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Approval of Class Action Settlement by the Amsterdam Court of Appeals Closes Chapter on One “F-Cubed” Securities Litigation, But the Future of Such Actions Remains Uncertain

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On Friday, May 29, 2009, the Amsterdam Court of Appeals approved a securities fraud class action settlement providing that Royal Dutch Shell pay \$381 million to a foundation representing a group of more than 150 institutional investors from 19 countries. The approval of the settlement undoubtedly represents a landmark for European issuers and investors. As discussed below, however, the settlement arose from a combination of circumstances that may limit its impact on the resolution of “f-cubed” actions filed in the United States.

Introduction to F-Cubed Actions

An f-cubed action involves a foreign shareholder suing a foreign company whose stock was purchased on a foreign exchange. With their limited connection to the United States, f-cubed actions raise important jurisdictional issues that impact both the reach of American securities laws and the economic behavior of issuers seeking access to the U.S. capital markets. F-cubed actions have recently become a more frequent litigation gambit as reflected in a recent spate of high-profile securities litigation, including alleged frauds at Royal Dutch Shell plc (discussed in detail below), Parmalat Finanziaria S.p.A, and Vivendi Universal, S.A.

The Royal Dutch Shell Litigation

The Royal Dutch Shell litigation arose in part from one of the great corporate email gaffes of all time. In November 2003, Walter van de Vijver, then the head of oil and gas exploration at Shell, e-mailed the company chairman, “I am becoming sick and tired about lying about the extent of our reserves issues.” Shell would later sharply reduce its oil and gas reserves estimate by some four billion barrels (approximately 20 percent) with the largest reduction occurring in Nigeria, the world’s seventh largest oil exporter. Shell then further reduced its reserves estimate three more times, bringing the total reduction to six million barrels. In addition to reducing its previously-reported reserves, Shell also twice restated its financial results for 2001 and 2002 and once restated its financial results for 2003.

On January 29, 2004, the first of several securities fraud class actions against Shell was filed in the United States District Court for the District of New Jersey. Subsequently, twenty one additional class actions were filed in U.S. courts against Shell. The plaintiffs asserted claims on behalf of a putative class whose members were foreign nationals that purchased their shares on foreign exchanges. Shell moved to dismiss on that basis, contending that the U.S. was not the place of “substantial and material” conduct by

the company. See *Royal Dutch/Shell Transp. Sec. Litig.*, 380 F. Supp. 2d 509, 539 (D. N.J. 2005). Shell was headquartered in The Hague, Netherlands. Of the 11.7 billion Shell shares held worldwide, roughly 92 percent were traded outside the United States. Chief Judge Bissell denied the motion, citing the fact that some sites where reserves were overstated were in the U.S., some auditing took place in the U.S., and there were investor relations meetings held in the U.S.¹

The Settlement by the F-Cubed Plaintiffs

Facing the threat of a global class action in a U.S. court, Shell decided to settle with its non-U.S. investors, ultimately agreeing to pay more than \$352.6 million, plus administrative expenses, to foreign investors in a settlement class action in the Netherlands.² That settlement was contingent on (1) the U.S. District Court in New Jersey declining foreign jurisdiction, and (2) the Amsterdam Court of Appeals approving the deal.

Following the preliminary settlement, Shell renewed its motion to dismiss for lack of subject matter jurisdiction and also moved to sever and dismiss the non-U.S. purchasers' claims based on the doctrines of comity and *forum non conveniens*. In *re Royal Dutch/Shell Transport Securities Litigation*, No. 04-374, 2007 WL 3406599 at *2 (D. N.J. Nov. 13, 2007). The United States District Court for the District of New Jersey appointed retired United States District Court Judge Nicholas H. Politan as Special Master for the purpose of reviewing the extensive evidentiary record and making a recommendation with respect to the renewed jurisdictional motion. The parties stipulated to adjourn Shell's motion to sever and dismiss based on comity and *forum non conveniens* until after the Court reviewed the Special Master's report.

The Special Master determined that courts will "exercise subject matter jurisdiction over foreign investors' foreign transactions only where the alleged fraud was contrived in or from the United States or arose from activities in the United

States." *Id.* at *5 (quoting September 18, 2007 Report and Recommendation of Special Master Nicholas H. Politan at 35). Judge Joel A. Pisano ultimately adopted the Special Master's report and ruled that the Court lacked subject matter jurisdiction over the f-cubed plaintiffs. In contrast to the Court's 2005 decision that "Plaintiffs, at the pleading stage of the case, alleged sufficient conduct to retain jurisdiction," the Court adopted the Special Master's factual conclusion, after the parties engaged in extensive discovery, that there was insufficient evidence that Shell's conduct within the United States was essential to the plan to defraud the f-cubed plaintiffs. *Id.* at *2, *11. The Court emphasized that its holding would not prejudice the f-cubed plaintiffs because they could still "seek recovery through the Settlement Agreement entered into before the Amsterdam Court of Appeals or through procedures available within their respective jurisdictions." *Id.*

The Dutch Act on Collective Settlement of Mass Damages

The Royal Dutch Shell settlement was made possible by legislation that went into effect in the Netherlands in July 2005 – the Dutch Act on Collective Settlement of Mass Damages ("Dutch Act"). The Dutch Act was created at the initiative of pharmaceutical lobbyists as a method to avoid a flood of individual suits by families that suffered injuries related to the synthetic hormone DES. Before the Dutch Act, the Dutch Civil Code permitted "Representative Actions" which are similar to class actions in the United States with one major difference – while a representative action may seek a variety of types of relief, class damages claims are not permitted. The Dutch Act does not completely close this gap. Instead, the Dutch Act permits settlement agreements on the basis of "damages classes" to be (1) entered into between a representative organization and a defendant and then (2) made binding upon the members of the organization who do not opt out once approved by the Amsterdam Court of Appeals.

The approval of the Royal Dutch Shell settlement represents a defining moment for the Dutch Act because of the scope of jurisdiction exercised by the Amsterdam Court of Appeals. The settlement class included plaintiffs from 17 different European countries (plus Canada and Australia), not just Dutch parties.³ Additionally, the Amsterdam Court's binding approval of the settlement is likely enforceable throughout Europe pursuant to the European regulation on jurisdiction and recognition of judgments. Accordingly, while the Dutch Act does not provide a mechanism for the litigation of mass damages suits, it does provide a mechanism for defendants to "buy peace" across the European continent.

The Future of F-Cubed Plaintiffs Actions

While the approval of the Royal Dutch Shell settlement is certainly significant, it seems likely that the impact to f-cubed actions filed in U.S. courts will be relatively minimal. The primary reason for this is the attractiveness and unique advantages U.S. courts offer to class action plaintiffs. To begin with, collective suits for damages are not only permitted, but commonplace. The United States is also "unique for its jury system, the availability of punitive and treble damages, the cultural embrace of jackpot verdicts, the acceptance by both

business and law firms of litigation as a profit center, the existence of universal class action procedures and the absence of 'loser pays' rule in the award of legal fees."⁴ For these reasons, foreign plaintiffs (or at least plaintiffs' counsel) are likely to prefer to file suit in the United States where possible.

Moreover, while European defendants may now have the option to use the Dutch Act to settle claims on their own turf, ultimately such settlements depend upon particular motivating circumstances. Without a mechanism to seek class damages, defendants are unlikely to be motivated to settle unless they are faced with a global class action in a U.S. court (like the Royal Dutch Shell case) or a multitude of actions filed by numerous individual plaintiffs (like the DES hormone case). Additionally, in order for a settlement under the Dutch Act to bring a final resolution to claims by f-cubed plaintiffs, U.S. courts will have to either accept the settlement under the Dutch Act or, like Judge Pisano, decline jurisdiction.

In short, while the approval of the Royal Dutch Shell settlement may indicate Europe's gradual acceptance of collective action remedies, f-cubed class action filings in the United States are unlikely to be impacted in any significant way because of that settlement.



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¹ In determining whether there is federal court subject matter jurisdiction over foreign transactions in a securities fraud case, courts employ two different tests: (1) the "effects test" (which considers whether conduct outside U.S. has had substantial adverse effect on domestic investors or the U.S. markets) and (2) the "conduct test" (which analyzes whether conduct within U.S. is alleged to have played some part in perpetration of securities fraud on investors outside of this country). See *Royal Dutch/Shell*, 380 F. Supp. 2d at 540.

² Notably, the settlement was negotiated without the knowledge of the plaintiffs' attorneys who filed the U.S. case. Instead, the company agreed with a separate firm to settle the European investor's claims. See Ben Hallman, *Dutch Court Approves Landmark Royal Dutch Shell Shareholder 'Class Action'*, The AM Law Litigation Daily, May 29, 2009, <http://www.law.com/jsp/tal/digestTAL.jsp?id=1202431087599>.

³ A complete list of the entities, organizations and countries taking part in the settlement, as well as the settlement agreement itself and the petition to the Amsterdam Court of Appeals for approval of the settlement, can be found at <https://www.royaldutchshellsettlement.com>.

⁴ M. Goldhaber, *'Shell Model' Opens Door to European Class Actions*, Law.com, Jan. 7, 2008, <http://www.law.com/jsp/article.jsp?id=1199441125202> ("In securities law in particular, plaintiffs in U.S. courts are blessed with two doctrines that are rare overseas. Derivative suits allow shareholders to sue in the corporation's name, and the fraud-on-the-market theory presumes that injured shareholders relied on corporate misrepresentations.").