Expanding Private Causes of Action: Lessons from the U.S. Litigation Experience

by John H. Beisner and Charles E. Borden

In recent years, the European Union and a number of its individual member nations have undertaken significant efforts to embrace what heretofore had been uniquely American legal concepts regarding private causes of action. Most notably, various attempts have been made to develop procedures analogous to the American class action device and to create a system of private antitrust enforcement.

In embracing these new American style causes of action, European nations have to date kept in place a number of protections against litigation abuse not found in the United States. Specifically, the legal systems of most European nations contain rational constraints on litigation, including, inter alia, the use of “loser pays” rules, the relative absence of contingency fee relationships, limitations on the scope of available discovery, and prohibitions on punitive damages. Thus, it should be expected that those who have advocated the adoption of U.S. legal principles in the class action, antitrust, and other contexts will urge with increasing vigor the elimination of these traditional litigation principles, all in the name of encouraging broader usage of the U.S. private cause of action concepts in Europe.

Any moves in such directions should be approached with extreme caution and with a keen and informed sense of the American experience. Although rules that require losing parties to pay the other side’s attorneys’ fees or that place severe limitations on the scope of available discovery operate as barriers against the expansion of class action and private antitrust litigation, they are also bulwarks against the litigation abuses that have plagued the American legal system over the past several decades.

Messrs. Beisner and Borden are attorneys in the Washington, D.C. Office of O’Melveny & Myers LLP.
In many respects, Europe stands at a similar crossroads to the one that America stood at nearly forty years ago. During the 1960s, efforts were undertaken to liberalize access to the United States courts – efforts that included the creation of the modern American class action device. Like European advocates today, the American reformers of that age were motivated by a desire to create a more efficient legal system that would make it easier for individuals with meritorious claims to have their day in court. But rather than improving the American legal system for the better, the adoption of class action and other procedural devices in the 1960s ended up providing one of the best examples of the law of unintended consequences in the history of American jurisprudence. In their zeal to expand opportunities for private individual and group litigation, those advocates failed to foresee the extent to which they were also facilitating the onset of widespread litigation abuse. Plaintiffs’ attorneys quickly realized that they could use these procedural devices to force large settlements, regardless of whether they were capable of bringing meritorious claims. Indeed, these “reforms” provided plaintiffs with such extreme leverage vis-à-vis defendants that they essentially spawned a new industry of plaintiffs’ lawyers, and the amount of mass litigation against corporate defendants in the United States accordingly increased exponentially over the next few decades. The good intentions of the American reformers therefore were ultimately subverted. Reforms that were meant to improve access to the courts for deserving plaintiffs ended up being largely employed as a

---

2 Arthur R. Miller, Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem”, 92 Harv. L. Rev. 664, 669 (1979) (“The Advisory Committee’s objectives in rewriting the [federal class action rule] were rather clear. It had few, if any, revolutionary notions about its work product. Although it was expected that the revision would operate to assist small claimants, the draftsmen conceived the procedure’s primary function to be providing a mechanism for securing private remedies, rather than deterring public wrongs or enforcing broad social policies.”).

3 Id. at 670 (“Thus, in the main, the rulemakers apparently believed that they simply were making rule 23 a more effective procedural tool. The class action onslaught caught everyone, including the draftsmen, by surprise.”).

4 Glenn Hubbard, Let’s Put The “Litigation Tax” On Trial, BUSINESS WEEK, Aug. 9, 2004, at 18 (noting that “President Bush’s Council of Economic Advisers estimated in 2002 that the U.S. tort system’s direct costs total about $180 billion a year”).

---
mechanism for plaintiffs’ lawyers to extort large sums of money from national and multi-
national corporations.

Only in the past few years have meaningful steps been taken to address the problems of litigation abuse in the United States. But as one door begins to close, another door threatens to open. The recent changes in European law have already created the potential for American-style litigation abuses; indeed, such abuses presently are only prevented by long-standing European legal structures that temper litigation impulses. But if those structures are eliminated or modified, then it will not be long before litigation abuse in European legal systems is as prevalent as it is in the United States. Right now, such an outcome remains a distinct possibility. In fact, prominent American plaintiffs’ attorneys are already attempting to develop a presence in Europe so that they will be able to exploit any future European litigation opportunities.5

Commentators have often remarked on European disdain for modern American legal culture.6 But if Europe wishes to avoid a similar fate, it needs to heed the U.S. experience.

I. The Changing Landscape Of European Law

For numerous reasons, the United States and Europe have traditionally had widely divergent legal systems. For example, the United States uses a common law system; it permits attorneys to be retained on a contingency fee basis; it allows for the award of non-economic and punitive damages; and it makes frequent use of juries. These concepts, however, are virtually

5 UK Firms Gear Up As Class Action Culture Hits Europe, LAWYER, Feb. 7, 2005, at 72 (“Michael Hausfeld, a veteran class action partner at US firm Cohen Milstein Hausfeld & Toll, which last year teamed up with [UK firm] Irwin Mitchell to bring class actions against companies fined by the EU, said he is preparing to launch class actions across Europe once the rule changes are passed.”); Michael Freedman, Can You Say Tort?, FORBES, Dec. 27, 2004, at 124 (discussing efforts of Michael Hausfeld “to export U.S.-style litigation tactics, including contingency fees and class actions” to Europe).

nonexistent in European law. But more recently, Europe has taken steps to change this situation and has begun to import elements of the American litigation system. In the past decade, for example, European policy-makers have undertaken concerted efforts to expand the availability and use of group and representative actions similar to the American class action mechanism and to bolster the bringing of antitrust cases by private parties.

A. Class Actions

The modern American class action dates from a revision of the Federal Rules of Civil Procedure in the mid-1960s. As a practical matter, it is a procedural device that permits the trial of one person’s claim to serve as the proxy for the claims of a larger group. Although there are several different types of class actions, the most common form involves a plaintiff bringing a claim for damages on behalf of not only himself or herself, but also on behalf of a class made up of allegedly similarly situated individuals, i.e., individuals who are capable of asserting the same claim on the basis of the same law and the same facts. If the plaintiff is able to establish the existence of such a class of similarly situated individuals, then he or she is essentially permitted to have his or her claim serve as a proxy for those of the class members, with a decision on the merits of the plaintiff’s claims being binding on the claims of the rest of the class (unless those class members affirmatively choose to not participate in the litigation). In other words, the

---

7 Sherman, supra note 6, at 133; Deborah R. Hensler, Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation, 11 Duke J. Comp. & Int’l L. 179, 179-180 (2001); Miller, supra note 1, at 669-670.

8 Hensler, supra note 7, at 182.

9 Sherman, supra note 6, at 134-36.

10 Id. at 139-140; Hensler, supra note 7, at 182 (“Class actions permit one or more persons to bring a civil lawsuit on behalf of a large number of similarly situated people or entities. The resolution of the lawsuit, by trial or settlement, binds all members of the class, present and absent. In U.S. damage class actions (i.e., suits for money damages), class members who do not want to be bound by the outcome must be given an opportunity to opt out, so that they can pursue their claims individually if they so wish.”).
critical feature of the American class action is that it permits the aggregation and simultaneous
determination of numerous claims. Indeed, some certified classes have contained millions or
tens of millions of class members.\textsuperscript{11}

In contrast, European courts have historically eschewed representative actions and other
forms of group litigation.\textsuperscript{12} England is the exception to this general rule, having recognized a
form of representative action for more than two centuries and having clearly permitted group
litigation by multiple plaintiffs who share “the same interest” in a claim against a defendant for
over 100 years.\textsuperscript{13} But even the English representative actions traditionally have not been
particularly comparable to American class actions. Until very recently, it was understood that
such representative actions were limited to those circumstances in which all of the plaintiffs
sought identical relief – thereby proscribing group litigation in all cases where plaintiffs sought
individuated damages.\textsuperscript{14}

European reluctance to permit group litigation and representative actions, however, has
noticeably slackened in recent years. In 1998, the European Union issued the “European
Directive on Injunctions for the Protection of Consumers’ Interests” which required all member
nations to adopt laws for “group litigation” by the end of 2000.\textsuperscript{15} This directive did not mandate

\textsuperscript{11} See, e.g., \textit{Block v. McDonald’s Corporation}, (No. 01-409137, Cook County, Illinois, 2002); \textit{Scott v. Blockbuster Inc.}, (No. D162-535, Jefferson County, Texas, 2001).

\textsuperscript{12} Sherman, \textit{supra} note 6, at 131 (“Most European countries eschewed American class action practice until
quite recently, although some had distinctive procedures permitting expanded standing and aggregation through
‘group litigation.’”); \textit{see also} Hodges, \textit{supra} note 6, at 327 (“The first factual observation is that it is only recently
that some European jurisdictions have introduced a rule of court procedure on the recognition or management of
multi-party actions.”).

\textsuperscript{13} \textit{Id.} at 147.

\textsuperscript{14} \textit{Id.} at 147-148.

\textsuperscript{15} \textit{Id.} at 131, 144; Directive 98/27/EC on Injunctions for the Protection of Consumers’ Interests (May 19,
the creation of American-style class action laws; instead, it provided that certain consumer associations or independent public bodies (such as administrative agencies) should be granted the authority to bring suit on behalf of a specifically defined group of citizens.\footnote{Id. at 144.} This change was spawned by the fact that, unlike the United States, European nations typically have “no method of self-appointment of an individual champion (plaintiff) and no concept of an individual private Attorney General, whose initiative is fostered by fee incentives or by alluring contingency fee arrangement.”\footnote{Id.} Rather, only pre-approved entities are capable of initiating such group actions. In addition, such representative actions rarely seek damages and usually request no more than the injunctive or declaratory relief necessary to stop the defendant’s wrongdoing.\footnote{Michelle Taruffo, Some Remarks on Group Litigation in Comparative Perspective, 11 Duke J. Comp. & Int’l L. 405, 406, 411-412 (2001).} And when damages are sought, they usually accrue to the consumer organization or government entity that prosecutes the case rather than the individual members of the group.\footnote{Id. at 413.} Nonetheless, given the prior absence of representative actions in Europe generally, this directive represents a significant break with past practice.

Moreover, outside of the Directive, a number of European countries have independently begun to adopt or enhance representative action procedures. Most notably, Sweden in 2002 authorized a new group litigation procedure that allowed a person to bring a group action on behalf of other potential plaintiffs with similar claims.\footnote{Sherman, supra note 6, at 146.} This new Swedish procedure resembles American class action rules in multiple respects – for example, a case may only proceed as a
group action if its meets requirements roughly analogous to those contained in Federal Rule of Civil Procedure 23, and the group representative has the authority to settle the litigation on behalf of all plaintiffs.\textsuperscript{21} The Swedish law does, however, differ from American class action law in one important respect. In Swedish group actions, potential group members must “opt-in” to join a group action, \textit{i.e.}, there is no way for them to be part of the litigation unless they affirmatively choose to do so.\textsuperscript{22} In contrast, American class actions utilize an “opt-out” procedure. Unless a potential class member affirmatively chooses not to participate in the lawsuit, he or she will be deemed a party to the litigation.

In addition, representative actions in the United Kingdom have also begun to take on a greater resemblance to American class actions. As noted above, representative actions have traditionally been limited to claims under which all members of the group sought identical damages. But in 2000, the United Kingdom adopted a new group litigation procedure that permits a group of plaintiffs to request that a judge issue a group action order allowing all of the group’s claims to be adjudicated on a single basis.\textsuperscript{23} This process is essentially analogous to class certification in the American legal system – although, as in Sweden, an individual must choose to participate in this case before he or she will be included in the group action.\textsuperscript{24}

Furthermore, earlier this year, the Netherlands enacted the Act on the Collective Statement of Mass Claims, legislation which was deliberately designed to mimic the American

\textsuperscript{21} Id.
\textsuperscript{22} Id.
\textsuperscript{23} Id. at 149. In addition, a judge has the authority to issue \textit{sua sponte} a group action order that consolidates numerous individual claims into a single group proceeding.
\textsuperscript{24} Id.
class action rule in a variety of respects. The new Dutch rule does not involve named plaintiffs or class certification – instead, collective actions are pursued by a representative association. But, as in the United States and in contrast to Sweden and Britain, a decision to settle a collective action in the Netherlands will now be binding on all class members who do not opt-out of the proceeding.

Other European nations appear poised to adopt class action procedures as well. Earlier this year, President Chirac of France announced that his government was planning to draft and adopt class action legislation. In addition, a class action bill is presently under consideration in the Italian parliament and the Finnish government is also investigating whether to create a class action procedure. Thus, it appears as though it is only a matter of time before many European nations have representative action or group litigation procedures that resemble American class actions in significant respects.

B. Private Antitrust Enforcement


26 Id.

27 Id. Spain has also implemented, pursuant to Civil Procedure Act 1/2000, a modified class action procedure in which representative association may represent a group of end-users or consumers who are readily ascertained or easily ascertainable. Hodges, supra note 6, at 327. And Portugal has permitted a form of class actions since 1995, although “they have rarely, if ever, been used.” Marjorie Holmes & Lesley Davey, Competition Enforcement in the European Union: A Three-Way Partnership, 72 Def. Couns. J. 31, 34 (2005).


Private enforcement has played a central role in the United States antitrust law regime since the passage of the Sherman Act in 1890.\textsuperscript{31} Although initially the number of private actions brought was relatively small, totaling approximately 1,100 cases during the first 60 years after the Sherman Act’s passage\textsuperscript{32}, there was an explosion in private antitrust litigation starting in the 1960s.\textsuperscript{33} The expansion of the class action device under Federal Rule of Civil Procedure 23, \textit{see supra} Part I.A., coupled with “appellate court decisions recognizing new substantive rights or easing litigation burdens for plaintiffs pursuing existing rights, [] encouraged private actions and increased awareness of their possibilities in the antitrust context.”\textsuperscript{34} Private antitrust actions are now overwhelmingly the most common form of antitrust litigation in the United States.\textsuperscript{35} In fact, at present, it is estimated that private actions represent at least 90% of all federal antitrust cases.\textsuperscript{36}

In contrast, antitrust enforcement in Europe has principally been the province of the competition authorities. Although private enforcement was never actually barred by the law of the European Union, it was somewhat unclear until the decision of the European Court of Justice (the “ECJ”) in \textit{Courage v. Crehan}, C-452/99, [2001] ECR I-6297, that national courts and

---


\textsuperscript{32} Holmes, \textit{supra} note 31, at 25.

\textsuperscript{33} Miller, \textit{supra} note 2, at 672.

\textsuperscript{34} \textit{Id.}

\textsuperscript{35} Holmes, \textit{supra} note 31, at 25.

\textsuperscript{36} \textit{Id.} Furthermore, state antitrust acts also provide private causes of action and, in fact, a significant portion of private antitrust actions occur under state law as a consequence of the Supreme Court’s decision in \textit{Illinois Brick v. Illinois}, 431 U.S. 720 (1977). The Supreme Court in \textit{Illinois Brick} construed the Sherman Act as barring indirect purchasers of goods at supracompetitive prices from asserting claims for damages; however, numerous states have subsequently declined to follow the Supreme Court’s lead and have therefore provided for indirect purchaser standing under state law. Accordingly, private antitrust actions involving indirect purchasers almost always arise under state law.
authorities had the power to enforce European Union competition law. Indeed, a study released in August 2004 concluded that at that time there had only been approximately 60 judged cases involving private damages actions in the entire European Union.\textsuperscript{37}

But attitudes regarding private enforcement of antitrust law are changing in Europe. In \textit{Courage}, the ECJ did not merely conclude that national courts could enforce EU competition law; rather, it held that “the practical effect of the prohibition laid down in Article [81(1)] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.”\textsuperscript{38} The Court went on to note that “actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.”\textsuperscript{39}

Numerous European policy-makers, such as former Competition Commissioner Mario Monti, have expressed similar sentiments, and the European Commission has accordingly begun to take steps to facilitate private antitrust lawsuits.\textsuperscript{40} Its first significant effort was EC Regulation 1/2003, which came into effect on May 1, 2004. Regulation 1/2003 represented, \textit{inter alia}, an effort to make it easier for national courts to adjudicate private antitrust claims.\textsuperscript{41} Prior to the enactment of Regulation 1/2003, the European Commission had the exclusive power to grant

\begin{flushright}
\begin{minipage}{\textwidth}
\parbox{\textwidth}{\footnotesize


\textsuperscript{39} \textit{Id.} at ¶ 27.


\textsuperscript{41} \textit{Id.} at 3.
\end{minipage}
\end{flushright}
exemptions from Articles 81 and 82, the two provisions of the European Charter that provide the substantive basis for EU Competition law.\textsuperscript{42} As a consequence, national courts were unable to rule conclusively on private lawsuits claiming violations of those provisions, since the Commission might ultimately decide that an exemption was warranted.\textsuperscript{43} Regulation 1/2003, however, eliminated the Commission’s “exemption monopoly” and thereby making it possible for national judges “to rule on Articles 81 and 82 in their entirety.”\textsuperscript{44} In so doing, it strengthened “the possibilities for private parties to seek and obtain relief before national courts.”\textsuperscript{45}

The push for greater enforcement by the Commission has coincided with – and spurred – similar developments in individual member states. The United Kingdom has proven the most aggressive in developing a regime for private antitrust enforcement. It adopted the Enterprise Act of 2002 which, \textit{inter alia}, created a specialized tribunal, the Competition Appeal Tribunal (“CAT”), to deal with competition cases involving private damages actions where there is a prior decision by the European Commission or the UK Office of Fair Trading.\textsuperscript{46} And in May 2004, in \textit{Crehan v. Inntrepreneur},\textsuperscript{47} an English court awarded damages in a private antitrust action for this first time.\textsuperscript{48}

\textsuperscript{42} Holmes, \textit{supra} note 31, at 26.

\textsuperscript{43} \textit{Id.} at 27.

\textsuperscript{44} Monti, \textit{supra} note 40, at 3. \textit{See also} Woods \textit{et al.}, \textit{supra} note 40, at 31.

\textsuperscript{45} \textit{Id.} \textit{See also} Woods \textit{et al.}, \textit{supra} note 40, at 31 (“It is anticipated that private enforcement will thus increase as a result of the Regulation. Indeed, recital 7 of the Regulation explicitly foresees the possibility of private actions for damages for breach of Community competition law.”).

\textsuperscript{46} Holmes, \textit{supra} note 31, at 32.

\textsuperscript{47} [2004] EWCA 637.

\textsuperscript{48} Woods \textit{et al.}, \textit{supra} note 40, at 32.
Germany has also recently expanded private antitrust enforcement opportunities. In June 2005, a Seventh Amendment to Germany’s Act Against Restraints of Competition (“ARC”) went into effect.\(^49\) Prior to the Seventh Amendment’s enactment, German law contained a “protective purpose” requirement, which permitted only individuals or entities who had been “directly targeted” an alleged violator of antitrust law to bring private actions for damages – “requirement which [had proven] very difficult to fulfill in practice.”\(^50\) The Seventh Amendment, however, expanded standing so that any one who suffered harm as a result of anticompetitive activity could bring a damages claim.\(^51\)

Other countries also recently have taken steps to increase the ability of parties to bring private antitrust actions. For example, in the past few years, Spanish courts have it clear that private damages actions may be brought in Spanish court for violations of both EU and Spanish Competition law.\(^52\) The Netherlands is presently engaged in a review on how to improve conditions for the private enforcement of antitrust law.\(^53\) And a Government Committee in Sweden has recently recommended that the new Swedish class action device be explicitly extended to the victims of antitrust violations.\(^54\) Accordingly, as with class actions, it appears as though Europe is on the cusp of developing a private antitrust regime that is substantially akin to the current American one.


\(^{50}\) Monti, *supra* note 40, at 4.

\(^{51}\) *Id.*


\(^{54}\) *Id.* France and Italy also have permitted private antitrust actions seeking damages in the past. Indeed, it appears as though there have been “more successful damages actions to date in France than in the other principal European jurisdictions.” Woods et al., *supra* note 40, at 33.
II. The Press For Further Change In European Legal Practice

Despite these efforts to alter the European legal landscape, to date changes in European legal practice have not resulted in a dramatic increase in class action and private antitrust litigation. The reason for this restraint is straightforward – the continued presence in European legal systems of elements that temper the bringing of lawsuits and continue to operate as protections against litigation abuses. There are signs, however, that this could change.

Simply put, scholars, practitioners, and policy-makers who favor the recent changes to European law have begun to argue – and are likely to continue to argue with greater vigor – that Europe must adopt additional aspects of American law – aspects that affirmatively encourage litigation – so that the full benefit of the changes made to date will be realized. More specifically, they have focused on five characteristics of European law – none of which are applicable to the American legal system – that they believe are the primary reasons why European plaintiffs are unlikely to bring class actions and private antitrust actions: (1) the use of fee-shifting standards or “loser pays” rules; (2) the absence of contingency fee relationships; (3) restrictions on the scope of permissible discovery; (4) prohibitions on exemplary and punitive damages, as well as “soft” compensatory damages, such as pain and suffering damages; and (5) the use of judges, as opposed to juries, to apportion damage awards. In addition, a number of commentators have concluded that the heretofore general absence in Europe of collective action or class action procedures has also deterred private antitrust enforcement.

55 Linda A. Willett, U.S.-Style Class Actions in Europe: A Growing Threat?, Vol. 9, No. 6 (National Legal Center for the Public Interest, June 2005), at 8; Green Paper and the Future of Product Liability Litigation, Global Liability Issues, Vol. 1 (Center for Legal Policy at the Manhattan Institute, September 2001), at 6-7; Sandra N. Hurd & Frances E. Zollers, Product Liability In The European Community: Implications For United States Business, 31 Am. Bus. L.J. 245, 254-255 (1993). A number of commentators have also focused on the fact that most European nations, with the United Kingdom and Ireland being the principal exceptions, prohibit lawyers from advertising their services. See, e.g., Willett, supra note 55, at 8.

56 Woods et al., supra note 40, at 34.
As a practical matter, each of these features affect the risk versus return calculus that parties and plaintiffs’ lawyers undertake when considering whether to bring suit, i.e., how much will the suit cost, how likely is the party to win or obtain a favorable settlement, and how much will likely be recovered. As one European commentator has noted, Europe is “very keen” to avoid becoming a “litigation-driven society.”57 These various features of European law therefore function as safeguards against excessive litigation - taken together, they serve to increase the cost of bringing suit while reducing the amount of potential awards.58

Indeed, the effect that each of these characteristics has on a party’s willingness to litigate is readily apparent. Every European legal system employs a fee-shifting standard of some type that requires the losing party to pay the prevailing party’s legal fees.59 As a practical matter, such a standard strongly discourages a plaintiff from bringing a lawsuit unless he or she believes that success is likely, for if the plaintiff loses, he or she will be responsible for the defendant’s or the defendants’ often substantial legal fees.60 The United States, however, has for the most part

57 Hodges, supra note 6, at 343.

58 Thomas D. Rowe, Jr., Shift Happens: Pressure on Foreign Attorney-Fee Paradigms from Class Actions, 13 Duke J. Comp. & Int’l L. 125, 132 (2003) (“In short, the realities of litigation finance and risk allocation under the contra-American paradigm would make for little, if any class damage litigation, except possibly when success and substantial recovery looked virtually certain – and even then the incentive structure might lead to the choice of litigation in individual rather than class form.”).

59 Sherman, supra note 6, at 146-47 (“Furthermore, EU countries follow the “loser pays” rule requiring the losing side to pay the other side’s attorney’s fees, in contrast to the “American rule” by which the parties pay their own attorney’s fees.”); Willett, supra note 55, at 11 (“The loser pays rule has been the normal rule of cost allocation in the UK, Ireland, and many EU member states.”).

60 Hodges, supra note 6, at 335-336 (“The normal rule in the United Kingdom, Ireland, and, to some extent, a number of other European jurisdictions, is that whoever loses a case (or makes a payment in settlement) should pay the majority of the opponent’s legal costs; this usually amounts to a significant sum, often equal to or exceeding the value of small claims. This cost allocation rule is supported on economic principles. It aims to discourage weak cases, to encourage early settlements that reflect the strength of each party’s case, and to enable the winner to have the remedy, if plaintiff, or to fend off the claim, if defendant, without having to meet the costs generated by the losing party opposing or pressing the claim unsuccessfully.”).
eschewed a fee-shifting approach; instead, each party is responsible for its own costs.61 Accordingly, from a financial perspective, instituting a lawsuit is a far less risky proposition for a U.S. plaintiff than it is for a European plaintiff.

In addition, what financial risk does exist for an American plaintiff is often further ameliorated by the use of another distinctly American innovation – contingency fees. Although modified forms of such fee relationships are permitted in some European countries, use of contingency fee relationships is still largely limited to the United States.62 Under a contingency fee relationship, the attorneys for a plaintiff agree to cover the costs of litigation in exchange for a percentage of any recovery. If the plaintiff loses, then he or she is not liable for any fee. Thus, for many American plaintiffs, initiating a lawsuit is essentially a no lose proposition – either they will win and obtain a recovery, or they will lose but incur no cost.63 In contrast, for European plaintiffs, initiating a lawsuit can be a costly endeavor. If they win, they obtain and incur no cost; however, if they lose, they will have to pay their own fees and costs and those of the defendant or defendants.64

61 Baker, supra note 31, at 386. One notable exception is actually private antitrust actions, as the Clayton Act contains a limited fee-shifting standard. But this standard serves as an incentive to sue, not as a deterrent to doing so. For while a prevailing plaintiff under the Clayton Act is entitled to “reasonable attorneys’ fees,” a prevailing defendant has no similar entitlement. Id. at 386-87.

62 Sherman, supra note 6, at 146, 149.

63 Rowe, supra note 58, at 129 (“American practices are in several ways obviously hospitable to the flourishing of plaintiffs’ class actions for damages. While small chance of a significant recovery may (or at least should) deter the pursuit of class claims, individual class representatives’ or class members’ fear of down-side liability for large defense fees will not. Nor need the class representative or members worry about paying the class’s own attorneys in case of small or no recovery; contingent fee means that class counsel bears the risk of nonpayment. And class counsel’s substantial percentage stake in a large recovery, even one made up of many awards too small to be worth pursuing in individual actions, can make it financially attractive for entrepreneurial attorneys to front the considerable costs of class litigation if the chance of eventual reward appears great enough.”).

64 Id. at 131-132 (“Not only would the loser-pays rule pose the threat of a class plaintiff’s being out of pocket for the other side’s large fees in the event of defeat; but a ban on no-win, no-pay contingent fees would keep the plaintiffs’ attorney from bearing the risk of no or small recovery and spreading that risk across multiple cases – thus imposing the risk of being liable for the probably large fees of class counsel upon individual clients who are less equipped and likely less disposed to take it on in the first place.”); Sherman, supra note 6, at 149 (“In addition,
Furthermore, the discovery rules in the United States provide American plaintiffs with tremendous litigation advantages that European plaintiffs do not possess. American courts have liberal discovery rules and it is therefore very easy for an American plaintiff to seek massive amounts of information from defendants without knowing much about the substance and details of his or her case.\textsuperscript{65} Indeed, American plaintiffs and plaintiffs’ attorneys often engage in “fishing expeditions,” in which they file lawsuits with only a cursory understanding of their claims and then use broad discovery requests to learn about their case.\textsuperscript{66} Plaintiffs’ ability to seek such broad discovery can also impose extraordinary costs on defendants – sometimes running in the tens of millions of dollars.\textsuperscript{67} Thus, American discovery rules make it easy for plaintiffs and plaintiffs’ attorneys to file suit with little information and provide plaintiffs with the capacity to impose significant costs on defendants regardless of the merits of plaintiffs’ claims. And in turn this capacity to impose substantial discovery costs independent of the nature of the litigation grants American plaintiffs substantial leverage in negotiating favorable settlements with defendants.

European plaintiffs, however, lack such leverage over defendants.\textsuperscript{68} The scope of available discovery in European courts is usually circumscribed, and a European plaintiff is often

\textsuperscript{65} Woods et al., \textit{supra} note 39, at 34.


\textsuperscript{68} Hurd & Zollers, \textit{supra} note 55, at 254 (“In addition, discovery procedures are substantially different in the [EU] Member States than in the United States. Some countries do not permit discovery and some allow only very limited discovery closely supervised by the court.”). The United Kingdom, Ireland, and Cyprus, however, all have fairly liberal discovery standards. Ashurst Report, \textit{supra} note 37, at 4.
unable to obtain discovery from a defendant unless he or she can identify the documents he or she seeks with substantial specificity.69 In other words, most European plaintiffs are precluded from engaging in “fishing expeditions” and cannot impose significant discovery costs on defendants as a matter of course.

Finally, European plaintiffs are less likely to obtain large recoveries than their American counterparts. Although recent Supreme Court decisions have imposed some limitations on the size of punitive damages awards,70 it remains possible for American plaintiffs to obtain large punitive damages judgments. In addition, American law also generally recognizes a wide variety of types of compensatory damages, including damages for pain and suffering and damages for emotional distress, which can also run in the millions of dollars.71 Furthermore, under both state and federal antitrust law, plaintiffs are usually entitled to treble damages, plus reasonable attorneys’ fees and costs.72 Thus, American plaintiffs can often recover damages awards many times greater than actual economic loss. That is, however, not the case in European countries. No European Union nation permits punitive damages or non-traditional compensatory damages in tort or antitrust cases and it is very difficult for a European plaintiff to recover more than actual damages in any proceeding.73 In addition, American recoveries are also generally larger

69 Ashurst Report, supra note 37, at 4-5 (“The clearest obstacle here is the fact that in most Member States parties are not under an obligation to produce relevant information and often will only be ordered to do so when the requesting party can identify the individual document he seeks, which in many cases will simply not be possible.”).


72 Baker, supra note 31, at 382-85.

73 Willett, supra note 55, at 13; Hurd & Zollers, supra note 55, at Holmes & Davey, supra note 27, at 35 (“Unlike the United States, where the Clayton Act of 1914 (15 U.S.C. §§ 12 et seq.) authorises private antitrust cases and provides for treble damages, in Europe the general rule is that only compensatory awards are given.”).
than European recoveries because juries, not judges, usually award damages in the United States.\textsuperscript{74} As a number of recently published cognitive psychology studies have demonstrated, juries are more prone to returning high damage awards than judges are.\textsuperscript{75}

In short, European law contains safeguards that serve to prevent “a grossly over-heated litigation market.”\textsuperscript{76} As a result of these safeguards, European plaintiffs face a risk versus return calculus in bringing litigation that is far less favorable to them than the one faced by American plaintiffs. Thus, European plaintiffs are generally less likely than American plaintiffs to bring lawsuits of any kind – including class actions and private antitrust litigation.

III. The Need For Caution In Making Further Changes

It is unlikely that the European policy-makers pushing for the expansion of class actions and private antitrust suits will be content with the present state of affairs. In fact, it is virtually certain that they will seek further changes to European law to ensure that individuals take advantage of their reforms. Indeed, such additional efforts have already begun. Following the enactment of Regulation 1/2003, the European Commission authorized a report, the Ashurst Report, to help it identify “potential obstacles to private [antitrust] enforcement” so that the Commission could begin to tackle those obstacles.\textsuperscript{77} In fact, the Commission is scheduled to release a Green Paper detailing its plans for encouraging more private antitrust enforcement in

\textsuperscript{74} Hodges, \textit{supra} note 6, at 330; Hurd & Zollers, \textit{supra} note 55, at 255 (“European courts do not use juries for tort suits at either civil or common law; damages are determined by the court.”).


\textsuperscript{76} Hodges, \textit{supra} note 6, at 344.

\textsuperscript{77} Monti, \textit{supra} note 40, at 3-4.
the next few months. Moreover, a number of the European countries that have instituted group litigation procedures have also begun to relax their rules on fee-shifting and the use of contingency fees. For example, in France and Portugal, courts are instructed to take account of the losing party’s financial circumstances before assessing costs. In addition, the European Community recently has begun to debate whether or not to introduce a contingency fee system in principle. And numerous European countries, including the United Kingdom, Italy, Portugal, Greece, and France, now permit some form of a contingency fee relationship.

In other words, European policy-makers are poised to start down the path of eliminating those features of European law that presently make Europeans less likely to file lawsuits. They do so in the hopes of improving judicial efficiency and antitrust enforcement; however, by their actions, they risk throwing the baby out with the bathwater. The very features of European law that policy-makers are targeting – fee-shifting standards, contingency fee arrangements, discovery rules – do indeed make it less likely for individuals to file lawsuits, including, inter alia, class actions and private antitrust actions. But they are also the barriers that have largely

---

78 Holmes & Davey, supra note 27, at 35 (“Disincentives such as legal costs, limited damages and differing procedural rules suggest that private enforcement will have a limited influence on competition enforcement in Europe. The European Commission, however, is considering how to remove these obstacles and is due to initiate a debate on the subject in 2005.”).

79 Willett, supra note 55, at 9-12.

80 Id. at 11-12.

81 UK Firms, supra note 5, at 72.

82 Willett, supra note 55, at 10. In addition, the European Commission has also proposed liberalizing discovery rules in recent years. In 1999, the Commission issued a Green Paper on analyzing Directive 85/374, which had modified European product liability law. The Green Paper suggested several revisions to the original directive (none of which have been adopted), including proposals “such as requiring the production of all useful information to the plaintiff.” Green Paper, supra note 55 at 3.
precluded the onset of American-style litigation abuses in Europe.\footnote{Willett, supra note 55, at 8-9; Green Paper, supra note 55, at 15 (observing that Europeans believe that there are “four anchors that they think will keep their system from converting into ours: judges decide things, not juries; no extensive soft damages, like pain and suffering; no punitive damages; and no contingent fees”).} Removing or modifying those features therefore has the potential to do more harm than good. For although the elimination of those aspects of European law would likely encourage more class actions and private antitrust claims, it would also likely prompt a deluge of frivolous lawsuits and wasteful litigation.

In this regard, the American experience with class actions and antitrust law is instructive. Although many Europeans regard the current litigation landscape in the United States with a mixture of bewilderment and revulsion, the truth is that America’s present circumstances, to some degree, are all too easy to explain.\footnote{Sherman, supra note 6, at 132 (“[M]ost other countries view American class actions as a Pandora’s Box that they want to avoid opening.”); Green Paper, supra note 55, at 15 (“Yet at the same time it seems Europeans – through their press – have an image of America as the land of litigation in which life is made almost impossible by the need to call a lawyer before doing anything.”); id. at 16 (“It is true that most Europeans think American civil litigation is bonkers, but I am not sure they think that they could be so unreasonable. They just think it’s an American aberration.”).} Simply put, the current American legal system is the product of the failure of American policy-makers, when confronted with the same issues that European policy-makers face today, to appreciate the extent to which their efforts at legal reform could be subverted.

Like the present European policy-makers, the creators of the modern American class action procedure and America’s private antitrust enforcement scheme were motivated by the best of intentions. The drafters of the class action rule believed that there were certain areas of the law, such as civil rights, that would benefit from allowing the trial of one person’s claim to serve as the proxy for the claims of a larger group.\footnote{Willett, supra note 55, at 3.} They also thought that creating such a procedure
would generally improve the efficiency of the judicial system.86 Similarly, the proponents of the
Sherman and Clayton Acts were concerned about ineffectiveness of public antitrust enforcement
and were attempting to ensure that anticompetitive conduct was fully deterred.87 But neither
group foresaw how the interaction of those procedures with other aspects of American law would
create extraordinary opportunities for abuse that would ultimately overwhelm the benefits that
their reforms were supposed to bring.88

IV. Lessons From The American Experience

It therefore would be prudent for European policy-makers looking for ways to make class
actions and private antitrust enforcement more prevalent in Europe to examine what has occurred
in the United States over the past forty years. During that time, frequent use has been made of
both class actions and the ability to bring private antitrust actions without any of the features of
European law described above. And, in large part as a result of that absence, that time period has
been marred by substantial abuse of the litigation process.

Indeed, such an outcome in many respects is unsurprising. American class actions and
private antitrust actions in the United States are extraordinarily powerful weapons that a plaintiff
can wield against a defendant. Such powerful weapons create the potential for abuse, which in
turn creates a need for safeguards. The creators of both procedures, however, failed to appreciate
the fact that the American legal landscape lacked inherent safeguards against abusive litigation
and that there was little to prevent plaintiffs from leveraging these powerful procedures to obtain
unwarranted recoveries.

86 Miller, supra note 2, at 670 (“Thus, in the main, the rulemakers apparently believed that they were simply
making rule 23 a more effective procedural tool.”).
87 Baker, supra note 31, at 382, 407.
88 Miller, supra note 2, at 670 (“The class action onslaught caught everyone, including the draftsmen, by
surprise.”).
In fact, what the American experience over the past forty years makes clear is that the American legal system’s rules regarding fee-shifting, attorneys’ fees, discovery, and damages have encouraged abusive litigation. As noted previously, see supra, the combination of contingent fee relationships and the lack of a “loser pays” rule make it essentially costless for an American plaintiff to bring a claim.\textsuperscript{89} Instead, all costs effectively can be borne by plaintiffs’ law firms, which, because they are involved in numerous cases, can essentially spread those costs across to cases to minimize their overall financial risk.\textsuperscript{90} Furthermore, those firms’ overall financial risk is limited by the absence of fee-shifting statutes that would require plaintiffs to pay defendants’ costs. Generally speaking, the worst that can happen to a plaintiffs’ firm when it initiates a lawsuit is that, if it loses, it will be unable to recover the costs that it incurred in that particular proceeding.

Thus, as a practical matter, there is little downside to plaintiffs’ attorneys and plaintiffs filing a multitude of class actions, while there is a substantial benefit to doing so. The class action allows for the aggregation of millions of claims in a single proceeding – thereby exposing a defendant to an enormous amount of potential liability. Accordingly, a defendant in such a proceeding is placed in a real dilemma. Even if aggregation is not warranted and even if the defendant is very likely to prevail on the merits, a loss might very well put a defendant out of business. Thus, a defendant often may choose to settle a class action wholly lacking in merit

\textsuperscript{89} Rowe, supra note 58, at 128; Stephen B. Presser, \textit{How Should The Law of Products Liability Be Harmonized? What Americans Can Learn From Europeans}, Global Liability Issues, Vol. 2 (Center for Legal Policy at the Manhattan Institute, February 2002), at 5 (“If an American plaintiff knows that he will not have to bear the costs of any attorney’s fees, neither his own nor the other party’s, there is more of an incentive to participate in a lawsuit, more of an opportunity to vindicate his purported legal rights, and, indeed, more of an opportunity to gain the help of a lawyer.”).

\textsuperscript{90} Id. at 131 (“These kinds of risks to individual clients, to be sure, can lead to some form of risk-pooling or performance of an insurance function. That is precisely the role played by an entrepreneurial American plaintiffs’ class action law firm working for a contingent fee, typically handling a portfolio of multiple cases so that success in some can subsidize those that yield little or no recovery and finance cases still in process.”); Sherman, supra note 5, at 136-37.
rather than run even a miniscule risk of a catastrophic judgment. In other words, the American class action procedure, coupled with American rules for attorneys’ fees, created a situation where plaintiffs’ attorneys could essentially blackmail corporate defendants into settling large-scale class actions that were wholly lacking in merit. And plaintiffs’ attorneys unsurprisingly have taken advantage of this opportunity.91

The same holds true for private antitrust actions. Because of treble damages provisions in American antitrust laws, a defendant in an antitrust action faces potential liability often far in excess of any economic harm that it caused. And this potential liability is further increased by the fact that antitrust defendants are subject to joint and several liability – thus, not only does antitrust defendant face the potential of three times its own damages, but it also incurs some risk of being liable for three times the damages of any co-defendants.92 Again, because of the absence of a fee-shifting provision, the financial stakes for the plaintiff and the plaintiffs’ counsel are fairly low, while the risk to the defendant is relatively high. Moreover, the settlement process in antitrust actions inherently favors plaintiffs, with defendants settling lawsuits merely to avoid the slight possibility of a devastating judgment.93 Accordingly,

91 Hodges, supra note 6, at 343 (“A prevailing view amongst European experts is that the U.S. class action can simply be used to leverage large sums of money from a corporation to claimant attorneys through contingency fees ‘earned’ in return for settling a large number of claims sometimes of speculative value, as illustrated by the bendectin, silicone, and dietary drug settlements. Such a settlement may be in the corporation’s commercial interests in the U.S. context as it achieves closure on the potential for multiple individual claims arising over many states for an uncertain period, each with a cost and drain on resources and the risk of maverick jury awards.”); see also Castano v. American Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) (observing that “[t]hese settlements have been referred to as judicial blackmail”); In re Rhone-Poulenc Rorer, 51 F.3d 1293, 1298 (7th Cir. 1995) (“Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action ‘blackmail settlements.’”)

92 Baker, supra note 31, at 387-388.

93 Edward D. Cavanagh, Detrebling Antitrust Damages: An Idea Whose Time Has Come?, 61 Tul. L. Rev. 777, 809 (1987) (“The lure of treble damages may encourage the filing of baseless suits which otherwise might not have been filed. Indeed, the private bar has not been at a loss to conjure up ‘wild and wooly’ lawsuits for defendants to combat. Antitrust suits are frequently lengthy, complicated and costly both in terms of monetary costs, including legal fees and related discovery expenses, and nonmonetary costs, including dislocation of employees, decline in
American plaintiffs and plaintiffs’ firms have strong financial incentives to file “marginal and/or innovative antitrust cases.”

American discovery and damages rules further exacerbate these tendencies. The fact that American courts permit “soft” compensatory, exemplary, and punitive damages – and place the authority to award damages to juries – can cause dramatic increases in defendants’ potential financial exposure. Cases that, based on the compensatory damages at stake, would have been relatively minor litigation are transformed by the potential of punitive damages into litigation that poses a grave threat to the defendants’ fiscal health. In other words, plaintiffs’ ability to seek damages beyond a standard compensatory award increases the number of cases that defendants are prone to settle simply to avoid the risk of a catastrophic judgment.

American discovery rules have had a different, but related, effect. Discovery rules are very liberal in American courts – a litigant may seek any information reasonably calculated to lead admissible evidence. In addition, a litigant may seek discovery merely by propounding broad and general interrogatories or requests for the production of documents. As a result of these rules, discovery burdens between parties are often asymmetrical. Plaintiffs in class actions and antitrust cases are often individuals or small entities possessing few documents relevant to litigation. In contrast, defendants in such matters are often large corporations that possess substantial quantities of documents or information capable of being sought in discovery.

---

94 Baker, supra note 31, at 385; see Holmes & Davey, supra note 27, at 35 (noting that “[t]he incentive of increased damages awards therefore does not exist in Europe as it does in the United States”).

95 Cavaliere, supra note 71, at 308.

96 Thomas Koenig, The Shadow Effect of Punitive Damages on Settlements, 1998 Wis. L. Rev. 169, 208 (1998) (“Mass torts provide the clearest example of settlement leverage produced by punitive damages. Firms or whole industries facing the threat of numerous punitive damages awards based on the same behavior are under tremendous pressure to settle.”).
Complying with discovery requests can cost a defendant corporation millions of dollars. Indeed, in the age of e-discovery, that cost can be astronomical.\footnote{7} Accordingly, under such a scenario, defendants sometimes choose to settle large-scale litigation largely simply to avoid the massive discovery costs.\footnote{8} Thus, American discovery rules create another basis – the possibility of incurring substantial discovery costs – for settling cases regardless of the merits other than the refusal to risk the slight possibility of a catastrophic judgment. And when those two bases operate in conjunction, as they usually do, they make it even more likely that a defendant will settle a case for a substantial sum of money for reasons essentially unrelated to plaintiffs’ likelihood of success.

Put another way, each of these aspects of American law provide plaintiffs with incentives to sue. Each either lowers (or eliminates) a party’s potential cost of losing a lawsuit, increases a party’s potential gain of winning, or improves a party’s chance of prevailing. In contrast to other legal systems, none of them operate as a check on a party’s willingness to bring suit.\footnote{9} Accordingly, when these aspects are combined with the advantages that the class action device confers on plaintiffs, the incentives to bring suit – even when one lacks any legitimate claim –

\footnote{7} Mohammed Iqbal, \textit{The New Paradigms of E-Discovery and Cost-Shifting}, 72 Def. Couns. J. 283, 283 (2005) (“The cost of identifying, gathering, reviewing for privilege, and producing electronic documents is high. For example, in one case, the cost of recovering data was estimated at $9.75 million. These astronomical expenses stem from the sheer magnitude and redundancy of data on backup tapes.”).

\footnote{8} Presser, \textit{supra} note 89, at 6 (“The costs of discovery in this country, particularly for defendants, are very high indeed, and it seems likely that it is the avoidance of these costs, in large part, that raises the ‘nuisance value’ as a result of which settlement often occurs. Perhaps it is the threat of substantial costs in the discovery phase of litigation which is the most profound inducement to settle early.”); \textit{Green Paper, supra} note 55, at 11 (“The costs involved in discovery can cause companies to settle cases that may have no merit at all, because the cost of paying defense lawyers to run their clocks is higher than the cost to settle the case.”).

\footnote{9} Hodges, \textit{supra} note 6, at 343 (“One of the most important balancing controls is a rule that whomever loses should pay most (but not all) of the winner’s legal costs.”); Rowe, \textit{supra} note 58, at 127 (“As others have long recognized, class actions could find barren soil if they were transplanted to systems that, like much of the world, maintain bans on contingent fees for plaintiffs’ lawyers and adhere to the near-universal loser-pays rule on liability for a winning side’s attorney fees.”).
become overwhelming while the disincentives to do so become distinctively lacking.\textsuperscript{100} In short, a legal system develops which both has the propensity to produce and reward frivolous claims and no mechanism or effective sanction to weed them out.\textsuperscript{101}

That is essentially what occurred in the United States in 1980s and 1990s. It became so profitable to bring large-scale class actions and to initiate mass tort litigation that a cottage industry of plaintiffs’ firms developed. Moreover, the abuses quickly compounded. Plaintiffs’ attorneys poured their profits into judicial elections with the goal of creating jurisdictions where corporate defendants lacked any realistic chance of success – “magic jurisdictions” as well-known Mississippi plaintiffs’ attorney Dickie Scruggs once described them.\textsuperscript{102} And these efforts proved largely successful, as “magic jurisdictions” such as Madison County, Illinois, and Jefferson County, Texas, emerged in relatively short order.\textsuperscript{103}

These “magic jurisdictions,” or “magnet courts,” became havens for litigation abuses. Madison County went from having only two class actions filed in the county in 1998 to having 106 filed in the county in 2003.\textsuperscript{104} These jurisdictions routinely certified classes at the drop of the hat, regardless of whether the proposed class bore any resemblance to a group of similarly situated individuals. They also approved massive class action settlements, in which plaintiffs’

\textsuperscript{100} Id. (“[T]he root causes of the [American] problem lie in the legal system’s unpredictable potential for arbitrary variation in liability decisions, in the potential for very large (again unpredictable and arbitrary) damages awards, and in the disproportionate size of the commercial incentive to the plaintiffs’ lawyers.”).

\textsuperscript{101} Id. at 344 (“A central problem lies with the propensity of a system to generate poor claims and then its ability – or inability – to weed them out.”).

\textsuperscript{102} Legal Reform, Of Sorts, ECONOMIST, Feb. 19, 2005, at 82 (“Speaking at an asbestos conference in 2002, [Scruggs] said that such a place would have judges elected with ‘verdict money,’ trial lawyers who were cozy with those judges, and huge numbers of voters ‘in on the deal.’ In this trial lawyers’ paradise, ‘cases aren’t won in the courtroom,’ Mr. Scruggs assured his audience. ‘They’re won on the back roads long before the case goes to trial.’”);

\textsuperscript{103} Id.

\textsuperscript{104} Id.
attorneys racked up enormous sums of money in attorneys’ fees while class members received virtually nothing. In addition, they allowed huge punitive damage awards, numbering in the billions of dollars, to be handed down against corporate defendants.\textsuperscript{105}

These litigation abuses ultimately imposed immense costs on American business and American consumers. The Council of Economic Advisors (“CEA”) estimated that the cost of United States tort system in 2002 was approximately $180 billion,\textsuperscript{106} and others have concluded that the cost is actually far higher.\textsuperscript{107} These massive costs have in turn led to higher prices for the American consumer. Simply put, Americans have for years been paying a “litigation tax” in the form of price premium that American business is forced to impose to help offset the costs of litigation abuse.\textsuperscript{108} And that tax has been a heavy one – the CEA found that, if borne solely by consumers, “it would be equivalent to a tax on income from savings of 3.1%.”\textsuperscript{109}

Only in the past few years have United States policy-makers taken steps to rectify this situation and curb the problem of litigation abuses. Earlier this year, Congress passed the Class Action Fairness Act (“CAFA”), which remedies the “magic jurisdiction” in part by creating federal jurisdiction over most class actions that are presently being heard in magnet courts.\textsuperscript{110}

\textsuperscript{105} Id. (“In proportion to population, more lawsuits are pending at the Edwardsville courthouse than in any other US jurisdiction: 43 on target for over 90 this year, led by a $10.1bn verdict against cigarette-maker Philip Morris, and a $250 m asbestos damages award against US Steel.”).

\textsuperscript{106} Hubbard, supra note 4, at 18.

\textsuperscript{107} William A. Worthington, The “Citadel” Revisited: Strict Tort Liability And The Policy Of Law, 36 S. Tex. L. Rev. 227, 249 (1995) (“According to one study, $80 billion annually is attributable directly to litigation costs and increased insurance premiums with another $300 billion annually attributable indirectly to the [tort] crisis.”).

\textsuperscript{108} Id. at 249-250 (“These [tort] costs are ultimately reflected in the costs of products. Sporting goods manufacturers estimate that fifteen percent of the cost of their products is spent to cover the risk of litigation.”); Presser, supra note 89, at 1 (“These costs are generally passed on to the American consumer, and have been often described as a ‘litigation tax.’ This ‘tax’ increases the price of American consumer goods to Americans and to all other customers of goods produced by American corporations.”).

\textsuperscript{109} Hubbard, supra note 4, at 18.

\textsuperscript{110} Legal Reform, supra note 102, at 82.
CAFA also created safeguards to ensure that class action settlements primarily benefit class members rather than plaintiffs’ attorneys. In addition, at the state level, efforts have been made to cap punitive damages and “soft” compensatory damages.\(^{111}\) Nevertheless, by and large, most of the incentives to litigate that have prompted the widespread litigation abuses that the United States has witnessed over the past forty years remain intact. Simply put, it is still profitable for plaintiffs’ attorneys to file as much large-scale litigation against defendants as possible, even when they lack a valid claim. And therefore plaintiffs’ attorneys still do so.

In sum, the American experience has demonstrated the problems that Europe is likely to incur if it eliminates or modifies those aspects of European law that are deterring individuals from filing class action or private antitrust lawsuits. The absence of those “obstacles” in American law has undoubtedly permitted class actions and private antitrust enforcement to flourish in the United States; however, their absence has also meant that plaintiffs pay little price – and often make a great profit – by filing claims wholly lacking merit. It has therefore become profitable in the United States for enterprising plaintiffs’ attorneys to file as many lawsuits as possible, since defendants have strong incentives to settle large-scale litigation that have nothing to do with actual validity of the plaintiffs’ claims. Thus, what began as efforts to improve efficiency and vindicate public policy instead have evolved into vehicles for a subset of lawyers to get very rich at the expense of American business and the American consumer. And the same will hold true for Europe if it chooses to eliminate its “loser pays” rules, its prohibitions on contingency fees, its restrictions on the scope of discovery, and its limitations on damages.

V. Conclusion

The landscape of European law is changing. Having been essentially devoid of class actions and private antitrust lawsuits during the twentieth century, Europe appears ready to embark in the coming decade on vigorous attempts to incorporate both concepts into its legal structures. But in implementing such changes, European policy-makers can learn from the example of the United States, where both procedures have been prominent parts of American law for decades. More specifically, European policy-makers should take care in their efforts to ensure that European plaintiffs utilize the new procedures and should recognize that the very features that stand as impediments to the increased use of class actions and private antitrust suits are the same features that protected Europe for decades from the litigation abuses that are prevalent in the United States courts. In other words, expanding class actions and private antitrust suits in Europe will come at a cost in the form of greater litigation abuse. And the danger to Europe is that, if policy-makers are not careful, within a very short time European nations will descend into the litigation morass from which the United States is just beginning to extricate itself.

In fact, that is precisely what many American plaintiffs’ lawyers expect to occur. The recent changes in European law have led large American plaintiffs’ firms, such as Milberg Weiss and Cohen, Milstein, Hausfeld & Toll, to establish relationships with class action firms in the UK.\footnote{Willett, supra note 55, at 22.} Michael Hausfeld, a prominent Washington, D.C. plaintiffs’ lawyer, is currently in the process of “forming an international network of plaintiffs’ layers and is making plans to file a variety of antitrust, product liability, securities, and human rights lawsuits in several countries.”\footnote{Id.} Hausfeld’s stated goal is to “export U.S.-style litigation tactics, including
contingency fees and class actions, throughout the world”\textsuperscript{114} and his opinion, as a result of the recent changes in European law, “the future in Europe for both law and society is good.”\textsuperscript{115}

Simply put, the American plaintiffs’ bar presently views Europe as the new land of opportunity.

Indeed, the plaintiffs’ bar sees the recent changes in European law as an opportunity in more ways than one. Hausfeld has already stated that he plan to exploit the differences in European and American legal systems to help him prevail in both forums. For example, while the scope of discovery in most European nations is far more restrictive than the scope in the United States, several European nations permit limited discovery before the filing of complaint – a procedure which is virtually unheard of in the United States. Hausfeld therefore has indicated that he plans to uncover claims by “pry[ing] open corporate secrets in the U.K. with prefiling discovery” and then “follow up with massive document-dredging in the U.S.” to obtain discovery for both American and European actions.\textsuperscript{116} Furthermore, American plaintiffs’ attorneys have begun to recognize that the growing availability of European class actions will make it easier for American plaintiffs’ firms to bring claims on behalf of European plaintiffs in American courts. In the past, such claims have often been dismissed on the grounds that a class action judgment in American courts would not be given \textit{res judicata} effect in foreign courts due to the lack of comparable procedures to the American class action in other countries.\textsuperscript{117} But as European countries adopt their own class action procedures, that barrier is slowly falling by the wayside.

\begin{thebibliography}{10}
\item\textsuperscript{114} Freedman, \textit{supra} note 5, at 124.
\item\textsuperscript{115} \textit{UK Firms}, \textit{supra} note 5, at 72.
\item\textsuperscript{116} Freedman, \textit{supra} note 5, at 124.
\item\textsuperscript{117} \textit{See, e.g., Bersch v. Drexel Firestone, Inc.}, 519 F.2d 974 (2d Cir. 1975).
\end{thebibliography}
It would be supremely ironic if, at the moment that the United States was finally reining in its culture of litigation abuse, Europe succumbed to that very affliction. Yet if European policy-makers are not sufficiently cautious with their future reforms, that is what will occur. This is not to say that the European policy-makers who are pursuing these legal reform initiatives do not have the best of intentions - encouraging judicial efficiency and promoting competition are important and worthwhile policy goals. But as the American experience of the past few decades illustrates, merely having good intentions is no safeguard against litigation abuse. European policy-makers need to learn from the American experience and preserve those aspects of European law that have protected Europe from American-style litigation abuses. If they fail to do so, then their efforts ultimately are likely to do more harm than good.