KEYNOTE

The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding

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For many years after Rule 23[1] was adopted, the United States was not only the center of class action litigation, it was virtually the only jurisdiction that permitted class actions. Nor were large-scale aggregated proceedings common elsewhere. Outside the United States, class actions were authorized in Quebec province in 1973, but it was not until the early 1990s that class action procedures spread to other Canadian provinces. Australia adopted a federal class action rule in 1992, but it was not until the late 1990s that one of its states followed suit. If one looked out over the global landscape around 2000, that was about it with regard to the types of litigation that were the subject

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1 FED. R. CIV. P. 23.

of The George Washington University Law School's 2010 conference on aggregate litigation.[2]

Since then, there has been a remarkable change. Ironically, as obstacles to bringing and prevailing in class actions have been put in place in the United States, courts around the world have opened their doors to class actions and group litigation. Today, as shown in Table 1, there are at least twenty-one countries that have adopted some type of class action, and at least six countries that have some form of consolidated group proceeding in addition to, or instead of, a class action.

Table 1. Countries that Have Adopted Class Action or Group Litigation Rules[3]

- **Class actions:** Argentina, Australia, Brazil, Bulgaria, Canada, Chile, China, Denmark, Finland, Indonesia, Israel, Italy, Netherlands, Norway, Poland, Portugal, South Africa, Spain, Sweden, Taiwan, United States*
- **Group proceedings:** England and Wales, Finland, Germany, Japan, Switzerland, United States

* Under debate: Austria, Belgium, England, European Union, New Zealand

Several other countries are actively debating the adoption of a class action regime. The countries that have adopted class actions in the last ten years are remarkable in their diversity: they include countries on every continent, civil law as well as common law countries, and countries with authoritarian as well as liberal democratic traditions.[4]

The design of these procedures varies considerably with regard to who has standing to sue, scope, remedies, and whether the procedure requires or allows class members to opt in or opt out (see Table 2).

Table 2. Variations in Key Features

- **Standing:** (1) public officials; (2) licensed associations; (3) private actors
- **Scope:** (1) limited; (2) transsubstantive
- **Remedies:** (1) injunctive or declaratory; (2) damages
- **Procedure:** (1) opt-in; (2) opt-out

In many countries, the debate over class action adoption is dominated by the concern that, whatever the new procedure looks like, it should

2 Deborah R. Hensler, *The Globalization of Class Actions: An Overview*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 7 (2009).

3 *See id.* at 13.

4 *Id.*

not be an "American-style" class action. Despite this concern, the emerging model includes many of the features of a Rule 23 class action (see Table 3).

Table 3. The Emerging Model Approaches Rule 23[5]
• A majority of class action procedures permit private actors to represent a class (at least in some circumstances) • About half of the procedures are transsubstantive • Most of the procedures permit damages (at least in some circumstances) • There is a mix of opt-out and opt-in provisions

Yet only a small number of countries have adopted what we might term the full "American-style" class action, and because of differences between the formal procedural rules and the operation of rules in practice, the appropriate categorization of each procedure is often ambiguous. Those countries that approach the U.S. model include Australia, Canada, Indonesia, Israel, the Netherlands, Norway, Poland, and Portugal.[6] Perhaps not surprisingly, the countries that have seen the most extensive use of class actions for various types of civil damage litigation are those whose procedures most resemble ours (see Table 4).[7]

5 *See generally id.*

6 *Id.* at 16.

7 Some of the numbers on this chart are quite remarkable when one takes into account differences in population size: Israel's population is about 7 million, the Netherlands' about 17 million, Australia's about 22 million, and Canada's about 34 million. *See generally* CIA—THE WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/ (select country, then select "People") (last visited July 5, 2010). I estimate that, in recent years, about 7500 class actions have been filed annually in the United States, with a population that tops 310 million. *See* Nicholas M. Pace, *Group and Aggregate Litigation in the United States*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 32, 40 n.9 (2009) (discussing the number of class actions filed annually in United States).

Table 4. Numbers of Class Actions, Selected Jurisdictions
• **Australia:** 245 since 1992[8]
• **Canada:** 411 since 2007[9]
• **Israel:** 750 class action complaints since 2007[10]
• **Indonesia:** 20–30[11]
• **Netherlands:** 5[12]
• **Sweden:** 12[13]

In most other countries with new class action regimes, there has been relatively little use of the procedure to date. There are a variety of reasons for that, but one key factor is that, in most jurisdictions, the class action procedure has been dropped into a legal financing regime that prohibits or limits conditional or contingent fee arrangements, provides no mechanism for cost sharing among members of an opt-out class, and requires fee shifting—with the result that, in some instances, a class representative must post a security bond against adverse costs and is at risk for paying those costs. In these jurisdictions, there is a class action procedure "on the books," but so far little appetite for using it. There is reason to think that this will change, however. Experience suggests that class action procedures adopted solely for certain types of cases are extended later to other case types. In some jurisdictions, the advent of class actions and group proceedings is contributing to changes in fee regimes: for example, the demise of restrictions on contingency fees and the introduction of one-way fee shifting. In other words, putting class action procedures on the books can exert pressure to remove or loosen the obstacles to using them.

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8 VINCE MORABITO, AN EMPIRICAL STUDY OF AUSTRALIA'S CLASS ACTION REGIMES: FIRST REPORT: CLASS ACTION FACTS AND FIGURES 2 (2009), *available at* http://www.law.stanford.edu/library/globalclassaction/PDF/Australia_Empirical_Morabito_2009_Dec.pdf.

9 *National Class Action Database*, CANADIAN B. ASS'N, http://www.cba.org/ClassActions/main/gate/index/default.aspx (last visited Nov. 16, 2010) (figure derived from lists of cases, by year, available from main page).

10 E-mail from Peretz Segal, Head of the Legal Counsel Dep't, Isr. Ministry of Justice, to author (Mar. 2, 2009) (on file with author).

11 MAS ACHMAD SANTOSA, GLOBAL CLASS ACTIONS EXCH., NATIONAL REPORT: INDONESIA 9 (2007), http://www.law.stanford.edu/library/globalclassaction/PDF/Indonesia_national_report.pdf.

12 Ianika Tzankova, Prof., Tilburg Univ., Remarks at the Third Annual Conference on Global Class Actions (Dec. 11–12, 2009) (summary available at http://www.law.stanford.edu/library/globalclassaction/PDF/Event_3rd%20Annual%20Conference%20on%20Global%20Class%20Actions-2009.pdf). The Netherlands permits injunctive and damage class actions; there have been five damage actions but many more injunctive class actions.

13 PER HENRIK LINDBLOM, GLOBAL CLASS ACTIONS EXCH., NATIONAL REPORT: GROUP LITIGATION IN SWEDEN 2 (2008), http://www.law.stanford.edu/library/globalclassaction/PDF/Sweden_Update_paper_Nov%20-08.pdf.

The rise of class actions outside the United States adds to the challenges presented by transnational litigation. As a practical matter, the availability of class actions in Canada and Australia increasingly has led to coordinated (in Canada)[14] and parallel (in Australia)[15] class action proceedings, complicating litigation strategies for defendants and posing new managerial issues for U.S. judges. But other complications loom: until recently, U.S. federal courts considering whether to certify a class that included foreign nationals needed to consider, inter alia, whether foreign courts that had no class action procedure of their own would enforce U.S. class action judgments.[16] *In re Vivendi Universal, S.A. Securities Litigation*[17] offers a vivid example of such an inquiry. Increasingly, courts in numerous jurisdictions encounter litigation arising out of the same facts and proceedings worldwide—in courts with a variety of class and aggregate procedures—and judges will need to grapple with the question whether their citizens are bound by class settlements arrived at elsewhere. This may lead to some surprising turns of events.

To illustrate the possibilities, I will focus on the 2005 Dutch Act on the Collective Settlement of Mass Claims (*Wet collectieve afwikkeling massaschade*), popularly known as "WCAM" (see Table 5).[18]

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14 *See* Jasminka Kalajdzic et al., *Canada*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 41, 46 (2009).

15 *See infra* notes 57–58 and accompanying text.

16 George A. Bermann, *U.S. Class Actions and the "Global Class,"* 19 KAN. J.L. & PUB. POL'Y 91 (2009).

17 *In re* Vivendi Universal, S.A. Sec. Litig., No. 02 Civ. 5571, 2009 U.S. Dist. LEXIS 110283 (S.D.N.Y. Nov. 19, 2009). In *Vivendi*, the defendant argued that the U.S. court could not assume jurisdiction over French class members on the grounds that a French court would hold class actions unconstitutional. *Id.* at *23–24. For discussion, see Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 465, 471–72, 481–82.

18 Stb. 2005, pp. 340, 380.

Table 5. The Netherlands Settlement Class Action: *Wet collectieve afwikkelling massaschade* ("WCAM")
• Parties negotiate an out-of-court settlement of mass claims • Claimants are represented by one or more foundations and associations • Representative organizations may be preexisting or established for the purpose of negotiating a settlement • Settling parties jointly petition court for settlement approval • Court-approved notice • Opportunity for objectors to come forward and be heard • Court reviews and approves settlement • Notice of settlements and opt-out period • Settlement administration by private foundation

Under WCAM, claimant representatives—for example, an existing consumer association or a shareholders foundation created especially for the purpose of representing claimants—and putative defendants who have negotiated an out-of-court settlement of mass claims can jointly petition the Amsterdam Court of Appeals to approve the settlement and make the settlement binding on all class members who do not opt out.

After the petition is submitted to the court, notice of the proposed settlement is published (and, where feasible, communicated individually). The court reviews the reasonableness of the settlement, after considering objections submitted in writing or at an oral hearing in which any class member may come forward. If—and only after—the court approves the settlement, notice of the approved settlement is given, and class members have an opportunity to opt out and pursue their own litigation. There is no right of appeal for class members after the Amsterdam Court of Appeals approves the settlement on the grounds that those who are not happy with the settlement will have had an opportunity to opt out. Settlements are administered by private foundations established specifically for this purpose. The parties negotiating the settlement have wide scope to set the parameters for the settlement, including, for example, rules for distribution of settlement funds, opportunities for appealing decisions on individual claims within the settlement framework, and an option for the settling parties to abandon the settlement if there are too many opt-outs.

The parties may also negotiate provisions relating to the representative association's attorney's fees. As is true generally in private civil litigation in the Netherlands, fee agreements made in the course of settlement are not subject to court review or approval, but are expected to conform to the professional rules promulgated by the Dutch bar association. Dutch lawyers are barred from entering into contin-

gent fee arrangements, although "success fees" are not prohibited and it is possible for a lawyer to contract to charge substantially discounted hourly fees in exchange for a substantial success fee if her client prevails.

In 1994, over a decade prior to the adoption of the collective settlement act, the Netherlands adopted a statute providing for collective actions that permits associations to bring tort actions on behalf of common interests—essentially a litigation class action.[19] But in these actions, associations can only obtain declaratory or injunctive relief; by law, the court in a collective-action case cannot hold that damages—aggregate or individual—are owed to the association, its members, or the interested people it represents.

Collective settlements under WCAM may follow upon the outcome of a collective action that determined that a defendant had engaged in illegal action. However, parties may also petition the court to approve a binding collective settlement even where there has been no previous court action. In short, the Netherlands has adopted as its class action model the settlement class action paradigm that describes the majority of damage class actions today in the United States. As in the United States, the settlement class action paradigm—referred to by Dutch commentators as a "back-end device without a front-end"—has been subject to criticism as favoring putative defendants over plaintiffs. But although various amendments to the collective settlement procedure are now under discussion at the Dutch Ministry of Justice, revising the collective action statute to provide for damages—and hence a "front-end" for the collective settlement procedure—is apparently not currently on the table.

As is true in a significant number of the countries that have adopted class action or group litigation procedures, the WCAM was designed to address a specific instance of mass injury and mass claims; in the Netherlands, it was children claiming injury due to their mothers taking a hormone medication (diethylstilbestrol, commonly known as "DES") during pregnancy. In the United States, DES litigation has proceeded in the form of aggregated nonclass litigation in federal and state courts and is still ongoing. In the Netherlands, DES litigation has now been fully resolved, as the settlement reached under WCAM included all persons injured as a result of their mothers' taking DES, going forward, including those who are termed the "futures" in U.S. procedural discourse.

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19 Stb. 1994, p. 269.

Since 2005, WCAM has been used to settle mass claims in six instances, including DES (see Table 6).

Table 6. Settlements Reached Under WCAM, 2005–2010
• **DES** (DES victims vs. drug manufacturers)* • **Dexia** (investment product purchasers vs. bank)* • **Vie d'Or** (insurance policyholders vs. regulatory authority, auditors, and actuaries)* • **Shell Petroleum** (shareholders alleging securities fraud related to restatement of petroleum reserves by Royal Dutch Shell) • **Vedior** (shareholders alleging securities fraud related to merger and acquisition) • **Converium** (shareholders alleging securities fraud related to failure to disclose accurately loss reserves) * Followed successful injunctive class actions

The first three settlements followed decisions in Dutch collective actions, but the three most recent did not. The DES settlement was the only case that involved mass personal injuries; all of the others were securities and other financial injury cases. Some of the classes and damages were quite large, even by U.S. standards (see Table 7).

Table 7. Scope of Six Settlement Class Actions		
Case Amount	**Class Size (est.)**	**Settlement Amount**
DES	34,000 (plus futures)	$48,000,000
Dexia	300,000	$1,370,000,000
Vie d'Or	11,000	$62,000,000
Shell Petroleum	500,000	$352,600,000
Vedior	2000	$5,770,000
Converium	to be determined	$58,400,00

Note also that the DES settlement includes future claimants, another example of the Dutch model taking on what has been viewed as controversial in the United States.[20] But from a U.S. perspective, the most significant aspect of the settlements is the scope of the *Shell Petroleum* and *Vedior* classes.

In *Shell Petroleum*,[21] the Dutch court took jurisdiction over Dutch and foreign shareholders, holding that under Dutch and European

[20] On "futures" class actions, see Deborah R. Hensler, *Bringing* Shutts *into the Future: Rethinking Protection of Future Claimants in Mass Tort Class Actions*, 74 UMKC L. Rev. 585 (2006).

[21] Hof's-Amsterdam 29 mei 2009, NJ 2009, 506 m.nt. J.M.J. Chorus, M.P. van Achterberg en W.H.F.M. (Shell Petroleum N.V./Dexia Bank Nederland N.V.) [hereinafter *Shell Petroleum*]

Union law, the Dutch foundation that represented the class could act on behalf of foreigners as well as Dutch nationals—quite a contrast with the line of U.S. federal court decisions declining jurisdiction over foreign claimants on forum non conveniens grounds.[22] As a result, the *Shell Petroleum* settlement resolved the claims of all investors in 100 jurisdictions worldwide, excepting only those investors residing in the United States who purchased their shares on U.S. stock exchanges. According to the Amsterdam Court of Appeals, which approved the settlement, only twenty-seven percent of the shares were owned by class members who resided in the Netherlands, and many purchased their shares on exchanges outside the Netherlands.[23]

The *Shell Petroleum* collective settlement was negotiated after shareholder litigation against Shell began in the United States on behalf of U.S. and non-U.S. investors.[24] The complaint alleged that Shell had materially misrepresented information with regard to its oil reserves.[25] The class was represented by two Pennsylvania pension funds and one U.S. law firm, Bernstein Liebhard LLP, appointed as class counsel in accordance with the Private Securities Litigation Re-

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(English translation on file with author). *Shell Petroleum* is an example of what is termed an "F-cubed" case: foreign investors versus foreign defendants trading on a foreign exchange. *See* Choi & Silberman, *supra* note 17, at 465. Subsequent to *Shell Petroleum*, the U.S. Supreme Court held that U.S. courts do not have subject matter jurisdiction over foreign investors trading on foreign exchanges suing foreign-domiciled defendants for securities fraud. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010).

22 *E.g.*, *In re* Factor VIII or IX Concentrate Blood Prods. Litig., 531 F. Supp. 2d 957 (N.D. Ill. 2008); *In re* Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., No. 04-C-5812, 2007 U.S. Dist. LEXIS 98929 (S.D. Ind. Jan. 31, 2007).

23 *See Shell Petroleum*, NJ 2009, 506, ¶ 6.22. *Vivendi* is of interest here as well. Recall that, in that case, Vivendi sought dismissal of French class members on the grounds that a French court would hold class actions unconstitutional. *In re* Vivendi Universal, S.A. Sec. Litig., No. 02 Civ. 5571, 2009 U.S. Dist. LEXIS 110283, at *23–24 (S.D.N.Y. Nov. 19, 2009). The Amsterdam court in *Shell Petroleum* relied in part on European Union law in holding that it had jurisdiction over the WCAM settlement, even though the Shell settlement included French share purchasers.

24 Fourteen separate securities class actions arising out of the disclosure of the reclassification (downward) of oil reserves were filed in the United States and consolidated in the District of New Jersey, along with the two individual suits filed by Dutch pension funds. Two European institutional investors also filed suits against Shell in U.S. courts, which were also transferred to the District of New Jersey. Shell was also the subject of SEC and U.K. securities regulators' enforcement actions, resulting in penalties of $120 million and £17 million. Shareholders who participate in the WCAM and U.S. class settlements are also eligible to receive a portion of the $120 million SEC penalty fund. *Shell Petroleum*, NJ 2009, 506, ¶¶ 3.7, 3.22.

25 *Royal Dutch Petroleum Company (Shell): American Depository Receipts (ADR's)*, STAN. L. SCH. SEC. CLASS ACTION CLEARINGHOUSE, http://securities.stanford.edu/1029/RD04-01/ (last visited May 21, 2010).

form Act.[26] Two Dutch pension funds that filed individual suits in the United States were represented by other U.S. law firms, under contingency fee contracts negotiated by the funds.

Early in the litigation, the federal district court denied Shell's motion to dismiss the foreign claimants from the suit for lack of jurisdiction.[27] Two years later (and after further pretrial development), in April 2007, Shell informed the district court that it had reached a settlement with the non-U.S. purchasers and had asked the Amsterdam Court of Appeals to approve and make binding that settlement.[28] The claimants in the Netherlands case were represented by a foundation established especially for the purpose of such representation, plus a shareholders' advocacy group and the two Dutch pension funds that had earlier filed individual suits in the United States.[29] The special purpose foundation was formally incorporated on April 10, 2007, at about the same time the settlement was announced.[30] Its members were reported to include 150 institutional investors, a confederation of European shareholder associations, and eighteen other (unspecified) organizations representing shareholders in various European and other countries.[31]

Whether and when U.S. lead counsel Bernstein Liebhard was aware of the negotiations pertaining to a possible Dutch collective settlement is uncertain. According to an article in *The American Lawyer*, a U.S. law firm, Grant & Eisenhofer, the U.S. counsel for one of the Dutch pension funds, had been negotiating the settlement of non-U.S. claims without the knowledge of Bernstein Liebhard.[32] Grant & Eisenhofer lawyers ultimately signed the settlement agreement on be-

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26 Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

27 *In re* Royal Dutch/Shell Transp. Sec. Litig. (*Shell I*), 380 F. Supp. 2d 509, 572 (D.N.J. 2005).

28 *In re* Royal Dutch/Shell Transp. Sec. Litig. (*Shell II*), 522 F. Supp. 2d 712, 715 (D.N.J. 2007).

29 *Id.*

30 *See* Deed of Formation of the Stichting Shell Reserves Compensation Foundation (Apr. 10, 2007), http://www.shellsettlement.com/docs/Exhibit%202%20Articles%20of%20association%20of%20the%20Foundation.pdf.

31 Press Release, Stichting Shell Reserves Comp. Found., Amsterdam Court of Appeals Declares Shell Settlement Binding (May 29, 2009), https://www.royaldutchshellsettlement.com/Documents/PressReleaseAmsterdamCourtOfAppealsDeclaresShellSettlementBinding.pdf. According to interviews with case participants that I have conducted in the Netherlands, investors outside the Netherlands were solicited to participate in the Dutch class action after the foundation was established.

32 Ben Hallman, *Dutch Court Approves Landmark Royal Dutch Shell Shareholder 'Class Action,'* LAW.COM (June 1, 2009), http://www.law.com/jsp/article.jsp?id=1202431105422. That

half of the special purpose foundation and the two Dutch pension funds.[33] The settlement agreement also lists a Dutch law firm[34] as counsel to the special purpose foundation and two other U.S. law firms[35] as counsel to "certain participating shareholders."[36]

The U.S. lead plaintiffs sought an injunction from the U.S. federal court to enjoin the Netherlands settlement, while Shell moved the court to dismiss the non-U.S. claims.[37] Following mediation, the parties agreed to delay further action on their respective motions until a special master submitted a recommendation to the district court as to the jurisdictional issues regarding non-U.S. purchasers, and U.S. lead plaintiffs agreed that, should the U.S. judge decline jurisdiction, they would withdraw their motion seeking to enjoin Shell from pursuing the Netherlands settlement.[38] When the special master issued his report recommending that the district court decline jurisdiction, Shell again moved to dismiss the non-U.S. claims, and U.S. lead plaintiffs

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the U.S. court was aware of these negotiations is reflected in the judge's decision on a subsequent fee dispute between the U.S. lead counsel and U.S. liaison counsel:

> The Non-U.S. Purchasers were represented by other counsel and they negotiated with Shell towards a settlement of their claims outside the confines of this putative class action. Clearly, lead counsel and liaison counsel, upon notification of Shell's settlement in principle with the Non-U.S. Purchasers, realized that their potential counsel fees were thereby put in jeopardy; if the Non-U.S. Purchasers' claims were resolved outside of this case, the value of the common fund toward which they had been working would be substantially reduced.

In re Royal Dutch/Shell Transp. Sec. Litig. (*Shell III*), Civ. No. 04-374, 2008 U.S. Dist. LEXIS 32040, at *11–12 (D.N.J. Apr. 17, 2008); *see also* Michael Goldhaber, *'Shell Model' Opens Door to European Class Actions*, LAW.COM (Jan. 7, 2008), http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=900005499991&hbxlogin=1.

33 Settlement Agreement 68 (Apr. 11, 2007), https://www.royaldutchshellsettlement.com/Documents/Settlement%20Agreement.pdf.

34 Pels Rijcken & Droogleever Fortuijn N.V.

35 Diaz Reus Rolff & Targ, LLP (now Diaz, Reus & Targ, LLP) and Schiffrin Barroway Topaz & Kessler, LLP (now Barroway Topaz Kessler Meltzer & Check, LLP). Diaz Reus, based in Miami with affiliates in South America, describes itself as an "international law firm." *See* DIAZ REUS, http://www.diazreus.com (last visited July 1, 2010).

36 Settlement Agreement, *supra* note 33, at 68. Both Grant & Eisenhofer and Barroway Topaz list the Royal Dutch settlement on their websites. *See Representative Cases: Securities & Complex Litigation*, GRANT & EISENHOFER P.A., http://www.gelaw.com/securities.htm (last visited May 24, 2010); *Barroway Topaz Kessler Meltzer & Check, LLP Announces $352 Million Settlement with Royal Dutch Shell on Behalf of European and Other Non-United States Shareholders*, Posting to *News*, BARROWAY TOPAZ KESSLER MELTZER & CHECK, LLP (Apr. 12, 2007), http://www.sbclasslaw.com/news.php.

37 *Shell III*, 2008 U.S. Dist. LEXIS 32040, at *13.

38 Earlier, the U.S. district court had intended to hold a "mini-trial" on the jurisdictional issues. According to the court, the mini-trial was abandoned after Shell announced that it had settled with claimant representatives in the Netherlands, and the parties then requested referral of the matter instead to a special master. *Id.* at *11, *13.

again objected.[39] In November 2007, the U.S. district court dismissed the non-U.S. purchasers from the suit for lack of subject matter jurisdiction, citing in passing that these purchasers had a remedy under the settlement already submitted to the Amsterdam Court of Appeals.[40] In March 2008, U.S. lead plaintiffs and Shell announced an agreement in principle to settle the U.S. action for $82.85 million,[41] and the action was formally settled six months later, in September 2008.[42] The Amsterdam Court of Appeals approved the $353.6 million WCAM settlement in May 2009.

The U.S. district court awarded U.S. lead counsel $33 million in fees and expenses in the U.S. case.[43] In January 2008, about nine months prior to the settlement of the U.S. class action, Shell submitted a memorandum of agreement to the federal district court indicating that it had agreed to pay U.S. lead counsel $27 million for its contribution to the settlement in the Netherlands.[44] U.S. lead counsel, therefore, received a total of $60 million, a substantial amount in relation to the $82.85 million settlement achieved in the United States, but a rather modest amount in relation to the total value of the combined settlements worldwide of $435 million.[45]

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39 *Shell II*, 522 F. Supp. 2d 712, 716 (D.N.J. 2007).

40 *Id.* at 723–24.

41 Press Release, Shell, Amsterdam Court of Appeals Sets Date for Hearing with Respect to Shell Securities Class Settlement of Reserve-Related Claims with European and Other Non US Investors (Apr. 11, 2008), http://www.shell.com/home/content/media/news_and_media_releases/archive/2008/court_appeal_date_reserves_11042008.html.

42 The class settlement was approved by the United States District Court for the District of New Jersey on September 26, 2008. *See Bernstein Liebhard LLP Announces Final Approval of Royal Dutch Shell Securities Class Action Settlement*, BERNSTEIN LIEBHARD LLP (Oct. 10, 2008), http://www.bernlieb.com/featured-cases/royal-dutch-shell-settlement/index.html. On its website, Bernstein Liebhard LLP reports that the settlement was substantially higher: $89.5 million in cash benefits, nearly $41 million in fees and expenses (including expenses for administering the settlement), and "[p]otential additional relief" of $60.5 million. *Id*. The firm also says that it secured an "additional cash payment of $28.342 million . . . for the Non-U.S. Purchasers in the [Netherlands] settlement." *Id.* The website for the Netherlands settlement refers to a $28.4 million amount as intended to "align" the value of the Netherlands settlement with the value of the U.S. settlement. Press Release, *supra* note 31.

43 *Shell III*, 2008 U.S. Dist. LEXIS 32040, at *19–20.

44 According to the memorandum,

> "the Court and Shell recognize[d]" that the efforts of Lead Plaintiffs and lead counsel "in vigorously pursuing through litigation the Non-U.S. Purchasers' claims for more than three years, in satisfaction of their fiduciary obligations to the proposed class, were a substantial factor in Shell's decision to enter into a settlement agreement to resolve the claims of the Non-U.S. Purchasers."

Id. at *14 (alteration in original) (quoting Memorandum of Approval of Payment at 1, *In re* Royal Dutch/Shell Transp. Sec. Litig., No. 04-374 (D.N.J. Jan. 14, 2008)).

45 In the Dutch proceedings, U.S. experts testified that the WCAM settlement, compensat-

Because WCAM is a settlement vehicle, the Dutch foundation representing claimants never faced the risk of adverse costs associated with litigation in the Netherlands. The law firm for the foundation was apparently paid on a conventional hourly-fee-plus-expenses basis. According to interviews I have conducted with case participants in the Netherlands, Grant & Eisenhofer paid the foundation's legal fees and expenses. Whatever fees were paid to U.S. and non-U.S. law firms as part of the worldwide settlement were not subject to review or approval by the Amsterdam Court of Appeals, but apparently were disclosed to the court during the approval process.[46] According to *The American Lawyer*, Grant & Eisenhofer received $47 million for its role in negotiating the settlement of the non-U.S. purchasers' claims, which it was reported to have split with two other U.S. law firms.[47] Assuming the $47 million amount is correct, the U.S. lawyers who negotiated the Dutch settlement received almost half of the total fees and expenses paid to U.S. firms ($107 million) and about three-quarters as much as the firm that represented shareholders in the U.S. district court action ($60 million). Whether this reasonably reflects the relative contributions of the U.S. lead counsel and the counsel for plaintiffs in the Dutch settlement cannot be discerned from public information.

If U.S. lawyer fees and expenses for the combined U.S. and worldwide settlement totaled $107 million, then legal costs accounted for about 20% of the $542 million ($435 million plus $107 million) Shell paid out (excluding their own fees and expenses) to resolve the litigation. This is a bit less than the median attorney's fee fraction that has been reported for recent federal securities class actions in the United States.[48] However, attorney's fee awards in the United States as a fraction of total settlement value are negatively correlated with settlement amounts; for settlements of $190 million or more, the median fee fraction is a far smaller 10%, and the mean fraction, which

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ing an estimated 9.79% to 12.46% of losses suffered, was "much better than the typical plaintiff could hope to recover" in U.S. courts. *Shell Petroleum*, NJ 2009, 506.

46 The distribution of the Royal Dutch settlement funds will be administered by Epiq, a U.S. firm with offices in the United States and London. *See Shell Settlement*, EPIQ SYS., INC., https://www.royaldutchshellsettlement.com/ (last visited May 24, 2010); *see also About Us*, EPIQ SYS., INC., http://www.epiqsystems.com/about.php?AboutusID=2 (last visited May 24, 2010).

47 Hallman, *supra* note 32.

48 Theodore Eisenberg & Geoffrey Miller, *Attorneys Fees in Class Action Settlements: An Empirical Study* 32 (Cornell Law Sch. Legal Studies Research Paper Series, Research Paper No. 04-01, N.Y.U. Ctr. for Law & Bus. Research Paper Series, Working Paper No. CLB03-23), *available at* http://ssrn.com/abstract=456600.

reflects outliers, is only 12%.[49] In sum, the U.S. lawyers appear to have fared considerably better collectively in the global context than they would have had the *Shell Petroleum* settlement been prosecuted solely in U.S. courts. Whether Shell fared better because of the availability of the Netherlands settlement procedure is unknown; however, it seems unlikely that it would have pursued the settlement in Amsterdam unless it believed that to be the case.

Unlike *Shell Petroleum*, the *In re Randstad* ("*Vedior*")[50] collective settlement bound a worldwide shareholder class. Vedior (acquired by Randstad, a global human resources company with headquarters in the Netherlands, which gave rise to the dispute) was domiciled in the Netherlands, the alleged violations concerned Dutch securities law, and the alleged losses related to purchases on the Amsterdam exchange in the Netherlands. But only an estimated forty-five percent of the company's shareholders were Dutch; the rest were scattered about the world, including an estimated eighteen percent in North America.[51] In *Vedior*, the Amsterdam Court of Appeals held that the Dutch shareholders association could properly represent the interests of shareholders worldwide. Notice of the settlement was published internationally in the financial press, including the *Financial Times* (London) and *The Wall Street Journal*, and information about the settlement is available on multiple websites.[52]

In sum, under *Shell Petroleum* and *Vedior*, a settlement reached under WCAM comes under the jurisdiction of the Amsterdam Court of Appeals, even if most of the class members are not Dutch, as long as there is at least one Dutch association representing class members that is a party to the settlement. The members of the Dutch association do not need to be exclusively or primarily Dutch. Although all of the defendants in the first five WCAM settlements were domiciled in the Netherlands, the sixth settlement, submitted to the Amsterdam Court of Appeals in July 2010, is a securities class action against Converium, a Swiss reinsurance company now owned by SCOR, a French company, and against Zurich Financial Services, the former parent of

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49 *Id.* at 63 tbl.7.

50 Hof's-Amsterdam 15 juli 2009, JOR 2009, 325 m.nt. Scholten en Van Achterberg (In de zaak van Randstand Holding, N.V.) [hereinafter *Vedior*].

51 Petition for a Declaration of Binding Force of a Settlement Agreement Pursuant to Article 7:907 of the Dutch Civil Code 17 n.5 (Oct. 6, 2008), *available at* http://www.vediorsettlement.com/petition-for-a-declaration-of-binding-force-of-a-settlement-agreement-pursuant-to-article-7907-of-the-dutch-civil-code.html.

52 *Id.* at 18.

Converium. The class comprises non-U.S. investors.[53] Finally, *Shell Petroleum* seems to tell us that the lawyers retained by the association representing the class need not be Dutch and may be paid according to the fee rules of another jurisdiction; in other words, the lawyers may include U.S. counsel paid on a contingency fee or any other basis agreed to by defendants seeking a negotiated settlement.

The possibility of wedding U.S. legal fee rules to settlement class actions in the Netherlands is especially interesting when one recalls, as indicated above, that fee restrictions and the risk of adverse costs have been the primary barriers to effectuating damage class actions in countries that now permit them. But there is another phenomenon developing outside the United States that may obviate the need for such "mash-ups": third-party litigation funding.

Litigation funding is not a new phenomenon in the United States. Contingent fee lawyers fund their clients' cases—class and nonclass actions alike—and make significant investments in developing cases, investments that are not recoverable unless and until their clients prevail.[54] In recent years, there has also been a proliferation of for-profit firms offering nonrecourse loans to plaintiffs in return for a share of any funds recovered. But up until recently, with few exceptions, these firms have focused primarily on low-value litigation: automobile accident and other personal injury cases.[55] Now, third-party litigation investment firms are entering the high end of the litigation market in the United States, spurred on in part by success in Australia and, more recently, England and Western Europe (see Table 8).[56] This phenom-

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53 A class action on behalf of U.S. investors against the same defendants and arising out of the same facts was certified in 2008, *see In re* SCOR Holding (Switz.) AG Litig., 537 F. Supp. 2d 556 (S.D.N.Y. 2008), and ultimately settled after foreign investors' claims were dismissed. At the same time, foreign investors' claims were settled as well, with an understanding that a petition for approval under WCAM would be filed with the Amsterdam Court of Appeals. *See* Notice of Pendency and Proposed Settlements of Class Action, *In re* Scor Holding (Switz.) AG Sec. Litig., No. 04 Civ. 7897 (DLC) (S.D.N.Y. Oct. 4, 2004), *available at* http://www.scorsecuritieslitigation.com/cases/2008.08.11-NOTICE.pdf; *In re SCOR Holding (Switzerland) AG Securities Litigation (F/K/A In re Converium Holding)*, SPECTOR, ROSEMAN, KODROFF & WILLIS PC, http://www.srkw-law.com/areas-of-practice/international/converium-scor.html (last visited June 14, 2010).

54 In mass litigation, judges may issue fee orders taxing all lawyers who have cases involved in the litigation to pay a share of pretrial costs. *See, e.g.*, *In re* Air Crash Disaster at Fla. Everglades, 549 F.2d 1006, 1008 (5th Cir. 1977) (upholding order requiring "inactive" counsel to contribute to pretrial costs of class counsel).

55 One exception is patent litigation, where some hedge funds have begun to acquire patents for the purpose of bringing patent infringement suits. *See generally* Nathan Vardi, *Patent Pirates*, FORBES, May 7, 2007, at 44.

56 *See* Ralph Lindeman, *Third Party Investors Offer New Funding Source for Major Com-*

enon is quite new to the United States; some commentators date it to the entrance of Juridica into the market in 2007.

Table 8. Types of High-End Third-Party Funders
• **Open and closed funds** (e.g., Juridica Capital; Burford Capital) • **Hedge funds holding IP rights** (e.g., Rembrandt IP Management; Coller IP Management) • **Banker-lawyers** (e.g., Counsel Financial) • **Non-U.S. players** (e.g., IMF (Australia); Allianz Prozess Finanz (Germany); IM Litigation Funding (UK))

In Australia, third-party litigation funding evolved as a response to the restrictions on class action practice posed by limits on conditional fees (which usually forbid tying success fees to the amount of damages and impose caps on "uplifts"), the absence of a mechanism for sharing of class action fees in opt-out class actions, and—most importantly—fee shifting and the concomitant risk of adverse costs. Today, in Australia, securities, antitrust, and consumer class actions are funded by for-profit litigation financing firms. Third-party funding in Australia has had the practical effect of converting an opt-out class action procedure to an opt-in procedure because financing firms require each class member to contract with them. This practice was initially challenged for inconsistency with the legislators' intent, but has been upheld by the Australian courts.[57] Typically, the financing firms assume responsibility for paying class counsel's fees and adverse costs, should the class not prevail, and provide security against adverse costs in exchange for twenty-five to forty percent of damages recovered; these firms also provide ongoing litigation funding to class counsel. In the event the class prevails, the class members pay class counsel's fees and expenses (including funds extended by the third-party funder) out of the settlement fund on a pro rata basis. Class counsel maintains "skin in the game" in that it agrees to accept less-than-full compensation of its fees and expenses (e.g., a twenty-five percent reduction) if defendants prevail. (Since the arrangements among class members, class counsel, and third-party funders are contractual, other provisions are possible, subject to any public regulation.) Until recently, there has been no regulation of third-party funding in Australia, but after the Federal Court of Australia held that such funding arrangements

mercial Lawsuits, BNA DAILY REP. FOR EXECUTIVES, Mar. 5, 2010, at 1, *available at* http://www.bna.com/pdf/der_030510.pdf.

57 *See Multiplex Funds Mgmt. Ltd. v P Dawson Nominees Pty Ltd.*, (2007) 244 ALR 600, [2007] FCAFC 200, *available at* http://www.austlii.edu.au/au/cases/cth/FCAFC/2007/200.html.

constitute a "managed investment scheme,"[58] the issue of regulation was put before the Australian Securities and Investments Commission ("ASIC"). The Ministry for Financial Services recently announced that the government would issue a regulation exempting litigation funding from regulation as a managed investment scheme, but suggesting that ASIC might maintain an oversight role to prevent "conflicts of interest."[59]

In England, where adoption of a class action procedure appears to have been put aside for now, a recently released high-level report on civil litigation financing endorsed third-party financing for collective litigation, along with contingency fees.[60] The timing of this report is particularly interesting given the 2011 implementation of new legislation permitting nonlawyers to invest in law firms and become part owners thereof.[61]

In the United States, nontraditional third-party funding for class actions—that is, funding other than by class counsel backed by bank lines of credit—might raise new issues pertaining to adequacy of representation, appointment of class counsel, settlements, and legal fees. Such issues might also arise in the nonclass mass litigation context. Two key questions in both domains are: first, does the third-party funder have a role, however indirect, in strategic litigation decision-making; and second, under what conditions can the third-party funder withdraw financing?[62]

The entrance of third-party litigation funders into the U.S. legal marketplace (firms that we would expect to contract with class action lawyers rather than class members[63]) might increase the number of law firms willing to prosecute class actions, increase competition

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58 *See Brookfield Multiplex Ltd.* (2009) 180 FCR at 40, [2009] FCAFC ¶ 114.

59 *See Federal Government Relief for Funded Class Actions*, INSURANCENEWS.COM.AU (May 10, 2010), http://www.insurancenews.com.au/regulatory-government/federal-government-relief-for-funded-class-actions.

60 THE RIGHT HONOURABLE LORD JUSTICE JACKSON, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT 334–35 (2009), *available at* http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf. The report also recommended experimentation with a public financing scheme funded by a tax against successful class actions, modeled after the Ontario class action fund. *Id.* at 131.

61 New forms of legal service providers were authorized in England and Wales by the Legal Services Act of 2007. Certain provisions regarding alternative business structures for legal services provision are being brought online incrementally. *See FAQs: Legal Services Act and ABSs*, SOLIC. REG. AUTHORITY, http://www.sra.org.uk/sra/legal-services-act/lsa-questions-faqs.page (last visited May 24, 2010).

62 Both of these questions are raised in Lord Justice Jackson's report. *See* JACKSON, *supra* note 60, at 118–21.

63 It is also possible that litigation funders might contract with class action *defendants*,

among firms for class counsel appointments, and increase investment by class counsel in pretrial development of facts and law. The results might include increased numbers of class actions and higher-value settlements. But whether these or other changes ensue will depend critically on the strategies the third-party litigation funders adopt; at the moment, a number of high-end investment firms have said they do not intend to enter the U.S. class action market.

Joining broad class action jurisdiction, particularly the settlement paradigm pioneered by the Netherlands, with widely available third-party litigation funding opens up new opportunities for transnational class action litigation in the increasing number of instances in which mass injuries—financial and otherwise—are truly global. Already, Dutch law firms are advertising the attractiveness of settling under WCAM to their corporate clients. And many multinationals are in fact domiciled in the Netherlands, simplifying the jurisdictional decisions facing the Amsterdam Court of Appeals. The combination of global class actions with third-party litigation funding may prove to be a truly "disruptive innovation" that changes the nature of private civil litigation worldwide.[64]

It is not certain that domestic courts in the Netherlands—or domestic legislatures in countries that are currently debating adoption of class action or other forms of group proceeding—understand the global implications of their actions, or the domestic consequences of litigation decisions being made elsewhere. While lawyers and investors are joining forces to litigate worldwide, public decisionmakers are proceeding as if they can cabin litigation within their boundaries and procedural rules. Already, with regard to mass harms and calls for collective redress, public institutions are in the position of playing "catch up" with private actors. How well they respond to the new global litigation order will play a large role in determining the outcomes of the new class action regimes.

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perhaps offering to assume liability for legal defense costs and remedies, if any, in exchange for a large fee.

64 On the notion of "disruptive innovations," see CLAYTON CHRISTENSEN, THE INNOVATOR'S DILEMMA (1997). *See also* Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689 (2008).