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

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**Academic Conference Room, 11/F Cheng Yu Tung Tower**

**The University of Hong Kong**

Entrepreneurial litigation is litigation in which the plaintiff's attorney functions as a risk-taking entrepreneur, financing, organizing, managing, and settling the litigation on behalf of numerous clients (who generally hold "negative value" claims), but with only modest oversight from the clients. Although well established in the United States (and to a lesser extent in Australia, Canada, and Israel), it has long been resisted in Europe, the U.K., and elsewhere, where local rules both preclude the opt-out class action, contingent fees, and jury trials in civil cases, and mandate a "loser pays" rule with respect to legal fees. Yet, despite these obstacles, entrepreneurial litigation appears now to be coming to both Europe and Japan, with large settlements having recently been struck in securities litigation (most notably \$1.4 billion this year in the Fortis litigation). Perhaps surprisingly, the driving force leading this transition has been American plaintiff law firms, who do not litigate the action, but do organize it, using third party funding and litigation insurance as functional substitutes for the contingent fee and the American Rule on fee shifting. Some have explained this phenomenon as a response to the U.S. Supreme Court's decision in *Morrison v. National Australia Bank Ltd.*, which barred U.S. courts from exercising extraterritorial jurisdiction over the federal securities laws, and thereby arguably encouraged other jurisdictions to compete for the cases that formerly were litigated in the U.S. Although the *Morrison* decision was a catalyst, this article rejects the claim that foreign jurisdictions are engaged in any competition for securities litigation, finding instead that defense counsel have found that they can sweep absent class members into a low cost settlement class action under The Netherlands' WCAM statute by discriminating between "active" and "non-active" class members. This article examines these developments and the issues they pose for Europe and Japan. Ultimately, despite early successes, the long-term question becomes: How successful can legal entrepreneurs be when operating in a different and skeptical legal culture?

**John C. Coffee Jr.** is the Adolf A. Berle Professor of Law and Director of the Center on Corporate Governance at Columbia Law School. He is a fellow at the American Academy of Arts & Sciences and has been repeatedly listed by the *National Law Journal* as among its "100 Most Influential Lawyers in America". Coffee has served as a reporter to The American Law Institute for its Corporate Governance Project; has served on the Legal Advisory Board to the New York Stock Exchange; and as a member of the SEC's advisory committee on the capital formation and regulatory processes. Coffee is the author or editor of several widely used casebooks on corporations and securities regulation, including *Securities Regulation: Cases and Materials*, (with Hillary Sale), 2015, (13th edition); *Cases and Materials on Corporations* (with Jesse H. Choper and Ronald J. Gilson), 2013, (8th edition); and *Business Organizations and Finance*, (with William Klein and Frank Partnoy), 2010, (11th edition). His scholarly books include *Entrepreneurial Litigation: Its Rise, Fall, and Future*, Harvard University Press, 2016; *Gatekeepers: The Professions and Corporate Governance*, Oxford University Press, 2006; *Knights, Raiders, and Targets: The Impact of the Hostile Takeover*, (with Louis Lowenstein and Susan Rose-Ackerman), Oxford University Press, 1988; and *The Regulatory Aftermath of the Global Financial Crisis*, (with Ellis Ferran, Niamh Moloney, and Jennifer G. Hill), Cambridge University Press, 2012. According to a recent survey of law review citations, Coffee is the most cited law professor in law reviews over the last 10 years in the combined corporate, commercial, and business law field. In 2015, Lawdragon listed him on its 100-member "Hall of Fame" list of influential lawyers in the US.

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