The Harvard Law School Forum on Corporate Governance and Financial Regulation
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Dutch Court Decision Impacts Global Securities Class Actions

Posted by Scott Hirst, co-editor, HLS Forum on Corporate Governance and Financial Regulation, on Saturday February 18, 2012

Editor's Note: The following post comes to us from Todd G. Cosenza, partner in the Litigation Department of Willkie Farr & Gallagher LLP, and is based on a Willkie memorandum by Mr. Cosenza and Antonio Yanez, Jr.

Recently, the Amsterdam Court of Appeal issued an important decision in the Converium case with implications for class action suits in the United States and internationally. The decision authorizes the use of the Dutch collective-settlement statute to settle disputes on a classwide, opt-out basis. Given that the U.S. Supreme Court's decision in *Morrison v. National Australian Bank* significantly limited the extent to which claims by foreign investors can be settled in United States securities cases, the Amsterdam Court of Appeal's decision is significant because it provides a practical mechanism for structuring global securities class action settlements through the use of the Dutch statute in concert with U.S. proceedings, particularly in cases involving a large number of European investors.

Background on the Dutch Collective-Settlement Statute

In 2005, the Netherlands adopted the Act on the Collective Settlement of Mass Claims (the "Dutch Act"). The Dutch Act permits an alleged wrongdoer, irrespective of whether any litigation is pending, to enter into a contract with a foundation that represents the interests of a purportedly injured group or class. Pursuant to that contract, the wrongdoer agrees to compensate the foundation for the injuries suffered by the group. The foundation and the alleged wrongdoer then submit the executed contract (or settlement agreement) to the Amsterdam Court of Appeal and request that the Court order the contract binding on all members of the class. The class members are given an opportunity to object to the agreement. If the Court declares the contract binding, class members are bound by the settlement unless they opt out and initiate individual proceedings.

Background on the Converium Case

The common shares of Converium Holding (Switzerland) AG, a Swiss reinsurer, were listed on the SWX Swiss Exchange. Converium's American Depository Shares were listed on the New York Stock Exchange. After the market price of Converium's shares declined in the wake of the company's announcement of reserve increases, investors brought a putative securities class action alleging that Converium and certain of its officers and directors had earlier misrepresented the sufficiency of the company's loss reserves, conveying the false impression that the company was in a far stronger financial position than it really was. In a groundbreaking opinion that presaged the Supreme Court's decision in *Morrison*, the district court excluded the claims of most foreign investors (the vast majority of the purported class) because the alleged fraudulent scheme was, according to plaintiffs' version of events, masterminded and implemented in Switzerland, not in the United States. What remained of the U.S. securities class action (the claims brought by investors who purchased Converium's ADS on the NYSE) was then settled. Willkie represented Converium in the U.S. securities class action.

In July 2010, certain Dutch representative groups entered into settlement agreements with Converium for the benefit of non-U.S. purchasers (*i.e.*, those purchasers who had been excluded from the U.S. securities class action). Citing the Dutch Act, a petition was filed with the Amsterdam Court of Appeal requesting that the settlement agreements be declared binding on non-U.S. purchasers. Although the alleged wrongdoing took place outside the Netherlands, a small fraction of the potential claimants resided in the Netherlands, and Converium was a Swiss reinsurer, the Amsterdam Court of Appeal ruled that the Dutch Act was an appropriate mechanism for settling the claims remaining in the Converium case. The Court, therefore, found that the agreements submitted by the representative groups and the company are binding on those shareholders who do not affirmatively "opt out" of the settlement agreement. This is important because – as the Amsterdam Court of Appeal noted in its previous decision in the Converium case – under the Lugano Convention and Brussels I Regulation other Member States of the European Union as well as Switzerland, Iceland, and Norway must recognize the effect of the Court's ruling on citizens of other European countries.

Potential Impact of the Dutch Court's Decision

The Court's decision illustrates that the Dutch Act provides a viable class action settlement mechanism for complex multi-jurisdictional securities class actions. In particular, if the claims asserted face significant obstacles under U.S. law, the Dutch Act should be considered as a potential strategic alternative to resolve the dispute globally in conjunction with a United States settlement. Further, where a U.S. court will not hear investor claims because the shares of the

company allegedly involved in wrongdoing were listed and purchased on a European-based stock exchange, the company should be aware that it (with European and American investors) can seek to resolve those claims on a classwide basis in a European forum. Lastly, the Converium case and the availability of the Dutch forum to settle claims on a classwide basis may provide U.S. courts with another justification for limiting their jurisdiction over any claim brought by foreign investors.