture, and Incentives*, 165 U. PA. L. REV. 1895 (2017).

Available at: https://scholarship.law.columbia.edu/faculty_scholarship/2010

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.

ARTICLE

THE GLOBALIZATION OF ENTREPRENEURIAL
LITIGATION: LAW, CULTURE, AND
INCENTIVES

JOHN C. COFFEE, JR.†

INTRODUCTION	1896
I. THE EUROPEAN FRONT: BARRIERS OUTFLANKED	1900
A. <i>The Fortis Litigation</i>	1902
B. <i>The Volkswagen Litigation</i>	1908
II. ASIA: A SHIFT TOWARDS ENTREPRENEURIAL LITIGATION	1911
A. <i>Japan</i>	1912
B. <i>South Korea</i>	1914
C. <i>China</i>	1916
III. IMPLICATIONS AND ANALYSIS	1917
A. <i>How Should We Understand This New Phenomenon?</i>	1917
B. <i>New Patterns and New Issues</i>	1919
1. <i>New Players</i>	1919
2. <i>The Third Party Funder: Superior or Inferior?</i>	1920
3. <i>Reverse Auctions</i>	1920
4. <i>Unequal Distribution?</i>	1921
5. <i>Will the American Entrepreneurs Fade Away?</i>	1922
6. <i>Counter-Reaction?</i>	1922
7. <i>Future Directions</i>	1923
CONCLUSION	1923

† Professor Coffee is the Adolf A. Berle Professor of Law at Columbia University Law School and Director of its Center on Corporate Governance. In researching this Article, Professor Coffee spoke to a number of attorneys on both sides of the major cases discussed herein, but will not quote them by name at their preference.

INTRODUCTION

The fiftieth anniversary of Rule 23's adoption in 1966 provides an opportunity to consider how legal change occurs. 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 areas of litigation came to depend on Rule 23's availability (e.g., securities litigation, antitrust litigation, and, for a time, mass torts litigation).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 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

¹ That surge was initially noticed in the early 1970s, but it was not only the product of Rule 23's amendment. This increase in "private" class actions for monetary damages was at least equally the product of 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 later, this litigation taught plaintiffs' attorneys how to network and share information, but it also showed courts and policymakers 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., *ENTREPRENEURIAL LITIGATION: ITS RISE, FALL AND FUTURE* 56-60 (2015). 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 R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality and the "Class Action Problem"*, 92 HARV. L. REV. 664 (1979) (defending Rule 23 of the Federal Rules of Civil Procedure against those who would cut back its scope and utility).

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) (criticizing the overreach of mass tort class actions and proposing prudential limits on the problems that courts dealing with mass torts can competently handle on a class-wide basis). 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.

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) (demonstrating the ability of plaintiff's counsel to incur extremely high costs in order to receive large class action fee awards). 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, and thus shows that this investment paid off. *Id.* at 828.

“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 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 obvious 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 those issues, but it suggests that perspective and insight is gained into the relative impact of law, culture, and incentives by looking at how entrepreneurial litigation is now 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.

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

4 For a fuller description, see COFFEE, *supra* note 1, at 18-32.

5 Earlier in the twentieth 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. 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: Its Rise, Fall and Future*, I attempt to delineate the specific elements of this culture, including the contingent fee, the common fund doctrine, the strong preference for jury trials, the potential for punitive damages, and the American rule against fee-shifting. *Id.* at 12-31. 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 an entrepreneurial culture, which the class action catalyzed.

7 The Private Securities Litigation Reform Act of 1995 (“PSLRA”) was intended to (and for a brief time did) curb securities litigation by enhancing the pleading standards for securities litigation and creating a safe harbor for “forward-looking” information. See Securities Exchange Act of 1934 §§ 21D-21E, 15 U.S.C. §§ 78u-4-78u-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 S.Ct. 2541 (2011) (denying class action certification to Walmart female employees alleging sex discrimination); *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011) (holding that the Federal Arbitration Act preempts California’s judicial rule regarding the unconscionability of class action arbitration waivers in consumer contracts).

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 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

⁸ Although the name of the Milberg, Weiss firm changed periodically over the last twenty years, Melvin Weiss, William Lerach, David Bershaw and Steven Schulman were all at one point “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 the class representatives in class actions brought by the firm. 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 376-78 (2010) (providing a biography of William Lerach); Peter Elkind, *The Law Firm of Hubris, Hypocrisy & Greed*, FORTUNE, Nov. 13, 2006, at 154-56 (satirizing the securities class-action firm Milberg, Weiss).

⁹ Among those narrow escapes have been: (1) the passage of the PSLRA, which in its 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 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 generally 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) (providing a history of the constant challenges and threats faced by Rule 10b-5 class action litigation and predicting that, once again, class actions will survive). 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 actions have recently experienced a significant increase in filings. See CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS: 2016 MIDYEAR ASSESSMENT 4 fig.2 (2016) (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 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 MELB. U. L. REV. 775 (2008) (Australia); 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) (Canada); Amichai Magen & Peretz Segal, *The Globalization of Class Actions, National Report: Israel* (2007), http://globalclassactions.stanford.edu/sites/default/files/documents/Israel_National_Report.pdf [<https://perma.cc/PK3U-PJEH>] (Israel).

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, strict rules often limit 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. One focus of this brief article will be on how this has happened and the forces that have driven it. In overview, this article 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 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.

¹¹ The United Kingdom has recently adopted an "opt-out" procedure 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 notable exceptions of Australia, Canada, and Israel, few developed nations permit the American-style opt-out class. The Netherlands authorizes an opt-out settlement class action, but a settlement is a precondition to its use. *See infra* notes 12–13 and accompanying text. As later discussed, China permits a functional equivalent to the class action, but has imposed severe procedural preconditions on securities litigation, although it does permit the contingent fee. The result of this compromise has been that a significant population of entrepreneurial lawyers are now promoting aggregate litigation in China, at least in the securities law context. *See infra* notes 71–77 and accompanying text.

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 plaintiffs' attorneys the practical ability to bring a class action. *See* Deborah R. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306, 307 (2011) ("Standing: (1) public officials; (2) licensed associations; (3) private actors."); Michael Palmisciano, Note, *Going Dutch: The Effects of Domestic Restriction and Foreign Acceptance of Class Litigation on American Securities Fraud Plaintiffs*, 53 B.C. L. REV. 1847, 1868 (2012) ("Member States also tend to restrict standing in aggregate claims to organizations or foundations, denying standing to individuals.").

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 & Richard W. Painter, *Forum Competition and Choice of Law Competition in Securities Law After Morrison v. National Australia Bank*, 97 MINN. L. REV. 132, 134 (2012) ("For private lawsuits, *Morrison's* curtailment of the reach of U.S. securities laws potentially expands the opportunity for other jurisdictions to compete with U.S. securities law by providing their own combination of legal rules, private rights of action, and government enforcement mechanisms."); *see also* Tiana Leia Russell, *Exporting Class Actions to the European Union*, 28 B.U. INT'L L.J. 141 (2010) (arguing that the U.S. model of class action litigation provides a useful roadmap for private enforcement of competition law in the European Union). 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 United States. 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 infra* Part I. Other cases have recently been exported to Japan, sometimes after an initial and smaller case was settled in the U.S.

The result is not a perfect substitute for the U.S. system—indeed, the same legal services seem to be 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 in order to show 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 cause a significant increase in the volume of litigation in a jurisdiction. Conversely, even when authorization of collective redress is lacking, entrepreneurial litigation can still develop if the local culture is tolerant.

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 presented extraterritorial plaintiffs with a crisis. They had come to rely on a U.S. forum and on U.S. plaintiffs’ attorneys willing to take their cases on a contingent fee basis. The result was a search, led by U.S. plaintiffs’ 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 described below.

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 a hypothetical consumer product: a defective toaster that costs \$50. No individual can afford the likely legal costs of establishing the toaster’s defects—assuming that the defendant would not concede them. The answer to this problem is broad claim aggregation: 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

¹⁴ 561 U.S. 247.

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 persons who may have been injured 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 of 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 it could not have been more emphatic in rejecting 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;¹⁶
- (2) The close regulation of contingent fees (in the “Member States that exceptionally allow” such fees at all);¹⁷
- (3) A “loser pays” rule under which the winning party is paid its legal costs by the losing party;¹⁸
- (4) A prohibition on punitive damages;¹⁹
- (5) Mandatory use of non-profit entities to lead the class action (in order to minimize the danger of lawyer-controlled classes);²⁰ and
- (6) Close regulation of litigation funding by third parties (with a special requirement of its disclosure to the court).²¹

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. *Id.* Under E.U. law, a Recommendation has no binding effect and simply suggests a course of action without imposing any obligation.

¹⁶ *Id.* at 201/64-65.

¹⁷ *Id.*

¹⁸ *Id.* at 201/63.

¹⁹ *Id.* at 201/64.

²⁰ *Id.* at 201/62-63.

²¹ *Id.* at 201/63. For a careful review of this Recommendation, see Astrid Stadler, *The Commission’s Recommendation on Common Principles of Collective Redress and Private International Law*

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.

A. *The Fortis Litigation*

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.²² 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 *Morrison*, however, the court found that it lacked jurisdiction and dismissed the action 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.²³

Actions were filed by Fortis investors in both the Netherlands and Belgium early in 2011,²⁴ but they moved slowly, in large measure because

Issues, 4 NEDERLANDS INTERNATIONAAL PRIVAATRECHT (N.I.P.R.) 483 (2013), <http://www.nipr-online.eu/pdf/2013-463.pdf> [<https://perma.cc/6BTJ-RRYB>] (reviewing the European Commission’s recommendation). Stadler 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.

²² See Kaal & Painter, *supra* note 13, at 172 (describing the efforts of the Dutch, Belgian and Luxembourg governments to orchestrate an €11 billion bailout of Fortis).

²³ See *Copeland v. Fortis*, 685 F.Supp.2d 498, 502-03 (S.D.N.Y. 2010) (dismissing complaint for lack of subject matter jurisdiction after determining that it failed the “conduct test” because the alleged fraud was not “conceived or ‘executed’” in the U.S., and that it failed the “effects test” because “the allegations [were] insufficient” to support a finding that the alleged fraud “produced ‘substantial effects’ on U.S. investors or U.S. markets”).

²⁴ 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* 274 (2012) (providing a description of Belgian class action law). Mr. Mischael Modrikamen, a prominent Belgian attorney who had 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 (including 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,

neither jurisdiction authorized plaintiffs to sue in a class action. Meanwhile, two American plaintiffs' law firms, who had represented some of the plaintiffs 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.²⁵ The stichting has regularly been used in the Netherlands as a vehicle for litigation, as it essentially permits the separation of ownership and control.²⁶ 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

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 associations ("stichtings" in Dutch, *see infra* note 25), which were formed for the special purposes of representing Fortis shareholders. One of these, "Stichting FortisEffect," appears to have been organized by Deminor, and the other, Stichting Investor Claims Against Fortis (SICAF) was organized by two American law firms, Grant & Eisenhofer and, Kessler, Topaz, Meltzer & Check, LLP, for the sole purpose of representing Fortis investors. The American-organized stichting represented 140 institutional investors and 2,000 individuals from the United States, Europe, the Middle East and Australia. *See* STICHTING, <http://investorclaimsgainstfortis.com> [<https://perma.cc/D6VY-2GDS>]; Press Release, Grant & Eisenhofer, P.A., International Investors Join Forces in Support of Lawsuit Against Fortis Over Massive Interpretation Ahead of Bank's Collapse in 2008 (Jan. 10, 2011).

²⁵ 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 generally* Robert Profusek, Ferdinand Mason, Floris Pierik, & Bastiaan K. Kout, *Shedding Light on the Dutch 'Stichting': The Origins and Purposes of an Obscure but Potentially Potent Dutch Entity*, 20 No. 3 M&A LAW. 3 (March 2016) (providing an overview of the Dutch 'Stichting'). 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 & Margot Patrick, *The Rise of the 'Stichting,' an Obscure Takeover Defense*, WALL ST. J. (Apr. 22, 2015, 12:15 PM), <http://www.wsj.com/articles/the-rise-of-the-stichting-an-obscure-takeover-defense-1429716204> [<https://perma.cc/T6UY-2KPM>] (describing the use of 'stichting' by Mylan N.V. in its defense against a takeover by Israel's Teva Pharmaceutical Industries).

²⁶ In fact, the two U.S. law firms did not organize the first stichting to sue the Fortis defendants. An earlier stichting—"Stichting FortisEffect"—was formed by Deminor and others.

every plaintiff must opt into the stichting. In effect, the stichting is the functional equivalent to an “opt-in” class action.²⁷

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, whether 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,²⁸ and (2) VEB, the Dutch shareholders association.²⁹ 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 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—a cost that 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 as much as 50% 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

²⁷ The Netherlands, however, does not authorize an “opt-in” class action.

²⁸ Deminor’s website describes it as “since 1990[,] the leading European consultancy firm whose core businesses encompass the defense of shareholders’ interests, corporate governance and investor protection through collective damage recovery claims.” ABOUT DEMINOR, <http://www.deminor.com/drs/en/about-deminor> [<https://perma.cc/9W57-UK3C>]. Clearly, it is an intermediary specializing in matching clients with collective damage recovery actions.

²⁹ See ABOUT THE VEB, <https://www.veb.net/over-de-veb-menu/about-the-veb> [<https://perma.cc/U7AH-GP88>] (describing the organization’s “[c]ore activities” as “[p]roviding support (including collective redress) and independent information about investing”).

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.³⁰ That action had followed on the heels of a parallel, but earlier, U.S. securities class action brought by another law firm against the same defendant,³¹ and Grant & Eisenhofer sought 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 other U.S. law firm representing the U.S. plaintiffs had initially objected to this division, the U.S. court decided that, even under the pre-*Morrison* law then in effect, it probably lacked 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.³² 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”).³³ Enacted in 2005 in response to a mass torts crisis involving a

³⁰ See Hof's-Amsterdam 29 mei 2009, JOR 2009, 197 m.nt. AJIA Leitjen (Shell Petroleum NV/Dexia Bank Nederland NV). For discussions of this settlement, see De Brauw Blackstone Westbroek, Shell: *Landmark Decision Regarding International Collective Settlement of Mass Claims*, LEGAL ALERT (June 2, 2009), <http://www.lexology.com/library/document.ashx?g=d13b9f13-1e37-4027-8264-5dfcf6fb93c1> [<https://perma.cc/8CK2-9BR5>]; Kaal & Painter, *supra* note 13, at 167; Palmisciano, *supra* note 12, at 1875-76.

³¹ See *In re Royal Dutch/Shell Transport Sec. Litig.*, 552 F. Supp. 2d 712 (D.N.J. 2007) (holding that Dutch oil company did not engage in conduct in the United States that amounted to more than mere preparatory acts in furtherance of the alleged fraud in reporting its proved oil and gas reserves, and therefore the U.S. court lacked subject matter jurisdiction over the securities claims brought by non-U.S. purchasers of its stock).

³² *Id.* at 723-24.

³³ “WCAM” stands for Wet Collectieve Afwikkeling Massaschade. For the fullest review of this statute, see HÉLÈNE VAN LITH, DUTCH MINISTRY OF JUSTICE, *THE DUTCH COLLECTIVE SETTLEMENTS ACT AND PRIVATE INTERNATIONAL LAW* (2010) (analyzing the relationship between private international law and collective settlements for the benefit of foreign interested parties under the 2005 Dutch Collective Settlements Act or WCAM); see also Bart Krans, *The Dutch Act on Collective Settlement of Mass Damages*, 27 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 281 (2014) (describing procedures under the WCAM statute, some aspects of the case law, and some elements of WCAM's July 2013 amendment).

defective drug that caused birth defects,³⁴ 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, 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? Rationally, the defendants may want universal coverage, either to achieve 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 action. That is, a WCAM settlement class action can be designed to include all similarly situated persons anywhere with claims against the defendant. This global resolution would be subject to the 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, possibly with a lower price being paid to the absent class members. In effect, the global settlement may come cheap. Thus, both sides can gain from a global settlement: the plaintiff’s side will gain a larger recovery (much of which will go to the third party funder and other entrepreneurs) and the defendants will be able to extinguish the claims of absent class members cheaply (if they do not opt out).

³⁴ 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. Krans, *supra* note 33, 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 infra* notes 78–80 and accompanying text.

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.³⁵ 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. Because the Amsterdam Court of Appeals had approved nearly all the prior WCAM settlements presented to it, the settling parties were confident that they could use the WCAM statute as their vehicle to effect a global settlement.³⁶ Under established European law, any settlement approved by the Amsterdam Court of Appeals is enforceable throughout Europe and will extinguish all covered European claims.³⁷

After a long delay, the Amsterdam Court of Appeals announced its ruling in June, 2017 and largely upheld the procedures followed by the settling

³⁵ See Press Release, Ageas, Ageas, Deminor, Stichting FortisEffect, SICAF and VEB Reach Agreement Aiming at Settling All Fortis Civil Legacies 1 (Mar. 14, 2016), <http://hugin.info/134212/R/1993901/734150.pdf> [<https://perma.cc/8FRX-4E8H>] (explaining the settlement as allowing “the company to regain its full strategic and financial flexibility and to focus entirely on its [i]nsurance business.”); see also Oliver Ralph, *Ageas to Pay Fortis Shareholders €1.2bn Over Financial Crisis*, FIN. TIMES (Mar. 14, 2016), <https://www.ft.com/content/fa130ada-e9d2-11e5-888e-2eadd5fbc4a4> [<https://perma.cc/K92C-DEHY>] (describing Ageas’ agreement to pay Fortis shareholders); Kevin LaCroix, *Massive \$1.3 Billion Settlement of Fortis Investor Actions Under Dutch Collective Settlement Procedures*, D&O DIARY (Mar. 14, 2016), <http://www.dandodiary.com/2016/03/articles/international-d-o/massive-1-3-billion-settlement-of-fortis-investor-actions-under-dutch-collective-settlement-procedures> [<https://perma.cc/JP9C-FPG4>] (describing it as “by far the largest investor settlement ever under the Dutch collective settlement procedures”).

³⁶ Since the enactment of the WCAM statute and prior to *Fortis*, seven applications have been made to the Amsterdam Court of Appeals for approval of a WCAM settlement, and six have been approved. See Krans, *supra* note 33, 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. *Id.*

³⁷ 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. Council Regulation 44/2001 of December 22, 2000, 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.” VAN LITH, *supra* note 33, 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. VAN LITH, *supra* note 33, at 33-34; Palmisciano, *supra* note 12, at 1879-80. This condition is seemingly always met because the WCAM statute requires that a 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.

parties—with one notable exception.³⁸ It found that the WCAM statute applied and the settlement would be upheld—except for a provision in the settlement that gave “active claimants” (basically, the original clients of the law firms who had joined the stichtings) a larger recovery per share than “non-active claimants” (those class members who had not opted to join the settlement but who were covered by the WCAM statute’s inclusion of absent class members).³⁹ As a result, because of this prohibition on disparities in treatment unrelated to the merits, defendants will not be able to pay absent class members who are brought into the settlement at a late stage less than those who effectively opted in earlier. Otherwise, however, the utility of the WCAM statute to resolve global disputes was broadly confirmed.

Even with this constraint, the *Fortis* settlement demonstrates the logic of a two-step strategy: (1) sue first through one or more stichtings and demonstrate the viability of the plaintiff’s claims, and (2) 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 will likely increase the size of the settlement, but it may protect the defendant from more expensive litigation in other jurisdictions.

B. *The Volkswagen Litigation*

No sooner had *Fortis* settled, than the same American law firms began litigation against Volkswagen. As in *Fortis*, the facts of the case were well known to all: Volkswagen had used hidden “defeat devices” to conceal the emissions from its diesel engines, and had acknowledged 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 plaintiffs’ 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 institutional investors from around the globe.⁴⁰ Damages of over \$4 billion are sought. Again, the

³⁸ See Hof’s-Amsterdam 16 juni 2017, ECLI:NL:GHAMS:2017:2257 (Ageas S.A./N.V. / [H]) (Neth.), <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2017:2257> [<https://perma.cc/P6S8-LBYY>]. For an analysis of this opinion consistent with that of this author, see Proskauer Rose LLP, *Dutch Court Denies Approval of Collective Settlement Unless Changes Are Made as to Allocation of Compensation and Fees*, NAT’L. L. REV. (June 19, 2017) <https://www.natlawreview.com/article/dutch-court-denies-approval-collective-settlement-unless-changes-are-made-to> [<https://perma.cc/BG4A-QCQZ>].

³⁹ The Court gave the settling parties until October, 2017 to decide if they wished to file a revised settlement that did not violate the Court’s prohibition of any differential in the recovery between early and late class members. See Proskauer, Rose LLP., *supra* note 38. For a fuller description of the differences in the *Fortis* settlement, see *infra* notes 86–87 and accompanying text.

⁴⁰ William Boston, *Institutional Investors Sue Volkswagen Over Fall in Share Price*, WALL ST. J. (Mar. 15, 2016), <https://www.wsj.com/articles/institutional-investors-sue-volkswagen-over-fall-in>

American law firms retained a local German law firm,⁴¹ which will not receive a contingent fee. Litigation funding is being provided by various “third party funders,”⁴² and 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.⁴³ 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.⁴⁴

Still, it is far from clear that this action will be resolved in Germany. The plaintiffs’ 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 in order to reach all potential plaintiffs. An important case in the Netherlands has approved a global settlement in which all the defendants and

share-price-1458038261 [https://perma.cc/4DEP-S2CJ]. For more detail, see Press Release, Kessler Topaz Meltzer & Check, LLP, Global Institutional Investor Group Files Large-Scale German Securities Suit against Volkswagen AG over Diesel Emission Scandal (Mar. 15, 2016). Many of these were U.S. investors, such as CalPERS, the California pension fund, which had bought shares abroad. I have been advised by other plaintiffs’ attorneys active in this case that, as of March, 2017, the number of plaintiffs in this litigation was well over one thousand. This implies that a number of other plaintiffs’ attorneys have become involved in the action.

⁴¹ The local German firm is TISAB, which filed suit in the Regional Court of Braunschweig, which has jurisdiction over the German city where Volkswagen is based. *Id.*

⁴² Claims Funding Europe, Ltd., an Ireland-based litigation funding company, is providing the financing to the American law firms. *Id.* Other third party funders are also funding German litigation against Volkswagen. Kevin LaCroix, *Litigation Funding Firm Announces German Securities Actions on Behalf of Volkswagen’s German Shareholders*, D&O DIARY (Oct. 4, 2015), <http://www.dandodiary.com/2015/10/articles/international-d-o/litigation-funding-firm-announces-german-securities-action-on-behalf-of-volkswagens-german-shareholders/> [https://perma.cc/RDW6-MQ3X] (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).

⁴³ For an overview, see Astrid Stadler, *Developments in Collective Redress: What’s New in the ‘New German KapMuG’?*, 24 EUR. BUS. L. REV. 731 (2013); see also Kaal & Painter, *supra* note 13, at 161.

⁴⁴ See William Boston, *German Court Allows Lawsuits Against Volkswagen to Move Forward*, WALL ST. J. (Aug. 8, 2016, 10:04 AM), <https://www.wsj.com/articles/german-court-allows-lawsuits-against-volkswagen-to-move-forward-1470664803> [https://perma.cc/PR8U-C45R]; Carmen Germaine, *Volkswagen Must Face €4B German Investor Suits*, LAW360 (Aug. 8, 2016, 7:27 PM), <https://www.law360.com/articles/825953/volkswagen-must-face-4b-german-investor-suits> [https://perma.cc/8CMK-GP4P] (describing Volkswagen’s German Investor suits).

virtually all the plaintiffs were foreign to the Netherlands.⁴⁵ On this basis, 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 begins to become a magnet for the resolution of European or global claims.

In any event, the attraction of the “Dutch strategy” is again that the settlement could have a far broader scope than the German action and could cover absent plaintiffs (other than those that might opt out). However, the two American firms already involved (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 plaintiffs’ firms that specialize in securities litigation, have reportedly formed stichtings in the Netherlands with a view to structuring a WCAM-style settlement.⁴⁶ 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 plaintiffs’ side could increase the leverage available to Volkswagen. Volkswagen could elect between settling in Germany or in the Netherlands, depending on which plaintiffs’ team agrees to a cheaper settlement. At this point, it is too early to predict which strategy—the German approach, the Dutch approach, or a reverse auction⁴⁷—will dominate.

⁴⁵ See Hof’s-Amsterdam 17 januari 2012, JOR 2012, 51 m.nt. BJ de Jong (SCOR Holding (Switzerland) AG/Liechtensteinische Landesbank AG) (Neth.) <https://www.recht.nl/rechtspraak/uitspraak/?ecli=ECLI:NL:GHAMS:2012:BV1026> [<https://perma.cc/QX8E-UQJA>]. In this case, the defendants were mainly Swiss insurance companies, of which SCOR Holding was the largest. By one estimate, only 3% of the plaintiff shareholders were Dutch residents. See Proskauer Rose LLP, *supra* note 38. According to Kaal and Painter, the Amsterdam Court of Appeals approved this settlement under the WCAM statute, even though the defendants had no contacts with the Netherlands and only a small minority of the plaintiffs were domiciled there. *Supra* note 13, at 140-41. This case (popularly known as the *Converium Holding* case) probably stands as the strongest demonstration that litigation can be exported to the Netherlands, so long as a nominal plaintiff is resident there. See also Palmisciano, *supra* note 12, at 1877. Interestingly, a U.S. court had first dismissed all the foreign investors from a U.S. class action against the same defendant. *In re SCOR Holding (Switzerland) AG Litigation*, 537 F. Supp. 2d 556, 560 (S.D.N.Y. 2008). The American plaintiffs’ law firms in that case then essentially escorted these clients to the Netherlands for a settlement.

⁴⁶ Alison Frankel, *Fortis’ \$1.3 Billion Settlement in Netherlands: Roadmap for VW?*, REUTERS (Mar. 16, 2016), <http://blogs.reuters.com/alison-frankel/2016/03/16/fortis-1-3-billion-settlement-in-netherlands-roadmap-for-vw/> [<https://perma.cc/KFU4-HAAQ>].

⁴⁷ A “reverse auction” involves the defendant playing off rival plaintiffs’ 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. 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 plaintiffs' 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 interjurisdictional competition.⁴⁸ 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. None of the Asian nations with significant securities markets authorizes the American "opt-out" class action, except for South Korea (which authorizes it only for securities-related actions).⁴⁹ However, "opt-in" class actions (or a functional equivalent) are generally permitted.⁵⁰ Most of these Asian nations also permit contingency fees,⁵¹ 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.⁵² Also, Japan

⁴⁸ For a description of the events leading up to the adoption of the Judicial Panel on Multidistrict Litigation, see Mark Herrmann and Pearson Bownas, *An Uncommon Focus on "Common Questions": Two Problems with the Judicial Panel on Multidistrict Litigation's Treatment of the "One or More Common Questions of Fact" Requirement for Centralization*, 82 TUL. L. REV. 2297, 2299-2307 (2008) (describing the origins of the Judicial Panel on Multidistrict Litigation).

⁴⁹ See *infra* section II.B.

⁵⁰ Japan and Taiwan permit "opt-in" class actions (and China permits a functional equivalent to the "opt-in" class action). Nonetheless, neither Japan nor Korea has seen more than a modest increase in class actions. See *infra* section II.A. As later discussed, China with a very large securities market has a higher volume of aggregate litigation in the securities context. See *infra* section II.C. This may be evidence for the proposition that culture counts more than law.

⁵¹ 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. See generally Daisuke Oda et al., *Class/Collective Actions in Japan: Overview*, PRACTICAL LAW, (Aug. 1, 2015), <http://us.practicallaw.com/9-618-0825> [<https://perma.cc/9VM3-XPRR>] (providing an overview of collective actions in Japan); Jing-Huey Shao *Class Action Mechanisms in Chinese and Taiwanese Contexts—A Mixture of Private and Public Law*, 28 EMORY INT'L L. REV. 237, 262-281 (2014) (discussing the evolution of collective actions in Taiwan and China).

⁵² 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 generally Jin-Yeong Chung et al., *Class/Collective Actions in Korea: Overview*, PRACTICAL LAW (Dec. 1, 2016), <http://us.practicallaw.com/5-617-3110?source=>

and South Korea permit legal expense insurance, which can cover fee-shifting liabilities.⁵³ In short, with opt-in classes prevalent, contingent fees permitted, and “loser pays” policies softened, Asia does not share Europe’s hardline opposition to entrepreneurial litigation.

This does not mean that class actions are common in Asia. In fact, they are not, and, in terms of this article’s focus, this may imply that “culture” dominates “law.” Only two Asian jurisdictions—Japan and South Korea—have had any experience with large-scale class action litigation (and even that experience is limited). The greater receptivity of Japan and South 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 South 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 countries has had a different experience, and each today stands on the verge of a potentially significant increase in aggregate litigation.

A. Japan

The 2004 reform of Japanese securities law intentionally invited more securities litigation, particularly in the secondary market context.⁵⁴ 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 litigation in the United States).⁵⁵

Although the number of cases fell again between 2010 and 2015, one major case may signal a coming increase in securities litigation in Japan.⁵⁶ Once again,

relatedcontent [https://perma.cc/66DV-J6PP]; Gyooho Lee, *Cost and Fee Allocation in Civil Procedure in Korea*, 58 AM. J. COMP. L. 195 (2010).

⁵³ Legal expense insurance has been available in Japan since 2000. Craig I. Celniker et al., *Litigation and Enforcement in Japan: Overview*, PRACTICAL LAW (Nov. 1, 2016), <http://us.practicallaw.com/9-502-0319> [https://perma.cc/W9TW-JKT2]. Its availability was important to the *Olympus* litigation discussed *infra* at notes 56–60, where the plaintiffs obtained such insurance.

⁵⁴ 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. Gen Goto, *Growing Securities Litigation Against Issuers in Japan: Its Background and Reality* (2016), <http://ssrn.com/abstract=2714252> [https://perma.cc/6APB-ZMDQ]; Michael J. Madderra, *The New Class Actions in Japan*, 23 PAC. RIM L. & POL’Y J. 795, 801 (2014).

⁵⁵ The number of securities lawsuits rose in the early-2000s, from almost none to double-digit numbers. *Id.*; see also Asa Shinkawa et al., *Securities Litigation After Olympus: Liability Through an Olympus Lens*, INT’L FIN. L. REV. (Apr. 1, 2012), <http://www.iflr.com/Article/3007093/Securities-litigation-after-Olympus-Liability-through-an-Olympus-lens.html> [https://perma.cc/DZU3-AFJR].

⁵⁶ For this prediction, see Anna Zhang, *Tort Trouble Ahead?*, ASIAN LAW., July 2014, at 12, 12, http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0ahUKEwi_

that case reflects the impact of the *Morrison* decision. In the *Olympus* securities litigation, the initial action was filed in the United States.⁵⁷ But the defendant only had American Depositary 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 the action, which was filed in Japan (but not as a class action)⁵⁸ 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.⁵⁹

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*).

5La5i6XTAhUByyYKHWJJoDz8QFggqMAE&url=http%3A%2F%2Fwww.mhmjapan.com%2Fcontent%2Ffiles%2F00004561%2FAsian%2520Lawyer%2520Jul%25202014.pdf&usg=AFQjCNEdFvSbn22AERXId8IMUnMD5Sujg&sig2=NmCd6-MLCy3KOD7eOlaMKA [https://perma.cc/W7P7-E7X7]. Olympus had apparently hid losses for thirteen years, until this came to light in 2011. *Id.*

⁵⁷ That case was *Graham v. Olympus Corp.*, filed in 2011 and settled (with court approval) in 2014. See Stanford Law School, *Case Summary, Olympus Corporation, SEC. CLASS ACTION CLEARINGHOUSE*, <http://securities.stanford.edu/filings-case.html?id=104805> [https://perma.cc/T3GC-H3HN] (describing the filing of the Olympus Corporation case).

⁵⁸ The action was not filed as a class action because the Japanese class action rules apply only to consumer cases, and investors are not seen as "consumers." See Shōhisha no zaisan-teki higai no shūdan-tekina kaifuku no tame no minji no saiban tetsudzuki no tokurei ni kansuru hōritsu [Act on Special Measures Concerning Civil Court Procedures for the Collective Redress for Property Damage Incurred by Consumers], Law No. 96 of 2013, art. 3 (Japan) [hereinafter "Collective Recovery Act"], translated at <http://www.japaneselawtranslation.go.jp/law/detail/?printID=&id=2727&re=02&vm=02> [https://perma.cc/X3UW-7KQN]; Takao Suami, *Legal Support to Fukushima Municipality: Law School, Lawyers, and Nuclear Disaster Victims*, 16 ASIAN-PAC. L. & POL'Y J. 158, 179-180 (2015) (explaining that the Collective Recovery Act "is applicable to disputes arising from consumer contracts only," rendering "the class-action option" unavailable for other kinds of private claims); see also Collective Recovery Act, art. 2, para. 1 (defining "Consumer" as "an individual (excluding the case where the individual conducts a business)").

⁵⁹ See Cara Salvatore, *Olympus to Pay Investors \$92M over Alleged Fraud*, LAW360 (Apr. 2, 2015), <https://www.law360.com/articles/638729/olympus-to-pay-investors-92m-over-alleged-fraud> [https://perma.cc/MU7G-LFL3] (describing the \$92 million settlement with institutional investors over the allegations of the accounting fraud). The action was not filed as a class action because the Japanese class action rules apply only to consumer cases, and investors are not seen as "consumers." This is further evidence that the existence of the class action is not necessarily critical to the development of aggregate litigation.

A key entrepreneur in *Olympus* was a Miami-based law firm, DRRT, which advertises itself as focused on global litigation.⁶⁰ 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 and Toshiba.⁶¹ In some of these cases (including *Olympus*), the Japanese 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.⁶² 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 jurisdictions.

B. South Korea

Adopted in 2005 in response to financial scandals, South Korea’s Securities-Related Class Action Law (SRCAL) was a deliberate attempt to emulate the American class action model.⁶³ Uniquely in Asia, it authorizes an

⁶⁰ DRRT’s website 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 investor loss recovery, from analysis to funding to handling and supervising securities litigation, arbitration, or simply doing global settlement claims filing.” DRRT, <https://drdt.com/> [<https://perma.cc/QU3G-MHNB>]. DRRT’s website shows it has offices in Miami, Frankfurt, Paris and London, and it discusses *Fortis*, *Takata* and *Olympus* as among the cases in which it has been or is currently active. See *Contact Us*, DRRT, <https://drdt.com/offices/> [<https://perma.cc/3RU9-MB9V>]; *Cases*, DRRT, <https://drdt.com/legalservices/cases/> [<https://perma.cc/4R6T-6DFK>].

⁶¹ DRRT discusses its efforts in both of these cases on the “Cases” page of its website. *Cases*, *supra* note 60. Both actions were filed in 2016. *Id.*

⁶² *Institutional Investors Reach 11 Billion Yen Settlement with Olympus*, DRRT, <http://securitiesclaimsfiling.drdt.com/institutional-investors-reach-11-billion-yen-settlement-with-japan-based-manufacturer-olympus/?lang=de> [<https://perma.cc/2GJR-U5E3>]. The website further states that DRRT “is active in 11 countries and currently handles cases of investor loss recovery exceeding \$10 billion.” *Id.* DRRT also participated in the *Fortis* litigation. See *Cases*, *supra* note 60 (suggesting that the major international players all know each other).

⁶³ SRCAL became effective on January 1, 2005. *Financial Supervisory Service, A PRIMER ON KOREA’S NEW SECURITIES CLASS-ACTION SUIT LAW* (Jan. 10, 2005); see also Sheron Korpus, *Is Korea’s Securities Class Action Law Working?*, 25 INT’L FIN. L. REV. 53, 53 (2006) (stating that the

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.⁶⁴

Yet, despite the wholesale legislative adoption of the U.S. approach by South 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.⁶⁵ Why? Part of the answer may be that South 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 South Korea. In addition, there are upfront costs in South Korea that are based on the size of the claim (a tax of approximately 0.5% of the claim must be paid on filing).⁶⁶ Standing to bring such a suit is also limited.⁶⁷ Third-party funding is strongly discouraged in South Korea. Hence, South 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 South Korea,⁶⁸ and no American legal entrepreneur appears to have attempted to bring or organize a class action in South Korea. This may be further evidence of a lack of demand among institutional investors for a South 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.

Korean Securities-Related Class Action Act “is based on US federal legislation and more than 60 years of US class action experience”); Dae Hwan Chung, *Introduction to South Korea’s New Securities-Related Class Action*, 30 J. CORP. L. 165, 169 (2004) (stating that the South Korean class action system “is a by-product of the Anglo-America legal system”); Stephen J. Choi, *The Evidence on Securities Class Actions*, 57 VAND. L. REV. 1465, 1521 (2004) (stating that the new Korean law “is patterned somewhat on the U.S. system of class actions”).

⁶⁴ Korpus, *supra* note 62, at 53.

⁶⁵ See Lee Kyung-mi, *Court Gives First Approval for Lawsuit by Equity-Linked Securities Investors*, HANKYOREH (Sept. 12, 2013), http://english.hani.co.kr/arti/english_edition/e_international/603193.html. [<https://perma.cc/9GQU-DW8V>].

⁶⁶ See Lee, *supra* note 52.

⁶⁷ See Choi, *supra* note 62, at 1521 (explaining that 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). In the case of a large corporation with a multi-billion dollar market capitalization (i.e. Samsung), this could require an investment of several hundred thousand dollars to confer standing.

⁶⁸ This is the Hannuri Law Firm, which maintains an active website. See HANNURI LAW, <https://onlinesong.com/hannuri/eng> [<https://perma.cc/BK64-7JLU>]. 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.

C. China

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,⁶⁹ 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,⁷⁰ thereby deliberately subordinating private enforcement to public enforcement. On the other hand, China does permit the contingent fee.⁷¹ Close observers report that China has many lawyers utilizing such fees who seem already well-adapted to entrepreneurial litigation.⁷² 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,⁷³ and some have obtained settlements amounting to a very high percentage of the potential damages.⁷⁴ Still, the filing rate appears to be low, possibly because regional courts appear to protect local companies from “outside” litigation.⁷⁵

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.⁷⁶ Even at present, one careful analyst finds that “China’s

⁶⁹ Robin Hui Huang, *Private Enforcement of Securities Law in China: A Ten-Year Retrospective and Empirical Assessment*, 61 AM. J. COMP. L. 757, 782 (2013) (stating that China uses an “opt-in” rule under which the plaintiff class covers those who have not registered with the court at the time the case is filed but who later actually bring suits within the prescribed time period”). 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) (discussing class action litigation in China). Nonetheless, they only cover those who take an affirmative act to be included and thus tend to be much smaller in size. See 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”).

⁷⁰ See Huang, *supra* note 68, at 762 (explaining that the private civil enforcement action would have to be brought by the China Securities Regulatory Commission (CSRC)).

⁷¹ *Id.* at 767-68 (noting that contingency fees, known as “risk agency fees” in China, “have long been used in the context of securities civil actions”).

⁷² *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.

⁷³ 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, 766.

⁷⁴ *Id.* at 770-71 (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.

⁷⁵ *Id.* at 794-95.

⁷⁶ 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 68, 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*

securities civil cases are also lawyer-driven, and there is no shortage of entrepreneurial lawyers in China.”⁷⁷ 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

A. *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 Asia 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:

<i>Element</i>	<i>U.S. System</i>	<i>Non-U.S. alternative</i>
Claim Aggregation	Opt-out Class	WCAM settlement class or aggregative mechanisms (such as the stichting)
Litigation Finance	Contingent Fee	Third Party Funding or Crowdfunding
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* decision.⁷⁸ Although such a theory may enable academic theorists to use models of regulatory competition

False Statements on China’s Securities Market, 31 N.C. J. INT’L L. & COM. REG. 377, 427 (2005) (explaining that while the Rules of the SPC are “generally welcomed by lawyers, academics, and investors at large, they nevertheless fall short of expectations”).

⁷⁷ Huang, *supra* note 68, at 798.

⁷⁸ See Kaal & Painter, *supra* note 13, at 159 (explaining that “one or more European jurisdictions—particularly the Netherlands—may provide some aspects of the type of global securities forum that the *Morrison* court” denied); see also Russell, *supra* note 13. This idea is also implicit in Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081 (2015) (arguing that U.S.’s avoidance of transnational litigation has caused plaintiffs to sue in foreign courts).

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.⁷⁹ 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 later 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.⁸⁰ 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.

For the most part, Europe continues to believe that the U.S. system often creates an excessive incentive to litigate,⁸¹ 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 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, 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.-based practice. Although conceivably these plaintiffs could use consolidated proceedings as an alternative to class resolution (as they did in fact do in Belgium

⁷⁹ See generally *supra* text accompanying notes 15–21.

⁸⁰ See Krans, *supra* note 33, at 284 n.36 (noting the 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").

⁸¹ For a similar view, see generally Manning G. Warren III, *The Prospects for Convergence of Collective Redress Remedies in the European Union*, 47 INT'L. LAW. 325 (2013) (predicting that it is "highly unlikely" that Europe will move closer to the American model).

early in the *Fortis* litigation⁸²), 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 coincidental that the Netherlands supplied the latter need with its WCAM statute. Predictably, resourceful entrepreneurs will 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 South Korea—have not yet seen any significant influx of foreign litigants or foreign attorneys (with only Japan seeing some examples). The limited response appears to be because, unlike the Netherlands, they have not created a mechanism that permits a global consensual resolution (as the WCAM statute does).

B. *New Patterns and New Issues*

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

1. 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 this function, based on their longtime roles as 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. Plaintiffs' 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.

⁸² See *supra* note 24.

2. 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 plaintiffs' 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. Plaintiffs' 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. Of course, the larger issue is whether the "third party funder" can control the litigation. It is only logical that it will attempt to do so, seeking settlement when it is in its interests. Conflicts of interest are self-evident here. This calls out for close judicial supervision, which remains underdeveloped in Europe.

Finally, other funding alternatives are also possible. In at least one case, the plaintiffs' attorneys sought and obtained financing through "crowdfunding" based on an Internet solicitation.⁸³

3. 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 respect⁸⁴), this strategy may soon be exploited. Although the other

⁸³ Professor Stefaan Voet of the University of Leuven Law School is my source for this information. I tend to doubt that "crowdfunding" will be frequently used, but it might be turned to in smaller cases.

⁸⁴ See *supra*, note 37.

plaintiffs' attorneys thereby precluded can object to the settlement's approval, the WCAM statute does not permit them to appeal the settlement's approval.⁸⁵

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.⁸⁶ Europe lacks such a body, and no substitute mechanism is in sight.

4. Unequal Distribution?

In the U.S., a class action settlement will basically be disbursed on a per share basis, possibly modified based on when the class members made their purchases (which can affect the legal strength of their claims). But in the Fortis settlement, "active" shareholders were to receive significantly more than those who joined only by virtue of the WCAM settlement.⁸⁷ "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 lower cost. To its credit, the Amsterdam Court of Appeals refused to accept this disparity, possibly recognizing that the entrepreneurs organizing the class had less motivation to protect the absent class members that the WCAM statute allows them to

⁸⁵ See Krans, *supra* note 33, at 288 (explaining that "[t]his system means that a WCAM application will only be brought before the Supreme Court, which rules in cassation, if the court of appeal denies an application to declare the settlement contract generally binding").

⁸⁶ To the extent that "reverse auctions" are easier to run when parallel actions are pending in state and federal court, the Class Action Fairness Act ("CAFA") has greatly reduced the number of class actions in state court. See Emery G. Lee III & 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, 1750-54 (2008) (noting that 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).

⁸⁷ The original press release announcing the Fortis settlement stated: "The Parties have agreed to take into account within the compensation principles the concept of 'Active' and 'Non-Active' claimants." Press Release, Ageas, Ageas, Deminor, Stichting FortisEffect, SICAF and VEB reach agreement aimed at settling all Fortis civil legacies, at 5 (Mar. 14, 2016) (on file with author). Under the settlement, an "active claimant" is any Eligible Shareholder who initiated legal actions or actively adhered to a collective action before December 31, 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 be "non-active" claimants and would receive less. Although quietly stated, this provision would have allowed 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 Euro "per Buyer 1 share held," while "active" claimants receive 0.56 Euro "per Buyer 1 share held." See Settlement Agreement, dated 14 March, 2016, as amended (copy on file with the author). The settling parties have until October, 2017 to submit a revised settlement agreement without this disparity.

represent.⁸⁸ This decision is at least a first step towards recognizing in Europe the desirability of equality of treatment within the class. But the incentives remain strong for defendants to structure such disparities into the settlement, possibly justifying them as based on legal merit.

5. 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 plaintiffs' 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.

6. Counter-Reaction?

It is still early. Europe may yet find the invasion of American plaintiffs' 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.

⁸⁸ See *supra* notes 38–39 and accompanying text. These absent class members will not have signed a retainer or other fee agreement with the legal entrepreneurs organizing the class action (unlike those "active" class members who joined one of the *stichtings*), and the party most interested in their inclusion in the class is probably the defendant.

7. 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 middle-class individuals are less likely than in their U.S. counterparts 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 fiftieth anniversary of Rule 23 and the law-versus-culture debate on which this article began. Did Rule 23 initiate a major revolution in the nature of U.S. litigation? To answer yes (as I suspect most proceduralists would) assumes that legal rules are decisive. But to analyze this question in greater depth, it is useful to pose a preliminary question: Suppose the Advisory Committee had not adopted Rule 23(b)(3), which authorized for the first time a money damages class action (which was controversial within the Advisory Committee). Would large-scale money damages actions have still developed in the U.S.? I believe imperfect substitutes would have soon appeared. Instead of a Rule 23(b)(3) class, we might have seen an alternative procedure expand to fill this void, such as the type of consolidated proceeding now seen in multi-district mass tort cases.⁸⁹

⁸⁹ Judge Jack Weinstein has properly referred to large consolidated proceedings, such as those used to deal with asbestos cases, as “quasi-class actions.” See Jack Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 480-81 (1994); see also Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 110-11 (2016) (describing multi-district consolidated litigation as a “quasi-class action”). My point is only that functional substitutes to the Rule 23(b)(3) class action would likely have developed, because the background culture was supportive of entrepreneurial litigation. These

In this light, it may be more accurate to conclude that the amendment of Rule 23 in 1966 catalyzed a number of preexisting and distinctive elements in the U.S. legal system and thereby heightened the 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, at least as important as Rule 23 was the fact that, in the U.S., the contingent fee had been recognized and accepted by the turn of the twentieth century, as it had already come to finance the personal injury litigation that an industrializing nation produced in volume.⁹⁰ During the late 1930s, an entrepreneurial plaintiff's bar developed in the U.S., concentrating mainly on derivative actions.⁹¹ 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 actions.⁹² Then, in the 1970s, with the judicial recognition of a private cause of action under Rule 10b-5, many shifted to securities litigation.⁹³ 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 plaintiffs' attorneys that was well understood and respected in the United States, but not elsewhere.⁹⁴

Consistent with this interpretation, the new legislation adopted in Japan and South Korea to encourage class litigation as a reform in the wake of scandals has had only a modest impact in terms of increasing the volume of litigation. In contrast, 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.⁹⁵

alternatives might have been "second best" substitutes, but Europe is now also experimenting with "second best" substitutes to the opt-out class. In short, legal rules are important, but not decisive.

⁹⁰ See COFFEE, *supra* note 1, at 19-22 (describing early controversy and eventual acceptance of the contingent fee in the U.S.).

⁹¹ *Id.* at 33-52.

⁹² *Id.* at 56-59.

⁹³ *Id.* at 64-73.

⁹⁴ The term "private attorney general" was not coined until 1943, when Judge Jerome Frank first used the term. See *Assoc. Indus. of N.Y. State v. Ickes*, 134 F. 2d 694, 704 (2d Cir. 1943). However, 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.

⁹⁵ 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.

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 local culture is at least skeptical and arguably hostile to entrepreneurial litigation). Nonetheless, these entrepreneurs do have a clientele that wants their services, are motivated by strong economic incentives to sue, and face 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 potentially encourage and support a sizable indigenous population of entrepreneurial litigators.

Although it is still early, some generalizations do suggest themselves: First, legislation (including rule amendments) will not alone produce major change (as the recent experience in South Korea and Japan seems to show). Second, entrepreneurs (domestic or foreign) will scour the legal landscape for opportunities to exploit, and this characteristic is probably what best explains the recent 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 may show).

For the future, movement may occur in both directions. 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 entrepreneurs will continue to push the envelope, as they can now operate on a global scale and have attracted an international demand for their services.

* * * * *