

Securities Class Action Services, LLC

Case Brief

Converium: The Netherlands Welcomes International Asset Recovery

Report Author

Luke Green

+1 (405) 366-5095

luke.green@issgovernance.com



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Summary

The Converium decision is the first time that a European court has approved a class action settlement on an opt-out basis (U.S. style) regarding the securities of a company not based in the Netherlands, whose securities were traded on a foreign exchange, and where the class included few Dutch residents. As such, it appears as though Dutch jurisdiction over securities collective actions is a real possibility for large global classes. And because jurisdiction has always been a hotly contested issue with regard to international securities class actions, investors have cleared a significant hurdle in their pursuit of asset recovery opportunities outside the U.S.

The Converium settlement, worth an estimated \$58.4 million (\$40 million from Converium and \$18.4 million from Zurich Financial Services (ZFS)), presents a notable opportunity for asset recovery in its own right. With settlement dollars in non-U.S. actions averaging almost \$500 million per year over the past decade, global recovery potential could accelerate as investors look to countries like the Netherlands to recoup their losses.

Background

Now known as SCOR Holding AG, Converium is a Swiss reinsurance company. Converium was wholly owned by Zurich Financial Services until 2001, when ZFS sold all of its shares through an IPO. The shares were listed on the SWX Swiss Exchange and ADSs were listed on the New York Stock Exchange (NYSE). Converium's share price plummeted following an announcement of increases in its loss reserves from 2002 through 2004.

In October, 2004, a host of Converium investors based both inside and outside the U.S. filed a securities class action lawsuit against Converium, ZFS, and others in the United States District Court for the Southern District of New York. That action was eventually settled in 2008 for \$84.6 million. However, applying pre-*Morrison* jurisprudence, the court excluded from the class the investors domiciled outside the U.S. who purchased their shares on the SWX or another non-U.S. exchange. Those investors were domiciled primarily in Switzerland and the U.K. with only a few domiciled in the Netherlands.

Enter the Netherlands' 2005 Act on the Collective Settlement of Mass Claims ("the Act", or WCAM). The 2005 Act was the first to authorize Dutch courts to approve opt-out securities collective action settlements in the Netherlands. Under its terms an investor class may be certified by a Dutch court if, among other things, the class is presented by a Dutch foundation or other authorized Dutch representative group. To take advantage of this act, non-U.S., non-Dutch investors created the Stichting Converium Securities Compensation Foundation, while another group—Vereniging VEB NCVB—primarily represented those investors domiciled in the Netherlands.

These two Dutch groups entered into settlement negotiations with Converium for the benefit of the non-U.S. investors excluded from the settlement in the U.S. In July 2010, a petition was filed with the Amsterdam court of Appeal seeking a binding resolution approving the settlement. On November 12, 2011, the Court of Appeals issued a provisional ruling tentatively approving the settlement, which was notable given that: (1) the defendant was domiciled in Switzerland; (2) the alleged misconduct occurred outside of the Netherlands; (3) the stocks at issue were traded on non-Netherlands exchanges; and (4) the plaintiff class included only a few investors domiciled in the Netherlands. On January 17, 2012, the Court of Appeals approved its earlier ruling and held the settlement to be binding on the class.

The current litigation climate emphasizes the significance of the recent Converium settlement. The June 2010 U.S. Supreme Court decision in *Morrison v. NAB* all but closed the door to international class certification, by U.S. courts, for any investor, foreign or domestic, trading on non-U.S. exchanges. Similarly, there have been few non-U.S. countries willing to entertain U.S. style class actions much less those with a global scope. Therefore, for most institutional investors, the Converium case provides a legitimate ray of hope for a litigation forum that allows for asset recovery due to global securities fraud.

Dutch courts have traditionally been friendly to investor collective actions, having rendered five pre-Converium final decisions under the WCAM, all of which include binding settlements. The most significant of these for securities purposes was a global settlement in the well publicized *Royal Dutch Shell* securities fraud case, which settled for \$381 million. How-

ever, in *Royal Dutch Shell* one of the two defendants was Dutch (the other was British) and a good portion of the claimants were domiciled in the Netherlands.

The *Converium* decision, by contrast, is the first time that a European court has approved a class action settlement on an opt-out basis (U.S. style) regarding the securities of a company not based in the Netherlands, whose securities were traded on a foreign exchange, and where the class included few Dutch residents.

What to Watch in this Case

Based on the Dutch Appeals Court's provisional judgment of November 2011, it would appear that future global class actions could have success in the Netherlands even though they have little connection to the Netherlands itself. In particular, the Court found jurisdiction over the parties because the settlement agreement was executed in the Netherlands and the funds will be deposited in a Dutch bank for disbursement. Another ground given, among many, was that the Dutch Stichting foundation was an entity domiciled in the Netherlands (a Dutch foundation is required under the WCAM).

Also significant, because the court's approval of the settlement is binding on the class as a whole (i.e. opt-out), it will ostensibly prevent class members who fail to opt-out from filing future litigation against *Converium* in other countries. Article 32, Brussels 1 Regulation can be read to require that EU countries recognize the settlement as binding. Although there are some potential exceptions to the requirement (i.e. if the settlement is "manifestly contrary to public policy," Article 34, Brussels 1 Regulation), the EU regulations give the settlement interna-

tional teeth that U.S. settlements have never had.

However, other issues may potentially limit the growth of such litigation in the Netherlands. The WCAM imposes strict requirements for settlement approval with regard to settlement notification, representativity, and reasonableness. More importantly, however, the WCAM does not allow for court approved damages; no trial is available. The court can only certify the class and approve/disapprove the settlement. This means that, unlike in the U.S., plaintiff classes will not be able to use the prospect of discovery and a costly trial as leverage to induce a settlement. Therefore, defendants may be reluctant to settle cases in the Netherlands

Since the landmark *Morrison v. NAB* case in the U.S. in 2010, the motivation to eliminate high settlement amounts in the U.S. through class actions in Europe has been more or less eliminated. Therefore, for the Netherlands to succeed as a popular forum for a wide spectrum of securities collective actions, there must be other reasons for defendants to settle in the Netherlands. Will the defendant's desire to suppress investor claims in other countries through a Netherlands settlement be enough to induce settlement? If yes, will Dutch opt-out settlements be recognized in "opt-in" type countries both inside and outside the EU? The answers to these questions are yet unknown. But, they will likely determine the viability of the Netherlands as a true safe harbor for international securities class actions on a broad scale.

We're monitoring developments around the case closely, and will keep investors abreast of relevant changes that impact asset recovery opportunities.

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