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across Europe and elsewhere, legal reform and market changes are taking place that are opening doors to the rise and spread of American-style products liability litigation.

Increasingly, lawyers and governments outside the United States are looking to the legal system – instead of government-run social welfare programs and regulation – for the private enforcement of legal rights and the recovery of damages. They are doing so not only with an eye on the towering shadow that American-style products liability litigation casts upon the horizon, but with American class action and mass tort specialists positioning themselves to lead the way.

These developments should be troubling to multinational corporate interests. It has all the markings of a perfect storm.

#### *Internationalization of the Plaintiffs' Tort Bar*

Like never before, products liability litigation is a global game. U.S. class action and mass tort lawyers from the plaintiffs' side are internationalizing their focus and network of contacts in an effort to capture new profit opportunities – and develop new “feeding grounds” – throughout the world.

In just the past few years, the U.S. plaintiffs' bar has begun building bridges to Europe and beyond. One of the pioneers in this effort is the Cohen, Milstein firm, led by Michael Hausfeld. In late 2004, he began building an international network of plaintiffs' lawyers boldly aimed at exporting American-style litigation tactics, including contingency fees and class actions.

Within a year, he boasted a four-continent network of representative law firms in the United Kingdom, France, Germany, Italy, Canada, South Korea and Colombia. See Jon Robins, [Michael Hausfeld Brings Class Actions to the UK](#), Oct. 24, 2005. Hausfeld is using this network to lobby for the adoption of American-style class action litigation and legal reform throughout the world, beginning in the European Union (EU). In early 2005, for instance, he said that he was “preparing to bring [class actions] in the areas of cartels, securities and in the products liability field.” Brendan Malkin, [UK Firms Gear Up As Class Action Culture Hits Europe](#), Feb. 7, 2005. In May 2007, his firm finally opened an office in London. *Id.* One of his partners in this venture has been Irwin Mitchell – English solicitors specializing in personal injury. Robins, *supra*.

The Cohen, Milstein firm is hardly alone in its foray abroad. Instead of opening foreign offices, however, other U.S.-

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 David L. Wallace, Chadbourne & Parke LLP

#### *Introduction*

Unlike at any other time, commercial opportunities and liabilities alike are today intensely global. At the same time,

based, plaintiff class action firms are forming alliances with European law firms. For instance, the new President of France – Nicolas Sarkozy – is a lawyer whose former law firm (Claude & Sarkozy) is said to be forging strong links with American class action specialists. According to *The Times* of London, President Sarkozy “has been talking about putting [class actions] on the agenda . . . and it is absolutely symptomatic of the way that his eyes have opened to the American way of doing things.” Edward Fennel, *Sarkozy Eyes Are Open to the American Way of Doing Things*, *The Times*, May 15, 2007, at 2.

These allied forces seek to bring American-style class action and mass tort litigation to Europe (and elsewhere). As one London observer recently observed, “[it]’s a shop window effort to find a new feeding ground for the U.S. class litigation lawsuits.” Caroline Byrne & Cary O’Reilly, *Sarkozy, U.S. Lawyers Shift Class-Action Suits to Europe*, *The New York Sun*, Jul. 25, 2007. Presently, the emphasis is largely on commercial litigation – specifically on behalf of large institutional investors in Europe. But if this experiment takes root (and it undoubtedly will), the trend can be expected eventually to spread into other areas of the law, such as products liability litigation.

#### *Back to the Future? American Tobacco Litigation Pointed the Way*

Many of the seeds of this development were planted in the tobacco litigation wars in the United States. This products liability litigation began in the early 1950s, on the heels of the first published scientific reports linking cigarette smoking with lung cancer. Plaintiffs’ claims generally failing at the outset, tobacco litigation receded briefly. Then, in the early 1980s, the U.S. plaintiffs’ bar reinvigorated and renewed it – in new directions and dimensions. See generally David Wallace, *A Dispatch from America’s Tobacco Litigation Ranks: Primary Assumption of Risk and Personal Responsibility in a Comparative Fault Age*, *Zeitschrift Für Stoffrecht: The European Journal for Substances and the Law*, 85–88 (May 2006). Thereafter, in the 1990s, tobacco litigation jumped the border – crossing the Atlantic to Northern Ireland, where the tobacco industry defended at trial the first tobacco case brought outside the United States. Defendant, an English multinational tobacco company, prevailed at trial in that case, but by then the litigation had already spread to England, and later to Ireland and Scotland.

The lack of contingency fees, the “loser pays” rule and the generally risky, speculative nature of the claims made it difficult and expensive for plaintiffs to get them off the ground outside the United States. Plaintiffs needed government funding (*i.e.*, legal aid) to run the litigation, and the English government declined the requests – amidst budget constraints and cutbacks in the 1990s, which generally continue. By then, however, tobacco litigation had spread still further to Continental Europe and beyond.

Individual and group (associated or representative) litigation was being launched throughout South America, beginning first in Brazil and Argentina.

For the most part, this litigation mimicked American products liability litigation. The claims, evidence and even witnesses traveled with the litigation. U.S. plaintiffs’ lawyers first boxed the case for sale, and then began to promote it more aggressively on a regional basis. Early on, however, the effort was largely uncoordinated and parochial. Then another wrinkle – a new front – developed. After the state attorneys general began filing health-care cost recoupment suits against the tobacco industry in the United States in the mid-1990s, foreign governments, along with private litigants (such as union trust funds, insurers, hospitals and other health-care providers) began suing multinational tobacco companies in American courts on similar theories of liability.

This push by the plaintiffs’ bar against tobacco interests continued and, in the process, the international dimension – the early globalization of American-style products liability litigation – started to take shape. Foreign governments, and others, began suing multinational tobacco companies as well as their international subsidiaries and affiliates abroad, on theories akin to U.S.-style recoupment and individual litigation. Within and without Europe, individuals, consumer associations and public interest groups began pushing products liability claims against tobacco companies throughout the world, notwithstanding traditionally perceived obstacles to the advancement of U.S.-style products liability litigation.

In short, for almost two decades now, tobacco litigation has been a global enterprise. The realities of the modern economy and commerce – especially the Internet – have only made it more so. In just the past few years, we have begun to see its replication in pharmaceutical and other litigation, where many of the same trends are playing out. The model repeats itself, giving reason for caution and account-taking.

Only now, the stakes are higher – following nearly ten years of largely coordinated, progressive legal reform efforts throughout Europe. Unlike the 1990s, when tobacco litigation first appeared overseas, sundry procedural and substantive law reform at the EU and national level, in large part modeled on aspects of the U.S. civil justice system, are allowing plaintiffs greater maneuverability to run large-scale products liability and consumer protection litigation internationally.

#### *Gathering Storm Conditions on the Horizon*

The plaintiffs’ products liability bar, of course, is doing no more than what any other business enterprise must do to grow and survive – adapting its business model to change in order to increase market and profit opportunities.

Hausfeld says, “[w]e feel we’re at the frontier,” and he is. Michael Freedman, [Can You Say Tort?](#), Dec. 20, 2004. He and his international network of firms are sharing clients and information, leading corporate defendants to “global resolution” of claims by settlement and splitting massive fees in the process. *Id.*

What Hausfeld and others are seeding for export is America’s “compensation culture” – driven by the powerful twin engines of U.S.-style entrepreneurial lawyering and aggregated litigation. What is more, lawyers, governments and consumers alike outside the U.S. are listening. *See, e.g.*, European Justice Forum, *Meeting Report: European Business at Risk of Increased Litigation*, 3 (Mar. 2005) (referencing European Commission study revealing that “European citizens were increasingly more likely to stand up for their rights and go to court”).

In sum, the management of global litigation is only going to get much more complicated – starting now. Like the “virtual” transnational law firms assembled by large multinational corporate defendants in more recent years to manage litigation around the world, the plaintiffs’ bar has followed suit. It is organizing to spread American-style class action and mass tort litigation – our “compensation culture” – as a template for the world to clone.

Naturally, not everyone thinks this is a good thing. Advocating quarantine instead of export, one English legal commentator has said:

Europe neither needs nor wants U.S.-style class action litigation, representing huge, avoidable, and unnecessary cost which distorts the economy by siphoning transactional costs towards service suppliers who are enabled significantly to influence demand for their services.

Christopher Hodges, *Multi-Party Actions: A European Approach*, Lessons from the Land of Litigation Fever: Should the Class Action be Exported or Quarantined? (Int’l Bar Assoc. Proc. 2000). Time will tell if these concerns are borne out.

Increasingly, however, efforts are afoot within Europe to give plaintiffs greater collective access to the courts, leading to the specter of class action litigation on a pan-European basis. Already the groundwork for eventual class action litigation reform is being laid in the Netherlands (1994), Portugal (1995), England and Wales (2000), Spain (2001), Sweden (2002) and Israel (2006). These are not exactly class action mechanisms as we know them in America. In large measure, they are tailored to relatively specific substantive areas of the law. But their precedential roots can be expected to spread – especially given the growing trend outside America for pro-consumer legislation, and the development of a “compensation culture” in Europe and elsewhere, among other things.

### *Paradigm Shifts Abroad*

For decades, there have been assurances that “Torts, American-Style” were not possible outside the U.S. It was said that there were too many procedural and systemic obstacles. Besides that, economic and cultural differences were said to make the export of American-style products liability litigation less likely.

*Procedural and Systemic Factors.* The major procedural obstacles are well known, including: no contingency fees; no lawyer advertising; no punitive damages; no juries; limited discovery; the “loser-pays” rule; and generally lower compensatory damages. Systemically, civil law judges do not have the same degree of discretion and decisional latitude as common law judges have. There is no doctrine of precedent (*stare decisis*), and civil law judges traditionally function as relatively passive state bureaucrats in the legal process – with limited choices and discretion in dispute resolution. Generally speaking, and unlike the American bench, they are guided in decision-making by “very precise legislative parameters which have pre-solved social conflicts.” Richard B. Cappalli & Claudio Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, 6 *Temple Int’l & Comp. L. J.* 217, 291–92 (1992). But with growing calls for and gradual movement toward the harmonization of EU legal systems as well as procedural rules, this impediment will shrink eventually. *See, e.g.*, Christopher Hodges, *The Americanization of European Civil Justice Systems*, Univ. of Oxford Centre for Socio-Legal Studies at 4 (2006).

*Cultural and Economic Factors.* Europeans have long presumed themselves not to be litigious – at least not in the “petty-minded” way of Americans, *see Leaks of Prince’s Letters to Ministers Spiral – The Letters – “We Are Sliding Down A Slope of Petty-Minded Litigiousness,”* *The Guardian*, Sept. 27, 2002, at 9 – but with the continuing collapse of “the post-World War II social model in Europe,” governments increasingly are looking to shift some of the burden and cost of regulation to “private actors and consumers,” by, among other things, encouraging private litigation “as a regulatory enforcement tool.” Hodges, *The Americanization of European Civil Justice Systems*, *supra*, at 1.

But over the past decade, the speed of the crumbling of these long-presumed obstacles to international commerce in American-style tort litigation has quickened.

*Aggregate Litigation.* As already noted, across (and beyond) Europe, countries are seriously considering or have already adopted class action-like procedures, in the form of group or representative actions. Over time, with increased use and greater familiarity, their roots will spread – fertilized by the decay and elimination of the traditional systemic and cultural obstacles to their earlier adoption.

*Funding Liberalization.* The EU, for instance, plans to abolish prohibitions on lawyer advertising across the Union, and it

is already allowed in some parts of Europe. Varieties of contingency fees are now found in some countries, as are “success fees” within certain limits. Not all that long ago, the English system witnessed the arrival of privatized legal aid (and litigation cost insurance), as part of the financial services sector – although it quickly led to statutory prohibition due to the “considerable consumer detriment” it generated. Hodges, *The Americanization of European Civil Justice*, *supra*, at 3. Also, in some types of cases financed by government legal aid, the “loser pays” rule is being relaxed or eliminated and in some instances its application can depend upon the parties’ relative financial positions. More generally, lack of support for legal aid funding by government is leading to greater encouragement of private-funding systems (*i.e.*, contingency fees, which are now allowed in Italy).

*Punitive Damages.* Also, while punitive damages are generally not available outside the United States, there have been proposals for reform, with more likely to follow. In the late 1990s, for example, the U.K. Law Commission recommended that exemplary damages be made available for torts and certain statutory wrongs. Although the government rejected the proposal, in 2002 the House of Lords held that there was no bar to punitive damages in the United Kingdom. *See Kuddus v. Chief Constable of Leicestershire*, [2002] 2 A.C. 122, 134 (H.L.) (appeal taken from Court of Appeal) (“the House [of Lords] is [not] bound by a clear or unequivocal decision in *Broome v. Cassell & Co. Ltd.* to hold that the power to award exemplary damages is limited to [pre-1964] cases”).

Already in this regard, one observer has insightfully noted that “[i]f the contingency, or conditional, fee gains greater acceptance [outside the U.S.], then the question of paying for lawyers through higher damages [*i.e.*, punitive damages] will inevitably arise.” Linda Willett, *U.S.-Style Class Actions in Europe: A Growing Threat?*, 9 National Legal Center for the Public Interest 6, at 18 (2005); *see also* Hodges, *The Americanization of European Civil Justice*, *supra*, at 4 (“If lawyers or funding intermediaries are to be paid a cut, yet plaintiffs are to receive adequate compensation, damages will have to rise.”).

Wielding an increasingly internationalized business model, the plaintiffs’ bar cannot be too far behind such words.

### *The “Rediscovery” of America*

Add to all of this the fact that Europe is seeing “a broad political shift . . . away from the generous welfare state of the late 20th century,” along with a “shift towards liberalization and privatization of access to justice” – and the outlines of a broad paradigm shift are evident. Willett, *supra*, at 22.

Through the 1990s, the systemic and cultural differences between America’s civil justice system and those of Europe

and elsewhere generally stifled the seeding and large-scale export of American-style tort litigation. Examining this issue in 1992, however, an Italian law professor observed that paradigm shifts in tradition tend to occur gradually – over time and in phases, which is proving the case in respect of international traffic in the spirit and tradition of American-style products liability litigation. Cappalli & Consolo, *supra*, at 271.

We have already seen the seeding of this shift take place through the prism of tobacco litigation, beginning in early 1990s. The twin banners of “access to justice” and consumer protection, the increasing liberalization of societies abroad – and with it the waning of faith in the benevolence of the national welfare state – are ushering in a new generational mind-set, especially in Europe. Successfully defending the still-ongoing international tobacco wars in the 1990s required the development of an international network of counsel and witnesses, along with considerable advance planning.

Managing global products liability litigation going forward will require significantly more effort, if only to account for and prevent repetition of the American model’s shortcomings (leaving practical experience to inform subsequent improvement efforts).

### *Charting the Course*

International traffic in American-style class action and mass tort litigation – that is, regulation (and compensation) by private litigation – is a real, growing and expensive threat to commercial interests globally, and it will only become further internationalized in the future. Indeed, the business operations most likely to produce liability exposure will themselves be increasingly international in scope.

Naturally, potential corporate defendants are not taking these developments lying down. Wise by experience to the peril (and extreme uncertainty) of regulation through private litigation, in 2005 a number of companies formed a lobbying group in an effort “to examine, combat and prevent the threats that could be posed by U.S.-style class actions in Europe.” European Justice Forum, *supra*, at 1. This group – called the European Justice Forum (EJF) – is urging caution and incrementalism in the proposed adoption of U.S.-style class action and mass tort measures. Among other things, EJF is advocating that European governments limit contingency-fee arrangements where they exist or are being contemplated, and keep the “loser pays” rule – both constructive brakes against (too much) entrepreneurial lawyering. Aviva Freudmann, *United We Stand*, June 2007.

If, as seems practically unavoidable at this juncture, European and other legal systems continue their flirtation with American-style class action and mass tort litigation, proactive efforts must be made to engage foreign governments “window-shopping” the U.S. products liability

system to ensure that the product they ultimately import is not contaminated with the weeds that have been allowed to grow up around the landscape of American products liability litigation. These weeds have set consumers against companies, increased the transactional costs of litigation and simultaneously choked investment and interest in product innovation.

In these still early days of legal reform and cultural change in Europe and elsewhere – largely centered on the perceived virtues of American-style products liability litigation – every effort must be made to educate the reform-minded of the abuses endemic to the U.S. products liability system, so that they are not blindly copied. As the European Justice Forum cautions, “[i]t is now much harder for companies in the U.S. to peel back this problem than it would have been to prevent it in the first place.” European Justice Forum, *supra*, at 2. Put differently, because countries outside the United States have only one chance to get it right, they must be persuaded to maintain systemic balance in doing so. Hodges, *The Americanization of European Civil Justice*, *supra*, at 1 (“Too often, those proposing what may appear to be the most change in one aspect have limited awareness of the real effects that will be produced in . . . complex [civil justice] system[s]. Proposals are rarely based on sound empirical research. Maintaining a balanced system of civil justice will become an increasing challenge.”).

#### Conclusion

In summary, the most logical and immediate future profit opportunities for the plaintiffs’ tort bar (now and going forward) are as an integral part of the international economy. Its strategy – and business model – is to internationalize American-style class action and mass tort litigation. The systemic and cultural things once thought of as barriers to the transplantation of American-style tort litigation are slowly giving way – piece by piece, in phases, to the growth of new legal paradigms.

Plaintiffs’ advocates are now well-financed, organized and networked globally – not unlike the multinational corporate defendants they target. Increasingly, U.S. plaintiffs’ lawyers will drive international trade in American-style tort litigation to new feeding grounds – on both an individual and some sort of collective basis. The multinational defendants in their sights must, at the same time, organize and discipline themselves to an international focus in terms of litigation risk management – reasoning and ordering all subsidiary action accordingly. This effort must begin with the active engagement of governments, the legal academy and consumer groups – to the end of striking balance and establishing lines of communication for constructive dialogue.

These waters, together with the storm clouds on the horizon, must be carefully charted and navigated. As popular maritime folklore has it, “Red sky at night, sailor’s

delight. Red sky in the morning, sailors take warning.” Beware, the perfect storm.

*David Wallace is a litigation partner at Chadbourne & Parke LLP specializing in products liability litigation. He has represented and counseled tobacco companies in litigation in civil and common law jurisdictions internationally for 20 years. He is grateful for the research assistance of Chadbourne associate Cassandre Charles and the editorial comments of Chadbourne partner Joseph Falcone. He may be reached at [dwallace@chadbourne.com](mailto:dwallace@chadbourne.com) or 212-408-5498.*

## Bankruptcy Litigation

### Standing

#### Second Circuit Holds Investors Lacked Standing to Contest or Appeal Preference Settlement in Refco Case

[\*In re Refco, Inc.\*, No. 05-6844, 2007 BL 118933 \(2d Cir. Oct. 5, 2007\)](#)

On October 5, 2007, the Second Circuit Court of Appeals affirmed the settlement of a preference action, ruling that a defendant’s investors lacked party-in-interest standing under [11 U.S.C. § 1109\(b\)](#) to contest, and therefore appeal, approval of the settlement. Similarly, joint liquidators’ appointed by a foreign court were held by the Second Circuit to stand in the shoes of the defendant and were therefore also precluded from appealing the settlement.

#### *Transfer of Funds on the Eve of Bankruptcy*

Sphinx SPC (Sphinx) was an investment company incorporated under the laws of the Cayman Islands. In order to manage each investor’s assets and liabilities, which were held in a particular portfolio or “cell,” Sphinx hired PlusFunds Group, Inc. (PlusFunds). According to the investors of Sphinx (Investors), PlusFunds hired Refco Alternative Investments (RAI) to oversee Refco related investments for Sphinx, and RAI, at PlusFunds’ direction, caused Sphinx to invest in accounts at its affiliate, Refco Capital Markets, Ltd. (RCM).

On October 12, 2005, five days before Refco, Inc. (Refco) filed for bankruptcy and two days after it announced a substantial, previously undisclosed liability that caused a crisis of confidence in RCM’s ability to accommodate client withdrawals, a total of \$312,046,266.23 was transferred from the Sphinx accounts at RCM to its affiliate Refco, LLC, and ultimately to accounts held on behalf of the “cells” at Lehman Brothers (Transfer). According to the Investors, the Transfer was made at the behest of PlusFunds, which maintained allegiances to Refco.