
SAVING THE KOREAN SECURITIES CLASS ACTION

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ABSTRACT

In 2005, the Securities-related Class Action Act went into force in Korea. Although this Act is similar to the class action rules of the United States in many respects, only thirteen securities class action cases have been filed in Korea, as of August 2017. This contrasts with the active use of the securities class action observed in the United States. This Comment compares the “law in the books” and the “law in practice” in the United States and Korea regarding the securities class action, aiming to find some explanation for the differences in practice between the two countries.

I show that there are many similarities between the two countries’ class action rules, such as the opt-out type class action feature and the contingency fee arrangement. Some differences, such as those in fee shifting rules, are mitigated by other rules or through innovative maneuvering by the plaintiff’s attorney. Other differences that may disfavor plaintiffs in Korea, such as the lack of discovery process, are mitigated by rules that account for the lack of such a process, such as rules shifting the burden of proof to the defendant regarding certain elements.

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After arguing that none of the analyzed factors provide a conclusive answer to account for the difference in the use of class actions, I argue that the difference may be caused by the distinction in the filing fee rule. In Korea, the filing fee escalates gradually in a function to the amount-at-stake. This is not only for the lead plaintiff but also for the class members. So, the lead plaintiff or the lead plaintiff's attorney will have to pay the filing fee not only for herself but for other class members. This rule lowers the incentives of using the class action for both the plaintiff and the plaintiff's attorney.

I propose using only the alleged amount of the lead plaintiff's amount-at-stake to calculate the filing fee, with a flat fee separately required for using the class action system. This flat fee will be borne by the plaintiff's attorney. This proposal will have the following merits compared to the current rule. First, this proposal will allow the plaintiff to consider only the merits of the class action, without taking into account the difference in the filing fee between filing an individual action and filing a class action. Second, it will lower the filing fee, thus incentivizing the plaintiff or the plaintiff's attorney to use the class action in securities-related matters. Last, by using the amount-at-stake for the lead plaintiff, it is possible to use the same formula that is currently used by courts when calculating the filing fee for monetary claims.

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1. INTRODUCTION

In Korea, the Securities-related Class Action Act ("SCAA") went into effect in January 2005.¹ The SCAA is intended to establish special provisions of Civil Procedure Act of Korea that only apply to securities-related class actions.² The SCAA has many provisions that are similar to the U.S. Federal Rule of Civil Procedures ("FRCP") Rule 23.³ For instance, the SCAA adopts an opt-out based class action procedure.⁴

The scope of the SCAA is narrower than that of the FRCP because the SCAA allows the use of the class action for only a few causes of action.⁵ However, the SCAA does allow the plaintiff or plaintiffs to sue with a few causes of action in the Financial Investment Services and Capital Markets Act ("FISCMA") of which some, especially Article 179 of the FISCMA ("Article 179"), are comparable to the Securities and Exchange Commission's Rule 10b-5 ("Rule 10b-5") cause of action in the United States.⁶

The Rule 10b-5 cause of action is used extensively in the United States.⁷ But, interestingly, there are almost no claims brought by the SCAA in Korea.⁸

¹ JAI YUN LIM, JABONSIJANGBEOBGWA PULKONGJEONGGEORAE [CAPITAL MARKET LAW AND UNFAIR TRADE] 541 (2014).

² HWA-JIN KIM, JAPONSIJANGBEOB IRON [THEORETICAL FOUNDATIONS OF SECURITIES REGULATION] 43 (2d ed. 2016).

³ LIM, *supra* note 1, at 541.

⁴ Jeunggwongwanryeon jipdansosongbeob [Securities-related Class Action Act], Act No. 7074, Jan. 20, 2004, amended by Act No. 11845, May 28, 2013, art. 28 (S. Kor.), <http://www.law.go.kr/법령/증권관련집단소송법> [<https://perma.cc/D2JY-NSLW>].

⁵ See *infra* Section 3.2.1.

⁶ LIM, *supra* note 1, at 452.

⁷ See *infra* Section 4.

⁸ Only thirteen securities class action cases were filed up until August 31, 2017 in Korea according to the notices that can be found in the website of the Supreme Court of Korea. Suwon District Court [Dist. Ct.], 2009Ga-Hap8829 (S. Kor.), http://www.scourt.go.kr/img/notice/090427_suwon.pdf [<https://perma.cc/3PG6-BZK3>]; Seoul Central Dist. Ct., 2010Ga-Hap1604 (S. Kor.), http://www.scourt.go.kr/img/notice/101231_seoul.pdf [<https://perma.cc/V55L-3EXT>]; Seoul Southern Dist. Ct., 2011Ga-Hap19387 (S. Kor.), http://www.scourt.go.kr/img/notice/111022_slambu.pdf [<https://perma.cc/455N-NPTN>]; Seoul Southern Dist. Ct., 2011Ga-Hap23003 (S. Kor.), http://www.scourt.go.kr/img/notice/111201_slambu.pdf [<https://perma.cc/6N75-DE4F>]; Seoul Central Dist. Ct., 2012Ga-Hap17061 (S. Kor.), http://www.scourt.go.kr/img/notice/120309_seoul.pdf

Various arguments are made about the reasons why the enactment of the SCAA did not result in active filings of securities class actions in Korea. One scholar pointed to the lack of compensation for the class representative's time and effort.⁹ Another scholar pointed to the size of the market capitalization of the Korean listed corporations¹⁰ and the number of plaintiff's attorneys in Korea.¹¹ Another explained that the restraints of the SCAA procedure combined with the general Korean civil procedure work together to discourage the use of the SCAA.¹²

[<https://perma.cc/QD8N-YMVN>]; Seoul Central Dist. Ct., 2013Ga-Hap74313 (S. Kor.), http://www.scourt.go.kr/img/notice/131016_seoul.pdf
 [<https://perma.cc/6JVX-TH42>]; Seoul Southern Dist. Ct., 2013Ga-Hap107585 (S. Kor.), http://www.scourt.go.kr/img/notice/131202_slambu.pdf
 [<https://perma.cc/9MSB-Z9CR>]; Seoul Western Dist. Ct., 2013Ga-Hap35856 (S. Kor.), http://www.scourt.go.kr/img/notice/131204_slseobu.pdf
 [<https://perma.cc/TAE7-2S3V>]; Suwon Dist. Ct., 2013Ga-Hap26404 (S. Kor.), http://www.scourt.go.kr/img/notice/131206_suwon.pdf
 [<https://perma.cc/JB7H-993G>]; Seoul Central Dist. Ct., 2014Ga-Hap31627 (S. Kor.), http://www.scourt.go.kr/img/notice/140626_seoul.pdf
 [<https://perma.cc/BRU9-9ZLW>]; Seoul Central Dist. Ct., 2014Ga-Hap30150 (S. Kor.), http://www.scourt.go.kr/img/notice/140714_seoul.pdf
 [<https://perma.cc/HA5X-HR5P>]; Seoul Western Dist. Ct., 2015Ga-Hap9047 (S. Kor.), http://www.scourt.go.kr/img/notice/170929_seoul.pdf
 [<https://perma.cc/2VKR-5RNF>]; Seoul Western Dist. Ct., 2016Ga-Hap30418 (S. Kor.), http://www.scourt.go.kr/img/notice/160128_slseobu.pdf
 [<https://perma.cc/DNT7-QN3Y>]. Because securities class actions are so infrequently filed, it has been said that the SCAA has failed. See Myungjong Kim, *Securities Class Action System in South Korea; The Failure of ASCA in Korea* 38 (2010) (unpublished Master of Laws dissertation, University of Washington) (on file with the Gallagher Law Library, University of Washington) (arguing that the SCAA did not succeed in taking root in Korea).

⁹ See Young-Cheol Jeong, *Legal Compliance and Korea's Financial Services Market: A Strategic Approach*, 20 PAC. RIM L. & POL'Y J. 483, 508 (2011) ("Due in part to a lack of compensation for the class representative's time and efforts, many expect the Securities Class Action Act to become a dead letter.").

¹⁰ See Stephen J. Choi, *The Evidence on Securities Class Actions*, 57 VAND. L. REV. 1465, 1508-10 (2004) (explaining that Korean listed corporations' relatively small market capitalization may negatively affect the incentive to bring a class action against them).

¹¹ See *id.* at 1516-17 (explaining that the relatively small number of the Korean attorneys and their lack of experience in litigating securities class action as plaintiff's lawyers will negatively affect the number of class action filings at least initially).

¹² See Sheron Korpus, *Is Korea's Securities Class Action Law Working?*, 25 INT'L FIN. L. REV. 53, 53-54 (2006) (explaining that factors such as the limits on lead plaintiff and counsel, limits on size and stake minimums, high up-front costs, lack of discovery system, lack of jury system, and fee shifting deters class action filings in Korea).

This Comment compares some differences between the law of Korea and the United States regarding securities class actions. It covers class action procedures, contingency fee rules, fee shifting rules, discovery systems, jury systems, and filing fee rules.¹³ This Comment tries to show not only the differences in law, but also some of the practices used by the lawyers and judges that mitigate the differences in practice. By doing so, I argue that such differences in the legal system may not in fact be that different, at least regarding the effect on the incentives of the plaintiff or plaintiff's attorney. However, I find, and suggest a reform to, one substantial obstacle in Korean law that could be effectively prohibiting the use of the securities class actions: the filing fee rule.

This Comment will proceed as follows. First, I will introduce some theories regarding the role of the players who potentially have a say in whether to file suit, that is the plaintiff and the plaintiff's counsel, in the enforcement of class action. I do not intend to make any claim here about whether such a role played by each party is a positive one. Rather, I describe the role as it is currently thought to be played in the United States. Second, I will introduce the law regarding class action as it stands in the United States and Korea. Because many cases are filed as class actions, under Rule 10b-5, in the United States, the introduction will focus on rules regarding the Rule 10b-5 class action. But because there is no such concentration in Korea, I will generally introduce the substantive law that allows the use of the SCAA, followed by an explanation of the SCAA. Third, I will introduce the current practice of private enforcements on securities class action in the United States and Korea. While my introduction about this practice in the United States will be brief, I will go into more details about the practice as it exists in Korea. The Supreme Court of Korea ("SCK") uses its website to disclose information regarding SCAA cases. This allows me to collect some details about securities class actions filed in Korea. Fourth, I will explain, and compare, the differences between the practice of securities litigation in both countries, including the differences in each respective country's civil procedure law and evidence law. In

¹³ Similar comparisons using some or all of these factors have been made in different contexts. *See, e.g., id.* (comparing various aspects of Korean civil procedure and SCAA procedure); Manning Gilbert Warren III, *The U.S. Securities Fraud Class Action: An Unlikely Export to the European Union*, 37 BROOK. J. INT'L L. 1075, 1085-86 (2012) (comparing the general civil procedure between the United States and the European countries).

my comparisons, I will try to focus on how the various parties' incentives in securities class actions are affected by each country's securities litigation practices. Said section will cover the differences not only between the countries' class action procedures, but also between other parts of their legal systems, including their civil procedure laws. Fifth, I will point to a difference between the two countries' civil procedures that seems to account for the difference in class action filings: the difference in the filing fee rule. I will suggest a reform to the filing fee rule in Korea that may allow more active use of the SCAA class action. Sixth, I will conclude.

2. THEORY ON CLASS ACTION ENFORCEMENTS

The class action system, specifically the opt-out type of class action system, has a distinguishable feature that allows the action to be filed and pursued even in instances where an individual claimant, apart from the class, would not be incentivized to do so, because her expense would be higher than the amount she would be able to recover.¹⁴ The class action works as a tool to overcome the free-rider problem and other collective action problems that usually arise in a situation where a large number of people have been injured by another person's conduct, but the injury to many of these individuals is, taken in isolation, small.¹⁵ The U.S.-type class action mechanism, with its distinct characteristics, collectively solves the problem of addressing these negative value claims — that is, those claims in which enforcement cost outweighs the value to the individual claimant.¹⁶

¹⁴ See James D. Cox, *Making Securities Fraud Class Actions Virtuous*, 39 ARIZ. L. REV. 497, 497 (1997) ("Where the single claimant could not proceed individually because her expenses would dwarf the expected recover, the class action can be brought on behalf of all who are similarly situated.").

¹⁵ See Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 8 (1991) (discussing the economic rationale for class action).

¹⁶ See John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 291-92 (2010) (discussing the uniqueness of the U.S. entrepreneurial litigation system that includes the availability of class action procedure).

In the class action context, it may be that any individual plaintiff has less at stake in the outcome of the case compared to the plaintiff's counsel.¹⁷ This difference in stake between the two could be quite sizable.¹⁸ And this difference may cause the plaintiff's counsel to act as a principal rather than an agent, regardless of the legal relationship.¹⁹ Moreover, in some instances, this system allows the attorney to seek out the violation because the attorney may expect to be compensated by the contingency fee amplified in a class action.²⁰ After the plaintiff's attorney decides to bring suit, the plaintiff's attorney may identify and secure the client to bring suit.²¹ Even when the Congress enacted the Private Securities Litigation Reform Act ("PSLRA") to reform the private enforcement system in 1995, the focus was on the behavior of plaintiffs' attorneys.²² For this reason, this comment will generally focus on the effect each legal mechanism may have on the incentive of the plaintiff's attorney, rather than the plaintiff, when deciding whether to commence a class action.

¹⁷ See John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implication of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 677-78 (1986) (explaining that the client of a class action generally has only a nominal stake in the outcome of a litigation).

¹⁸ See John C. Coffee, Jr., *Accountability and Competition in Securities Class Action: Why "Exit" Works Better than "Voice"*, 30 CARDOZO L. REV. 407, 413 (2008) ("Typically, class counsel expects a contingent fee in the vicinity of 25% of the recovery, and no class member will likely own a similar percentage of the defendant's stock to give it an equivalent stake in the action.").

¹⁹ See *id.* at 411 (noting that the plaintiff's attorney can behave less as an agent and more as an independent entrepreneur in a class action).

²⁰ See Coffee, Jr., *supra* note 17, at 679 ("[B]ecause the attorney as private enforcer looks to the court, not the client, to award him a fee if successful, the attorney can find the legal violation first and the client second.").

²¹ See *id.* at 682 ("Once the plaintiff's attorney has decided to bring suit, identifying and securing a nominal client is often only a necessary procedural step that seldom poses a substantial barrier for the experienced professional.").

²² See Stephen J. Choi & Robert B. Thompson, *Securities Litigation and Its Lawyers: Changes During the First Decade After the PSLRA*, 106 COLUM. L. REV. 1489, 1490 (2006) (noting that all three PSLRA reform tactics are directed at the behavior of plaintiff's lawyers).

3. THE SECURITIES CLASS ACTION IN THE UNITED STATES AND KOREA: THE LAW IN THE BOOKS

3.1. *The Rule 10b-5 Class Action in the United States: the Law in the Books*

A plaintiff who files a Rule 10b-5 class action complaint must publish notice within twenty days to other potential class members encouraging them to take action.²³ Any member of the purported class may move to serve as a lead plaintiff within sixty days after the date of the publication.²⁴ The court should appoint as lead plaintiff the member or members of the purported plaintiff class that it determines to be the most capable of adequately representing the interest of the class members.²⁵ It is the lead plaintiff who usually selects and retains counsel to represent the class.²⁶ The defendants may move to dismiss the case.²⁷

After the motion to dismiss, the case proceeds to the class certification stage.²⁸ Class action is allowed only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.²⁹ To seek monetary relief, the plaintiffs must also show that (1) questions of law or fact common to class members predominate over any questions affecting only individual members, and that (2) a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.³⁰

²³ 15 U.S.C. § 78u-4(a)(3)(A).

²⁴ 15 U.S.C. § 78u-4(a)(3)(A)(i)(II).

²⁵ 15 U.S.C. § 78u-4(a)(3)(B)(i).

²⁶ See Tom Baker & Sean J. Griffith, *How the Merits Matter: Directors' and Officers' Insurance and Securities Settlements*, 157 U. PA. L. REV. 755, 771 (2009) (explaining the mechanism for selecting a lead plaintiff).

²⁷ FED. R. CIV. P. 12.

²⁸ MICHAEL J. KAUFMAN & JOHN M. WUNDERLICH, *RULE 10B-5 SECURITIES-FRAUD LITIGATION* 353 (2015).

²⁹ FED. R. CIV. P. 23(a).

³⁰ FED. R. CIV. P. 23(b)(3).

It is possible to opt out of a class action that seeks monetary damages.³¹ If a party opts out of a securities class action, the party is not bound by the class action.³²

3.2. *The Securities Related Class Action in Korea: The Law in the Books*

3.2.1. *Causes of Action Allowed to Use the SCAA*

Article 3 of the SCAA allows the use of the act for only a few specified causes of action. They are: (1) claims for damages referred to in article 125 of the FISCMA (“Article 125”);³³ (2) claims for damages referred to in article 162 of the FISCMA (“Article 162”) excluding reports on material facts referred to in article 161 of the FISCMA (“Article 161”);³⁴ (3) claim for damages referred to in article 175, 177, or 179 of the FISCMA;³⁵ and (4) claims for damages referred to in article 170 of the FISCMA (“Article 170”).³⁶ Article 125 concerns the false description or representation of a material statement in a registration statement or an investment prospectus.³⁷ Article 162 concerns false description or representation of a material fact in a business report, half-yearly report, quarterly report, or material fact report under article 159(1) of the FISCMA (hereinafter referred to as “Business Report”) or a document attached thereto (excluding audit

³¹ See Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1537-38 (2004) (explaining some effects of the opt-out right to the practice of class action law).

³² KAUFMAN ET AL., *supra* note 28, at 636.

³³ Jeunggwongwanryeon jipdansosongbeob [Securities-related Class Action Act], Act No. 7074, Jan. 20, 2004, amended by Act No. 11845, May 28, 2013, art. 3 (S. Kor.), <http://www.law.go.kr/법령/증권관련집단소송법> [<https://perma.cc/D2JY-NSLW>].

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Jabonsijanggwa geumyungtujaeope gwanhan beobryul [Financial Investment Services and Capital Markets Act], Act No. 8635, Aug. 3, 2007, amended by Act No. 14817, Apr. 18, 2017, art. 162 (S. Kor.), <http://www.law.go.kr/법령/자본시장과금융투자업에관한법률> [<https://perma.cc/KY7H-Y9HJ>].

reports prepared by an accounting auditor), or due to an omission of a description or representation of a material fact therein.³⁸ Article 175 of the FISCMA (“Article 175”) regulates insider trading.³⁹ Article 177 of the FISCMA (“Article 177”) regulates market price manipulation.⁴⁰ And Article 170 of the FISCMA regulates auditor’s liability.⁴¹ Article 179 works as a catch-all provision, like Rule 10b-5.⁴² Article 179 states that a person who violates Article 178 of FISCMA (“Article 178”) shall be liable for damages sustained by a person who trades or makes any other transaction in financial investment instruments by relying on violation in connection with such trading or transaction.⁴³ And Article 178 regulates various actions to deter fraud; it includes a clause stating that no one may employ any device, scheme, or artifice in connection with trading (including public offering, private placement, and sale in case of securities) or other transaction of financial investment instruments, of which the wording is an attempt to translate the wording of Rule 10b-5 into Korean.⁴⁴

³⁸ Japonsijanggwa geumyungtujaeope gwanhan beobyul [Financial Investment Services and Capital Markets Act], Act No. 8635, Aug. 3, 2007, amended by Act No. 14817, Apr. 18, 2017, art. 162 (S. Kor.), <http://www.law.go.kr/법령/자본시장과금융투자업에관한법률> [<https://perma.cc/KY7H-Y9HJ>].

³⁹ Japonsijanggwa geumyungtujaeope gwanhan beobyul [Financial Investment Services and Capital Markets Act], Act No. 8635, Aug. 3, 2007, amended by Act No. 14817, Apr. 18, 2017, art. 175 (S. Kor.), <http://www.law.go.kr/법령/자본시장과금융투자업에관한법률> [<https://perma.cc/KY7H-Y9HJ>].

⁴⁰ Japonsijanggwa geumyungtujaeope gwanhan beobyul [Financial Investment Services and Capital Markets Act], Act No. 8635, Aug. 3, 2007, amended by Act No. 14817, Apr. 18, 2017, art. 177 (S. Kor.), <http://www.law.go.kr/법령/자본시장과금융투자업에관한법률> [<https://perma.cc/KY7H-Y9HJ>].

⁴¹ Japonsijanggwa geumyungtujaeope gwanhan beobyul [Financial Investment Services and Capital Markets Act], Act No. 8635, Aug. 3, 2007, amended by Act No. 14817, Apr. 18, 2017, art. 170 (S. Kor.), <http://www.law.go.kr/법령/자본시장과금융투자업에관한법률> [<https://perma.cc/KY7H-Y9HJ>].

⁴² See LIM, *supra* note 1, at 536.

⁴³ Japonsijanggwa geumyungtujaeoppe gwanhan beobyul [Financial Investment Services and Capital Markets Act], Act No. 8635, Aug. 3, 2007, amended by Act No. 14817, Apr. 18, 2017, art. 179 (S. Kor.), <http://www.law.go.kr/법령/자본시장과금융투자업에관한법률> [<https://perma.cc/KY7H-Y9HJ>].

⁴⁴ See LIM, *supra* note 1, at 466.

The SCK has interpreted Article 178(1)1 to mean: all device, scheme, or artifice that is deemed socially unfair.⁴⁵ The SCK said that the test for determining what unfair means is: whether the act is forbidden by the law, or whether the act makes other investors make wrong decisions, so that it hurts fair competition and shifts monetary harm to good investors, which in turn leads to damaging the fairness, integrity and efficiency of the capital market.⁴⁶ And to determine whether an act comprises an unfair act that is prohibited by Article 178, one must consider factors such as, but not limited to, the structure of the financial investment product in question, the method of the transaction, the circumstances of the transaction, the particularity of the market in which the financial investment product is traded, the terms of rights and obligations of the investor, the period of termination of the rights and obligations, the relation between the actor and the investor, and circumstances of the time of, before, and after the action.⁴⁷ According to the SCK's interpretation, it is possible to say that Article 179 is a catch-all provision intended to deter unfair actions in the securities market.⁴⁸

3.2.2. The SCAA Procedures

The claim for damages by the SCAA may be filed when damages result from trade or other securities transactions issued by a stock-listed corporation.⁴⁹ Because the SCAA only allows certain causes of action, as seen above, other causes of action, including tort in the Civil Act of Korea may not be raised in the procedure.⁵⁰

Anyone who wants to be considered a lead plaintiff in the class action should file a complaint with an application asking for permission to use class action under the SCAA.⁵¹ A claimant who may be

⁴⁵ Supreme Court [S. Ct.], 2013Do4064, Jan. 16, 2014 (S. Kor.).

⁴⁶ S. Ct. 2013Do4064, Jan. 16, 2014 (S. Kor.).

⁴⁷ S. Ct. 2013Ma1052 & 1053 (consol.), Apr. 9, 2015 (S. Kor.).

⁴⁸ LIM, *supra* note 1, at 452.

⁴⁹ Jeunggwongwanryeon jipdansosongbeob [Securities-related Class Action Act], Act No. 7074, Jan. 20, 2004, amended by Act No. 11845, May 28, 2013, art. 3 (S. Kor.), <http://www.law.go.kr/법령/증권관련집단소송법> [<https://perma.cc/D2Y-NSLW>].

⁵⁰ LIM, *supra* note 1, at 545.

⁵¹ Jeunggwongwanryeon jipdansosongbeob [Securities-related Class Action Act], Act No. 7074, Jan. 20, 2004, amended by Act No. 11845, May 28, 2013, art. 7 (S.

considered to be the lead plaintiff should be deemed a class member who can represent the interests of the class fairly and appropriately, such as a person who is a class member with the largest economic benefit in the class action among the members.⁵² The plaintiff's attorney should also be a person who can represent the interests of the class fairly and appropriately.⁵³ A person who has been involved in three or more securities-related class actions as a lead plaintiff or lead plaintiff's attorney during the preceding three years may not be a lead plaintiff or lead plaintiff's attorney unless the court finds that, considering the circumstances, the person has met the requirements listed above.⁵⁴

The court shall, within ten days after receiving the complaint and application, give public notice of: (1) the fact that a class action has been filed; (2) the alleged scope of the class; (3) the alleged claim and the summary of the counts; and (4) a notice that any class member who intends to be the lead plaintiff should file an application within thirty days from the notice.⁵⁵ The claimant shall pay for the notice to the court in advance.⁵⁶ The court shall, within fifty days from the date of publicizing the notice above, appoint a person who is deemed to be the most appropriate person to represent the interests of the class as a lead plaintiff from among those who meet the requirements to be the lead plaintiff, as explained above, and who either initially filed the complaint or filed an application to be the lead plaintiff.⁵⁷

Kor.), <http://www.law.go.kr/법령/증권관련집단소송법> [<https://perma.cc/D2JY-NSLW>].

⁵² Jeunggwongwanryeon jipdansosongbeob [Securities-related Class Action Act], Act No. 7074, Jan. 20, 2004, *amended by* Act No. 11845, May 28, 2013, art. 11 (S. Kor.), <http://www.law.go.kr/법령/증권관련집단소송법> [<https://perma.cc/D2JY-NSLW>].

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Jeunggwongwanryeon jipdansosongbeob [Securities-related Class Action Act], Act No. 7074, Jan. 20, 2004, *amended by* Act No. 11845, May 28, 2013, art. 10 (S. Kor.), <http://www.law.go.kr/법령/증권관련집단소송법> [<https://perma.cc/D2JY-NSLW>].

⁵⁶ Jeunggwongwanryeonjipdansosonggyuchik [Rule on the Securities-related Class Action], S. Ct. Rule No. 1916, Dec. 29, 2004, art. 4 (S. Kor.), <http://www.law.go.kr/법령/증권관련집단소송규칙> [<https://perma.cc/WTM9-75ZD>].

⁵⁷ Jeunggwongwanryeon jipdansosongbeob [Securities-related Class Action Act], Act No. 7074, Jan. 20, 2004, *amended by* Act No. 11845, May 28, 2013, art. 10 (S. Kor.), <http://www.law.go.kr/법령/증권관련집단소송법> [<https://perma.cc/D2JY-NSLW>].

When multiple plaintiffs file complaints under the SCAA, the court shall consolidate the cases.⁵⁸ In this case, the court may appoint the lead plaintiff and lead plaintiff's attorney after listening to opinions of the plaintiffs or the class members who applied to be the lead plaintiff.⁵⁹

For a case to proceed as a class action, the plaintiffs must meet the following requirements. First, there should be at least fifty class members with the sum of the securities held by the class members being at least 1/10,000 of the total number of the outstanding securities of the defendant corporation at the time of conduct which is the ground for the claim.⁶⁰ This requirement need only be met at the time of the filing.⁶¹ Second, there should be a material legal or factual issue for a claim, allowed the use of the SCAA, that is common to all class members.⁶² Third, class action should be a suitable and efficient means to realize the rights of the class members or protect their interests.⁶³ Finally, there should be no defects on the application for class action or its accompanying documents.⁶⁴

The court shall allow the case to proceed as class action only if the court finds that the requirements have been met.⁶⁵ The court should issue an order to prepay necessary costs, such as costs for notice to the individuals, announcement to the public, and hiring an

⁵⁸ Jeunggwongwanryeon jipdansosongbeob [Securities-related Class Action Act], Act No. 7074, Jan. 20, 2004, *amended by* Act No. 11845, May 28, 2013, art. 14 (S. Kor.), <http://www.law.go.kr/법령/증권관련집단소송법> [<https://perma.cc/D2JY-NSLW>].

⁵⁹ *Id.*

⁶⁰ Jeunggwongwanryeon jipdansosongbeob [Securities-related Class Action Act], Act No. 7074, Jan. 20, 2004, *amended by* Act No. 11845, May 28, 2013, art. 12 (S. Kor.), <http://www.law.go.kr/법령/증권관련집단소송법> [<https://perma.cc/D2JY-NSLW>].

⁶¹ *Id.*

⁶² *Id.*

⁶³ Jeunggwongwanryeon jipdansosongbeob [Securities-related Class Action Act], Act No. 7074, Jan. 20, 2004, *amended by* Act No. 11845, May 28, 2013, art. 12 (S. Kor.), <http://www.law.go.kr/법령/증권관련집단소송법> [<https://perma.cc/D2JY-NSLW>].

⁶⁴ *Id.*

⁶⁵ See Jeunggwongwanryeon jipdansosongbeob [Securities-related Class Action Act], Act No. 7074, Jan. 20, 2004, *amended by* Act No. 11845, May 28, 2013, art. 15 (S. Kor.), <http://www.law.go.kr/법령/증권관련집단소송법> [<https://perma.cc/D2JY-NSLW>].

expert for appraisal, when allowing the class to proceed as class action.⁶⁶ Both of the decisions – to allow class action and to deny class action – may be appealed.⁶⁷ If the decision not to allow proceeding as class action is conclusive and beyond appeal, the case will be deemed as if not filed.⁶⁸

When the decision to allow proceeding as class action is conclusive and beyond appeal, the court should give notice about certain information regarding the class action: including, but not limited to, the name and address of the lead plaintiff and defendant, the name and address of the lead plaintiff's counsel, the scope the class, the claim, the procedure and period for opting out of the class, the fact that an opted-out member may sue individually, the fact that class members who do not opt out will be legally bound by the decision made by the court, the fact that class members can replace lead plaintiff with permission from the court, and the information regarding fee contract of the lead counsel.⁶⁹ The court may ask the lead plaintiff, defendant, or the stock exchange, for the name and address of the class members, to send the notices by ordinary mail.⁷⁰ The court should also make the requisite announcement above by newspaper that is distributed nationwide.⁷¹

⁶⁶ Jeunggwongwanryeon jipdansosongbeob [Securities-related Class Action Act], Act No. 7074, Jan. 20, 2004, *amended by* Act No. 11845, May 28, 2013, art. 16 (S. Kor.), <http://www.law.go.kr/법령/증권관련집단소송법> [<https://perma.cc/D2JY-NSLW>].

⁶⁷ Jeunggwongwanryeon jipdansosongbeob [Securities-related Class Action Act], Act No. 7074, Jan. 20, 2004, *amended by* Act No. 11845, May 28, 2013, art. 15 (S. Kor.), <http://www.law.go.kr/법령/증권관련집단소송법> [<https://perma.cc/D2JY-NSLW>]; Jeunggwongwanryeon jipdansosongbeob [Securities-related Class Action Act], Act No. 7074, Jan. 20, 2004, *amended by* Act No. 11845, May 28, 2013, art. 17 (S. Kor.), <http://www.law.go.kr/법령/증권관련집단소송법> [<https://perma.cc/D2JY-NSLW>].

⁶⁸ Jeunggwongwanryeon jipdansosongbeob [Securities-related Class Action Act], Act No. 7074, Jan. 20, 2004, *amended by* Act No. 11845, May 28, 2013, art. 17 (S. Kor.), <http://www.law.go.kr/법령/증권관련집단소송법> [<https://perma.cc/D2JY-NSLW>].

⁶⁹ Jeunggwongwanryeon jipdansosongbeob [Securities-related Class Action Act], Act No. 7074, Jan. 20, 2004, *amended by* Act No. 11845, May 28, 2013, art. 18 (S. Kor.), <http://www.law.go.kr/법령/증권관련집단소송법> [<https://perma.cc/D2JY-NSLW>].

⁷⁰ Jeunggwongwanryeonjipdansosonggyuchik [Rule on the Securities-related Class Action], S. Ct. Rule No. 1916, Dec. 29, 2004, art. 15 (S. Kor.), <http://www.law.go.kr/법령/증권관련집단소송규칙> [<https://perma.cc/WTM9-75ZD>].

⁷¹ Jeunggwongwanryeon jipdansosongbeob [Securities-related Class Action Act], Act No. 7074, Jan. 20, 2004, *amended by* Act No. 11845, May 28, 2013, art. 18 (S.

Class members may opt out of the class action before the end of the opt-out period on the notice above.⁷² The final and conclusive decision made by the court binds all class members who did not opt out.⁷³ After the class certification stage, the case will proceed to the trial stage, where the court will consider the merits of the case.

4. THE U.S. SECURITIES CLASS ACTION: THE LAW IN PRACTICE

In the United States, 189 new federal securities class action suits have been filed in 2015, meaning 4% of U.S. exchange-listed companies were subject to such filings.⁷⁴ The plaintiff's attorneys earned more than fourteen billion dollars in fees and expenses from securities litigation during the period between 1997 and 2013.⁷⁵ In 2014, the total settlement amount was more than one billion dollars.⁷⁶ Of the cases filed in 2015, about 84% included Rule 10b-5 claims.⁷⁷ And

Kor.), <http://www.law.go.kr/법령/증권관련집단소송법> [<https://perma.cc/D2JY-NSLW>].

⁷² Jeunggwongwanryeon jipdansosongbeob [Securities-related Class Action Act], Act No. 7074, Jan. 20, 2004, *amended by* Act No. 11845, May 28, 2013, art. 28 (S. Kor.), <http://www.law.go.kr/법령/증권관련집단소송법> [<https://perma.cc/D2JY-NSLW>].

⁷³ Jeunggwongwanryeon jipdansosongbeob [Securities-related Class Action Act], Act No. 7074, Jan. 20, 2004, *amended by* Act No. 11845, May 28, 2013, art. 37 (S. Kor.), <http://www.law.go.kr/법령/증권관련집단소송법> [<https://perma.cc/D2JY-NSLW>].

⁷⁴ Cornerstone Research, *Securities Class Action Filings – 2015 Year in Review 1* (2016), <http://securities.stanford.edu/research-reports/1996-2015/Cornerstone-Research-Securities-Class-Action-Filings-2015-YIR.pdf> [<https://perma.cc/99ER-P2T8>].

⁷⁵ Joseph A. Grundfest, *Damages and Reliance Under Section 10(b) of the Exchange Act*, 69 BUS. LAW. 307, 308-09 (Feb. 2014).

⁷⁶ Cornerstone Research, *Securities Class Action Settlements – 2014 Review and Analysis 1* (2015), <https://www.cornerstone.com/GetAttachment/701f936e-ab1d-425b-8304-8a3e063abae8/Securities-Class-Action-Settlements-2014-Review-and-Analysis.pdf> [<https://perma.cc/5L8Y-KBA6>].

⁷⁷ Cornerstone Research, *supra* note 74, at 8.

almost all of the allegations in the claims filed included misrepresentation in the financial documents.⁷⁸ But the possibility of the auditor being named as defendant in the United States is quite low.⁷⁹

Not many cases actually go to trial because most cases are either dismissed or settled.⁸⁰ According to one study, only twenty-one cases have gone to trial and only fifteen cases have reached a verdict or judgment out of 4,435 securities class action suits filed between the enactment of PSLRA and December 31st, 2014.⁸¹ No trial was held in 2015.⁸² Another study found that, of securities law cases seeking damages from 1980 to 2005, only thirty-seven cases were tried to judgment against public companies, their officers and directors, or both.⁸³

5. THE SECURITIES CLASS ACTION OF KOREA: THE LAW IN PRACTICE

5.1. General Introductions on Filing of Class Actions in Korea

As of August 31, 2017, thirteen SCAA cases have been filed in the courts of Korea.⁸⁴ The SCK gives notices on those cases on its

⁷⁸ *Id.* (finding 99% of the filed securities class action cases contained misrepresentation in the financial documents).

⁷⁹ *Id.* (finding that the percentage of the auditor being named in securities class action cases that has been filed each year in the United States did not rise above 3% between 2011 and 2015).

⁸⁰ Michael Klausner, Jason Hegland & Matthew Goforth, *When Are Securities Class Actions Dismissed, When Do They Settle, and for How Much? An Update*, 23 PLUS 1 (April 2013).

⁸¹ Renzo Comolli & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2014 Full-Year Review* 36 (2015), http://www.nera.com/content/dam/nera/publications/2015/PUB_2014_Trends_0115.pdf [<https://perma.cc/QB3Y-MAF6>].

⁸² Svetlana Starykh & Stefan Boettrich, *Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review* 38 (2016) http://www.nera.com/content/dam/nera/publications/2016/2015_Securities_Trends_Report_NERA.pdf [<https://perma.cc/8VNX-MTSN>].

⁸³ Bernard Black, Brian Cheffins & Michael Klausner, *Outside Director Liability*, 58 STAN. L. REV. 1055, 1064 (2006).

⁸⁴ See *supra* note 8 (listing cases filed).

website,⁸⁵ which may be used to follow the case docket summary of each case, also accessible on its website.⁸⁶ I have summarized the cases in appendix Table A (“Appendix A”).

Of the thirteen SCAA cases, two were consolidated because they concerned the same facts, but involved different defendants.⁸⁷ Another three cases were consolidated because they also concerned the same facts, but with different defendants.⁸⁸ So, the actual case count is ten. Of the ten cases, two have been settled.⁸⁹ And one court found for the plaintiffs.⁹⁰ The other cases are still pending, at various stages, with some courts granting certification.⁹¹

None of the lead plaintiffs in the SCAA cases seem to be institutional investors, such as mutual funds or pension funds.⁹² Most of the plaintiffs were individuals, with only a few corporations joining the individuals as plaintiffs.⁹³ Some cases were filed with multiple plaintiffs, with one case having over 1,000 plaintiffs.⁹⁴

Regarding the plaintiff’s counsel, it is interesting to note that the lawyers who had been the first to make use of the SCAA and who had succeeded in managing the case until the end did not engage in any other class actions.⁹⁵ One firm, *Hannuri Law*, holds six cases, and two different law firms hold one case each.⁹⁶ The lead plaintiff in

⁸⁵ Sup. Ct. S. Kor., *Jeunggwongwanryeon jipdansosong*, <http://www.scourt.go.kr/portal/notice/securities/securities.jsp> [<https://perma.cc/9FGF-Y2GX>].

⁸⁶ Sup. Ct. S. Kor., *Nauisageongeomsaek*, <http://www.scourt.go.kr/portal/information/events/search/search.jsp> [<https://perma.cc/3GNP-Z992>].

⁸⁷ See *infra* Appendix A.

⁸⁸ See *id.*

⁸⁹ See Yeongkil Jo, *Bunbaejongryobogoseo* [Report on Final Distributions] (Jan. 30, 2012), http://www.scourt.go.kr/img/notice/120130_suwon.pdf [<https://perma.cc/ESU3-T5TG>]; Seoul Central Dist. Ct., *Gonggo* [Notice] (Feb. 10, 2017), http://www.scourt.go.kr/img/notice/170210_seoul.pdf [<https://perma.cc/LA4M-NXG5>].

⁹⁰ See Seoul Central Dist. Ct., 2012Ga-Hap17061, Jan. 20, 2017 (S. Kor.).

⁹¹ See *infra* Appendix A.

⁹² See *id.*

⁹³ See *id.*

⁹⁴ See *id.* In the United States, aggregation of plaintiffs was a method used by counsel to secure the position of lead counsel. See Jill E. Fisch, *Aggregation, Auctions, and Other Developments in the Selection of Lead Counsel Under the PSLRA*, 64 L. & CONTEMP. PROBS. 53, 63-64 (2001). However, this may not be the case here, because there were no competing filings for lead plaintiff in cases filed in Korean courts. See *infra* Appendix A.

⁹⁵ See *infra* Appendix A.

⁹⁶ See *id.*

one of the two consolidated cases is being counseled by two different law firms, and of the two law firms, one had a lawyer, Park Pilseo, who left *Hannuri Law* to join it at the time the class action was filed.⁹⁷ Since then, the lawyer, Park Pilseo, has rejoined *Hannuri Law*.⁹⁸ Of the law firms involved in these SCAA cases, only *Hannuri Law* seems to define itself as a plaintiff's law firm, according to its website.⁹⁹

There are differences between the cases regarding the characteristics of the defendants. The first case that has been filed as a class action had two directors as codefendants, but the plaintiffs voluntarily dismissed the cases against them before the settlement.¹⁰⁰ In every case where the lead counsel is *Hannuri Law*, the plaintiffs named the corporation as the only defendant.¹⁰¹ But in other cases, the plaintiffs have named individuals also as codefendants.¹⁰²

5.2. The First Case

The first class action case under the SCAA was filed in 2009.¹⁰³ The plaintiffs were a private equity fund and its director, and the defendants were a corporation, whose stocks were traded on the Kosdaq market, and its directors.¹⁰⁴ The plaintiffs alleged that the defendant corporation omitted a huge loss incurred to the corporation by a certain derivative product from the financial statement, causing the financial statement to show net profit instead of net loss,

⁹⁷ *See id.*

⁹⁸ *See id.*

⁹⁹ HANNURI LAW, <http://www.hannurilaw.co.kr> [http://web.archive.org/web/20170930213248/http://www.hannurilaw.co.kr/] (last visited Sept. 30, 2017); *see also* John C. Coffee, Jr., *The Globalization of Entrepreneurial Litigation: Law, Culture, and Incentives*, 165 U. PA. L. REV. 1895, 1915 (2017) (noting that "one law firm has brought the majority of securities class actions filed in South Korea.").

¹⁰⁰ *See infra* Appendix A.

¹⁰¹ *See id.*

¹⁰² *See id.*

¹⁰³ *See* Suwon Dist. Ct., *Jeunggwongwanryeonjipdansosongui sojegi gonggo* [Notice on Filing of Securities-related Class Action] (Apr. 29, 2009), http://www.scourt.go.kr/img/notice/090427_suwon.pdf [https://perma.cc/X37T-9KL4].

¹⁰⁴ Suwon Dist. Ct., 2009Ka-Gi1048, Jan. 21, 2010 (S. Kor.), http://www.scourt.go.kr/img/notice/100203_suwon.pdf [https://perma.cc/TYZ6-AFWE].

and that the class members bought the stocks of the corporation because they relied on the disclosed financial statement.¹⁰⁵ This allegedly resulted in a loss for the plaintiffs that should be compensated by the defendants.¹⁰⁶

The court decided to permit the case to proceed as a class action on January 21, 2010, while allowing class members to opt out until March 26, 2010.¹⁰⁷ The scope of the class members was: members who were certified as stock holders of the corporation as of December 19, 2008, and who bought the stock from the period of August 14, 2008, when the corporation made the alleged misrepresentation, to December 19, 2008, when the corporation made the adjustment.¹⁰⁸ During the opt-out period, fifteen class members chose to opt out.¹⁰⁹

The case was permitted to settle on April 30, 2010, which is about a year after the case was first filed.¹¹⁰ With regards to the terms of settlement, the corporation initially agreed to pay 2,900,000,000 won,¹¹¹ half in cash and the rest in its treasury stock.¹¹² But because fifteen class members chose to opt out, the settlement resulted in the corporation agreeing to pay 1,371,696,201 won and treasury stock of 199,664 that amounts to 2,743,392,402 won, to the rest of the class members.¹¹³ Each party agreed to pay for its own legal fees.¹¹⁴ On

¹⁰⁵ Suwon Dist. Ct., *supra* note 103.

¹⁰⁶ *Id.*

¹⁰⁷ Suwon Dist. Ct., *Sosongheogagyaeoljeong gojiseo* [Notice on Decision to Permit Class Action Proceeding] (Feb. 3, 2010), http://www.scourt.go.kr/img/notice/100203_suwon_2.pdf [<https://perma.cc/A4B5-FJT2>].

¹⁰⁸ Suwon Dist. Ct., 2009Ka-Gi1048, Jan. 21, 2010 (S. Kor.), http://www.scourt.go.kr/img/notice/100203_suwon.pdf [<https://perma.cc/FA8Z-E8RQ>].

¹⁰⁹ Suwon Dist. Ct., 2009Ga-Hap8829, Apr. 30, 2010 (S. Kor.), http://www.scourt.go.kr/img/notice/20100430_01.pdf [<https://perma.cc/T3R3-ZJ2P>].

¹¹⁰ *Id.*

¹¹¹ This amount is approximately 2,617,329 U.S. dollars calculated by the currency exchange rate of 1,108 won per one U.S. dollar as of April 30, 2010. For the currency exchange rate as of April 30, 2010, see *Foreign Exchange Rates: Historical Rates for the South Korean Won*, FED. RES. SYS., https://www.federalreserve.gov/releases/h10/hist/dat00_ko.htm [<https://perma.cc/B26R-J5HV>].

¹¹² Suwon Dist. Ct., 2009Ga-Hap8829, Apr. 30, 2010 (S. Kor.), http://www.scourt.go.kr/img/notice/20100430_01.pdf [<https://perma.cc/AAT2-8726>].

¹¹³ *Id.*

¹¹⁴ *Id.*

July 14, 2010, the court decided to choose one of the plaintiff's counsels as the distribution administrator.¹¹⁵ The distribution administrator submitted the distribution plan on August 6, 2010, which the court granted on September 30, 2010, with only a few modifications.¹¹⁶ The court granted to the plaintiff's counsel fees that amounted to 20% of the settlement, that is 274,339,240 won,¹¹⁷ and treasury stock of 39,932.¹¹⁸ The cost incurred during the proceeding that included filing fee, fee for sending individual notice and fee for public notice (10,878,710 won), was to be deducted from the settlement amount.¹¹⁹ Because the plaintiff's counsel also undertook the position of distribution administrator, the cost and fee for the distribution would be paid to the plaintiff's counsel.¹²⁰ However, the plaintiff's counsel agreed not to be paid a fee for the distribution, nor be reimbursed the cost of the distribution, which the court estimated to be approximately 90,898,250 won.¹²¹

The notice announcing the ending of the distribution was made public on January 30, 2012.¹²² According to the notice, 134,720 stocks and 926,956,248 won have been distributed to the class members.¹²³ The rest of the stocks, and the money, were returned to the defendant.¹²⁴

¹¹⁵ Suwon Dist. Ct., 2009Ga-Hap8829, July 14, 2010 (S. Kor.), http://www.scourt.go.kr/img/notice/100714_suwon.pdf [<https://perma.cc/VQQ9-ZPXR>].

¹¹⁶ Suwon Dist. Ct., 2009Ga-Hap8829, Sept. 30, 2010 (S. Kor.), http://www.scourt.go.kr/img/notice/100930_suwon.pdf [<https://perma.cc/YZN8-4QU5>].

¹¹⁷ This amount is approximately 247,599 U.S. dollars calculated by the currency exchange rate of 1,108 won per one U.S. dollar as of April 30, 2010. For data on currency exchange rate as of April 30, 2010, see FED. RES. SYS., *supra* note 111.

¹¹⁸ Suwon Dist. Ct., 2009Ga-Hap8829, Sept. 30, 2010 (S. Kor.), http://www.scourt.go.kr/img/notice/100930_suwon.pdf [<https://perma.cc/V8MH-5RWF>].

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Jo, *supra* note 89.

¹²³ *Id.*

¹²⁴ *Id.*

5.3. Decisions by the Lower Courts

Currently five cases have proceeded to the trial stage.¹²⁵ I have summarized the current statuses of the cases in appendix Table B (“Appendix B”).¹²⁶ As discussed earlier, only two cases have been settled, and one court found for the plaintiffs.¹²⁷ The rest of the cases are still pending at various stages.¹²⁸

The courts have so far been quite willing to interpret the requirements to allow certification.¹²⁹ One court was content to find the commonality requirement met when the alleged cause of action of the plaintiffs was about Article 179.¹³⁰ Another court found commonality in an Article 125 case because the materiality element and loss causation element were both common to all class members.¹³¹ The court went on to say that the fact that a certain subset of the class members may have an affirmative defense to the claim is not enough to deny the commonality requirement in an Article 125 class action.¹³² Moreover, regarding the suitability requirement, the courts found: the loss to the individual plaintiff being small is enough to find that the plaintiffs may not be expected to file a suit individually, which makes the class action a suitable and efficient alternative.¹³³

¹²⁵ See *infra* Appendix B.

¹²⁶ In Korea, the case regarding petition for class certification and the case regarding actual complaint are given separate case numbers. When the case for class certification is appealed the case number for class certification will change accordingly. However, the case number for the claim itself, in principle, will stay the same.

¹²⁷ Seoul Central Dist. Ct., 2012Ga-Hap17061, Jan. 20, 2017 (S. Kor.); Jo, *supra* note 89; Seoul Central Dist. Ct., *supra* note 89.

¹²⁸ See *infra* Appendix A.

¹²⁹ Although some lower courts have denied certification, they were overturned. See Appendix B. Currently only one case, which has been appealed, has been denied certification. See Appendix B.

¹³⁰ See Seoul High Court [Seoul High Ct.], 2015Ra619, Jan. 29, 2016 (S. Kor.).

¹³¹ See Seoul High Ct., 2013Ra20093, Feb. 6, 2015 (S. Kor.).

¹³² *Id.*

¹³³ Seoul High Ct., 2015Ra656 & 657 (consol.), Nov. 16, 2016 (S. Kor.), http://www.scourt.go.kr/img/notice/151117_slgodung.pdf [<https://perma.cc/NZY7-PMYA>].

6. THE COMPARISON

The difference in practice between Korea and the United States is quite striking. In the United States, nearly 200 cases are filed every year with over a billion dollars at stake. In Korea, on average, fewer than one SCAA case was filed every year, and only three cases resulted in settlements or a final decision by the court in the eleven years since the enactment of the SCAA.¹³⁴ While it may be too early to tell, although eleven years since enactment of the SCAA is not a short period, the current practice in Korea could mean that the implementation of an opt-out type class action system, standing alone, may not be enough to encourage private enforcement.

In this section, I will compare some differences between the civil procedures of the two countries that may be affecting the difference in practice. The first part will focus on the specific rules pertaining to the class action, while the second part will consider the differences more broadly by including the differences in general civil procedure mechanics.

6.1. *Comparing the Class Action Procedures*

6.1.1. *The Requirements at the Class Certification Stage*

As discussed above, FRCP 23 requires predominance for the class certification of a Rule 10b-5 class action.¹³⁵ This requirement allows the court to exercise considerable discretion in determining what causes of action are suitable on their facts for class-wide determination.¹³⁶ In the Rule 10b-5 class action context, the Supreme Court of the United States (“SCOTUS”) decided that the reliance requirement needs to be investigated at the class certification stage.¹³⁷

¹³⁴ See *infra* Appendix A.

¹³⁵ See FED. R. CIV. P. 23(b)(3).

¹³⁶ Coffee, Jr., *supra* note 16, at 299.

¹³⁷ Jill E. Fisch, *The Trouble with Basic: Price Distortion After Halliburton*, 90 WASH. U. L. REV. 895, 910-11 (2013).

Expert witnesses are used to prove not only reliance, but also materiality and loss causation.¹³⁸ The court, by using the fraud-on-the-market theory as a basis for allowing presumption of reliance, turned the reliance inquiry into an analysis of market efficiency.¹³⁹

So, how do you prove market efficiency? SCOTUS was not clear on this point, so it was left to the lower courts to find an appropriate test to determine whether a security was traded in an efficient market.¹⁴⁰ No uniform test has been accepted by the lower courts.¹⁴¹ In *Cammer v. Bloom*, the court discussed the following factors as relevant to determining market efficiency for a given security: (1) eligibility to file an SEC form S-3, (2) average weekly trading volume, (3) analyst coverage, (4) existence of market makers and arbitrageurs, and (5) price reaction to company-specific information.¹⁴² Accordingly, class certification in the United States requires the use and expenditure of various resources, including hiring expert witness for the plaintiff.¹⁴³

Although it may be too early to tell, this might not be the case in Korea. As is shown above, there is no predominance requirement in Korea. Furthermore, the court is not explicitly required to inquire into reliance or market efficiency at the class certification stage.¹⁴⁴ Conflicts between the parties during the class certification stage center around the question of whether the alleged claim should be allowed to proceed by the SCAA as a matter of law. The courts do not

¹³⁸ See Jonah B. Gelbach, Eric Helland & Jonathan Klick, *Valid Inference in Single-Firm, Single-Event Studies*, 15 AM. L. & ECON. REV. 495, 501 (2013) ("Plaintiffs seeking to meet the reliance, materiality, and loss causation elements of a securities fraud case can use event study evidence to establish that a security's price movement was associated with allegedly fraudulent statements.").

¹³⁹ Fisch, *supra* note 137, at 897.

¹⁴⁰ See Jeffrey L. Oldham, *Taking "Efficient Markets" out of the Fraud-on-the-Market Doctrine After the Private Securities Litigation Reform Act*, 97 NW. U. L. REV. 995, 1015 (2003).

¹⁴¹ See *id.* ("Yet no particular test or set of factors has been universally accepted by a majority of courts across the country.").

¹⁴² See Paul A. Ferrillo, Frederick C. Dunbar & David Tabak, *The "Less Than" Efficient Capital Markets Hypothesis: Requiring More Proof From Plaintiffs in Fraud-on-the-Market Cases*, 78 ST. JOHN'S L. REV. 81, 90-93 (2004).

¹⁴³ See KAUFMAN ET AL., *supra* note 28, at 355 ("In addition, an expert is vital at class certification. An expert may be able to perform the necessary event study at class certification and demonstrate common issues, such as reliance and loss causation.").

¹⁴⁴ See, e.g., Seoul High Ct., 2015Ra619, Jan. 29, 2016 (S. Kor.) (certifying class without any mention of market efficiency).

seem to require any reports by expert witnesses to make this determination.¹⁴⁵ Although the SCAA requires the plaintiff to prepay necessary costs, such as costs for notice, announcement, and appraisal, the prepayment is required only when it becomes definite by the order of the court that the case will proceed as a class action.¹⁴⁶

These differences in class certification procedures between the United States and Korea can be quite significant. Because the plaintiff's counsel in the United States expends a significant amount of resources in the class certification stage, the risk of not getting a class certification after spending so much time, and expending so many resources, must be seriously considered. But in Korea, the plaintiff's counsel has the advantage of waiting for the class to be certified before expending such resources.¹⁴⁷ All things being equal, this difference in procedure arguably should incentivize plaintiff's counsel in Korea to file a class action claim more actively, when compared to its U.S. counterparts.

6.1.2. Restriction on Cases the Plaintiff's Counsel May File

As was discussed above, there are limitations as to how many cases a plaintiff's counsel may file as class actions under the SCAA

¹⁴⁵ See, e.g., Seoul High Ct., 2015Ra619, Jan. 29, 2016 (S. Kor.) (certifying class without any mention of expert witness opinion).

¹⁴⁶ Jeunggwongwanryeon jipdansosongbeob [Securities-related Class Action Act], Act No. 7074, Jan. 20, 2004, amended by Act No. 11845, May 28, 2013, art. 16 (S. Kor.), <http://www.law.go.kr/법령/증권관련집단소송법> [<https://perma.cc/D2JY-NSLW>].

¹⁴⁷ The courts differ on the amount to be prepaid. Compare Seoul High Ct., 2015Ra656 & 657 (consol.), Nov. 16, 2016 (S. Kor.), http://www.scourt.go.kr/img/notice/151117_slgodung.pdf [<https://perma.cc/NZY7-PMYA>], and Seoul High Ct., 2015Ra619, Jan. 29, 2016 (S. Kor.) (ordering prepayment of 40,000,000 won, which consists of fee for sending notice 10,000,000 won, fee for giving notice newspaper etc. 20,000,000 won, fee for appraisal 5,000,000 won and other fees 5,000,000 won), with Seoul Southern Dist. Ct., 2011Ka-Gi2010, Sept. 27, 2013 (S. Kor.) (ordering prepayment of 51,000,000 won, which consists of fee for sending notice 16,000,000 won, fee for giving notice newspaper etc. 20,000,000 won, fee for appraisal 10,000,000 won and other fees 5,000,000 won). The court will return the unused amount of the prepaid fees when the case settles or otherwise ends. See Suwon Dist. Ct., 2009Ga-Hap8829, Sept. 30, 2010 (S. Kor.), http://www.scourt.go.kr/img/notice/100930_suwon.pdf [<https://perma.cc/MH45-U9XW>].

during a given time period in Korea.¹⁴⁸ The clause does not specify whether the lawyer as an individual or a firm is subject to the restriction, leaving this to the courts for interpretation.¹⁴⁹ But, there is no such restriction in the United States, which allows the plaintiff's attorney to file multiple cases in an attempt to diversify.¹⁵⁰

This difference in regulation may partially affect plaintiff's attorneys' limitations to diversifying litigation risks. In the United States, plaintiff's attorneys, as repeat players of litigation, may be able to diversify litigation risk by choosing to handle multiple cases, although somewhat to the lesser degree when compared to securities investors.¹⁵¹ But Korean attorneys may be less capable of diversifying the litigation risk by holding multiple class actions, because they may only be involved in three cases over the past three years.¹⁵² Risk aversion could be difficult to address in this kind of legal framework, accounting for the fact the many attorneys may decide not to pursue class actions.¹⁵³

However, bringing multiple class actions is not the only means by which plaintiff's attorneys diversify. Attorneys in Korea may diversify by representing non-class-action cases as well.¹⁵⁴ Moreover, as we have seen above, one firm, *Hannuri Law*, currently holds six cases that are still pending in various courts.¹⁵⁵ The defendant in one of the cases has petitioned for disqualification of *Hannuri Law*

¹⁴⁸ See Jeunggwongwanryeon jipdansosongbeob [Securities-related Class Action Act], Act No. 7074, Jan. 20, 2004, amended by Act No. 11845, May 28, 2013, art. 11 (S. Kor.), <http://www.law.go.kr/법령/증권관련집단소송법> [<https://perma.cc/D2JY-NSLW>].

¹⁴⁹ *Id.*

¹⁵⁰ See Coffee, Jr., *supra* note 17, at 705.

¹⁵¹ See Coffee, Jr., *supra* note 17, at 705 ("Phrased more generally, portfolio diversification is a strategy that permits the plaintiff's attorney, much as any investor, to reduce the variance associated with an expected return.").

¹⁵² Jeunggwongwanryeon jipdansosongbeob [Securities-related Class Action Act], Act No. 7074, Jan. 20, 2004, amended by Act No. 11845, May 28, 2013, art. 11 (S. Kor.), <http://www.law.go.kr/법령/증권관련집단소송법> [<https://perma.cc/D2JY-NSLW>].

¹⁵³ See John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is not Working*, 42 MD. L. REV. 215, 280-81 (1983) (explaining that risk aversion affects the attorney's litigation strategy).

¹⁵⁴ Restriction of multiple class action filings do not fully limit the power to diversify because the plaintiff's attorney is free to retain other kinds of cases. I thank Professor Rock for pointing this out to me.

¹⁵⁵ See *infra* Appendix A.

for this reason.¹⁵⁶ But the court decided that, considering the firm's past experience in litigating securities related claims, the firm is deemed to be able to fairly and appropriately represent the total class members, allowing it to remain as counsel.¹⁵⁷

The decision made by the lower court in effect may lower the hurdle imposed on the plaintiff's attorney, because by its logic, the experience of handling securities class action cases qualifies as a reason for excepting the allowed limit to the number of cases a plaintiff's counsel may file in a given period. If the SCK affirms the lower court's holding on this issue, then the gap between the United States and Korea may effectively be narrowed.¹⁵⁸

6.2. Comparing the General Civil Procedure Process

6.2.1. Rule on Contingency Fees

Contingent fee arrangement is one of the key legal rules that allows lawyers in the United States to act as private attorneys general.¹⁵⁹ But many countries around the world do not allow contingency fee arrangements, thereby discouraging active entrepreneurial litigation filed by plaintiffs' attorneys.¹⁶⁰ This is not the case in Korea. Until recently, the SCK found contingent fee arrangements between parties to be effective in principle.¹⁶¹ The SCK decided that a contingent fee arrangement regarding a criminal case is void for public policy reasons in 2015.¹⁶² But the SCK made it clear that a contingent fee arrangement for a civil case should be allowed.¹⁶³ So, of the critical factors that allow plaintiff's counsel to

¹⁵⁶ Seoul High Ct., 2015Ra619, 14-15, Jan. 29, 2016 (S. Kor.).

¹⁵⁷ *Id.*

¹⁵⁸ The SCK did affirm the case, but did not specifically address the issue. See S. Ct., 2016Ma251, May 27, 2016 (S. Kor.).

¹⁵⁹ See Coffee, Jr., *supra* note 17, at 667-70.

¹⁶⁰ See JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION 199 (2015) ("Most countries also prohibit private attorneys from charging fees based on the amount of the damages obtained, thereby barring 'entrepreneurial litigation' (at least to the extent that the attorney serves as the entrepreneur).").

¹⁶¹ S. Ct., 2015Da200111, July 23, 2015 (S. Kor.).

¹⁶² *Id.*

¹⁶³ *Id.*

act as an entrepreneur, one is not much different between the two countries.¹⁶⁴

6.2.2. Rule on Fee Shifting

Fee shifting rules may also affect the use of class action litigation, because fee shifting may chill litigation.¹⁶⁵ On the other hand, the American rule, wherein each party is required to pay for its own legal fees without regard to the outcome of the case, may encourage the filing of litigation.¹⁶⁶

In the United States, each party to a litigation typically pays its own legal fees.¹⁶⁷ But in Korea, the fee is usually shifted to the losing party.¹⁶⁸

However, it should be noted that the costs paid or prepaid by the plaintiff's counsel, such as filing fees, costs for individual notice, costs for public announcement, and costs for appraisal, will also be shifted to the defendant in the event that the plaintiff wins.¹⁶⁹ So, if the fee shifting rule deters cases, it may deter more cases without merit than cases with merit.¹⁷⁰

We should also note that there is a cap on the amount of attorney's fees that may be shifted in Korea.¹⁷¹ The cap is calculated by a function of the amount-at-stake and the fee awarded (or promised

¹⁶⁴ Different types of contingent fee arrangements may affect the incentives of the plaintiff's counsel differently resulting in different behaviors. *See generally*, John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48 *LAW & CONTEMP. PROBS.* 5, 33-48 (1985) (explaining the different behaviors of the plaintiff's counsel under compensatory schemes which compensate time spent and under compensatory schemes which compensates by a function of recovered loss).

¹⁶⁵ *See* COFFEE, JR., *supra* note 160, at 84.

¹⁶⁶ *See id.* at 165.

¹⁶⁷ *See* Cox, *supra* note 14, at 497.

¹⁶⁸ Minsasosongbeob [Civil Procedure Act], Act No. 547, Apr. 4, 1960, amended by Act No. 13952, Feb. 3, 2016, art. 98 (S. Kor.), <http://www.law.go.kr/법령/민사소송법> [<https://perma.cc/EU3B-3XPC>].

¹⁶⁹ *Id.*

¹⁷⁰ *See* COFFEE, JR., *supra* note 160, at 166-67.

¹⁷¹ Minsasosongbeob [Civil Procedure Act], Act No. 547, Apr. 4, 1960, amended by Act No. 13952, Feb. 3, 2016, art. 109 (S. Kor.), <http://www.law.go.kr/법령/민사소송법> [<https://perma.cc/EU3B-3XPC>].

to be awarded) to the counsel by the prevailing party.¹⁷² This cap may work as a device that mitigates the threat of punitive fee shifting.¹⁷³ Moreover, the cap allows plaintiff's attorney to calculate the cost to be paid to the defendant in advance when deciding whether to bring suit.

Lastly, the fee shifting rule will matter less if it is not actively enforced. For the prevailing party to be reimbursed its legal fees in Korea, it must first file a claim requesting the court to calculate the amount to be shifted.¹⁷⁴ So far, there has been no SCAA case decided against the plaintiff that has been subject to the calculation of legal fees.¹⁷⁵

Do prevailing parties' legal fees actually get reimbursed by the losing parties in Korea? It is difficult to gather data on the current practice of private negotiations being made between the parties. But the SCK provides public annual statistics on decided civil cases and filings of claims for calculation of legal fees. By comparing the civil cases which are decided with the filings for calculation of legal fees, I provide a rough proxy for the enforcement of the fee shifting rule.¹⁷⁶ In Korea, the court of the first instance has decided 745,358 cases in 2014.¹⁷⁷ However, only 31,324 claims for calculation of legal

¹⁷² Byeonhosabosuuisosongbiyongsanipegwanghangyuchik [Rule on Calculating Attorney's Fees in Litigation Cost], S. Ct. Rule No. 758, Feb. 28, 1981, *amended by* Rule No. 2496, Nov. 27, 2013, art. 3 (S. Kor.), <http://www.law.go.kr/법령/변호사보수의소송비용산입에관한규칙> [<https://perma.cc/X7AW-GJLW>].

¹⁷³ See COFFEE, JR., *supra* note 160, at 165-66.

¹⁷⁴ Minsasosongbeob [Civil Procedure Act], Act No. 547, Apr. 4, 1960, *amended by* Act No. 13952, Feb. 3, 2016, art. 110 (S. Kor.), <http://www.law.go.kr/법령/민사소송법> [<https://perma.cc/EU3B-3XPC>].

¹⁷⁵ There has been only one case where certification was denied of which the plaintiff decided not to appeal against one defendant out of two defendants. The case against the appealed defendant has been overturned in appeal. Because the case against one defendant had not been appealed, the case between the plaintiff and the defendant who was not appealed against has ended. But so far, I have not found any evidence that any defendant who technically won a case file for the calculation of legal fees.

¹⁷⁶ This comparison will not be completely accurate because of the following reasons. First, it will not account for private settlement of legal fees. Second, civil cases decided may be appealed to be settled at the appellate court. When the case settles, each party typically pays for its own legal fees. Third, the prevailing party may decide not to take any enforcement action on the losing party even after the legal fee calculation is made.

¹⁷⁷ SUPREME COURT OF KOREA, SABEOPYEONGAM [Annual Judicial Statistics] 736 (2015).

fees have been filed in 2014.¹⁷⁸ Although the prevailing party may only choose to pursue legal fees when the amount-at-stake is high enough to be worth pursuing, the enforcement of the loser pays rule does not seem to be a common practice, which could mean that the loser pays rule may currently work even less as a deterrent.

6.2.3. Discovery System

The lack of a discovery system may work as a barrier to the aggressive pursuit of class actions.¹⁷⁹ In the United States, the discovery process allows for ease in gathering evidence and proving complex factual matters.¹⁸⁰ In Korea, there is no such discovery process.

However, other tools supplement the lack of a discovery system in Korea. First, the court may order, with or without a petition by the parties, a person who has documents related to the lawsuit, to submit them, subject to certain restrictions.¹⁸¹ The SCAA also allows the court to investigate evidence without a petition by the parties, when the court finds it necessary.¹⁸²

Second, as we have seen above, the courts in Korea do not require the plaintiff to prove market efficiency in the class certification stage. Since the plaintiff in the United States must prove that the market was efficient at the class certification stage, it can be said that it is easier for plaintiffs in Korea to file a class action, regardless of the presence of a discovery system.

Third, Article 162 accounts for the lack of a discovery process. As we have seen, most U.S. Rule 10b-5 class actions allege misrepresentation in the financial statement.¹⁸³ In this sense, Article 162 may be more comparable to Rule 10b-5 rather than the catch-all provision

¹⁷⁸ *Id.* at 773.

¹⁷⁹ See Warren III, *supra* note 13, at 1083-84 (2012).

¹⁸⁰ See COFFEE, JR., *supra* note 160, at 200.

¹⁸¹ Jeunggwongwanryeon jipdansosongbeob [Securities-related Class Action Act], Act No. 7074, Jan. 20, 2004, amended by Act No. 11845, May 28, 2013, art. 32 (S. Kor.), <http://www.law.go.kr/법령/증권관련집단소송법> [<https://perma.cc/D2JY-NSLW>].

¹⁸² Jeunggwongwanryeon jipdansosongbeob [Securities-related Class Action Act], Act No. 7074, Jan. 20, 2004, amended by Act No. 11845, May 28, 2013, art. 30 (S. Kor.), <http://www.law.go.kr/법령/증권관련집단소송법> [<https://perma.cc/D2JY-NSLW>].

¹⁸³ Cornerstone Research, *supra* note 74, at 8.

in Article 179.¹⁸⁴ And Article 162, which is a rule about misrepresentation of material facts in the Business reports that should be submitted to the Financial Services Commission, does not require the plaintiff to prove reliance.¹⁸⁵

Moreover, Article 162 does not require the plaintiff to prove scienter, but instead requires the defendant to prove that she was unable to know such facts were misrepresented although she exercised reasonable care.¹⁸⁶ This is a functional equivalent of shifting the burden to the defendant to disprove scienter in a Rule 10b-5 class action.

Also, the SCK has held that the defendant has the burden to prove that the misrepresentation did not cause the loss in a non-class action Article 162 case.¹⁸⁷ The SCK allowed the defendant to use event studies to disprove loss causation, but held that the defendant does not meet her burden by showing a result that says it cannot be said with certainty that the movement of stock price was caused by the correction of misrepresentation.¹⁸⁸

Lastly, there are also special considerations regarding damages calculations. Specifically, the SCAA makes it clear that the court may use various means, including the use of statistical methods, when it is difficult to calculate the exact amount of damages.¹⁸⁹ Moreover, Article 162 specifies formulas for the presumption of damages.¹⁹⁰ The presumptive amount of damages is calculated by the difference between the amount actually paid or received by the plaintiff, and (1) the market price of the securities at the date of the closing of the trial proceedings if the securities is not sold, or (2) the

¹⁸⁴ See Hwa-Jin Kim, *Jeunggwonsosongeseoui ingwagwangyeironui jaejomyeong [Rethinking Causation in Securities Fraud Litigations]*, 144 *JEOSEUTISEU* 209, 210-11 (2014) (explaining the impact of the fraud-on-the-market theory on Article 162).

¹⁸⁵ See *id.* at 210.

¹⁸⁶ *Japonsijanggwa geumyungtujaeope gwanhan beobryul* [Financial Investment Services and Capital Markets Act], Act No. 8635, Aug. 3, 2007, amended by Act No. 14817, Apr. 18, 2017, art. 162 (S. Kor.), <http://www.law.go.kr/법령/자본시장과금융투자업에관한법률> [<https://perma.cc/KY7H-Y9HJ>].

¹⁸⁷ S. Ct., 2014Da207283, Jan. 29, 2015 (S. Kor.).

¹⁸⁸ S. Ct., 2008Da92336, Aug. 19, 2010 (S. Kor.).

¹⁸⁹ *Jeunggwongwanryeon jipdansosongbeob* [Securities-related Class Action Act], Act No. 7074, Jan. 20, 2004, amended by Act No. 11845, May 28, 2013, art. 34 (S. Kor.), <http://www.law.go.kr/법령/증권관련집단소송법> [<https://perma.cc/D2JY-NSLW>].

¹⁹⁰ KIM, *supra* note 2, at 73.

price at the time of the sale of the securities.¹⁹¹ Because of these provisions, proving damages for plaintiffs in Korean securities class actions may not be relatively difficult, as compared to U.S. counterparts.¹⁹² And considering the factors above, the lack of the discovery process may not be the conclusive cause for the lack of class actions in Korea.

6.2.4. Civil Juries

The availability of civil juries may also affect the behavior of plaintiff's counsel in securities class action. The reason may be that fact-finding decisions made by civil juries are generally more unpredictable as compared to the decisions made by professional judges.¹⁹³ Another reason may be that juries could favor investors alleging loss over publicly-traded corporations.¹⁹⁴ For this reason, there could be more incentive to initiate a securities class action when civil juries are provided.¹⁹⁵

While there are civil juries in the United States, there are no such civil juries in Korea.¹⁹⁶ But the lack of civil juries would not completely deter filings of class actions. The Delaware Chancery Court,

¹⁹¹ Japongsijanggwa geumyungtujaeope gwanhan beobyul [Financial Investment Services and Capital Markets Act], Act No. 8635, Aug. 3, 2007, amended by Act No. 14817, Apr. 18, 2017, art. 162 (S. Kor.), <http://www.law.go.kr/법령/자본시장과금융투자업에관한법률> [<https://perma.cc/KY7H-Y9HJ>].

¹⁹² See Seoungwan Hahm, *Jeunggwongwanryeonjipdansosongui jinhaengkwa kwanryunhan myeot gaji jaenjeomdl* [Some Issues Regarding SCAA Process], 43 BFL 69, 75 (2010) (noting that it is relatively easy to calculate damages when the securities are sold before the date of the closing of the trial proceedings). *Contra* Hwanbong Byun, *Jeunggwongwanryeonjipdansosongbeobui silje unyongkwajeongeseoui moonjejeom* [Technical Problems of the SCAA], in JEUNGGWONGWANRYEONJIPDANSOSONGBEOB GAEJEONGRON [REFORMING SCAA] 166, 180 (Seoul Bar Ass'n Legal Research Inst. ed., 2014) (arguing that it is technically not possible to prove the market price of the securities at the date of the closing of the proceeding before the end of the trial on such date).

¹⁹³ See COFFEE, JR., *supra* note 160, at 200.

¹⁹⁴ See Warren III, *supra* note 13, at 1087.

¹⁹⁵ See *id.* at 1086-87.

¹⁹⁶ Compare U.S. CONST. amend. VII, with Beobwonjojikbeob [Court Organization Act], Act No. 51, Sept. 26, 1949, amended by Act No. 14470, Dec. 27, 2016, art. 7 (S. Kor.), <http://www.law.go.kr/법령/법원조직법> [<https://perma.cc/CQ5M-F8WH>].

a non-jury trial court, has attracted over seventy cases of merger litigation every year between 2005 and 2011.¹⁹⁷ As long as there are merits and economic incentives, the plaintiff or plaintiff's counsel will be willing to file, even though the fact-finders are not less sophisticated civil juries, but professional judges.

7. RULE ON FILING FEES (AND FEE SHIFTING)

One factor that may not be deeply considered when deciding whether to file a class action claim in the United States is the filing fee amount. In the United States, the filing fee for a class action in federal court is currently flat.¹⁹⁸ Because the filing fee does not escalate with a function of the aggregate amount-at-stake, the filing fee that the plaintiff or plaintiff's counsel should bear in a class action is quite nominal.¹⁹⁹

In Korea, the filing fee escalates gradually as a function of the amount-at-stake.²⁰⁰ If the filing fee becomes high, it could work as an entry barrier.²⁰¹ But there is a ceiling to the filing fee in the SCAA,

¹⁹⁷ See Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 465, 475 (2015) (providing data on merger litigation over the period 2005 through 2011).

¹⁹⁸ See Deborah R Hensler, *The United States of America*, in THE COSTS AND FUNDING OF CIVIL LITIGATION 535, 539 (Christopher Hodges, Stefan Vogenauer & Magdalena Tulibacka eds., 2010) (explaining that the filing fees of the U.S. federal and state courts are generally flat).

¹⁹⁹ I thank Professor Fisch for pointing this out to me.

²⁰⁰ See Jeunggwongwanryeon jipdansosongbeob [Securities-related Class Action Act], Act No. 7074, Jan. 20, 2004, amended by Act No. 11845, May 28, 2013, art. 7 (S. Kor.), <http://www.law.go.kr/법령/증권관련집단소송법> [<https://perma.cc/D2JY-NSLW>]; Minsasosong deung injibeob [Act on the Stamps Attached for Civil Litigation, etc.], Act No. 337, Sept. 9, 1954, amended by Act No. 12892, Dec. 30, 2014, art. 2 (S. Kor.), <http://www.law.go.kr/법령/민사소송등인지법> [<https://perma.cc/5VEJ-LLK2>].

²⁰¹ See Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, 60 LAW & CONTEMP. PROBS. 167, 171 (1997) (noting that filing fees and amount-in-controversy requirements may serve as entry barriers which prevent the litigation of some claims); see also Michael M. Karayanni, *The Class Action Experience in Israel and the Value of Having a Representative with a Personal Claim*, in CROSS-BORDER CLASS ACTIONS: THE EUROPEAN WAY 189, 195 (Arnaud Nuyts & Nikitas E. Hatzimihail eds., 2014) (noting that in an escalating filing fee regime the amount of the filed claim in a class action "can easily reach substantial amounts thereby making the fees the plaintiff must pay very significant").

set at 50 million won.²⁰² So if the amount-at-stake is sufficiently high, then the filing fee will become flat. This rule gives the entrepreneurial attorney an incentive to identify and pursue cases with a high amount-at-stake.

But the filing fee rule has a deterring effect on the lead plaintiff. In Korea, the amount-at-stake used for the calculation of the filing fee is not the amount-at-stake of the lead plaintiff, but of the whole class.²⁰³ So the lead plaintiff will have to pay the filing fee for not only herself, but also for other class members, in a class action. This may not be an issue, if we consider that when an entrepreneurial attorney takes the case on a contingent fee basis, she may be willing to pay the filing fee for the plaintiffs.²⁰⁴ Because the contingent fee she will receive is calculated not by the amount recovered by the lead plaintiff, but by the amount recovered for the whole class, calculation of the filing fee for the whole class may not be over-inclusive if the fee is ultimately borne by the entrepreneurial attorney. It can even be said that the mechanism has been formulated with the entrepreneurial attorney in mind, since it deters individual plaintiffs from actively pursuing a class action claim without an entrepreneurial attorney.

The entrepreneurial attorney may contract with the lead plaintiff to reimburse the plaintiff in the event of a loss.²⁰⁵ But even assuming that this kind of contract is allowed,²⁰⁶ the lead plaintiff would have

²⁰² Jeunggwongwanryeon jipdansosongbeob [Securities-related Class Action Act], Act No. 7074, Jan. 20, 2004, amended by Act No. 11845, Feb. 27, 2013, art. 7 (S. Kor.), <http://www.law.go.kr/법령/증권관련집단소송법> [<https://perma.cc/D2JY-NSLW>].

²⁰³ *Id.*

²⁰⁴ See Coffee, Jr., *supra* note 17, at 683 (“But unless the client is willing to invest in the action by bearing litigation expenses, the attorney will still make the critical investment decision, thereby reversing the normal roles of principal and agent.”).

²⁰⁵ It is difficult to find any discussion about whether this kind of contract is legal and/or ethical in Korea. The legality or ethicality of the contract has not been an issue because presumably such a contract is scarce. Korea does not have a history of entrepreneurial attorney, so the attorney will not be willing to make such a contract. Discussions about professional ethics in the class action context focus on advancing legal costs and contingency fee clauses. See, e.g., Changwan Son, *Jipdangihoesosongui beobjeok moonje – byunhosa yunrireul joongsimeuro* [Legal Issues in Entrepreneurial Class Action – Concentrating on Professional Responsibility], 54 BFL 6, 15 (2012) (arguing that the lack of an explicit statute provision shows that advancing legal costs does not violate professional responsibility); *id.* at 17-19 (discussing the ethical boundaries of contingency arrangements).

²⁰⁶ See S. Ct., 2013Da28728, July 24, 2014 (S. Kor.) (holding that contract where a third party agrees to fund legal costs with the other party agreeing to repay the

to first assume the liability at the event of the loss. So, the lead plaintiff risks the plaintiff's attorney becoming judgment proof.²⁰⁷

According to the Korean fee shifting rule, the fee to be shifted escalates as the amount-at-stake goes up.²⁰⁸ The lead plaintiff would risk paying the legal fees calculated by not only the amount-at-stake for herself but also the amount-at-stake for the other class members.²⁰⁹ This rule may also potentially make class action uneconomical for the lead plaintiff.²¹⁰

However, as discussed above, the fee shifting rule is not actively enforced in Korea.²¹¹ Also, a judgment-proof plaintiff may still serve

legal cost after the dispute is resolved is unenforceable if the third party also acted as the actual party of the dispute); S. Ct., 2014Da18322, July 10, 2014 (implying without deciding that a contract where the plaintiff's attorney agrees to advance legal costs for the plaintiff is not illegal). In Canada, an indemnity agreement by the plaintiff's counsel is allowed. WARREN K. WINKLER ET AL., *THE LAW OF CLASS ACTIONS IN CANADA* 387 (2014) (noting that indemnity agreements between the plaintiff and the plaintiff's counsel became a norm of class action practice). In the United States, states are split on whether a plaintiff's attorney may agree to indemnify the plaintiff of adverse costs. Compare Oklahoma Bar Ass'n Legal Ethics Comm., Op. 323 (2009), <http://ethics.okbar.org/EthicsCounsel/EthicsOpinions/Opinion323.aspx> [<https://perma.cc/S8N6-Y63M>] ("An Attorney may *not* agree to indemnify his client against attorney's fees and costs in the event that such fees and costs are awarded to the opposing party and taxed as costs against the client.") (emphasis in original), with Alaska Bar Ass'n Ethics Comm., Op. 2004-02 (2004), https://www.alaskabar.org/servlet/content/indexes_aeot_2004_2.html [<https://perma.cc/RT4W-C8HR>] (allowing the plaintiff's attorney to agree with the plaintiff to assume responsibility for a client's adverse attorney award in the event that an appeal taken is unsuccessful).

²⁰⁷ See John C. Coffee, Jr., "Loser Pays": *The Latest Installment in the Battle-Scarred, Cliff-Hanging Survival of the Rule 10b-5 Class Action*, 68 S.M.U. L. REV. 689, 699 (2015) (noting that even if the law firm serving as class counsel can indemnify its client's fee-shifting losses, the law firm may become insolvent and unable to pay).

²⁰⁸ See footnote 172 and accompanying text.

²⁰⁹ See Hongki Kim, *Urinara Jeunggwongwanryeonjipdansosongui Hyunhwangkwa Kaeseonkwaje [Improving Ways of Securities Class Action Suit in Korea]*, 11 KYUNGJEBEOPYEONGU 59, 82 (2012) (arguing that a Korean investor will not have any incentive to file a class action because the investor gains little when she wins but pays a lot in legal fees when she loses).

²¹⁰ Assume that the lead plaintiff has one dollar at stake, and there are 100 class members with each class member having the same 1 dollar at stake. For sake of simplicity, also assume that the fee shifting rule allows ten cents to be shifted for every dollar. In this case, the lead plaintiff will recover one dollar if she wins, but will have to pay ten dollars if she loses in a class action.

²¹¹ See footnote 174-78 and accompanying text.

as a lead plaintiff.²¹² Lastly, there is the possibility of improper counseling by the attorney, to the potential plaintiff, about the risk involved at the time of the filing.²¹³ So, the potential risk of fee shifting may matter less when compared to the filing fee that should generally be paid upfront.²¹⁴

The filing fee rule also deters the entrepreneurial attorney from using the class action. That is because the entrepreneurial attorney must pay the filing fee paid upfront if she chooses to pay the filing for the class.²¹⁵²¹⁶

It is interesting to note that some plaintiff's attorneys began to file a class action alleging initially only a relatively small amount-at-stake, that is 100,000,000 won,²¹⁷ with a promise to expand the amount-at-stake at a later date.²¹⁸ The rationale given for this kind

²¹² See Coffee, Jr., *supra* note 207, at 699 ("Ironically, the one party who could rationally serve as a lead plaintiff under a 'loser pays' rule will be the judgment-proof, nominal plaintiff with no assets.").

²¹³ See Garry D. Watson, *Class Actions: The Canadian Experience*, 11 DUKE J. COMP. & INT'L L. 269, 275 (2001) (noting the possibility of improper counseling about the risk involved by Canadian plaintiff class counsels to representative plaintiffs).

²¹⁴ The plaintiff's attorney can try to mitigate the impact of the fee shifting rule by splitting the claim. See Stephen B. Burbank, *All the World His Stage*, 52 AM. J. COMP. L. 741, 758-60 (2004) (reviewing ARTHUR TAYLOR VON MEHREN, *THEORY AND PRACTICE OF ADJUDICATORY AUTHORITY IN PRIVATE INTERNATIONAL LAW* (2003)) (explaining the German practice of claim splitting).

²¹⁵ See Karayanni, *supra* note 201, at 195-96 (arguing that fees might prove to be a real obstacle for class actions if payment of the filing fee in advance is required when filing a class action in an escalating filing fee regime); see also Coffee, Jr., *supra* note 99, at 1915 (noting the upfront costs as a "procedural law [that] may to a degree undercut the announced purpose of [SCAA]").

²¹⁶ The amount of the shifted fee in the event of a loss may also deter the plaintiff's lawyer if the plaintiff demands that the lawyer indemnify the plaintiff. WARREN K. WINKLER ET AL., *supra* note 206, at 413 ("An indemnity agreement, however, simply shifts the threat of the adverse costs award unto class counsel, who may be sufficiently intimidated by the exposure to costs to decline to take on the case in the first place.").

²¹⁷ This amount is approximately 87,308 U.S. dollars calculated by the currency exchange rate of 1,145.37 won per one U.S. dollar as of October 31, 2016. For data on currency exchange rate as of October 31, 2016, see FED. RES. SYS., *supra* note 111.

²¹⁸ See, e.g., Seoul Western Dist. Ct., *Jeunggwongwanryeonjipdansosongui sojeji gonggo* [Notice on Filing of Securities-related Class Action] (Jan. 28, 2016), http://www.scourt.go.kr/img/notice/160128_slseobu.pdf [<https://perma.cc/RPF5-8A8F>]. It is difficult to know whether the plaintiff's counsel has raised the amount-at-stake after the filing of the cases because most of the cases are still pending at the class certification stage or have just reached trial stage. See appendix B. If the court allows the amount-at-stake to be raised after the class

of action is that the scope of the class is not determined at the initial filing of the complaint.²¹⁹ This practice has the practical effect of lowering the amount of the filing fee the plaintiff must submit upfront, causing it to become even lower than the flat filing fee practiced in the United States.²²⁰ And because the cap for legal fee shifting is calculated by a function of the amount-at-stake, this practice may also limit the amount of legal fees to be shifted.

In another case, the complaint was filed with over 1,000 plaintiffs as lead plaintiffs.²²¹ The law firm representing this case gave notice on its website requesting that the plaintiffs submit a certain amount for payment of the filing fee.²²²

Because the filing fee deters class action filings, a few proposals have been made. One scholar has suggested lowering the cap on filing fees, arguing that the government should subsidize class actions since they have a deterrent effect on corporate misconduct.²²³ Another has suggested using a flat filing fee for class actions.²²⁴ Both

certification, then the plaintiff's counsel will be able to lever up the stake after the class certification issue has been settled.

²¹⁹ See, e.g., Seoul Southern Dist. Ct., *Jeunggwongwanryeon jipdansosongui sojegi gonggo* [Notice on Filing of Securities Related Class Action] (Dec. 2, 2013), http://www.scourt.go.kr/img/notice/131202_slnambu.pdf [<https://perma.cc/9MSB-Z9CR>].

²²⁰ The filing fee for the amount-at-stake of 100,000,000 won is 47,500 won. See *Jeunggwongwanryeon jipdansosongbeob* [Securities-related Class Action Act], Act No. 7074, Jan. 20, 2004, amended by Act No. 11845, May 28, 2013, art. 7 (S. Kor.), <http://www.law.go.kr/법령/증권관련집단소송법> [<https://perma.cc/D2JY-NSLW>]. This amount is approximately 41 U.S. dollars calculated by the currency exchange rate of 1,145.37 won per one U.S. dollar as of October 31, 2016. For data on currency exchange rate as of October 31, 2016, see FED. RES. SYS., *supra* note 111.

²²¹ Seoul Central Dist. Ct., 2014Ga-Hap31627 (S. Kor.), http://www.scourt.go.kr/img/notice/140626_seoul.pdf [<https://perma.cc/BRU9-9ZLW>].

²²² Jeongyul LLC, *Jeunggwongwanryeonjipdansosong seoryu jechul mit sosongbiyong ibgeum anne* [notice for class action documets collection and cost deposit] (Nov. 10, 2015), <http://jeongyul.co.kr/this-is-a-blog-test/> [<https://perma.cc/4G5X-6NZK>] (requesting payments to cover the filing fee and other anticipated costs to the plaintiffs).

²²³ Jung-Sik Choi, *Jeungwonjipdansosongjedoui hwalseonghwareul uihan jean* [Proposal for the Invigoration of Securities Class Action System], 53 BEOBHAKYEONGU 311, 326 (2014).

²²⁴ See Hyojeong Im, *Jeunggwongwanryeon jipdansosongui hwalseonghwa bangane gwanhan yeongu* [A Study on How to Promote Securities-related Class Action], 147 (June 2015) (unpublished master's thesis, on file with the Yonsei University Graduate School) (suggesting that a flat filing fee may be possible in a Korean class action context considering that a flat filing fee is already being used in certain administrative cases).

proposals will affect the incentives of the lead plaintiff and the entrepreneurial attorney because they will lower the cost the plaintiff or the plaintiff's attorney must pay in the event of a loss. However, they do not address the exact cap amount or flat fee amount.

I propose using the alleged amount of the lead plaintiff's amount-at-stake to calculate the filing fee and the fee to be shifted.²²⁵ For a case to proceed as a class action, a flat fee will be separately required as a cost to be borne by the plaintiff's attorney.²²⁶ This proposal will have the following merits. First, it will allow the plaintiff to consider only the merits of the class action without considering the difference in filing fee and the fee to be shifted between individual filing and class action filing.²²⁷ Second, it will effectively lower the filing fee, thus incentivizing the plaintiff or the plaintiff's attorney to use class action. Third, by using the amount-at-stake of the lead plaintiff, it is possible to use the same formula that is used when calculating the filing fee for monetary claims.

²²⁵ See Talia Fisher & Issi Rosen-Zvi, *It's for the Judges to Decide: Allocation of Trial Costs in Israel* Report on Israel, in COST AND FEE ALLOCATION IN CIVIL PROCEDURE 177, 183 (Mathias Reimann ed., 2012) (explaining that courts usually required class action plaintiffs to pay court fees only with respect to their personal claim in Israel as of 2012); see also Karayanni, *supra* note 201, at 196 (explaining that the Israeli Supreme Court held that only the individual amount claimed for the representative will be regarded as the amount of the action for fee purposes in class actions of aggregated monetary amounts).

²²⁶ In Israel, the government charges a flat fee for class actions. See Chen Ma'anit, *Shaked Sets Fees to Stem Class Action Flood*, GLOBES (Mar. 23, 2017, 6:19 PM), <http://www.globes.co.il/en/article-shaked-sets-fees-to-stem-class-actions-flood-1001182423> [<https://perma.cc/X4GH-YAVV>]. I thank Benjamin Weitz for alerting me to the recent change in Israel.

²²⁷ If we use a flat fee for class action filing, the plaintiff will pay a filing fee calculated by the amount-at-stake if she files by herself but pay a flat fee when she files a class action. So, the filing fee will affect the choice of the plaintiff. Even if we lower the cap on filing fee, any amount that is above (or lower) the expected filing fee of an individual action will affect the choice of the plaintiff whether to file a class action or not.

8. CONCLUSION

Opt-out type class action and contingency fee arrangements are considered to be some of the major mechanisms that allowed entrepreneurial litigation to take hold in the United States.²²⁸ But considering the current practice in Korea, where the plaintiff's counsels are not aggressively filing for class action even though both mechanisms are present, other factors also seem to matter. I do not assert that I have considered every variable in the civil procedure practices that could affect the outcome here.

However, we should also note that while countries differ in law and practice, there may be some other legal mechanisms or practices which account for the present differences, to some extent. For instance, the lack of discovery could be accounted for by the substantive law, which eliminates certain elements, or procedural law, which shifts the burden of proof for certain elements.

It may be possible that the use of the SCAA will increase in Korea in the future. The basic framework that allowed the class action to thrive in the United States is implemented in Korean civil procedure, at least in the securities class action context. And other mechanisms that could possibly deter entrepreneurial attorneys from pursuing securities class actions do not seem to be determinative. Korean law on class certification may be even more favorable to entrepreneurial attorneys in Korea when compared to their U.S. counterparts.

The Filing fee rule may be one hurdle that deters the plaintiff or the plaintiff's attorney from using the securities class action in Korea. The escalating filing fee that takes the amount-at-stake of the class members into account affects the incentives of the lead plaintiff and the lead plaintiff's attorney. By removing the other class members' amount-at-stake from the filing fee formula, it may be possible to incentivize the lead plaintiff and lead plaintiff's attorney to use the class action.

However, it should be noted that civil procedure is not the only factor that affects the actions of lead plaintiffs and entrepreneurial attorneys. As noted earlier, social and economic situations, such as the size of the market capitalization of the listed corporations, may

²²⁸ See Coffee, Jr., *supra* note 153, at 217-18 (noting the effect of the class action and the contingent fee arrangement on the lawyer as an entrepreneur).

also affect their actions.²²⁹ To really understand the reason for the differences in the practice of class action, we may have to look beyond civil procedure.

²²⁹ See Choi, *supra* note 10 and accompanying text; see also Coffee, Jr., *supra* note 99, at 1925 (noting the Korean experience when arguing that legislation will not alone produce major change).

APPENDIX TABLE A²³⁰

No.	Case No.	Date of Filing	Plaintiff	No. of Plaintiffs	Plaintiff's attorney	Defendant	Status
1	Suwon Dist. Ct., 2009Ga-Hap8829	2009. 4. 13.	Park Yun-pae, Seoul Investment Club, Inc.	2	Lawyer Jo Yeongkil, Jo Nam-taek, Ham Seungwan, Choi Soengjin, Park Sangbeom, Cheong Huseon	Jinseong TEC, Inc., Ma Young-jin, Yoon Wuseok ²³¹	2010. 4. 30. Settled.
2	Seoul Central Dist. Ct., 2010Ga-Hap1604	2010. 1. 7.	Yang Innam, Choi Young mi	2	Hannuri Law (Lawyer in charge: Song Seonghyeon, Kim Sangwon, Kim Juyeong, Park Pilseo)	Royal Bank of Canada	2017. 2. 15. Settled.
3	Seoul Southern Dist. Ct., 2011Ga-Hap19387	2011. 10. 13.	Lee Jae-hyeong et al.	186	Hannuri Law (Lawyer in Charge: Song Eonghyeon, Kim Sangwon, Kim Juyeong)	DONGBU Securities Co., Ltd., Trustee of Ssimotek Park Younggu ²³²	Pending in the court of first instance.

²³⁰ Summarized by the Author using the data in the Supreme Court of Korea website (www.scourt.go.kr).

²³¹ Case against Ma Youngjin has been voluntarily dismissed on August 21, 2009, and case against Yoon Wuseok has been voluntarily dismissed on January 18, 2010.

²³² Case against Trustee of Ssimotek Park Younggu has been voluntarily dismissed on March 8, 2012.

4	Seoul Southern Dist. Ct. 2011Ga-Hap23003	2011. 11. 25.	Yang Il Nam, Choi Young mi	2	Hannuri Law (Lawyer in charge: Song Seonghyeon, Kim Sangwon, Kim Juyeong, Park Pilseo, Jeon Youngjun)	HANH WA INVESTMENT & SECURITIES CO., LTD.	Consolidated to Seoul Central Dist. Ct., 2010Ga-Hap1604 and given a new case number of Seoul Central Dist. Ct., 2012Ga-Hap509676.
5	Seoul Central Dist. Ct., 2012Ga-Hap17061	2012. 3. 2.	Kim Soondeok et al.	5	Hannuri Law (Lawyer in charge: Song Seonghyeon, Kim Sangwon, Kim Juyeong, Park Pilseo, Jeon Youngjun)	Korea Investment & Securities Co., Ltd., Deutsche Bank AG ²³³	Judgement for the plaintiff.
6	Seoul Central Dist. Ct., 2013Ga-Hap74313	2013. 10. 8.	Kim Taeun g et al.	15	Hannuri Law (Lawyer in charge: Song Seonghyeon, Kim Sangwon, Kim Juyeong, Jeon Youngjun)	GS Engineering & Construction Corp.	Pending in the court of first instance.
7	Seoul Southern Dist. Ct., 2013Ga-Hap107585, 2014Ga-Hap100	2013. 11. 25.	Kim Jiwun	1	Geonjin Law (Lawyer in charge: Park Pilseo) Yul Law (Lawyer in charge: Byun	Jang Chul	Pending in the court of first instance.

²³³ Case against Korea Investment & Securities Co., Ltd. has been voluntarily dismissed on May 16, 2012.

	086 & 100093 (consol.)				Hwan-bong)		
8	Seoul Western Dist. Ct., 2013Ga-Hap35856	2013. 11. 26.	Kim Jiwun	1	Geonjin Law (Lawyer in charge: Park Pilseo) Yul Law (Lawyer in charge: Byun Hwan-bong)	Yu Wangdon	Consolidated to Seoul Southern Dist. Ct., 2013Ga-Hap107585 and given a new case number of Seoul Southern Dist. Ct., 2014Ga-Hap100086.
9	Suwon Dist. Ct., 2013Ga-Hap26404	2013. 11. 26.	Kim Jiwun	1	Geonjin Law (Lawyer in charge: Park Pilseo) Yul Law (Lawyer in charge: Byun Hwan-bong)	Jin Matrix, Co., Ltd.	Consolidated to Seoul Southern Dist. Ct., 2013Ga-Hap107585 and given a new case number of Seoul Southern Dist. Ct., 2014Ga-Hap100093.
10	Seoul Central Dist. Ct., 2014Ga-Hap31627	2014. 6. 13.	Seo Wonil et al.	1254	Jeongyul LLC (Lawyer in charge: Kim Hak Sung, Lee Ji Ho, Jeon Jong Won, Kim Seok Bae, Lee Hae Wook, Woo-Jung Jon, Hwang Yunjeong, Park Dong Won, Jung Jae Seop)	Yuanta Securities (Korea) Co., Ltd. et al.	Pending in the court of first instance.
11	Seoul Central Dist. Ct. 2014Ga-	2014. 6. 10.	Kang Jonggu et al.	20	Jeongyul LLC (Lawyer in charge: Lee Dae Soon, Park Seo	Yuanta Securities (Korea) Co., Ltd. et al.	Pending in the court of first instance.

	Hap301 50				Jin, Park Hwiyeong, Mun Che- olju, Kim Jee Eun, Baek Seungjae) Lawyer Jin Cheol		
12	Seoul Central Dist. Ct. 2015Ga- Hap904 7	2015. 3. 27.	Kim Hui- dong et al.	6	Youngjin LLC (Law- yer in charge: Yu Kyungjae, Kwak Wonkon, Mun Jin O	STX Off- shore & Ship- building Co., Ltd. et al.	Pending in the court of first in- stance.
13	Seoul West- ern Dist. Ct., 2016Ga- Hap304 18	2016. 1. 19.	Lee Junsik	1	Hannuri Law (Law- yer in charge: Kim Sang- won, Kim Juyeong, Song Seonghyeo n, Park Pil- seo, Kim Jeongeun, Im Jim- seong, Goo Hyunjo)	Samil Account- ing Corp.	Pending in the court of first in- stance.

APPENDIX TABLE B²³⁴

No.	Case Number for Trial	Case number for class certification	Status
1	Suwon Dist. Ct., 2009Ga- Hap8829	Suwon Dist. Ct., 2009Ka-Gi1048, Jan. 21, 2010	Certified
2	Seoul Central Dist. Ct., 2010Ga-	Seoul Central Dist. Ct., 2010Ka- Gi9474 & 2012Ka-gi2082 (consol.), May 1, 2012	Certifica- tion Denied

²³⁴ Summarized by the Author using the data in the Supreme Court of Korea website (www.scourt.go.kr).

	Hap1604 & 2012Ga-Hap509676	Seoul High Ct., 2012Ra764 & 765 (consol.), May 31, 2013	Affirmed
		S. Ct., 2013Ma1052 & 1053 (consol.), Apr. 9, 2015	Reversed to be re-manded
		Seoul High Ct., 2015Ra656 & 657 (consol.), Nov. 16, 2015	Certified
		S. Ct., 2015Ma2056 & 2057 (consol.), Mar. 28, 2016	Affirmed
3	Seoul Southern Dist. Ct., 2011Ga-Hap19387	Seoul Southern Dist. Ct., 2011Ka-Gi2010, Sept. 27, 2013	Certified
		Seoul High Ct., 2013Ra20093, Feb. 6, 2015	Affirmed
		S. Ct., 2015Ma4027, Nov. 4, 2016	Affirmed
4	Seoul Central Dist. Ct., 2012Ga-Hap17061	Seoul Central Dist. Ct., 2012Ka-Gi1273, Sept. 3, 2013	Certified
		Seoul High Ct., 2013Ra1426, Jan. 13, 2014	Reversed
		S. Ct., 2014Ma188, Apr. 9, 2015	Reversed to be re-manded
		Seoul High Ct., 2015Ra619, Jan. 29, 2016	Affirmed
		S. Ct., 2016Ma251, May 27, 2016	Affirmed
5	Seoul Central Dist. Ct., 2013Ga-Hap74313	Seoul Central Dist. Ct., 2013Ka-Gi6824, Feb. 12, 2015	Certified
		Seoul High Ct., 2015Ra539, Jan. 29, 2016	Affirmed
		S. Ct. 2016Ma253, June 10, 2016	Affirmed
6	Seoul Southern Dist. Ct., 2013Ga-Hap107585, 2014Ga-Hap100086 & 100093 (consol.)	Seoul Southern Dist. Ct., 2013Ka-Gi2787, 2014Ka-Gi10064 & 10065 (consol.)	Pending
7	Seoul Central Dist. Ct.,	Seoul Central Dist. Ct., 2014Ka-Gi3556, Sept. 29, 2016	Certification Denied

	2014Ga-Hap31627	Seoul High Ct., 2016Ra21279, Aug. 4, 2017	Affirmed
		S. Ct. 2017Ma5883	Pending
8	Seoul Central Dist. Ct. 2014Ga-Hap30150	Seoul Central Dist. Ct., 2014Ka-Gi3443	Pending
9	Seoul Central Dist. Ct., 2015Ga-Hap9047	Seoul Central Dist. Ct., 2015Ka-Gi1755	Pending
10	Seoul Western Dist. Ct., 2016Ga-Hap30418	Seoul Western Dist. Ct., 2016Ka-Gi44	Pending