**Class Action Scarcity:**

**The Empirical Analysis of Securities Class Action in Korea**

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**Abstract**

Class action, originally developed in the United States, has recently spread throughout the world. Not all countries that emulated the US-style class action have seen the class action tool frequently used. Korea, one of the civil law countries that adopted a US-style class action in securities law more than 10 years ago, serves as an excellent example of legal transplant that is underutilized. The Securities-Related Class Action Act (“the SCAA”), modeled on U.S. class action generally, was enacted in 2004 in Korea and went into effect in 2005. Over the last 13 years, however, only 10 class action suits have been filed. Instead, securities damage suits in the form of non-class action (“securities damage suits”) are more frequently used in Korea.

In this paper, I aim to fill the gap in the literature by empirically researching why securities-related class action is seldom used in Korea, focusing on the perspective of the plaintiff’s lawyers and considering securities damages suits as an alternative. This research intends to provide meaningful insights to other countries considering the adoption of US-style class action. More broadly, this paper, as a case study, can contribute to enhancing our understanding of the conditions for legal transplants to successfully take root in the host country. To accomplish this, the study relies on a mixed-methods research approach: (1) interviews with plaintiff’s lawyers and plaintiffs and (2) content analysis of court decisions on securities class action suits and securities damage suits.

This research identifies three main factors that, in combination, discourage plaintiff’s lawyers from filing securities class action more often. First, the plaintiff’s lawyers in securities litigations are conditioned to be risk-averse, mainly due to the lack of risk diversification measures. They are generally small-sized firms or virtually operate as solo-practitioners, with no third-party litigation funding available. Moreover, cooperation among the plaintiff’s lawyers to share litigation risks, a practice developed in the United States over the last several decades, has not emerged yet. Second, filing securities class action imposes the risk of larger upfront investment and fee-shifting on the plaintiff’s lawyers, whereas plaintiffs bear those risks under securities damage suits. Moreover, the costs tend to be much larger under securities class actions due to not only the large claim amount and class size, but also the delay in certification procedures. Third, risk-averse plaintiff’s lawyers, facing large costs to bring securities class action suits, consider bringing securities class action only for cases with greater potential of winning and enforcing the judgment. Korea has no discovery system and the alternative method of a document production order is often ineffective. With the evidence typically on the defendant’s side in securities litigations, the plaintiff’s lawyers usually resort to governmental investigations to gather evidence from them. The cases that comprise preceding governmental investigations, however, often have issuing companies under a bankruptcy or rehabilitation proceeding. Therefore, only a scant number of cases, ones that satisfy the high bar of a guaranteed win and enforcement, would appeal to the risk-averse plaintiff’s lawyers as worth filing as class actions and for which a significant risk should be assumed.

Several lessons can be drawn from the Korean experience that would not only be valuable to the countries considering importing a US-style class action, but also inform the theory of legal transplant. First of all, the fit to the existing institutions should be carefully considered when the law is drafted. Second, in the process of legislation, the existence of substitutes and the incentives for the plaintiff’s lawyers to use such substitutes should be carefully assessed and compared with the incentives to use the new class action mechanism. Third, if the transplanted law may achieve its efficacy only through legal actors implementing the mechanism, enough time for adaptation should be allowed before judging the success or failure of the legal transplant. (629 words)

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