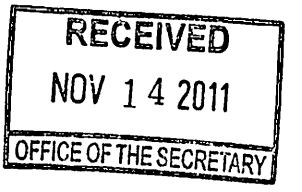
4-617

November 12, 2011

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090



Re: **Study on Extraterritorial Private Rights of Action – SEC Request for Comments**

Dear Ms. Murphy:

The undersigned institutional investors (the "Institutions") welcome and appreciate the opportunity to respond to the request of the Securities and Exchange Commission ("Commission") for our comments on the extent to which private rights of action under the anti-fraud provisions of the Securities Exchange Act of 1934 ("the "Exchange Act") should be extended to cover trans-national fraud. The institutions represent in excess of $990 billion in global wealth under management as of December 31, 2010, and have a long history of advocacy for shareholder rights in the United States, several times being appointed Lead Plaintiffs by US Courts in the purported interests of investors both American and otherwise.

As prominent institutional investors, we believe that the United States Supreme Court's decision in *Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010), has severely undermined the established expectations of foreign investors that they may seek redress in US Courts, under US law, for frauds committed predominately in the United States by US-based companies. The long standing precedent providing foreign investors with this avenue of relief has evolved over the course of many years, and clearly reflects the economic realities of the international environment. Pre-*Morrison* jurisprudence developed, for example, in the same period that saw the United States enter into cross-listing agreements with foreign countries, enabling companies worldwide to trade on different exchanges under the de facto regulation of the United States and its standards of conduct and disclosure. It is our view, in particular, that the extra-territorial reach of the Exchange Act to cover fraud based in the US is broadly coherent with the arrangements under which US companies may sell their stock in our local jurisdictions without complying with our domestic securities regulations.

Precluding the wisdom of many years of trial and error, the *Morrison* decision not only imposes new uncertainties and operational costs on investors, but fundamentally ignores the trans-national nature of the securities in question. We welcome The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), so far as it re-instates both the conduct

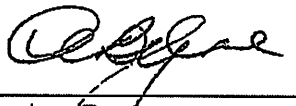
and the effects tests for actions brought by the Commission and the United States Department of Justice. We believe, however, that the same must be done for actions brought by private litigants.

Because we are fiduciaries, and not private investors, the nature of our interests is distinct. It is our primary concern that we are afforded appropriate and sufficient protections for our beneficiaries. The Exchange Act has long represented the gold standard in market regulation. The United States enjoys its position as the most credible securities market in the world, not because of the unique location of its trading floors, but because of the rules and regulations which govern the conduct of its participants. By retreating behind territorial borders and choosing to disrupt the efficacy of these regulations, the US Supreme Court wrongly dismissed the prospect of the US becoming a 'Barbary Coast' for securities fraud and complained instead of the litigiousness of foreign institutional investors. We would respond that the former is a far more legitimate concern than the latter is factual. None of us is a prolific user of class action litigation: it is merely one, albeit crucial, part of our armoury and is used as a last resort when other avenues have been explored. We believe that, ultimately, all parties stand to gain from the restoration of pre-*Morrison* jurisprudence, a system that was without peers.

The fact of the matter is that *Morrison* has produced an odd and undesirable result. The loss of a conduct test promotes the importance of the particular exchange transactions in trans-national securities are recorded on, when in fact the choice of trading venue is driven by best execution practices, cost, liquidity, et cetera. Although we have been willing, historically, to pay a premium for stock subject to US securities laws, the requirement to purchase on American exchanges threatens to set the premium too high. At the margin, investors will be increasingly incentivized to find other investment opportunities, just as, at the margin, we expect many companies will find themselves incentivized to de-list from American exchanges. The combined effect of these changes in costs and incentives is unnecessarily disruptive to the security and equity of the market place.

For the foregoing reasons, we urge the Commission to recommend the abrogation of the transaction test established by *Morrison*, and reinstatement of pre-*Morrison* tests. Attached to this letter you will find documents submitted individually by Ontario Teachers Pension Plan, the Australian Council of Superannuation Investors, PGGM, and the Mineworkers Pension Scheme in further support of our recommendation.

Respectfully,



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Ms. Ann Byrne
Chief Executive Officer, Australian Council of Superannuation Investors

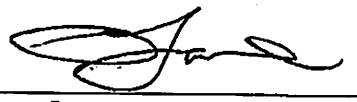
Date

Femke van't Groenewout

Ms. Femke van't Groenewout
Senior Advisor Responsible Investment, PGGM Investments

10 November 2011

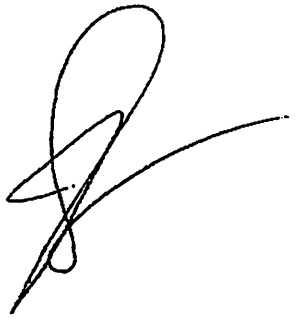
Date



10-11-2011

Mr. Gerry Lane
Chief Operating Officer, Mineworkers Pension Scheme

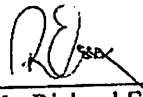
Date



10/12/2011

Mr. Jeff Davis
Associate General Counsel, Ontario Teachers' Pension Plan

Date



14.11.11

Date

Mr. Richard Essex
Legal Counsel, Universities Superannuation Scheme

14 November 2011
Date

Dr. Daniel Summerfield
Co-Head of Responsible Investment, Universities Superannuation Scheme

Mr. Anders Mansson
Legal Counsel, AP7

21 November 2011
Date

Mr Richard Grottheim
Chief Executive Officer, AP7

21 November 2011
Date

Mr. Leo Palmen
APG Algemene Pensioen Groep NV

11/29/11
Date:

Statement on Behalf of the Mineworkers' Pension Scheme

Mike Hensman, *September, 2011*

Mineworkers' Pension Scheme (MPS) is a defined benefit pension plan based in the UK. The Scheme was established in 1952 and provides retirement benefits for around 230,000 individuals who were employed in the coal mining industry in the UK, with assets around GBP11.5billion. [http://www.mps-pension.org.uk/]

The assets of the Scheme are managed externally by a series of investment managers based in the UK, US and Europe, whilst the Trustees of the Scheme have ultimate responsibility to co-ordinate and administer the Scheme. Whilst the Scheme has always sought to recover any entitlements, including filing claims in respect of settled class actions, the Trustees have been reluctant to take to take any more active role in class action litigation. However, in January 2009, the Trustees became aware of a significant loss which had arisen in respect of a holding in Satyam Computer Services Ltd, an Indian based technology company. [see note below)

The Trustees were approached by several US based monitoring agents, but were initially reluctant to take a lead role. However the Trustees were concerned that the Scheme might be excluded from any settlement if it were not a party to the litigation (as it believed it had been excluded from other US based actions). In addition it became apparent that the MPS had a very strong case and could take a key role in the case. The Trustees considered taking action in other jurisdictions. However, the UK legal system did not permit the Scheme to engage lawyers on a contingency basis. The Trustees also considered the possibility of pursuing a claim through the Indian courts, although it could not identify any precedent for this, and other damages claims (the Union Carbide Bhopal disaster, which occurred in 1984, was still being considered by the Indian Courts some 26 years later.)

MPS was appointed as co-lead plaintiff with Mississippi State Public Employees Retirement Plan and two other European based investors. Following submission of a consolidated complaint and various responses from the defendants, the decision in the Morrison case was announced in June 2010. Satyam then made a submission to the US Court that Mississippi should be excluded from the case as it had purchased securities on the local Indian exchange. The MPS case was not challenged on *Morrison* grounds (as it had acquired ADS's on the New York Stock Exchange) and the lead Plaintiffs agreed to continue to negotiate together as a group, as they believed it was in their common interest and each party had suffered a financial loss irrespective of the exchange on which the shares had been purchased.

The Lead Plaintiffs secured settlements from Satyam Computer Services and its outside auditors totalling $150.5M, which were approved by the Courts in September 2011. All class members, including U.S. residents who purchased Satyam securities on the Indian exchange will participate in the settlement. It is unlikely that any settlement could have been achieved in the light of the Morrison case without the involvement of MPS. Consequently MPS's involvement has ensured that all US investors in Satyam will receive some compensation, even if they would have otherwise been excluded subsequent to *Morrison.*

Background to the Satyam case

The action asserts claims for violations of the federal securities laws against Satyam Computer Services Limited ("Satyam" or the "Company") and certain of Satyam's former officers and directors and its former auditor relating to the Company's January 7, 2009, disclosure admitting that B. Ramalinga Raju ("B. Raju"), the Company's former chairman, falsified Satyam's financial reports by, among other things, inflating its reported cash balances by more than $1 billion. The news caused the price of Satyam's common stock (traded on the National Stock Exchange of India and the Bombay Stock Exchange) and American Depository Shares ("ADSs") (traded on the New York Stock Exchange ("NYSE")) to collapse. From a closing price of $3.67 per share on January 6, 2009, Satyam's common stock closed at $0.82 per share on January 7, 2009. With respect to the ADSs, the news of B. Raju's letter was revealed overnight in the United States and, as a result, trading in Satyam ADSs was halted on the NYSE before the markets opened on January 7, 2009. When trading in Satyam ADSs resumed on January 12, 2009, Satyam ADSs opened at $1.14 per ADS, down steeply from a closing price of $9.35 on January 6, 2009.

Lead Plaintiffs filed a consolidated complaint on July 17, 2009, on behalf of all persons or entities, who (a) purchased or otherwise acquired Satyam's ADSs in the United States; and (b) residents of the United States who purchased or otherwise acquired Satyam shares on the National Stock Exchange of India or the Bombay Stock Exchange between January 6, 2004 and January 6, 2009. The Plaintiffs secured a settlement for $125 million from Satyam on February 16, 2011. Additionally, the Plaintiffs were able to secure a $25.5 million settlement from PwC on April 29, 2011, who was alleged to have signed off on the misleading audit reports. Satyam agreed to pay Plaintiffs twenty-five percent (25%) of the PwC settlement. Claims against former executives at Satyam remain pending.

Statement on Behalf of The Australian Council of Superannuation Investors.
Phil Spathis, *November 6, 2011*

As fiduciary investors, Australian superannuation funds do not invest on their own behalf but on behalf of our beneficial members. It is therefore our primary concern that our beneficiaries receive the maximum protection possible when it comes to investing across every jurisdiction. There was some comfort available as fiduciary investors that we could sue under the US securities laws if, as investors, we were injured by reason of a fraud that occurred in the US. The real effect of the *Morrison* decision is such that it requires non-US investors to purchase stock on a US exchange in order to receive the protection of the US securities laws. This is not only more costly for us and our beneficiaries; it creates the serious likelihood that we will have to change our trading strategies.

Best execution policy often dictates that fund managers who are domiciled all over the globe will seek to purchase shares on behalf of a pension fund at the most conducive price, taking into account such factors as liquidity, currency movements and overall availability. Although, as investors, we have been willing to pay a premium for stock subject to US securities laws, the requirement to purchase on US exchanges threatens to set the premium too high. Furthermore, to the extent that some stocks trade on US exchanges only in the form of American Depository Receipts (ADR), purchasing these companies will be inconvenient and expensive. Most companies that issue ADRs have only a tiny ADR float, and are not always readily available. Because custodians impose extra transaction costs for both assembling ADR packages at sale and un-bundling them when the purchaser desires the underlying stock, ADRs are inherently more expensive.

It is our impression that, with the United States Supreme Court's decision in *Morrison*, the US is retreating behind its borders from the international market. While continuing to protect its own citizens who most likely trade on US exchanges, the US is indicating that it does not share the same concern in protecting foreign investors injured by fraud emanating from the US. The fact of the matter is that there are already examples of non-US based companies that have committed massive fraud in the US who have been able to avoid the grasp of the US class action system as a consequence of *Morrisson*.

Australia does not have a class action system as advanced as was portrayed in the Australian Government Submission as *Amicus Curaie* in support of the defendant- appellees (NAB). The Australian Government submission and that of many other Governments appear to have been influenced by business groups. Since 2000, there have been only 23 class action law suits brought in relation to securities fraud in Australia, and none of these actions have gone to full trial. The reasons for the small number of class action cases are manifold. Lawyers in Australia cannot charge as a percentage of damages on a contingent basis, as they can in the United States, but only for work performed. There are further adverse costs associated with litigation because the unsuccessful party is required to pay the opposing party's costs. As well,

the complex and costly nature of the litigation itself has meant that law firms have generally not been prepared to bring these actions. The High Court has only recently affirmed the legitimate role of litigation funding, and our courts have yet to even rule on whether the "fraud on the market" theory applies to causation in shareholder claims, as they do in United States.

In light of *Morrison*, we believe it is of critical importance that the US address access issues in the US for bad behaviour that arises out of the US. We did not subscribe to investor 'forum shopping', nor to simply 'clogging' the US legal system for unrelated matters of fraud. In other words, as institutional investors who come from jurisdictions where, even on a per capita basis, legal actions are minimal, we indicate to the SEC that the Morrison decision has put in place an impossible hurdle and that the SEC should genuinely consider recommending in favour of a "cause and effect" hurdle in order to address securities frauds emanating from fraud the US.

Statement on Behalf of the Ontario Teachers' Pension Plan Board
Jeff Davis, *November 6, 2011*

The Ontario Teachers' Pension Plan Board ("Ontario Teachers") appreciates the opportunity to respond to the request by the Securities and Exchange Commission ("Commission") for comments on the extent to which private rights of action under the antifraud provisions of the Securities Exchange Act of 1934 (the "Exchange Act") should be extended to cover transnational fraud.

Ontario Teachers is a Canadian institutional investor with approximately $110 billion in assets under management as of December 31, 2010, and has a long history of advocacy for shareholder rights. As a prominent Canadian institutional investor, Ontario Teachers believes that the United States Supreme Court's decision in *Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010), has severely undermined the well-established expectations of Canadian institutional (and other) investors that they can seek redress in the U.S. courts under U.S. law for frauds committed mainly in the U.S. by U.S. companies, especially with respect to those companies that are able to trade on Canadian exchanges under the regulation of U.S. rather than Canadian law pursuant to cross-listing agreements between the U.S. and Canada.

In 1991, the Commission and the Canadian securities regulatory entities entered into an agreement creating the Canada-U.S. Multijurisdictional Disclosure System ("MJDS"). The MJDS permits U.S. companies to seek capital in Canadian markets, and Canadian companies to seek capital in U.S. markets, while complying only with their home country's regulatory framework. Thus, U.S. companies meeting certain criteria of size and experience can trade their shares on Canadian exchanges by meeting the initial and continuing disclosure requirements of U.S. law, without having to comply with the separate requirements of Canadian law. The two jurisdictions concluded that, since their respective regulatory regimes shared the same goals and premises, they would ignore the detailed differences in application and rely on the other jurisdiction's laws and rules to regulate that jurisdiction's issuers. *See* Susan Wolburgh Jenah, *Commentary on A Blueprint for Cross-Boarder Access to U.S. Investors: A New International Framework*, 48 Harv. Int'l L.J. 69, 73-74 (2007). As the Ontario Securities Commission described the proposed system prior to its adoption, "the Commission will rely primarily on foreign disclosure requirements, application of disclosure standards and day-to-day enforcement of those standards." Multijurisdictional Disclosure System – Request for Comments, 12 O.S. C.B. 2,919, 2,920 (1989) (Can.).

U.S. companies have taken advantage of the MJDS. At present, at least 28 U.S. companies cross-list their securities on Canadian exchanges under the MJDS while complying only with U.S., and not Canadian, securities regulations.

Canadian institutional investors who diversify their portfolios by purchasing U.S. stocks on Canadian exchanges rely on the availability of redress under U.S. law in U.S. courts if the U.S. companies defraud them. Since U.S. disclosure rules apply, we expect that U.S. courts will give us redress under U.S. law for any misstatements or omissions that may occur. It is our view, as investors, that this is part and parcel of the arrangement under which U.S. companies may sell their stock in Canada without complying with Canadian securities regulations.

Conversely, the MJDS permits large-cap Canadian companies who are dual-listed to raise money on U.S. exchanges without having to prepare alternative U.S. disclosure documents. As large Canadian investors, it is a matter of indifference to us whether we purchase shares of these dual-listed companies on Canadian or U.S. exchanges. Under the "best execution" rules imposed on Canadian brokers by the Canadian Investment Regulatory Organization, Canadian brokers must make sure that orders for securities are executed to the best benefit of the client, irrespective of the client's location or the exchange's location.[1] In order to achieve "best execution," in the case of securities that are cross-listed on both U.S. and Canadian exchanges, the broker will execute on whichever exchange provides the greatest advantage to the client, depending on current market conditions. We have come to expect that, if we purchase shares of these dual-listed Canadian companies that have taken recourse to U.S. markets, we will be able to seek redress for securities fraud in U.S. courts irrespective of which exchange our purchase was executed on.

Given the convergence of regulatory schemes for many years and the availability pre-*Morrison* of U.S. courts, the settled expectation of Canadian institutional investors has become that they may take advantage of U.S. securities law in U.S. courts. In addition, we believe the U.S. courts have accepted the role of Canadian institutional investors in U.S. securities regulation under the MJDS, as demonstrated by the number of significant securities class actions in which U.S. courts have appointed Canadian institutional investors as Lead Plaintiffs. These include *In re Williams Sec. Litig.*, No.02-00072 (N.D. Okla.); *In re Biovail Corp. Sec. Litig.*, No. 03-8917 (GEL) (S.D.N.Y.); *In re Nortel Networks Corp. Sec. Litig.*, No. 01-1855 (RMB), (S.D.N.Y.); *In re Nortel Networks Corp. Sec. Litig.*, No. 05-1659 (S.D.N.Y.); *Washington Mutual Inc., Sec., Derivative & "Erisa" Litig.*, No. 08-MD-01919 (W.D. Wash.); *In re Cable & Wireless, PLC Sec. Litig.*, 217 F.R.D. 372 (E.D. Va. 2003); *In re Bristol Myers Squibb Co. Sec. Litig.*, No. 07 Civ. 5867 (PAC) (S.D.N.Y.); *In re Computer Sciences Corp. Sec. Litig.*, No. 11-610 (E.D. Va); *In re Vivendi Universal, S.A. Sec. Litig.*, No. 02 Civ. 5571 (RJH) (HBP) (S.D.N.Y.).

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[1] Investment Industry Regulatory Organization of Canada Uniform Market Integrity Rule 5.1 (participants "shall diligently pursue the execution of each client order on the most advantageous terms for the client as expeditiously as practicable under prevailing market conditions"); *see* Investment Regulatory Organization of Canada Rules Guidance Note – UMIR 09-0244 (Aug. 27, 2009) ("Participants are expected to take into account order and trade information from all marketplaces that trade the same securities when discharging their best execution obligations").

It must be emphasized that the application of U.S. securities by U.S. courts in this situation will not contravene the central concern of *Morrison*. There, the Supreme Court observed that:

> The probability of incompatibility with the applicable laws of other countries is so obvious that if Congress intended such foreign application 'it would have addressed the subject of conflicts with foreign laws and procedures.'

130 S. Ct. at 2885 (citation omitted). Specifically, the Supreme Court pointed out:

> Like the United States, foreign countries regulate their domestic securities exchanges and securities transactions occurring within their territorial jurisdiction. And the regulation of other countries often differs from ours as to what constitutes fraud, what disclosures must be made, what damages are recoverable, what discovery is available in litigation, what individual actions may be joined in a single suit, what attorney's fees are recoverable, and many other matters.

Id.

Here, however, Canada has expressly determined that, because the goals and premises of U.S. securities law is the same as Canada's, it will rely on U.S. securities law rather than its own law to regulate seasoned U.S. issuers trading in Canada – despite the differences that may exist in details of application. The central concern of the *Morrison* Court simply is not present here.

For the foregoing reasons, we urge the Commission to exclude securities cross-listed on U.S. and Canadian exchanges pursuant to the MJDS from the *Morrison* rule limiting the application of the U.S. antifraud provisions to transactions occurring on U.S. exchanges.

Statement of PGGM regarding The Dutch Act on the Collective Settlement of Mass Claims

Femke van't Groenewout, *November 6, 2011*

Since The United States Supreme Court's decision in *Morrison v. National Australia Bank*, foreign investors have been forced to re-evaluate the adequacy of their own local courts for pursuing relief for injuries suffered as a result of securities fraud emanating from the United States. The Netherlands is at present the only European country in which a collective settlement of mass claims can be declared binding on an entire class on an "opt out" basis, making the Netherlands an attractive venue for settling international mass claims.

The Dutch Act on the Collective Settlement of Mass Claims (the "WCAM") was entered into force on July 27, 2005. Pursuant to the WCAM, the parties to a settlement agreement may request the Amsterdam Court of Appeal to declare the settlement agreement binding on all persons to which it applies according to its terms. If the Court declares the settlement agreement binding, all interested persons are bound by its terms, unless an interested party submits an "opt out" notice in due time. All other interested persons have a claim for settlement relief and are bound by the release in the settlement agreement. The Court will refuse to declare the settlement agreement binding if, among other things, the amount of settlement relief provided for in the settlement agreement is not reasonable or the petitioners jointly are not sufficiently representative regarding the interests of the relevant parties.

Since the entry into force of the WCAM in 2005, and through 2009, the Court has declared a settlement agreement binding in five cases---the most notable being the Shell settlement approved by the Court in May 2009. Recently, on November 12, 2010, the Amsterdam Court of Appeal delivered an important decision against Converium Holding AG (currently known as SCOR Holding AG) and Zurich Financial Services Ltd regarding an international collective settlement of mass claims using the Shell decision as a precedent. The Court assumed jurisdiction to declare an international collective settlement binding in a case where none of the potentially liable parties and only a limited number of the potential claimants were domiciled in the Netherlands.

The Converium decision is provisional, but if it becomes final, which is highly likely, it will have to be recognized in all European Members States, Switzerland, Iceland and Norway under the Brussels I Regulation and the Lugano Convention. The final hearing on the case will most likely take place during 2011. It is significant that the Court seemed fully aware of the importance of its judgment in creating an alternative venue to declare international collective settlements in mass claims binding on all class members. The Court explicitly referred to the limitations for the U.S. courts to do so in securities and anti-trust cases as a result of the U.S. Supreme Court's decisions in *Morrison v. National Australia Bank* and *Hoffman-La Roche v. Empagran.*

Rotterdam Institute of Private Law

Accepted Paper Series

Collective Settlement of Mass Claims in The Netherlands

Willem H. van Boom[•]

Published in

Matthias Casper, André Janssen, Petra Pohlmann, Reiner Schulze (eds.), Auf dem Weg zu einer europäischen Sammelklage?, Munich: Sellier 2009, p.171-192 (original page numbers between brackets)

[•] Willem H. van Boom is professor of private law at Erasmus School of Law, Rotterdam, The Netherlands. For a complete portfolio, please visit www.professorvanboom.eu. This paper was concluded in May 2009; later developments were not included.

Collective Settlement of Mass Claims in The Netherlands

Willem H. van Boom

Abstract:

As far as collective mass claim settlement is concerned, it has been said that 'the European landscape is a mixed bag of differing collective redress mechanisms'. One of the legal systems in this 'mixed bag' is the small jurisdiction of the Kingdom of The Netherlands. With the enactment of the 2005 Collective Settlement of Mass Damage Act (WCAM 2005) the Dutch legal system and indeed Dutch society has taken a significant (although far from perfect) step towards a more efficient resolution of mass damage claims.

In this paper, I provide the reader with an outline of the Dutch legal system concerning the collective settlement of mass damage claims. Obviously, the emphasis is on the 2005 Collective Settlement of Mass Damage Act (WCAM 2005). First I will give a brief outline of the fundamental position of Dutch law with regard to collective action and a chronological overview of the developments towards the WCAM 2005. Then I will analyse the WCAM 2005 in more detail and commit some thoughts on the future amendment of the Act.

Keywords:

Class action; group and representative action; class settlement; European securities litigation; group litigation

JEL Classifications:

K13, K41, K22

Contents

1 Introduction

[171] As far as collective mass claim settlement is concerned, it has been said that "the European landscape is a mixed bag of differing collective redress mechanisms".[1] One of the legal systems in this "mixed bag" is the small jurisdiction of the Kingdom of The Netherlands. With the enactment of the 2005 Collective Settlement of Mass Damage Act (WCAM 2005), the Dutch legal system and indeed Dutch society has taken a significant – although far from perfect – step towards a more efficient resolution of mass damage claims.

What prompted enactment of the WCAM 2005? It seems that the practical operation of fundamental values in private law has ultimately led to a growing call for a more efficient resolution of mass damage claims. Such fundamental values are, for instance, the concept of party autonomy, the right to be individually heard in private law issues, and the principle that actions and remedies are to be invoked exclusively by the interested or injured person. Key to these fundamental values is the concept of individual autonomy, which places individual rights and duties at the nucleus of civil law and procedure. Dutch civil procedure is by no means different from this traditional way of thinking. In real life, however, individuals can prove to be insignificant in the enforcement of private rights. Costs of individual proceedings – in terms of financial expenditure, time, strain, and anxiety – may well outweigh expected benefits. Moreover, if the masses do go to court individually, a multitude of similar individual claims may exert undue pressure on court efficiency.

Hence, there can be good policy reasons for allowing individuals to join forces in group actions, either in person or by the intermediate instrument of interest group associations. This does not imply that the aforementioned fundamental values are to be rejected or disregarded. It does mean, however, that they may need to be recalibrated in light of the practical effects they have in [172] modern society.[2] The 2005 Collective Settlement of Mass Damage Act is to be considered a serious effort of such a recalibration.

In this paper, I provide the reader with an outline of the Dutch legal system concerning the collective settlement of mass damage claims. Obviously, the emphasis is on the 2005 Collective Settlement of Mass Damage Act (WCAM 2005). First I will give a brief outline of the fundamental position of Dutch law with regard to collective action and a chronological overview of the developments towards the WCAM 2005. Then I will analyse the WCAM 2005 in more

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1 *Sorabji et al.*, Improving Access to Justice through Collective Actions - Developing a More Efficient and Effective Procedure for Collective Actions, 2008, 37; published online: http://www.civiljusticecouncil.gov.uk/files/Improving_Access_to_Justice_through_Collective_Actions.pdf

2 On this topic in Dutch legal writing, see for example *Asser et al.*, Een nieuwe balans - Interimrapport Fundamentele herbezinning Nederlands burgerlijk procesrecht, Den Haag 2003; *Asser et al.*, Uitgebalanceerd - Eindrapport Fundamentele herbezinning Nederlands burgerlijk procesrecht, Den Haag 2006; *Tzankova*, Strooischade - Een verkennend onderzoek naar een nieuw rechtsfenomeen, Den Haag 2005; *Tzankova*, Toegang tot het recht bij massaschade (thesis Tilburg), Deventer 2007; *Van Boom*, Efficacious Enforcement in Contract and Tort (inaugural lecture Rotterdam), The Hague 2006.

detail and commit some thoughts on the future amendment of the Act. In this paper the reader will not find issues of cross-border actions and private international law pertaining to mass damage.[3]

2 Individual substantive rights and collective actions

2.1 Legitimate interest and pooling individual claims

Under Dutch law, no one has an action without sufficient interest (Article 3:303 Burgerlijk Wetboek, Civil Code). Thus, the right to be heard in court is accessory to the legitimate interest in the action. Furthermore, an action cannot be separated from the right it aims to protect (Article 3:304). This is relevant, for instance, in cases of assignment of the claim; the action then follows the substantive right to compensation.

As a rule, the individual whose interest has been violated is the holder of the claim, and he has the exclusive right to pursue the claim in court. Voluntary pooling of individual claims is allowed, either by assignment of the claim or by giving mandate (power of attorney, litigation procuration, debt collecting mandate) [173] to a representative to initiate a civil procedure on behalf of the interested parties. Assignment of claims for compensation is broadly accepted under Dutch law. Unlike some other legal systems, such claims can be readily assigned to a foundation or association, or even to a natural person[4].

Assignment gives the new creditor the same position in court as the original creditor. Therefore the use of a pooling device, such as assignment or mandate, does not change the nature of the individual claims. In a case of mass damage, this may cause logistical problems for the assignee of the aggregated claims. For example, in a recent case some 1400 disappointed investors assigned their right to invoke nullity of their investment contracts to a foundation.[5] The right to nullification (rescission, voiding the contract) was based on misrepresentation allegedly caused by insufficient transparency and lack of due care on the part of the investment bank. The foundation took all 1400 cases to court in one single action. However, for nullification to succeed in court the claimant must show a number of specific circumstances relevant for his case. The foundation neglected to furnish a detailed account of these cir-

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3 Also excluded from this paper is the collective enforcement under public law by supervisory authorities such as the Dutch Consumer Authority. On that topic, see for example *Ammerlaan/Janssen*, The Dutch Consumer Authority: an introduction, in: Van Boom/Loos (ed.), Collective Enforcement of Consumer Law - Securing Compliance in Europe through Private Group Action and Public Authority Intervention, Groningen 2007, 107 ff. Also excluded is the precursor of the 1994 Act in art. 6:240 Civil Code (abstract evaluation of general consumer contract clauses by the Court of Appeals of The Hague).

4 Note, however, that assignment to an attorney/solicitor with the goal of filing the claim is not allowed; see art. 3:43 Civil Code. This prohibition is founded on the fundamental idea that an attorney should have no financial interest in a case other than his fees. At this moment, conditional fee arrangements are not yet allowed under Dutch law.

5 *Gerechtshof Amsterdam* (GA), 16 September 2008, Jurisprudentie Aansprakelijkheid (JA) 2009/1, no. 158.

cumstances both in the summons and in each of the 1400 case files. As a result, the courts of first as well as second instance rejected the 1400 amalgamated claims for nullification. In essence, voluntary amalgamation does not materially alter the standards developed for and applied to individual cases by the civil courts.

2.2 1970s and 1980s: the emergence of collective action

Apart from such voluntary pooling of individual claims, there were a number of cases in the 1970s and 1980s in which foundations and associations pleaded to have standing in court in the interest of individuals who were merely identified in the abstract sense (e.g. "all persons living in the area Y and affected by tortious act Z") and who in any case had not necessarily given explicit authority to instigate proceedings on their behalf.

Note that in this period there was no general statutory framework whatsoever for assessing for assessing whether or not foundations and associations that instigated proceedings (without assignment or mandate) have standing in the interest of others. Notwithstanding this lack of a statutory framework, in a number of cases the Dutch Supreme Court (*Hoge Raad der Nederlanden*) laid down the conditions for such collective action. As a matter of principle, the Supreme Court [174] acknowledged that foundations and associations had a legitimate interest in bringing actions for injunction[6] and declaratory judgment before civil courts. The Supreme Court was never called upon to consider whether representative organisations could claim compensation in the interest of the injured individuals.

Under the aforementioned case law, representative foundations and associations were allowed to take legal action in tort on behalf of those persons whose interests were tortiously infringed by third parties. The conditions set by case law were quite flexible. Firstly, it was for the lower courts to assess, taking all circumstances into account, whether the condition of adequate representation was fulfilled. In this respect, the courts would take into consideration the articles of incorporation and bye-laws of the legal person. The foundation or association should aim pursuant to its articles of incorporation at protecting interests identical to those damaged or endangered by the tortious act at hand.

Secondly, it was thought that foundations and associations were allowed to take legal action and claim injunctive relief against the defendant if there was evidence of tortious behaviour of the defendant vis-à-vis the interested parties. There was no need for a power of attorney or similar forms of consent of the interested parties in order for the legal person to pursue a claim.

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[6] The concept of "injunction" is used here as a generic term encompassing both prohibitory injunction (order to abstain from certain behaviour) and positive mandatory injunction (an order to actively engage in certain behaviour). In principle, both alternatives are generally available in tort law subject to certain exceptions.

Demands for a declaratory judgment would typically entail that the court declared (on demand of the organisation bringing the collective action) that the defendant had acted tortiously vis-à-vis the individuals whose interests were at stake. The nature of a number of cases – especially in environmental issues – seemed to resemble general interest actions (collective actions in which the individuals whose interests are involved cannot be identified because of the generality of the interest) rather than group actions (where some form of identification or demarcation is still possible). However, the Dutch Supreme Court was never explicitly called to rule on standing in court in genuine general interest actions.

The remarkable aspect of acknowledging collective action is that on the one hand the action is based on tortious behaviour vis-à-vis the individuals whose interests are at stake, when on the other hand the action may create obligations of the tortfeasor with respect to the organisation pursuing the collective claim.[7] For instance, there is no need for the foundation or association that files the claim to have suffered some injury from the tortious act itself. However, if the collective action is sustained by the court and injunctive relief is granted, the organisation that brought the collective action to court can claim [175] compensation of reasonable pre-trial expenses, such as the cost of expert research and legal fees.[8]

2.3 The 1994 Act on Collective Action

In 1994, the developments in case law as described in the previous section led to codification in the brand new 1992 Civil Code. The Dutch legislature added three ostensibly insignificant articles to the Dutch Civil Code: article 3:305a, 305b, and 305c. These articles seemed insignificant at the time because they merely codified the developments that had taken place in case law in the 1970s and 1980s.[9] What the articles also did, however, was freeze the evolution of case law.

The 1994 Act introduced article 3:305a Civil Code, which authorises incorporated foundations and associations with full legal capacity to file claims pertaining to the protection of common interests of other persons, if and insofar such an organisation represents these interests pursuant to its articles of association. Especially chilling was article 3:305a (3) Civil Code, which barred any collective claim for monetary compensation. In essence, the 1994 Act rejected organisations standing the right to claim compensation on behalf of interested parties. At the time, the legislature was not willing to tackle the legal issues involved in the introduction of such a novel class action system.

Summarising, the 1994 Act codified the following with regard to collective action:

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7 *Frenk*, Kollektieve akties in het privaatrecht (diss. Utrecht), Deventer 1994, 352.

8 *Hoge Raad* (HR) 13 October 2006, C04/279HR (Verzekeringskamer/Stichting Vie d'Or), JA 2006/10, nr. 142 (insolvency life insurance company Vie d'Or).

9 This case law also allowed public authorities to take legal action in tort to defend public interests; this particular strand of case law will not be considered here.

- Foundations and associations with full legal capacity are entitled to lodge an action in court against a tortfeasor, requesting either a declaratory judgment, a prohibitory injunction or mandatory positive injunction, or the publication of the court decision;
- If the foundation/association pursuant to its articles of association represents the aligned (i.e. common and comparable if not identical) interests of involved individuals;
- Provided that prior efforts of the organisation to reach a settlement out of court have failed.[10]

[176] The 1994 Act authorises representative organisations to initiate a collective action with the following objectives:[11]

1. Seeking a declaratory judgment to the benefit of interested parties, holding that the defendant has acted wrongfully against the interested parties, and is legally obliged to do something or to abstain from doing something vis-à-vis these interested parties;
2. Seeking injunctive relief, holding the defendant to perform a legal duty owed to interested parties (positive mandatory injunction) or to abstain from acting (prohibitory injunction);
3. Seeking performance of contractual duty of the defendant owed to multiple interested parties;
4. Ordering the termination of contract between the defendant and multiple interested parties;
5. Ordering the rescission of contract between the defendant and multiple interested parties.

In practice, however, some of these objectives are difficult to shape into a collective action. For example, a collective action for rescission of multiple contracts seems impossible if the basis for rescission is unconscionability, mistake, or misrepresentation. As mentioned *supra*, nullification (rescission, avoidance) of a contract for misrepresentation is only allowed on the basis of a concrete and subtle weighing of circumstances of the case at hand. Such a process, in which the focus is on the specificity of the case, seems at odds with the collective action process. Unsurprisingly, there are no examples in case law of successful collective nullification.

Moreover, the use of article 3:305a as a stepping stone towards individual compensation has proved to be difficult as well. A collective action procedure under article 3:305a can be used to provoke a declaratory judgment that the defendant has acted tortiously vis-à-vis the individuals whose interests were at stake. Such a judgment is of limited use. In practice, it has proved to be impossible to obtain a declaratory judgment that also declares that the defen-

[10] The organisation shall not be heard in court if it has not undertaken a serious effort at consulting the defendant unless such consultation would be impossible or fruitless. See Kamerstukken II 1991/92 (Parliamentary Proceedings Second Chamber 1991/1992) 22 486, no. 3 (Explanatory Memorandum), 29; *Frenk* (op. cit. fn. 7), 355.

[11] Cf. *Frenk* (op. cit. fn. 7), 355.

dant is legally liable *to compensate* these individuals. It was one thing for a court to assess wrongfulness on an abstract level but quite another to ascribe individual rights of compensation. The legislature considered that assessing the nature and extent of damage and causation was an operation to be carried out on a strictly individual level. Consequently, the Supreme Court ruled that individual rights of compensation were too dependent on individual circumstances to allow organisations in a collective action to obtain even a declaratory judgment, holding that the interested parties each had individual rights to compensation.[12] The Court's ruling is in line with the [177] explicit legislative intent to deny representative bodies the power to claim aggregate damage under article 3:305a Civil Code.

Obviously, these restrictions very much took the sting out of the 1994 Act: it can be used for eliciting declaratory judgments on wrongfulness and for obtaining injunctive relief, but strictly speaking it cannot be used to legally *compel* the tortfeasor to compensate. Moreover, individuals that collectively benefit from the court's decision can dissociate themselves from the outcome of the collective action. As they are not party to the litigation, the outcome is not to have any "res judicata effect" in their respect in view of their fundamental right to be heard, or so the legislature decided (both article 6 ECHR and article 17 of the Dutch Constitution warrant the right to unprejudiced evaluation of their personal litigation of facts and rights).[13]

Despite the legal restrictions, in practice the 1994 Act can still be a useful legal tool to pave the road to a *voluntary* mass settlement and thus help to obtain compensation. Whether a mere declaratory judgment on issues of wrongfulness is indeed sufficient to practically force the alleged tortfeasor to the negotiation table is likely to depend on factors such as:

- Is it likely that individual victims will individually prove damage and causation? This depends in part on the rules of evidence and the law of damages;
- Is it likely that individual victims will in fact pursue their individual claims? This depends largely on the cost and expected benefits of initiating proceedings for compensation;
- What are the costs and benefits to the tortfeasor of not negotiating individual settlement (in financial terms, negative media exposure, political pressure, and the like)?

3 The 2005 Collective Settlement of Mass Damage Act (WCAM 2005)

3.1 Introduction

As mentioned in the previous section, the 1994 Act lacked the tools for legally forcing *tortfeasors* to compensate the collective of injured persons. But the 1994 Act also lacked the possibility of forcing *victims* into settling mass claims with some degree of finality. It was precisely this finality that the pharmaceutical industry strived for in the Diethylstilbestrol

[12] *HR*, JA 2006/10, nr. 142.

[13] *Frenk* (op. cit. Fn. 7), 360. On "due process" in mass claim actions in view of art. 6 (1) ECHR, see for example *Baetge*, Class Actions, Group Litigation and Other Forms of Collective Litigation - Germany, 3; published online: http://globalclassactions.stanford.edu/PDF/Germany_National_Report.pdf.

(DES) case. In the 1980s, several thousand women whose mothers had been prescribed the DES [178] hormone during their pregnancy in the 1960s claimed compensation from the pharmaceutical industry for the cervical and breast cancer caused by DES. After a landmark Supreme Court decision in 1992, rendering all manufacturers jointly and severally liable for the injuries, collective negotiations on an all-encompassing compensation scheme were started. The industry was keen to settle with finality, which was actually not possible under Dutch law as long as not all victims came forward and opted in and settled individually with the industry. This deadlock in the negotiations triggered the Ministry of Justice to advance a generic solution for such problematic settlement negotiations.

The 2005 Collective Settlement of Mass Damage Act (WCAM 2005)[14] that came into effect as a result is an intricate mechanism that operates on the crossroads of tort law, substantive contract law, and civil procedure. The Act uses a design for collective settlement that can best be described as a composite of a voluntary settlement contract sealed with a "judicial trust mark" attached to the contract. The Act leaves much to market forces and it primarily sustains self-help and amiable settlement of conflicts by repeat players in society.

Although the main focus of the legislature was on designing an efficient mechanism for the settlement of events causing mass personal injury (in particular the DES case), it seems that the Act is of more practical relevance for securities litigation.[15] It has been applied in the DES case (a personal injury case) and the Dexia case (a securities case). Currently pending are the settlements in the Vedior case, the Vie d'Or case, and the Shell case (all three are securities actions).

Far from perfect as the WCAM 2005 may be, the Act is nevertheless broadly considered a meaningful step forward in reaching an efficient level of compensation and redress in mass damage cases.[16]

[179]

3.2 General features of the WCAM 2005

The legal technique used in the WCAM 2005 is both simple and sophisticated. Briefly described, the Act works as follows:

- An amicable settlement agreement concerning payment of compensation is concluded between the allegedly liable party or parties on the one hand and a foundation / associa-

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[14] Wet van 23 juni 2005 tot wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de collectieve afwikkeling van massaschades te vergemakkelijken (Wet collectieve afwikkeling massaschade), Staatsblad 2005, no. 340.

[15] Cf. *Croiset van Uchelen*, Van corporate litigation naar corporate settlement - het wetsontwerp collectieve afwikkeling massaschade, in: Solinge/Holtzer (ed.), Geschriften vanwege de Vereniging Corporate Litigation 2003-2004, Deventer 2004, 130.

[16] See for example *Croiset van Uchelen*, Handhaven of bijschaven? De effectiviteit van de WCAM, Weekblad voor Privaatrecht, Notariaat en Registratie (WPNR) 2008, 805.

tion acting in the aligned common interest of individuals involved (and injured) on the other,

- The parties to the agreement jointly petition the Amsterdam Court of Appeals to declare the settlement binding on all persons to whom damage was caused;[17] these interested persons are not summoned in this procedure but are given notice by letter or newspaper announcement;[18]
- The Amsterdam Court hears arguments of all interested parties. It can even allow amendment of the settlement by the original parties;
- The Court will consider several points concerning the substantive and procedural fairness and efficiency of the settlement (e.g. amount of compensation, adequate representation of interested parties);
- If the Court rules in favour of the settlement, it will declare the settlement binding upon all persons to whom damage was caused and that are accommodated by the settlement;
- Individual interested parties are given the opportunity to opt out of the settlement; original parties have limited possibilities to appeal; nullification of the settlement for misrepresentation is not allowed.

As can be derived from this overview, the foundation of the WCAM 2005 is a *contract* between the alleged tortfeasor and an organisation representing the interests of the injured individuals. In practice there are at least three original parties to the settlement contract:[19]

1. The alleged tortfeasor(s);
2. The foundation or association that negotiated the settlement in the interest of injured individuals (note that "injured" here does not necessarily denote death or personal injury but rather refers to any mass damage event, ranging from disaster to securities fraud); [180]
3. The administrator – usually a foundation that was incorporated especially for the purpose of distributing the settlement sum or fund – that will execute the settlement and act as trustee of the settlement fund.

Theoretically, the settlement contract can be concluded at any stage of the conflict. Strictly speaking there is no need for a preliminary court procedure in which the tortfeasor is considered liable in tort. He may well enter the settlement precisely with the purpose of avoiding being held liable. The settlement contract can thus serve the purpose of avoiding court procedure on the liability issue. Indeed, the very nature of a settlement is that it aims at ending or preventing uncertainty or dispute regarding the legal relationship between the alleged tortfeasor and the injured individuals (see art. 7:900 Civil Code).

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[17] See art. 1013 (3) Code of Civil Procedure for the exclusive competence of the Amsterdam Court in WCAM cases.

[18] In normal petition procedures, the interested parties are given notice by registered letter (art. 272 Code of Civil Procedure). This was considered too burdensome a requirement in WCAM petitions.

[19] If there is an administrator appointed in the settlement, it is the "legal entity" referred to in art. 7:907 (3) (h) Civil Code and it therefore needs to be party to the settlement for the Amsterdam Court to declare the settlement binding upon the injured individuals.

The contractual nature of the settlement is emphasised by the fact that the WCAM 2005 is part of Book 7 (special contracts) of the Civil Code. The contractual form of the settlement allows the parties to include specific clauses in the settlement that are not covered by the Act, such as clauses on choice of law and forum, on board approval condition, on confidentiality issues, and on dispute settlement, as well as on modification or termination (e.g. if the Amsterdam Court denies or the Supreme Court voids the binding declaration).

Furthermore, the fact that the declaration procedure before the Amsterdam Court starts out with a voluntary settlement by a foundation or association with the alleged tortfeasor obviously implies that the tortfeasor first has to *agree* to a settlement. This requires the parties to negotiate "in the shadow of the alternative": namely, the alternative of not settling, given the fact that there are no legal levers for forcing any of the parties into settling.[20] One might ask what factors contribute to a settlement in fact being reached. The few cases that have proceeded to the Amsterdam Court so far give us some impression of the dynamics of settlement. If the best alternative to a negotiated collective settlement is advancing with all individual claims in individual court cases, the willingness to settle may depend on the tortfeasor's assessment of the number of claims, the likelihood of success of such claims, the legal cost, and the expected losses involved. Moreover, it seems that less easily observable factors can come into play as well, such as political pressure and risks to reputation.

The contractual basis of the settlement is also evidenced by the fact that the WCAM 2005 does not provide for strict rules on the settlement fund, the distribution of the proceeds, and so on. From the outset, it is clear that the settlement aims primarily at financial compensation for injured individuals – be it in the event of personal injury disasters or securities fraud – but the method and procedure for calculating damages, the amounts, the forms, standards, [181] protocols, and so forth are deliberately not provided for in the Act. Parties can and will agree on some form of abstract damage scheduling that diverges from the "restitutio in integrum" ideals of the law of damages.

Parties may want to appoint a separate administrator and to set aside limited funds to distribute in order to attain finality of the arrangement, but little precludes them from shaping the compensation scheme in any other fashion.

3.3 The procedure before the Amsterdam Court of Appeals

The contractual nature of the settlement does not imply that parties to the settlement enjoy total freedom of contract. The Amsterdam Court is bound by strict rules to evaluate the substantive and procedural fairness of the settlement in view of the interests involved in the settlement. In a sense, the WCAM 2005 calls for an active court with considerable case management skills. The Court is to take an active role when petitioned to declare the settlement binding upon all injured individuals involved. The petitioners are not *domines litis* of the

[20] Cf. Parliamentary Proceedings II 2008/09, 31 762, no. 1, 4 ff (evaluation of the WCAM 2005).

procedure.[21] Indeed, when the draft bill was introduced this active role was not one that civil court judges in commercial cases felt most comfortable with. Certainly, their professional habit seemed at odds with the entire idea of judicial case management that underlies the WCAM 2005.

Moreover, the role of the judiciary within the WCAM 2005 framework is not the traditional one of settling disputes between parties present. Figuratively speaking, the Amsterdam Court is the "negotiorum gestor" of the absent individuals that will be affected when the settlement is declared binding upon them. This novel task for the judiciary was not welcomed by the Dutch Association of the Judiciary (Nederlandse Vereniging voor Rechtspraak). In fact, the Association objected to the enactment of the WCAM 2005 by arguing, *inter alia*, that the Amsterdam Court would not be adapted to the task of weighing factors that might to a large extent be unknown, such as the number of victims and the nature and extent of their injuries and damages.[22] The Association was also of the opinion that the open texture of the fairness criteria would put the judiciary in a position of substitute legislature, as it would be forced to make general pecuniary distributions on the basis of a vague general clause. This argument was dismissed by the legislator on the basis of the contention that it was in fact not uncommon for courts to have such a [182] task assigned to them.[23] In any event, the position of the Amsterdam Court is unmistakably crucial for the credibility of the WCAM 2005 as an instrument for the efficient and fair settlement of mass damage claims.

The procedure before the Amsterdam Court of Appeals commences with a joint petition by the parties that reached the settlement.[24] This tailor-made petition procedure departs from the normal civil procedure in which the defendant is served a summons. The petition is a request submitted to the court rather than a claim made to a defendant. In the petition procedure, interested third parties will be given notice to appear at the hearing. Interested parties are the individuals that were injured by the alleged tortious act and any foundation or association that was not party to the settlement but does represent the interests of the injured individuals involved. Such organisations are invited by the Court to join the procedure, to give their opinion on the petition, and to file a defence against it.[25] The Court will decide on the method of communication with interested parties and how they should be addressed (if possible by mail or if necessary, by newspaper advertisements, and so on).[26]

Central to the procedure is the hearing. The Amsterdam Court will set dates for an extensive hearing of the contracting parties and the interested parties that have applied to be heard, as well as any expert witnesses that the court feels it should consult. Other lower courts that

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21 See for example art. 1016 Code of Civil Procedure: the Amsterdam Court decides on the number and nature of expert witnesses called to appear. Cf. *Croiset van Uchelen* (op. cit. fn. 15), 135.

22 Parliamentary Proceedings II 2003/04, 29 414, no. 3, 9.

23 On this discussion, see *Henkemans*, De wetgevende taak van de rechter bij massaschade, in: Van den Berg et al. (ed.), Massaclaims: class actions op z'n Nederlands, Nijmegen 2007, 29 ff.

24 See art. 1013 ff. of the Code of Civil Procedure.

25 See art. 1014 Code of Civil Procedure.

26 See art. 1013 Code of Civil Procedure.

are concurrently hearing individual claims have the power to defer the individual procedure on request, pending the WCAM 2005 procedure.[27]

Generally speaking, the procedure will end with one of two possible outcomes: the requested declaration is either denied or granted.[28] If it is denied, the contractual settlement itself may still be valid and binding upon the parties. They will, however, have inserted a clause in the settlement dealing with the eventuality of denial. If the requested declaration is granted, all injured individuals are bound to the settlement unless they use their right to opt out of the settlement. The declaration by the Court that the settlement is binding upon all interested victims will be made public and will be published as soon as it is irrevocable.[29]

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3.4 Framework for evaluating the settlement by the Amsterdam Court

The framework for evaluating the settlement consists of a number of items, some of which are detailed while others are more abstract by nature. According to article 7:907 Civil Code, the submitted settlement shall include, *inter alia*:

1. a description of the group or groups of persons on whose behalf the agreement was concluded, according to the nature and the seriousness of their loss;
2. an indication of the number of persons belonging to the group or groups as accurate as possible;
3. the compensation that will be awarded to these persons;
4. the conditions these persons must meet to qualify for the compensation;
5. the procedure by which the compensation will be established and can be obtained;
6. the name and place of residence of the person to whom the written notification referred to in Article 908 (2) and (3) can be sent.

As in any case where a court is to balance various interests, the Amsterdam Court is required to make a well-balanced judgment on the basis of flexible and transparent standards. Deciding whether the settlement is a "fair deal" for all parties concerned, especially for the victims, will depend on a number of factors. The petition for declaration of the settlement as binding on all interested parties shall be rejected in any of the following cases (art. 7:907 Civil Code):

1. the amount of the compensation awarded is not reasonable, having regard to, inter alia, the extent of the damage, the ease and speed with which the compensation can be obtained, and the possible causes of the damage;[30]
2. insufficient security is provided for the payment of the claims of persons on whose behalf the agreement was concluded;

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27 See art. 1015 Code of Civil Procedure.

28 For procedural remedies in either cases, see *infra*, Section C. VII.

29 Art. 1018 Code of Civil Procedure.

30 Note that the Court should also prevent that the compensation scheme forwarded by the settlement overcompensates the injured individuals; see art. 7:909 (4) Civil Code.

3. the agreement does not provide for the independent determination of the compensation awarded pursuant to the agreement;
4. the interests of the persons on whose behalf the agreement was concluded are otherwise not adequately safeguarded;
5. the foundation or association does not sufficiently represent the interests of persons on whose behalf the agreement was concluded;
6. the group of persons on whose behalf the agreement was concluded is not large enough to justify a declaration that the agreement is binding.

Before giving a final decision on the petition, the Court may give the parties the opportunity to amend or add to the agreement (art. 7:907 (4) Civil Code). [184] Strictly speaking, the Amsterdam Court is not allowed to amend the settlement unilaterally but in actual practice it can do so by letting the parties know that some changes are essential to granting the requested declaration.[31] It is unclear whether all interested parties must be given the opportunity to react to the thus amended settlement but it does seem that procedural fairness demands this.[32]

3.5 After the declaration by the Amsterdam Court

Interested parties are bound as if they were parties to the contract. As soon as the request for a declaration has been granted irrevocably, the agreement shall, as between the parties and the persons entitled to compensation, have the consequences of a settlement agreement to which each of the persons entitled to compensation shall be considered as a party (art. 7:908). In legal terms, the interested persons entitled to compensation under the settlement automatically become party to a contract without their explicit consent (art. 7:908 (1) Civil Code). Instead, the initiative is on them to opt out of the contract if they deem it unfavourable.

The binding nature of the settlement is reinforced by the declaration by the Amsterdam Court that the settlement is binding upon the group of injured individuals identified in the settlement. To warrant this binding nature and to increase legal certainty after the declaration, the original parties to the agreement cannot nullify the settlement for misrepresentation or fraud. Moreover, the interested injured parties entitled to compensation cannot nullify the settlement on the basis that its binding nature is unacceptable according to reasonableness and fairness (i.e. good faith). Instead, the only remedy available to injured individuals is to opt out of the settlement if they feel it is unfair.

Naturally, it is vital for individuals bound by the settlement to be aware of their right to opt out of the settlement. In art. 1017 Code of Civil Procedure tools are made available to the Amsterdam Court to demand an intensive communication plan. The individuals have to be reached whenever possible by mail, but other means of communication are conceivable as

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[31] Cf. Parliamentary Proceedings, II 2003/04, 29 414, no. 3, 16.
[32] Cf. *Croiset van Uchelen* (op. cit. fn. 15), 135.

well. Additionally, newspaper advertisements are used to ensure an optimal dissemination of the information on the settlement and the opt-out right.

The injured individuals that have neither opted out nor come forward to collect their compensation may experience a lapse of rights. The settlement agreement may provide that a right to compensation pursuant to the agreement shall lapse if a person entitled to compensation has not claimed the compensation within a period of at least one year from the start of the day [185] following the day on which he became aware of his right to demand immediate payment of the compensation (art. 7: 907 (6) Civil Code).

3.6 Opting out

Art. 7:908 (2) Civil Code provides for a right to opt out of the settlement. As a result of the declaration by the Amsterdam Court, the injured individuals have automatically become party to a contract.[33] In view of the constitutional right of individuals to have their individual case heard by a court,[34] the injured are entitled to withdraw from the settlement contract by invoking their right to opt out. They must do so individually and in writing.[35] A peculiarity of the WCAM 2005 is that the power to opt out accrues only after the settlement has been declared binding upon the injured individuals. As a result, there is no formal way of knowing the number of individuals that will opt out beforehand. Informally, prior consultation of the members of the association(s) and the backing of the foundation(s) is possible.

The opt-out period is set by the Court and shall be at least three months running from the date of public announcement of the declaration. The legislature has also made arrangements for cases in which the group of injured persons bound by the declaration is unspecified and difficult to identify or locate. In art. 7:908 (3) Civil Code it is provided that the Court's declaration that the agreement is binding shall have no consequences for an injured individual who could not have known of his loss at the time of the public announcement if, after becoming aware of the loss, he has notified the administrator of his wish not to be bound. This allows for an extension of the opt out-period, although the administrator of the fund has the power to provoke a decision of the injured individual by giving notice in writing of a period of [186] at least six months, during which that person can state he does not wish to be bound. After the lapse of this period, the right to opt out has expired.

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[33] On the dogmatic structure of the WCAM on this point, see Parliamentary Proceedings II 2003/04, 29 414, no. 3, p. 18. The legislator refers to art. 6:254 Civil Code (accession to a contract by a third party as a result of acceptance of the offer implied in a contractual clause stipulated to the benefit of a third party). The upshot of accession is that the interested party is considered to be in a contractual relationship (the settlement contract) with the promissor.

[34] The legislature considered both art. 17 Dutch Constitution, art. 6 ECHR, and art. 1, 1st protocol ECHR (right to property) to be taken sufficiently into account with the opt-out possibility. See Parliamentary Proceedings II 2003/04, 29 414, no. 7, p. 14 ff. For an overview of the criticisms against this position, see *Falkena/Haak*, De nieuwe wettelijke regeling afwikkeling massaschade, Aansprakelijkheid, Verzekering & Schade (AV&S) 2004, 198 ff.

[35] The parties to the settlement shall specify in their petition and the Amsterdam Court will confirm in its decision the addressee of the opt-out notification (art. 7:907 (2) (f); art. 7:908 (2) Civil Code).

There is an additional important aspect of the opt-out possibility that needs some explanation here. Naturally, if the settlement is unfavourable for the injured individuals they may choose to opt out. This may affect the alleged tortfeasor in the sense that he experiences that too few individuals are still "on board". To cater for this eventuality, the joint power to cancel the settlement was conferred on the parties to the contract. Under specific circumstances set in art. 7:904 (4) Civil Code, the parties to the settlement have the power to cancel the contract for lack of a substantial numbers of participants.

3.7 Procedural remedies

The procedural remedies against the decision by the Amsterdam Court are limited. The joint petitioners can appeal in cassation (art. 1018 (1) Code of Civil Procedure). The Supreme Court may then quash or affirm the Amsterdam Court decision on points of law. Injured individuals affected by the settlement do not have a right to appeal, because they have the right to opt out.

"Revocation" as referred to in art. 1018 (2) Code of Civil Procedure is only possible in extraordinary circumstances such as fraudulently withholding, falsifying, or concocting evidence before the court.[36] Therefore, it is insufficient for evidence to suffice after irrevocability of the settlement that the tortfeasor had acted knowingly and fraudulently, rather than negligently. It must be proven that one of the petitioners knowingly withheld such information from the Amsterdam Court.

In principle, the right to revocation is only open to the original foundation or association representing the injured individuals in the settlement. If the Amsterdam Court indeed allows the motion for revocation, the settlement is effectively nullified. This far-reaching consequence can be mitigated by injured individuals who wish to object to the revocation. In their regard the settlement will then remain effective.

3.8 The execution phase: distribution of settlement proceeds

The WCAM 2005 is largely neutral as regards the compensation of injured individuals: they may or may not receive compensation that reflects the principle of full compensation underlying the law of damages.[37] The method and procedure [187] for calculating damages, the amounts, forms, standards, protocols and so forth are deliberately left to the contracting parties. The need for damage scheduling and categorising the injured individuals obviously depends on the nature of the mass damage event. The Amsterdam Court evaluates the fairness of the scheduling as well as the levels and conditions of compensation.

The settlement will contain or refer to a plan of allocation of the proceeds of the settlement. Parties to the settlement have considerable room to negotiate the most appropriate method

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[36] Cf. art. 382 Code of Civil Procedure.

[37] Art. 7:909 (4) Civil Code indicates that the injured individuals may not be evidently overcompensated, but undercompensation as such seems possible, especially in light of the uncertainty that the tortfeasor is actually liable.

of distribution. In the Shell case, for example, a transfer of the settlement sum to an escrow account was initially arranged. When the Amsterdam Court has approved the settlement with finality, the appointed administrator will distribute the fund.

It is possible that a separate administrator – usually a foundation incorporated especially for the occasion – is entrusted with the task of distributing the settlement fund among the injured individuals in an orderly manner. In practice, parties tend to appoint a separate administrator and to set aside limited funds to distribute in order to attain finality of the arrangement.

The administrator will have to decide on applications for compensations made by injured individuals. Obviously, such individual decisions may in turn cause conflicts that need to be settled individually. The parties to the settlement are well advised to devote considerable attention to the design of the settlement regarding the institution of an independent dispute resolution committee that is competent to deal with such issues that may arise in the execution phase. The WCAM 2005 itself suffers from a design flaw in this respect. Art. 7:909 (1) provides that the administrator is entitled to take *binding decisions* on the right to compensation under the settlement. According to this article, the nature of such a binding decision is that, in principle, recourse to judicial review of the decision is blocked. The consequence would be that an individual who has not opted out of the settlement and is then denied compensation can hardly ever redress his predicament. It has been rightly argued that this may be contrary to the fundamental right to access to justice.[38]

The foundation or association that is originally party to the settlement can act as a watchdog in the execution phase. It can act in the interest of injured individuals and demand performance of the settlement (see art. 7:909 (3) Civil Code). Furthermore, it will typically have negotiated the institution of a dispute resolution committee that is competent to deal with issues that may arise in the execution phase.

[188] What if the settlement sum is not collected in full? As mentioned, art. 7:907 (6) Civil Code provides that the settlement may provide that the right to compensation shall lapse if the injured individual has failed to claim compensation within one year running from the moment the individual became aware – or could have been aware –[39] of his right. Additionally, the settlement may contain a clause authorising the administrator to redistribute the remainder of the fund among the known participants. Conversely, if funds dry up before all individuals are compensated – for instance, because it was not possible to precisely calculate in advance the number of eligible injured individuals – art. 7:909 (5) Civil Code provides for a *pro rata* reduction of the outstanding claims. This method of redistribution seems particu-

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38 *Croiset van Uchelen* (op. cit. fn. 15), 138-139. Moreover, as the settlement is a *contract* it is also subject to the rules on unfair general contract terms. Therefore, the question even arises as to whether a settlement clause referring to an independent claims resolution committee is an unfair contract term because according to art. 6:236 (n) Civil Code general contract terms in consumer contracts shall not restrict access to the competent civil court (unless by means of an *arbitration* clause).

39 *Croiset van Uchelen* (op. cit. fn. 15), 139.

larly unfair if the number of claims thus reduced is outnumbered by far by the claims that were compensated without reduction. Therefore, both the contracting parties and the Amsterdam Court are under a duty to assess as accurately as possible the number and identity of those affected by the settlement and the rationing process.[40]

4 Evaluation of the WCAM 2005: towards a proper Dutch group action?

4.1 Practical experience with the WCAM 2005

As mentioned earlier, thus far only two settlements have been submitted to and declared binding by the Amsterdam Court (DES and Dexia). Three more are currently pending before the Court. Given this limited experience with the WCAM 2005, it is impossible to draw firm conclusions concerning the advantages and drawbacks of the Act. Therefore, any conclusions presented here should be read with caution.

The success of a WCAM 2005 settlement can to some extent be measured by the number of individuals opting out of the settlement. The lower this number is – relative to the total number of persons implicated in the settlement – the more successful the settlement can be considered. Obviously, this is only true under the assumption that:

1. there is adequate information available to the injured individuals on the risks and benefits of the alternative of pursuing their claims individually to make an informed decision whether or not to exercise their right to opt out;
2. the costs of using this right to opt out (in terms of time and effort) are not prohibitive.

[189] There is no empirical research available testing these assumptions. It is certain, however, that not all consumers are well educated and have knowledge of the law. For instance, theory predicts that the WCAM 2005 could cause a serious risk of *free rider behaviour* of consumers. The law does not require consumers to become a member of a representative association in order to profit from settlements negotiated by such associations. Thus, rational choice theory predicts that consumers will wait for the negotiations by tortfeasor and representative organisation to result in an advantageous settlement and then decide whether to obtain the compensation offered by the settlement or to opt out. Such behaviour would not cost the consumer anything and might only benefit him. It would render the representative activities of consumer foundations and associations a "public good", leaving these organisations without private funding.

[40] The risk of unknown individuals claiming compensation after the proceeds have already been distributed can be minimised by inserting a waiting period in the settlement of one year running from the date of publication.

In practice, however, it seems that *most* Dutch consumers are more than willing to donate contributions voluntarily to associations and foundations that negotiate a settlement in the interest of *all* injured consumers. Perhaps a certain amount of information asymmetry thus effectively inhibits free rider behaviour.

Theory also predicts that a tortfeasor will only voluntarily enter into a mass claim settlement if the advantages of doing so outweigh the benefits of not settling. Again, this is only true under the assumption that there is clear information about these costs and benefits. However, actual practice shows that it is quite difficult for all parties concerned to assess beforehand the pros and cons of settling. This is well illustrated by the Dexia case.[41] This settlement concerned financial products sold by predecessors of the Dexia Bank between 1990 and 2001. The overall design of this product was that it made stock investment available to low-income consumers by lending them money with which they could "lease" stock. The monthly deposits these consumers made were in fact interest payments for the loan they had taken out with the Bank.

Anyone will agree that buying or even "leasing" stock with borrowed money may be profitable but is certainly also highly risky.[42] Due to aggressive marketing techniques and highly impenetrable prospectuses and advertisements, the Bank nonetheless succeeded in selling some 465,000 contracts at a total value (in 2001) of some € 4.4 billion. Then the inherent risk that had [190] not been properly disclosed to the clients (or so they alleged), materialised: stock prices fell and a considerable number of clients were left with debts rather than equity.

These clients claimed that Dexia had not properly informed them of the risks inherent to the financial product. Some also argued that the Dexia Bank had been under a duty to assure prior to conclusion of the contract that the client was able to bear the financial consequences of a catastrophic downturn in stock value.

The initial stance of Dexia Bank was to deny any requests for leniency and to insist on payment of the net debt. The number of consumers unable to repay grew. Some went to court, others mobilised media and politicians. As time passed, the number of decisions of lower courts that favoured consumers grew. Thus, the pressure on Dexia to reach some sort of amicable solution also mounted. After unsuccessful attempts at conciliation by legal experts and public figures, a solution was reached in the form of a broad settlement valued at € 1

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41 See for example *Van Doorn*, De tweede WCAM-beschikking is een feit: tijd voor een terugblik en een blik vooruit, AV&S 2007, 105 ff.; *Krans*, DES en DEXIA: de eerste ervaringen met collectieve afwikkeling van massaschade, Nederlands Juristenblad (NJ) 2007, 2598 ff.

42 Nineteenth-century banking handbooks already warned against lending money to clients for the purpose of buying shares: a fall in the securities market would undermine the clients' collateral and threaten the advance. See *Collins/Baker*, Commercial banks and industrial finance in England and Wales, 1860-1913, Oxford; New York 2003, 140.

billion and brokered by the late economist W.F. Duisenberg (former head of the European Central Bank). This settlement was ultimately declared binding by the Amsterdam Court.[43]

Some 24,000 individuals opted out. Then two significant developments occurred. Most of the individuals that opted out took their chances and tried to recoup their total loss in individual actions rather than agreeing to the partial redress that the settlement offered them. The Supreme Court later decided in favour of some of these individuals who were able to raise a specific legal defence.[44] They could indeed fully recoup their losses provided they had indeed opted out of the settlement and the specific legal defence applied to their case.[45] On the one hand, this shows that by nature a voluntary settlement is a contract concluded in uncertainty: by not opting out of the settlement the injured individuals prefer a certain outcome to an uncertain procedure. On the other hand, it raises the issue of whether reaching a mass settlement before vital points of law have been dealt with by the Supreme Court really is the appropriate chronological order to deal with mass damage.

The second development worth noting is equally significant. Thousands of cases of individuals that opted out are to this day still clogging the lower courts. Instead of dealing with all these files on a case-by-case basis, what happened was that lower courts developed some sort of standardised framework ("model decisions") for assessing and judging most of these cases. Apparently, lower courts have found a creative method for dealing with the masses. This unquestionably raises issues concerning the position of the judiciary in mass [191] damage events. Note that this method currently is the subject of judicial review by Courts of Appeals and ultimately the Supreme Court.[46]

4.2 The policy agenda

Some three years after the enactment of the WCAM 2005, the first experiences have induced the Ministry of Justice to evaluate it.[47] It is expected that the issues mentioned in the previous paragraph will be on the legislative agenda in the near future. The key issue is that the WCAM 2005 starts with a *voluntary* settlement. There is no lever for compelling alleged tortfeasors to settle. The collective action (art. 3:305a Civil Code) may help to obtain clarity on points of law, but the road to a final verdict of the Supreme Court on points of law as a precursor for a settlement is a long and slippery one. Perhaps it could be helpful to amend the collective action to cater for the need for a swift Supreme Court "prejudicial opinion" on

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43 *GA* 25 January 2007, no. 1783/05, LJN no. AZ7033.

44 *HR* 28 March 2008, holding that spouses of investors could nullify the contract if they had not explicitly consented to the loan.

45 Note that in all probability this legal defence could only be raised by a specific part of the consumers involved.

46 Recently, the Amsterdam Court of Appeals rejected the model decision framework (*GA* 9 December 2008, LJN: BG6261/LJN: BG6263).

47 Parliamentary Proceedings II 2008/09, 31 762, no. 1 (evaluation of the WCAM 2005). In a similar vein to the legislator *Asser et al.* (op. cit. fn. 2), 121 and *Frenk*, In der minne geschikt, NJ 2007, 2615 ff.

points of law. I doubt, however, whether the legislature is likely to introduce the possibility of *compelling* the alleged tortfeasor to settle. The model of the WCAM is principally built on self-help, market forces, and autonomy of the contracting (representative) parties. Legal compulsion to settle seems incompatible with the model as it stands. Moreover, the case for compulsion has yet to be proved, as the voluntary model seems to have generated so many benefits already.

5 Conclusions

Individuals have a fundamental preference for being treated as individuals. We all want to be considered unique persons with unique characters (and at moments of introspection we may also admit to having character flaws), leading unique lives with unique sets of values and goals. Our sense of justice is modelled accordingly, so we also expect the institutions of the law to treat us as individuals. The reality, however, is that the law can hardly ever live up to this expectation. Take, for example, the fundamental idea in law that like cases are to be treated alike. Strictly speaking, this fundamental notion may in fact lead courts away from the individual in the direction of a more or less objective reflection on the *case* at hand rather than on the individual *person* involved. In a situation where cases are compared and distinguished, the person is thought to be treated fairly. In fact, the judicial process aims at [192] categorising fairly and then deciding the case. This is especially relevant if the case is one involving mass damages.

Moreover, in a regulating society, the legislature attempts to balance individual and collective interests. In doing so, it usually categorises individuals into groups of individuals in order to connect certain rules with specific groups. Tax law and social security law are notable examples of this "balancing act": the tax burden is assessed on the basis of abstract properties that can be applied relatively easily to bulk numbers of persons. Social security usually sticks to a system of fixed amounts in benefits and fixed categories of beneficiaries, in order to keep the cost of administration and the likelihood of inequalities at a minimum. Such systems of distribution of wealth operate on the basis of aggregated data, fixed categories, structured templates, and protocols. In essence, the law tries to categorise individuals into groups in order to deal with the need for mass justice effectively and swiftly whilst providing an adequate level of individual justice.

Why should settling mass claims for compensation and redress in private law be any different from this typology? Obviously, a meaningful argument here is that the framework for adjudicating such claims – tort law, contract law – is not primarily concerned with distributing – let alone redistributing – but rather with redressing individual wrongs committed against individuals. From a historical legal point of view, this might be true but it seems to be a position difficult to maintain in modern society. Here, one can think of the redress of "scattered damage" (also referred to as "trifle damage") caused by a breach of competition law – say horizontal price cartels – and causing slight price increases in consumer products.

Equally, individual claims may be substantial but not substantial enough to justify calling in the aid of expensive lawyers and experts.

Under those circumstances, individual access to justice may not be on a par with effective resolution and an optimal level of compliance. And if claims are indeed substantial and economically viable, bringing them to court all at once may clog courts. In such cases, the handling of similar claims in some sort of consolidated procedure may be a feasible alternative, provided that collective interests and individual interests are balanced in a transparent procedure. Admittedly, any system of collective claims settlement has to balance both the individual interests of the injured, the interest of defendants (more often than not industry, insurance, employers, manufacturers, government, and so on) and the collective interest of adequate access to justice. The Dutch system of balancing these interests is not without loopholes and drawbacks, but all in all it is a major improvement compared to the actual position of mass damage victims in The Netherlands before the enactment of the WCAM 2005.