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Converium/SCOR

Dutch Court Further Opens the Door for International Securities Fraud Settlements

By Jeroen van Kwawegen

On January 17, 2012, the Amsterdam Court of Appeals issued a decision granting final approval of two international settlements pursuant to the Dutch Collective Settlement Act in the *Converium/SCOR Securities Litigation*. Under the terms of the settlements, European, Middle Eastern and Asian investors recovered $58.4 million — money they would not have received without the Dutch court's decision — and the defendants obtained a release of claims relating to allegations that they committed securities fraud.

The Amsterdam Court of Appeals' decision in *Converium* has important implications for non-U.S. institutional investors and for corporate defendants who face securities claims, particularly in light of the U.S. Supreme Court's 2010 decision in *Morrison v. National Australia Bank*, which significantly limited the ability of investors who buy or sell securities on foreign exchanges to seek redress for fraud in U.S. courts. The decision broadens a legally binding mechanism to help resolve the securities claims of non-U.S. investors

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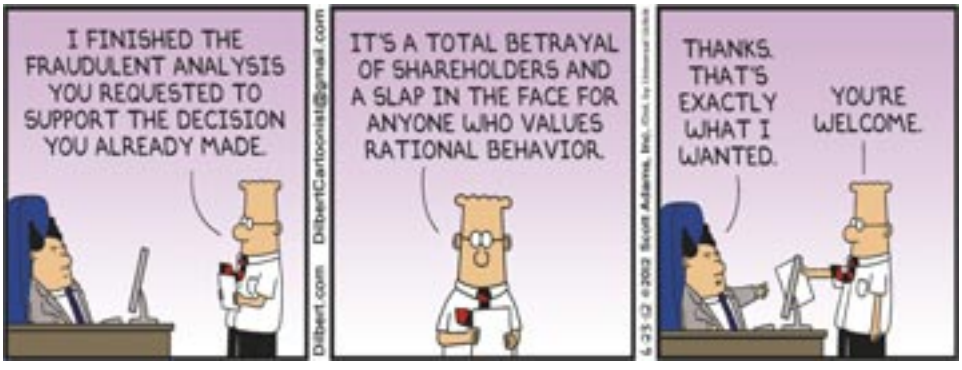
against non-U.S. companies. Moreover, the *Converium* decision is important for corporate defendants, because it shows that there is a forum that can provide a pan-European release of claims, giving certainty and peace, despite minimal ties of the companies or their shareholders to the Netherlands.

The *Converium* case began as a securities fraud action in the federal district court for the Southern District of New York. Plaintiffs alleged that the defendants — Swiss insurance carriers — had improperly overstated the loss reserves that were available to pay insurance claims. In March 2008, the court certified a class of exclusively U.S. investors and non-U.S. investors who purchased the defendants' American Depository Shares ("ADS") on the New York Stock Exchange. The court excluded from the plaintiff class all non-U.S. investors who purchased stock outside the U.S., finding that those investors did not have sufficient contacts with the U.S. to pursue their claims under the U.S. federal securities laws. This class certification decision resulted in two separate cases involving separate classes of plaintiffs—one class of investors who could continue to pursue their claims in New York because they were U.S. investors or purchased ADS on the New York Stock Exchange, and one class of plaintiffs who could not pursue their claims in a U.S. court because they were not U.S. investors and did not purchase securities in the U.S. The certified class of U.S. investors and non-U.S. investors who purchased ADS on the New York Stock Exchange proceeded with the case in New York and ultimately achieved an $84.6 million settlement.

Because of the U.S. court's decision, the excluded plaintiffs (non-U.S. investors who purchased securities on non-U.S. exchanges) were left without any recourse to recover compensation for the Converium fraud. This included a significant number of institutional investors, given that Converium was a Swiss company and a large portion of its securities were purchased by these excluded plaintiffs on the Swiss stock exchange.

The excluded plaintiffs decided to pursue recovery under Dutch law. Specifically, representatives of the excluded plaintiffs formed a foundation under Dutch law that separately negotiated settlements providing for a $58.4 million recovery pursuant to the Dutch Collective Settlement Act ("*Wet Collectieve Afwikkeling Massaschade*" or "WCAM"). The settlements were entered into by the Dutch foundation on behalf of all investors domiciled anywhere outside the U.S. who purchased Converium shares between January 7, 2002 and September 2, 2004 on a non-U.S. stock exchange. Notably, Converium was not incorporated in The Netherlands and not listed on the Amsterdam Stock Exchange, and the vast majority of investors who suffered losses and were potentially covered by the settlements were not domiciled in The Netherlands either. On October 1, 2010, the foundation and the defendants jointly petitioned the Amsterdam Court of Appeals for approval of the *Converium* settlement. On November 12, 2010, the Amsterdam Court of Appeals entered an interim order, provisionally holding that it had jurisdiction to review and possibly approve the proposed settlement. The order made clear, however, that the Court would make a final determination regarding its jurisdiction during the final approval stage of the proceedings. The Dutch foundation then provided approximately 12,000 potential class members in Europe, the Middle East and Asia with an individual notice of settlement (in Arabic, Dutch, English, French, German, Italian, Portuguese and Spanish), ran announcements in 19 broadly circulated newspapers in Germany, France, Italy, Luxembourg, The Netherlands, the United Kingdom and Switzerland, and announced the settlements on specially designated websites.

On January 12, 2012, the Amsterdam Court of Appeals approved the settlements as fair and reasonable. The Court held that the shareholders were adequately notified of the settlements, had ample opportunity to opt-out, and were adequately represented in the settlement proceedings by the Dutch foundation. The Court noted, for example, that no investor had commenced a separate lawsuit to recover losses covered by the settlements. The Court also noted that investors would receive a quick recovery without incurring any out-of-pocket expense if the settlements were approved. In this regard, the Court determined that the Dutch foundation was sufficiently representative of the interests of all non-U.S. purchasers of Converium shares between January 7, 2002 and September 2, 2004,



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European Institutions Take Leading Roles in U.S. Securities Litigation

By Kristin Meister

The financial crisis of the past few years is a sharp reminder that nations around the world are financially interconnected despite being separated by oceans and time zones. Unfortunately, this reminder has come in the painful form of the worldwide consequences of American financial fraud that directly impacted U.S. and foreign investors alike. In response, recent years have seen an increase in foreign (particularly, European) investors who have successfully requested to be appointed as lead plaintiffs in securities class actions across the United States. Indeed, European investors are now some of the most active and important protectors of shareholder rights.

Courts in the United States understand that with today's global economy, non-U.S. based investors, who increasingly hold sizeable amounts of U.S. securities, can appropriately serve as adequate lead plaintiffs and are encouraged to seek leadership positions. This is especially true given the Private Securities Litigation Reform Act ("PSLRA") provisions setting out the criteria for class representatives, which consider lead plaintiff applicants appropriate when they have "the largest financial interest in the relief sought by the class" irrespective of their country of origin. Increasingly, European institutional investors are found to have suffered the largest loss, even of a largely U.S.-based class, and are therefore appointed lead plaintiff. Indeed, it is now commonplace for U.S. courts to certify class actions and appoint European lead plaintiffs as class representatives to prosecute the lawsuits on behalf of members of a class which includes both American and non-American investors.

Since 2010, there have been at least 23 cases in which a movant originating from a European country was appointed lead or co-lead plaintiff in a class action securities litigation in the United States.

Since 2010, there have been at least 23 cases in which a movant originating from a European country was appointed lead or co-lead plaintiff in a class action securities litigation in the United States. These institutional plaintiffs, including pension funds, insurance companies, and asset managers, mostly came from The Netherlands, the United Kingdom, and Scandinavia. For example, in just the last couple of years, Stichting Philips Pensioenfonds, a public pension fund based in The Netherlands, was appointed lead plaintiff in *Jones, et al v. Pfizer, Inc.* in the federal district court for the Southern District of New York; Stichting Pensioenfonds Zorg en Welzijn, represented by PGGM Vermogensbeheer B.V., was appointed co-lead plaintiff in *In re Bank of America Securities Litigation* in the federal district court for the Southern District of New York; the Mineworkers' Pension Scheme from the United Kingdom was appointed lead plaintiff by the federal district court for the District of Arizona in *In re Apollo Group, Inc. Securities Litigation*; and the federal district court for the District of New Jersey appointed Swedish pension administrator Sjunde AP-Fonden (AP7) lead plaintiff in *Monde, et al v. Johnson & Johnson*.

The importance of these proactive and engaged European institutional investors for protecting shareholder interests cannot be overstated. Having sophisticated investors take ownership and serve as lead plaintiff is of crucial importance to the litigation and the ultimate recovery.

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Although the Converium decision does not create a European class action mechanism, it does show that European plaintiffs and defendants can turn to the Amsterdam Court of Appeals to quickly and capably resolve disputes that potentially involve thousands of plaintiffs in a manner that is beneficial to all parties involved.

in part because 29 organizations representing the interests of shareholders and institutional investors, including organizations from the United Kingdom and Switzerland (the two countries where most of the known shareholders of the Swiss defendant companies resided), supported the settlement.

The January 12, 2012 *Converium* decision is a very good outcome for the plaintiffs and the defendants in the case. But for the $58.4 million settlement, non-U.S. investors who purchased Converium shares on the Swiss Stock Exchange would have needed to commence individual actions around the world to recover their losses — costly and time-consuming for plaintiffs and defendants alike.

The broader implications of the *Converium* decision are also significant. By holding that very limited connections to The Netherlands were sufficient to merit the Court's jurisdiction, the Amsterdam Court of Appeals has significantly broadened the application of the Dutch Collective Settlement Act for resolving collective or group claims involving European plaintiffs or defendants. Pursuant to the Brussels 1 Regulation and the Lugano Convention, courts in all European Union member states, Norway, Switzerland and Iceland must in principle recognize and enforce the Amsterdam Court of Appeals' judgment, including the agreed-upon release of claims against the defendants. Moreover, any objections to enforcing the judgment approving the settlement will be met with considerable opposition because of the Amsterdam Court of Appeals' rigorous adherence to the notice provisions of the Dutch Collective Settlement Act, and the generous time periods that were given for opting out of the settlement.

Although the *Converium* decision does not create a European class action mechanism, the *Converium* decision does show that European plaintiffs and defendants can turn to the Amsterdam Court of Appeals to quickly and capably resolve disputes that potentially involve thousands of plaintiffs in a manner that is beneficial to all parties involved. Moreover, the Amsterdam Court of Appeals has shown that it is ready, willing and able to take a prominent role in reviewing the merits of class action settlements compensating investors for damages caused by fraud and other corporate misconduct by companies that have shares trading on a European stock exchange.

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