

2012

The U.S. Securities Fraud Class Action: An Unlikely Export to the European Union

Manning Gilbert Warren III

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

Recommended Citation

Manning G. Warren III, *The U.S. Securities Fraud Class Action: An Unlikely Export to the European Union*, 37 Brook. J. Int'l L. (2012).
Available at: <https://brooklynworks.brooklaw.edu/bjil/vol37/iss3/7>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

THE U.S. SECURITIES FRAUD CLASS ACTION: AN UNLIKELY EXPORT TO THE EUROPEAN UNION

*Manning Gilbert Warren III **

INTRODUCTION

This Article addresses the issue of whether the securities litigation model in the United States, centered on the notorious securities fraud class action, has been or should be exported throughout the world in order to provide defrauded investors greater access to justice. Specifically, the focus of this Article is whether the U.S. securities class action has spread or is likely to spread to the individual member states of the European Union (“EU”), or, alternatively, whether it may evolve into a supranational remedy through EU legislation. Although the EU has achieved an astounding degree of harmonization in the securities laws of its member states,¹ it has not yet advanced any individual or collective private remedies for violations of those securities laws. Moreover, while a number of the EU’s member states have adopted collective redress procedures in other areas, none have advanced a U.S.-style class action private remedy for securities fraud.

The failure by the EU and its various member states to enact U.S.-style class action and other collective private remedies for investors in securities may be readily explained by the differences in both the structure and demographics of European securities markets. The retail markets for securities among the EU member states are relatively underdeveloped compared to U.S. securities markets, particularly in terms of substantive participation by individual investors.² Consequently, there has hardly

* H. Edward Harter, Chair of Commercial Law, Brandeis School of Law, University of Louisville. The author would like to thank Lawrence A. Sucharow, Labaton Sucharow LLP, his colleague on the securities litigation panel of Brooklyn Law School’s Globalization of the U.S. Litigation Model Symposium, for his thoughtful review and comments. The author gratefully acknowledges the assistance provided by his research assistant, Taylor Gerlach, and by his administrative assistant, Janet G. Sullivan, in the final preparation of this Article.

1. See generally MANNING GILBERT WARREN III, *Global Harmonization of Securities Laws: The Achievements of the European Communities*, in EUROPEAN SECURITIES REGULATION 23 (2003).

2. Unlike stock ownership levels in the United States, Elina Laakso’s summary of data gathered by the SHARE project for the year of 2006 to 2007 shows the percentage of Europeans directly investing in European stock markets to be quite low. See Elina Laakso, *Stock Market Participation and Household Characteristics in Europe* 32 (Aug. 9, 2010) (unpublished master’s thesis) (on file with the Aalto University School of Economics); Brian K. Bucks, Arthur B. Kennickell, Traci L. Mach & Kevin B. Moore, *Changes*

been a populist hue and cry for more effective private remedies for securities fraud, and much less for broad-based collective redress procedures. Indeed, it is at least questionable whether there is any necessity for development of an EU-wide securities class action or stronger collective remedies among the member states. Nevertheless, the EU's European Commission recently invigorated the class action debate in Europe by initiating a public consultation process to discuss generally the utility of class actions and other forms of collective redress, both at the EU and member state regulatory levels.³ In doing so, the Commission made it clear that the U.S. class action remedy is the model of what not to do.⁴

This Article will first focus on the U.S. class action remedy as a wounded horse, hardly the robust steed the U.S. would offer as a breed to emulate in Europe. Domestically, the class action has been endlessly politically derided since the early 1990s, and, although still on four legs, has faced considerable hostility in legislative and judicial fora.⁵ After these observations, the author will briefly examine the significant barriers to entry, as well as the general hostility, that the class action confronts in the European legal culture, despite a few recent and significant inroads. While U.S. class actions have been facilitated both by principles common to the U.S. litigation system and specific to the class action, EU

in U.S. Family Finances from 2004 to 2007: Evidence from the Survey of Consumer Finances, 95 FED. RES. BULL. A1 (2009) [hereinafter Bucks et al., *Changes in U.S. Family Finances*]. In only four countries did stock ownership by individuals exceed 25% (52% in Sweden, 47% Denmark, 31% Switzerland (approximately), and 29% Belgium (approximately)). Laakso, *supra*. While most countries had rates of ownership around 10%, stock ownership among households was the lowest in Italy, Greece, Spain, the Czech Republic, and Poland (7%, 6%, 6%, 4%, and 1%, respectively). *Id.* On the contrary, for the same year, 51.1% of U.S. households owned stocks directly or through investment funds. Bucks et al., *Changes in U.S. Family Finances*, *supra*, at A1, A27. Furthermore, a 2008 FESE report shines light on the largely institutional makeup of European exchanges and share-ownership structures, with institutions (private financial and non-financial enterprises and companies) accounting for more than triple the 14% of the total market value of listed shares owned by individuals. FED'N OF EUR. SEC. EXCH. [FESE], ECON. & STATISTICS COMM. [ESC], SHARE OWNERSHIP STRUCTURE IN EUROPE 11 (2008), available at

http://www.bourse.lu/contenu/docs/commun/societe/Actualites/2008/FESE_SHARE_OWNERSHIP_SURVEY_2007.pdf. Consequently, the lacking participation of individuals in the European share ownership structure suggests that a private remedy such as the securities class action might not even be truly needed.

3. See generally *Commission Staff Working Document, Public Consultation: Towards a Coherent European Approach to Collective Redress*, SEC (2011) 173 final (Feb. 4, 2011) [hereinafter *Towards a Coherent European Approach*], available at http://ec.europa.eu/justice/news/consulting_public/0054/sec_2011_173_en.pdf.

4. *Id.*; see *infra* notes 150–54 and accompanying text.

5. See generally *infra* notes 12–23.

collective redress schemes have been debilitated by negative corollary principles. These principles are common both to the litigation systems of the member states and specific to their various collective redress procedures. Following this discussion, the Article will briefly review the European Commission's consultation process addressing the larger issue of collective redress in the European Union. Finally, this article will conclude that aside from episodic grand results for entrepreneurial U.S. plaintiff lawyers pursuing collective relief in the Netherlands, the U.S.-style securities fraud class action is unlikely to become a viable mechanism for providing European access to justice for defrauded investors. Neither an EU level directive for broad horizontal application nor a more limited secular application to securities fraud claims appears likely at the present time or in the foreseeable future. The EU member states simply have no zeal to partner private and public enforcement of their securities laws; the private Attorney General concept remains largely unique to American jurisprudence.⁶ Consequently, European investors should look to stronger and more vigorous public enforcement at the member state level through government funded and administered collective redress schemes for victims of securities fraud.

II. THE U.S. SECURITIES CLASS ACTION: BLOODY BUT UNBOWED

The U.S. securities fraud class action model has long been criticized as a failed remedy, a form of legal blackmail enabling plaintiffs' lawyers to obtain large settlements from corporate defendants based on non-meritorious claims.⁷ The purported primary beneficiary, at least in terms of monetary compensation, has been plaintiffs' counsel,⁸ which recovers a contingency fee ranging from roughly ten to thirty percent of the total class recovery.⁹ Although qualitative corporate governance reforms are often cosmetically tacked on to settlements in order to secure court approval, class action securities litigation has been accused of being a lawyer-driven, entrepreneurial business that results in payouts not from "a securities fairy," but from the movement of corporate funds "from investors' right pocket to investors' left pocket—and paying lawyers a lot for

6. See Ilana T. Buschkin, Note, *The Viability of Class Action Lawsuits in a Globalized Economy—Permitting Foreign Claimants to be Members of Class Action Lawsuits in the U.S. Federal Courts*, 90 CORNELL L. REV. 1563, 1566 n.11 (2005).

7. See generally Arthur A. Miller, Comment, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664 (1979).

8. See Samuel Issacharoff & Geoffrey Miller, Essay, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179, 186 (2009).

9. See, e.g., *id.*

moving that money around.”¹⁰ As another prominent scholar has noted, “shareholders are suing shareholders,” and as a result, “diversified shareholders wind up making pocket-shifting wealth transfers to themselves.”¹¹ The debate over the policies served or disserved by securities class actions continues to rage, but both legislature and judicial developments evidence significant victories for the detractors.

The viability of the securities class action has been considerably reduced by both judicial and legislative determinations during the past twenty-five years. In the late 1980s, the Supreme Court effectively corralled the vast bulk of securities litigation against dishonest broker-dealers into industry-dominated arbitration proceedings.¹² This decision reversed its own thirty-five year old holding that pre-dispute arbitration agreements were violative of the anti-waiver provisions of the federal securities laws.¹³ Then, in 2012, the Court effectively eliminated class action arbitration claims by upholding the enforceability of class action waivers in arbitration agreements.¹⁴ For those claims that may be given their day in court, the Supreme Court has imposed challenging “loss causation” requirements¹⁵ and has eliminated private aiding and abetting claims.¹⁶ Meanwhile, Congress in the 1990s effected a deregulatory tsu-

10. Joseph Grundfest & Nicholas Varchaver, *Winona, Martha & the Securities Fairy*, FORTUNE (Aug. 11, 2003), http://money.cnn.com/magazines/fortune/fortune_archive/2003/08/11/346800/index.htm.

11. John C. Coffee, Jr., *Capital Market Competitiveness and Securities Litigation*, N.Y. L.J., Nov. 16, 2006, at 5.

12. Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220, 226, 232–35 (1987); Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 479–84 (1989).

13. Wilko v. Swan, 346 U.S. 427, 438 (1953) *overruled by Rodriguez de Quijas*, 490 U.S. 477 (1989).

14. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746–52 (2011). The Court’s decision in *Concepcion* was presaged by its decision less than a year earlier in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, holding that in the absence of affirmative indicia in the agreement, a party cannot be forced to arbitrate against a putative class. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1773–76 (2010). See generally Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631 (2005).

15. *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 343–46 (2005) (interpreting securities law statutes to demand that plaintiffs prove proximate causation and economic loss).

16. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 158 (2008) (securities fraud plaintiffs may not sue “aiders and abettors” of fraud under a § 10(b) claim unless the aiders and abettors own conduct separately satisfies the elements of a § 10(b) claim); see also *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011) (barring primary violation claims against an investment adviser who prepared misleading prospectuses for the mutual fund it controlled).

nami through a trilogy of statutory enactments largely designed to impede plaintiffs' attorneys in their pursuit of both federal and state remedies for investors injured by securities law violations.¹⁷ Securities class actions were a primary target. Among the impediments imposed were heightened pleading requirements,¹⁸ discovery stays, restrictions on damages, and lead plaintiff and class counsel limitations.¹⁹ When plaintiffs' class action counsel migrated to state courts, Congress slammed that door shut with the passage of preemptive legislation requiring removal of those actions to federal courts.²⁰ Congress next enacted the Class Action Fairness Act²¹ to delimit plaintiff counsels' choice of forum by expanding federal diversity jurisdiction, mandating notices to federal and state authorities, and limiting attorney fee awards in class action coupon settlements.²² Subsequently, and to the glee of the defense bar, the captains of the securities class action industry, Melvyn Weiss and Bill Lerach, were indicted and sent to prison for unlawful undisclosed payments to nominal plaintiffs in class actions that they filed over the years on behalf of investors.²³

17. See Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.) (enacted to limit frivolous securities lawsuits by changing procedural standards; this included heightening of pleading standards, limiting the scope of pre-trial discovery and placing fee limitations on class attorneys); National Securities Market Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416 (codified as amended in scattered sections of 15 U.S.C.) (preemptive overhaul of states' securities acts to provide one uniform statutory act for companies and regulators to follow); Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 77p (2006) [hereinafter SLUSA] (enacted to limit the amount of securities lawsuits being brought in state courts due to plaintiffs inability to meet the heightened pleading requirements of the Reform Act). For a general discussion of these statutes and especial criticism of SLUSA, see Manning Gilbert Warren III, *Federalism and Investor Protection: Constitutional Restraints on Preemption of State Remedies for Securities Fraud*, 60-SUM LAW & CONTEMP. PROBS. 169, 169-84 (1997).

18. *Tellabs, Inc. v. Makor Issues & Rights Ltd.*, 551 U.S. 308, 323-24 (2007) (holding that under the Reform Act's exacting pleading requirements, a plaintiff must plead facts rendering an inference of scienter at least as likely as any plausible opposing inference).

19. Private Securities Litigation Reform Act of 1995, 109 Stat. at 737.

20. SLUSA § 77p .

21. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).

22. See generally Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593 (2008).

23. See Molly Selvin, *Two-year sentence for Lerach*, L.A. TIMES (Feb. 12, 2008), <http://www.latimes.com/business/la-fi-lerach12feb12,0,3591784.story>; Edward Patterson, *Weiss Sentenced to 2½ years for Kickback Scheme*, BLOOMBERG (June 2, 2008, 4:38 PM), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aGqfpC4ZjoAw>.

The Supreme Court recently delivered another devastating blow to plaintiffs' securities counsel filing class actions in U.S. courts against foreign companies. Reaffirming a presumption against the extraterritorial application of U.S. securities laws, the Court, in *Morrison v. National Australia Bank Ltd.*,²⁴ held that the antifraud provisions applied only to domestic securities transactions and to transactions in securities listed on domestic exchanges in the United States.²⁵ Justice Scalia effectively eradicated any fear that U.S. courts would continue as the "Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets."²⁶

Although the portent of securities class actions still strikes fear in the hearts of executives of publicly-held companies, the likelihood of successful securities class actions against their companies is substantially less.²⁷ The number of securities class action settlements approved in

24. *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010). Two European countries filed amicus briefs in support of denying U.S. court jurisdiction over f-cubed claims: the United Kingdom and France. See Michael P. Murtagh, *The Rule 23(b)(3) Superiority Requirement and Transnational Class Actions: Excluding Foreign Class Members in Favor of European Remedies*, 34 HASTINGS INT'L COMP. L. REV. 1, 42 (2011) stating that the premise for the briefs was a belief that jurisdiction would allow "U.S. courts [to] interfere with the policy choice they [foreign nations] have made in regulating securities."

25. *Morrison*, 130 S. Ct. at 2878–82. Following the Court's decision in *Morrison*, the U.S. Congress in its Dodd-Frank Wall Street Reform and Consumer Protection Act mandated that the U.S. Securities and Exchange Commission ("SEC") conduct a study regarding whether private rights of action under the federal securities laws should be applied extraterritorially to cover transnational securities fraud. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, § 929Y (2010). The SEC has commenced the study and has solicited public comments. See Study on Extraterritorial Private Rights of Action, No. 34-63174, 75 Fed. Reg. 66,822, 66,822 (Oct. 25, 2010).

26. *Morrison*, 130 S. Ct. at 2878. One recent article has discussed whether Canada may be entitled to that distinction. See Tanya Monestier, *Is Canada the New "Shangri La" of Global Securities Class Actions?*, 32 NW. J. INT'L L. & BUS. 3 (forthcoming 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1929090. The author noted that "just as Ontario courts are opening their doors to global securities class actions, American courts seem to be closing theirs." *Id.* at 2–3.

27. Modern class actions require the plaintiff class to meet many prerequisites before the case may advance to the merits. Federal Rule of Civil Procedure 23(a) states four prerequisites that all classes must satisfy in order to receive class certification: (1) the class must be so numerous that joinder of the parties is impracticable (numerosity); (2) questions of law or fact common to the class must exist (commonality); (3) claims and defenses of the representative parties are typical of the claims or defenses of the class (typicality); and (4) the representative parties must fairly and adequately protect the interests of the class (adequate representation). FED. R. CIV. P. 23(a). Only once the judge determines that the class has satisfied all four prerequisites, can the class certification

2010 was the lowest in over ten years.²⁸ Last year's mid-term results demonstrate continuing weakness in the securities fraud class action business.²⁹ Professor Joseph Grundfest, Director of the Stanford Law School Securities Class Action Clearinghouse, recently concluded:

There appears to be a sea change in the structure of the class action securities fraud litigation business. The traditional claims that U.S.-based companies have been cooking their books or hyping their stocks are in sharp decline. . . . If one focuses exclusively on traditional fraud claims against U.S.-based companies, then 2011 may well be on track to be the quietest litigation year since Congress passed the Private Securities Litigation Reform Act of 1995.³⁰

Notwithstanding the decline and despite serious abuses, the securities class action in the United States has enjoyed considerable success both as a deterrent to large-scale corporate securities fraud and as a source of compensatory recovery for investors.³¹ However, its success has devel-

analysis proceed to the other requirements set out in Rule 23. *See* *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 624 (3d Cir. 1996), *aff'd sub nom.* *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). Once the requirements of Rule 23(a) have been satisfied, the class will be certified if it further satisfies any of the three types of class actions listed in Rule 23(b). *See id.* at 625. If the court finds that the class fulfills the Rule 23(b)(3) requirement that questions of law or fact common to the class predominate over solely individual claims, Rule 23(c)(2) allows absent class members to "opt-out" (exclude themselves from the class action). *See* Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 603 (2006); *see also* FED. R. CIV. P. 23(c)(2)(B)(v). Should class members choose to exercise their right to opt-out of the class, the individual will not be bound by any settlement agreed to by the class and defendants. *See* Redish & Kastanek, *supra*. However, if a class member fails to opt-out, they will be bound by any settlement agreement reached between the class and defendants. *See id.* Thus, class members who do not affirmatively opt-out forgo the ability to bring a future action based on individual claims that the class has already collectively settled. *See generally id.*

28. STAN. LAW SCH. SEC. CLASS ACTION CLEARINGHOUSE & CORNERSTONE RES., SECURITIES CLASS ACTION FILINGS: 2010 YEAR IN REVIEW 14 (2011), *available at* http://securities.stanford.edu/clearinghouse_research/2010_YIR/Cornerstone_Research_Filings_2010_YIR.pdf.

29. *Securities Class Action Filings Decrease Moderately in First Half of 2011*, CORNERSTONE RES. (July 26, 2011), <http://www.cornerstone.com/securities-filings-mid-year-2011/>.

30. *Id.*

31. At a recent informational program, *Governance Reforms Through Securities Class Actions*, sponsored by Institutional Shareholder Services, Inc., experts stated that institutional investors view class action litigation as an effective means to achieve corporate reform. Che Odom, *Securities Class Actions an Effective Way to Spur Governance Reforms, Experts Say*, 26 CORP. COUNS. WEEKLY (BNA) 329 (Nov. 2, 2011), *available at*

oped in a uniquely adversarial legal system in a uniquely litigious culture. The primary features facilitating the U.S. securities class action are as follows:

- (1) its broad horizontal scope of application to virtually all causes of action, largely without sectoral limits;
- (2) liberal standing requirements, generally allowing any aggrieved member of a designated class to file a class action in a competent court;
- (3) the availability of contingency fees for legal services, often referred to as “no cure, no pay,” thus eliminating legal fees as barriers to plaintiffs;
- (4) freedom from the burden of the “loser pays” rule predominant in jurisdictions worldwide—in the United States, each party generally bears the responsibility for its own litigation costs, regardless of outcome;
- (5) liberal document and deposition discovery processes available to plaintiffs’ class counsel that can be massively intrusive, expensive, and time-consuming for corporate defendants;
- (6) trial by jury, employing jurors as finders of fact, despite jurors’ general lack of skill in financial disclosure issues and potential to bring populist or anti-corporate bias issues to bear on outcomes;
- (7) the *opt-out* feature,³² offering global peace for defendants by allowing representation of all individuals and entities falling within a designated class of investors who do not expressly “opt-out” of the class—those investors who take no action and simply let inertia take its course are included in the plaintiff class and thus subject to the preclusive effect of ultimate settlements and judgments; and, lastly,
- (8) the availability of punitive damages for claims ancillary to the federal securities fraud cause of action.³³

<http://convergence.bna.com/ContentDelivery/ContentItem/Article/23527872000000186/354478>.

32. The “opt-out” feature of the U.S. class action presents a unique procedural conundrum. Although commonly known as the “opt-out” feature because of the preclusive effects that bind class members to the judgment unless they “opt-out,” the procedure actually denies class members any portion of monetary relief unless they essentially “opt-in.” This is typically done by filing an individual claim with the class’ claims administrator. In essence, it is possible and many times very likely that a member of a U.S. plaintiff class will suffer the preclusive effects of a settlement agreement without ever receiving any proportion of the monetary settlement relief they would have been entitled to if they filed a claim.

33. See Richard L. Marcus, *Putting American Procedural Exceptionalism into a Globalized Context*, 53 AM. J. COMP. L. 709, 709–10 (2005); see also *Towards a Coherent European Approach*, *supra* note 3, at 9, para. 21; John C. Coffee, Jr., *Reforming the*

Despite various legislative “reforms” over the years, this lethal combination of facilitative features continues to place experienced securities class action counsel in a favored position to advance both meritorious and non-meritorious claims to advantageous settlements. Notwithstanding continual demands for reform from the securities industry and the defense bar based on perceived threats to the U.S. economy,³⁴ the securities class action, even as a wounded horse, retains considerable vitality at home. Although it clearly has no “unconquerable soul,” it remains “bloody, but unbowed.”³⁵

III. EUROPEAN UNION’S NATIONAL BARRIERS TO U.S. SECURITIES CLASS ACTIONS

The European Union’s member states feature legal cultures which largely are abhorrent to the adversarial legal system and litigious culture of the United States. EU member states generally share a cultural aversion to litigation and traditionally have favored government regulation and public enforcement over private lawsuits.³⁶ Indeed, the EU’s aver-

Securities Class Action: An Essay on Deterrence and Its Implementation, 106 COLUM. L. REV. 1534, 1535–36 (2006); James D. Cox, *Making Securities Fraud Class Actions Virtuous*, 39 ARIZ. L. REV. 497, 497–99 (1997).

34. See, e.g., Robert Glauber, *Section II: Regulatory Process*, in LUIGI ZINGALES ET AL., INTERIM REPORT OF THE COMMITTEE ON CAPITAL MARKETS REGULATION 59 (2006), available at http://www.capmktreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf. In its response to the European Commission’s recent public consultation on collective redress, *infra* notes 145–77 and accompanying text, the U.S. Chamber of Commerce’s Institute for Legal Reform advised the European Commission of a 2007 study concluding that the permissive rules of the United States’ liberal tort system resulted in annual costs of some \$865 billion, constituting an annual “tort tax” of \$9,827 on a family of four. Response from the U.S. Chamber Inst. for Legal Reform [LIR], to the Eur. Comm’n Public Consultation: Towards a Coherent European Approach to Collective Redress 2 (Apr. 29, 2011), available at http://ec.europa.eu/competition/consultations/2011_collective_redress/us_chamber_institute_en.pdf. It also expressed its fears that efforts to reform collective redress schemes in the European Union might erode Europe’s traditional safeguards against abusive litigation which, in turn, “would result in an explosion of meritless, abusive litigation.” *Id.*

35. William Ernest Henley, *Invictus* (1875), reprinted in 8 LEATHERNECK 32 (1925).

36. Indeed, one writer has recently noted Europe’s “historical preference for a regulatory rather than a citizen driven litigious response to widespread wrongdoing,” a preference that “remains strong despite recent developments in collective redress litigation.” Jessica Beess und Chrostin, *The Future of Collective Redress in Europe: Where We Are and How to Move Forward* 11 (Apr. 2011) (unpublished student paper), available at <http://blogs.law.harvard.edu/hnmcp/files/2012/02/Fisher-Sander-Prize-2011-Winner-Jessica-Beess-und-Chrostin-May-2011.pdf>. Another has observed that “Europe has predominantly punished corporate misconduct with regulatory action, rather than through

sion to U.S.-style class actions “corresponds to sustained critiques of class actions in the United States.”³⁷

The EU’s member states generally have none of the facilitating features credited for the nurture and development of the U.S. securities class action. EU member states generally prohibit plaintiffs’ lawyers from collecting contingent fees.³⁸ Losing parties in litigation are generally liable for the prevailing parties’ legal fees and costs.³⁹ Parties to litigation do not have liberal access to each other’s relevant documents and testimony.⁴⁰ Jury trials in civil cases are virtually nonexistent and punitive damages are never available.⁴¹ Moreover, even in those member states that do provide for some form of collective redress, they generally provide for class inclusion of only those individuals and entities that expressly *opt-in* to the proceedings, and thus do not preclude actions by claimants who do not.⁴² According to one scholar, “the law is unlikely to see anything like a trans-Atlantic convergence toward the specifics of U.S.-style class actions,”⁴³ and therefore, only a highly unlikely legal and cultural metamorphosis could transform the European Union into a receptive environment for U.S.-style securities class actions.⁴⁴ A closer look at these characteristics of the legal scheme of the EU demonstrates why such a structure might be viewed as debilitating to any effort to replicate the U.S.-style class action.

private enforcement.” Tiana L. Russell, *Exporting Class Actions to the European Union*, 28 B.U. INT’L L.J. 141, 142 (2010).

37. See Issacharoff & Miller, *supra* note 8, at 180.

38. Mark A. Behrens, Gregory L. Fowler & Silvia Kim, *Global Litigation Trends—Class Actions, Contingency Fees, and Punitive Damages: Moving Toward the American Civil Law Model?*, 17 MICH. ST. J. INT’L L. 165, 166 n.1 (2009) (citing Sabine Chalmers, *US Style Litigation in Europe?*, 26 ACC DOCKET 16 (Apr. 2008)).

39. *Id.* at 168 n.6 (citing Deborah R. Hensler, *The Globalization of Class Actions: An Overview*, 622 ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 2009, at 7, 22).

40. *Id.* at 167, 167 n.3 (citing Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 2 (2009)); Laurel Harbour & Marc Shelley, *Expanding Multi-party Litigation to a Shrinking World*, in 2006 ABA ANNUAL MEETING, SECTION OF LITIGATION, THE EMERGING EUROPEAN CLASS ACTION 1, 1 (Aug. 3, 2006), available at http://el.shb.com/nl_images/SHBWebsite/PracticeAreas/International/Pubs/The%20Emerging%20European%20Class%20Action_ABA_Meeting.pdf.

41. Behrens et al., *supra* note 38, at 187.

42. *Id.*

43. Nagareda, *supra* note 40, at 6.

44. See *supra* note 2. See generally John C. Coffee, Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 YALE L.J. 1 (2001).

(1) *No Contingency Fees*

Contingency fees, which fuel the class action remedy in the United States, have been largely rejected by EU member states.⁴⁵ Fees based on a proportion of the sum recovered, *pactum de quota litis*, are prohibited in Germany, France, the Netherlands, Portugal, Austria, Belgium, Cyprus, Malta, Czech Republic, Denmark, Luxembourg, Greece, Ireland, Poland, Romania, and the United Kingdom.⁴⁶ Some member states do permit conditional or success fees, payable only upon a successful conclusion of the litigation. Such fees may include an uplift over normal rates but cannot include a proportion of the recovered damages.⁴⁷ The prohibition of contingency fees not only serves to restrain aggrieved investors financially unable to pursue costly litigation, it also likely serves as a major restraint on the entrepreneurial zeal of the plaintiffs' bar.

(2) *Loser Pays*

The "loser pays" or the "English rule" requires the losing party in litigation to pay the winning party's costs.⁴⁸ It has been adopted by every EU member state except the Principality of Luxembourg.⁴⁹ It is based on a durable and culturally consistent policy of imposing financial risks on would-be complainants in order to discourage unnecessary litigation.⁵⁰ Thus, European lawyers are forced to analyze diligently the reasonable prospects for a successful claim and the reasonable quantum of damages to be sought through litigation. By placing the onus of both sides' costs on the party bringing the litigation, only clearly meritorious claims are

45. Behrens et al., *supra* note 38, at 183–87.

46. See Christopher Hodges, Stefan Vogenauer & Magdalena Tulibacka, *Costs and Funding of Civil Litigation: A Comparative Study* 29 (Univ. of Oxford Legal Research Paper Series, Paper No. 55, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1511714.

47. *Id.*; see also Eur. Parliament Directorate General for Internal Policies, *Overview of Existing Collective Redress Schemes in EU Member States* 19, 23, 26–28, Comm. on Internal Mkt. & Consumer Prot., Doc. IP/A/IMCO/NT/2011-16 (July 2011) (by Mariusz Maciejewski) [hereinafter EU Overview], available at <http://www.europarl.europa.eu/document/activities/cont/201107/20110715ATT24242/20110715ATT24242EN.pdf>.

48. See Shelley Thompson, *The Globalization of Securities Markets: Effects on Investor Protection*, 41 INT'L LAW. 1121 (2007); see also Marie Gryphon, *Assessing the Effects of a "Loser Pays" Rule on the American Legal System*, 8 RUTGERS J.L. & PUB. POL'Y 567 (2011).

49. See Stefano Grace, *Strengthening Investor Confidence in Europe: U.S.-Style Securities Class Actions and the Acquis Communautaire*, 15 J. TRANSNAT'L L. & POL'Y 281, 289 (2006).

50. See Gryphon, *supra* note 48, at 567–69; Thompson, *supra* note 48, at 1143.

likely to be prosecuted by plaintiffs and their counsel. While the loser pays rule seriously discourages access to the courts, it avoids the costliness and lack of settlements among weak claims in the U.S. system. The loser pays rule continues to be “a substantial deterrent to private investor enforcement measures in Europe.”⁵¹

(3) *Discovery Limitations*

In stark contrast to the liberal discovery procedures for document production and deposition testimony available in U.S. litigation, discovery is largely unavailable to the parties in judicial proceedings in the EU member states. EU states mostly subscribe to the civil law tradition that the gathering of evidence is strictly a *judicial function*.⁵² There is virtually no documentary discovery and no deposition discovery in the vast majority of EU jurisdictions, and only limited document discovery in the United Kingdom and Ireland.⁵³ Discovery in the United Kingdom has been described as a “push” rather than a “pull” system, commanding lawyers, as officers of the court, to provide to the adverse party all documents that support either party’s position.⁵⁴ In other words, the disclosure process is not dependent on requests and responses.⁵⁵ In the continental EU member states, litigation is administered by the presiding judge without any discovery process driven by the parties’ counsel.⁵⁶ The liberal discovery procedures integral to U.S. litigation are simply alien to litigation in Europe.

(4) *No Jury Trials*

In continental Europe, no member state provides for a jury trial in civil cases.⁵⁷ It is rarely used in Scotland and is available in England only for very limited categories of civil cases.⁵⁸ Consequently, the success or fail-

51. Grace, *supra* note 49, at 290.

52. See Harbour & Shelley, *supra* note 40, at 1.

53. See *id.*

54. Nigel Murray, *Discovery from the European Perspective*, ABA LAW PRACTICE TODAY (Oct. 2008), <http://apps.americanbar.org/lpm/lpt/articles/mgt10081.shtml>.

55. *Id.*

56. *Id.* The discovery process is further circumscribed by the EU Data Privacy Directive, which extends individual privacy protection to data on employer-provided computers, thereby according individual privacy the status of a basic human right. See Council Directive 95/46, art. 1, 1995 O.J. (L 281) 8 (EC).

57. Danielle Kantor, Note, *The Limits of Federal Jurisdiction and the F-Cubed Case: Adjudicating Transnational Securities Disputes in Federal Courts*, 65 N.Y.U. ANN. SURV. AM. L. 839, 855, 855 n.79 (2010).

58. See John Sheldon & Peter Murray, *Rethinking Rules of Evaluating Admissibility in Non-jury Trials*, 86 JUDICATIVE 227, 228 n.3 (Mar.–Apr. 2003).

ure of litigated claims is placed in the hands of non-elected jurists, generally experienced and well-trained in the judicial determination of both the facts and the law in various legal proceedings.⁵⁹ The elimination of fact finding by individual jurors with limited understanding of securities issues and possible biases favoring loss-suffering investors forecloses the plaintiff lawyers' appeals to jury sympathies and biases, along with their willingness to roll the dice on questionable or non-meritorious claims.

(5) *No Punitive Damages*

Punitive damages generally are not awarded by courts in the EU member states, and, accordingly, it is largely impossible to secure punitive damages awards against business enterprises in the EU member states.⁶⁰ This rejection of punitive damages is premised largely on the underlying policy that civil lawsuits should permit compensatory recoveries, with punishment to be meted out solely by the criminal justice system.⁶¹ Out-sized jury awards of punitive damages in U.S. litigation are universally disfavored in the EU and most jurisdictions worldwide.⁶²

These five debilitating factors generally applicable to private civil actions brought in the EU's member states are sufficient in themselves to discourage even the least risk-adverse plaintiffs' securities lawyers from pursuing bona fide claims on behalf of aggrieved investors in the EU's member states. These barriers are considerably heightened for those lawyers considering claims through a collective class action mechanism. The following discussion of the general characteristics of the extant collective redress schemes in the EU's member states reveals three additional debilitating factors that complete the negation of the corollary principles that have nurtured U.S.-style securities class actions.

IV. COLLECTIVE REDRESS AMONG THE EU MEMBER STATES

Among EU member states, there has been no fundamental shift from public enforcement to private enforcement of the member states' securities laws. As previously discussed, the same factors that facilitate class actions in the United States actually deter similar proceedings in the EU

59. See, e.g., Harbour & Shelley, *supra* note 40, at 1, 7, 13.

60. See Adam Liptak, *Embraced by U.S., Punitive Damages Scorned Elsewhere: Many Nations See Practice as Usurping Justice System's Role*, INT'L HERALD TRIB., Mar. 26, 2008, at 4.

61. See generally John Gotanda, *Punitive Damages: A Comparative Analysis*, 42 COLUM. J. TRANSNAT'L L. 391, 396-97 nn.24-27 (2004).

62. *Id.* at 393-94.

member states. Consequently, no European member state has yet enacted a U.S.-style securities class action for defrauded investors.

According to a recent EU report, sixteen member states have enacted collective redress schemes, providing “a complex legal patchwork of solutions,” but the report concludes that these schemes are “not effective due to disparities and low participation rates.”⁶³ Collective redress, as defined by the report, encompasses “any mechanism that may accomplish the cessation or prevention of unlawful business practices which affect a multitude of claimants or the compensation for the harm caused by such practices,” and that provides either for injunctive or compensatory relief.⁶⁴ These schemes all “stop markedly short of full-fledged embrace of U.S.-style class actions.”⁶⁵

The collective redress schemes adopted by these member states bear little resemblance to each other and are remotely different from the U.S.-style class action. Most of these schemes are subject to *opt-in* requirements, denying preclusive effect against potential claimants who have not consented to inclusion in a given class.⁶⁶ Many are limited by sectoral scope to consumer protection, product liability, or antitrust violations, while others have a broader, horizontal scope of coverage.⁶⁷ They also have widely-varying standing requirements. Some vest only public authorities with power to bring collective proceedings, some grant standing only to non-profit foundations and consumer organizations, and others permit harmed individuals and entities to use the procedures.⁶⁸ In different words, the collective redress schemes thus far enacted by the member states are subject not only to the (above) five common debilitating factors generally applicable to civil actions in the EU's member states, but are also subject to the following three specific debilitating factors, thus completing the negation of the eight previously identified facilitating factors that have long developed and nurtured the U.S. class action.

(1) *Limited Scope of Application*

Most of the collective redress schemes adopted by the EU's member states are limited in applicability to certain sectors of the law and, ac-

63. EU Overview, *supra* note 47, at 5.

64. *Id.* at 6.

65. Nagareda, *supra* note 40, at 6.

66. See EU Overview, *supra* note 47, at 40; see also Jules Stuyck, *Class Actions in Europe? To Opt-In or to Opt-Out, That is the Question*, 20 EUR. BUS. L. REV. 483–505 (2009).

67. See, e.g., EU Overview, *supra* note 47, at 11.

68. *Id.*

cordingly, are not necessarily available for violations of a particular member state's securities laws.⁶⁹ While some collective redress schemes are horizontal and thus have broad scopes of application,⁷⁰ many are limited sectorially to consumer protection claims,⁷¹ product liability claims, antitrust claims,⁷² or some combination of these limited areas of application.⁷³ Consequently, claims made on behalf of a specified group of claimants for securities law violations may have no collective redress scheme available to them, and as a result would be limited only to any individual causes of action available to them under a given member state's applicable law.⁷⁴

(2) *Restrictive Standing Requirements*

The collective redress schemes adopted by various EU member states generally provide standing only to governmental authorities,⁷⁵ consumer associations,⁷⁶ and other specified organizations.⁷⁷ Individuals, despite their extent of injury as a result of alleged violations, may be able to bring individual actions but are not necessarily entitled to bring a representative action on behalf of a specified class.

(3) *Opt-in Requirements*

The majority of collective redress schemes in the EU provide for an *opt-in* procedure, thus requiring all claimants to be identified individually, either at the time the action is filed under some statutes or at later

69. *See id.*

70. *Id.* at 39.

71. Finland, for example, has enacted a collective redress mechanism that is limited to consumer disputes. *Id.* at 19.

72. For example, Hungary provides only for group actions under its antitrust laws. *Id.* at 25.

73. Portugal's scheme is applicable to violations related to consumer protection, public health, quality of life and preservation of the cultural and environmental heritage. *Id.* at 32.

74. *Id.* at 39–40.

75. For example, in Finland only the Finnish Consumer Ombudsman may file collective redress claims, with no secondary rights of action for members of the specified group of consumers. *Id.* at 19. Similarly, only the Hungarian Competition authority has standing to assert collective claims under a collective redress scheme limited to antitrust violations. *Id.* at 25.

76. For example, under Greece's collective redress procedures, limited in scope of application to consumer protection claims, only consumer associations having at least 500 active members and registered for at least one year before filing any action, have standing to file group actions. *Id.* at 24.

77. For example, Portugal extends standing to any "associations or foundations that promote certain general interests." *Id.* at 32.

stages of the proceedings under other statutes.⁷⁸ Any settlement negotiated or judgment rendered by a competent court will only bind those claimants who have expressly consented to the proceedings.⁷⁹ The defendant remains subject to all claims that may be brought by injured parties who have not opted-in, and, consequently, the defendant cannot achieve any national or global peace through settlement with the representative of the designated class.⁸⁰ These commonly applicable opt-in requirements generally prevent the global preclusive effect that incentivizes settlements by defendants in U.S.-style class actions. Given the wide range of disparities among the EU member states' collective redress schemes, most of which were adopted during the last ten years, and given the barriers posed by the common and specific debilitating factors accompanying them, it is easy to understand why they have not been effective.

V. THE NETHERLANDS COLLECTIVE REDRESS SCHEMES

The collective redress procedures in the Netherlands have been frequently praised as the most effective of the member states' collective redress schemes, largely due to more frequent use by consumers.⁸¹ In fact, two significant collective redress mechanisms have been adopted in the Netherlands. The first is a representative group action that can only be used for injunctive or declaratory relief and not for monetary damages.⁸² The second, the collective settlement mass claims action, *wet collectieve afwikkeling massaschade*, popularly known as "WCAM," is not a class action at all, but a settlement approval procedure providing for judicial approval of out-of-court settlements.⁸³ It was originally estab-

78. *Id.* at 40.

79. See generally George A. Bermann, *U.S. Class Actions and the "Global Class,"* 19 KAN. J.L. & PUB. POL'Y 91 (2009) for his discussion of the jurisdictional issues that are created by opt-in and opt-or mechanisms. See also Rachael Mulheron, *The Case for an Opt-Out Class Action for European Member States*, 15 COLUM. J. EUR. L. 409 (2009), in which she argues that an opt-out system is better suited for the jurisdictional situation among EU member states.

80. See, e.g., Mulheron, *supra* note 79, at 431–34.

81. EU Overview, *supra* note 47, at 41.

82. M.-J. van der Heijden, *Class Actions/les actions collectives*, 14 ELEC. J. COMP. L., Dec. 2010, para. 4 (Neth.), available at <http://www.ejcl.org/143/art143-18.pdf>.

83. See Mulheron, *supra* note 79, at 425–26; see also Memorandum from Dr. I.M. Tzankova & D.F. Lunsingh Scheurleer, Tilburg Univ., to Prof. Deborah Hensler, Stanford Law Sch. & Dr. Christopher Hodges, Univ. of Oxford, on Class Actions, Group Litigation and Other Forms of Collective Litigation Dutch Report 3 (Sept. 24, 2007), available at

lished for mass personal injury claims,⁸⁴ but has been utilized to secure approval of several large securities fraud settlements.⁸⁵ Given the substantive differences between these procedures, they will be discussed briefly in turn.⁸⁶

(1) *Representative Group Actions*

The representative group action may be brought only by representative organizations, including investor or consumer organizations, special purpose vehicles formed expressly to represent aggrieved parties, and by

http://www.law.stanford.edu/display/images/dynamic/events_media/Netherlands_National_Report.pdf.

84. The WCAM procedure was prompted by claims arising from the use of the drug diethylstilbestrol (DES) and was adopted in 2005. Harbour & Shelly, *supra* note 40, at 7.

85. See *infra* notes 101–20 and accompanying text.

86. Although Representative Group Actions and WCAM settlements are the procedural mechanisms most frequently used for collective relief, a few variations and alternative mechanisms do exist. One variation of Representative Group Actions involves the assignment of a party's individual claims to a legal foundation for a representative group. The representative group may then request monetary damages for the group on the basis of the individual claim; this is in addition to the injunctive or declaratory relief that may be achieved by the group action. Although this procedure seems to be a loophole on the ban on monetary damages, in reality the legal assignment of claims is burdensome and not practical. See Ianika Tzankova & Daan Lunsingh Scheurleer, *Section Three: Western Europe: The Netherlands*, 622 ANNALS 149, 151–52 (2009); see also Karen Jelsma & Manon Cordewener, *The Settlement of Mass Claims: Hot Topic in the Netherlands*, INT'L L.Q., Summer 2011, at 13. Another alternative is to pursue an action derived from a proceeding in the Enterprise Chamber of the Amsterdam Court of Appeals. The Enterprise Chamber is a specialized business court dealing primarily with issues of corporate governance. Although not an "action," an Enterprise Chamber proceeding uses the "right of inquiry" to conduct an investigation into the facts regarding the corporate conduct at issue. The inquiry proceeding is divided into two phases. First, they must determine whether there is a "well founded reason to investigate." If one exists they will proceed to conducting an investigation into the conduct at issue. In the second phase, the court will determine if the conduct is improper, and if so may order them to cease, or pursue alternative conduct. Although the court will not address liability, the report findings on the corporate conduct may then be used as a springboard to induce settlements from alleged wrongdoers who believe the inquiry supports the finding that they are indeed liable. See Stephen Bainbridge, *The Dutch Right of Inquiry*, PROFESSORBAINBRIDGE (July 13, 2009, 4:59 PM), <http://www.professorbainbridge.com/professorbainbridge.com/2009/07/the-dutch-right-of-inquiry.html>; see also [No. 82] *The Purpose of the Right of Inquiry*, THEDEFININGTENSION (July 13, 2009, 2:11 PM), <http://www.thedefiningtension.com/2009/07/no-82-the-purpose-of-the-right-of-inquiry.html> [hereinafter DEFINING TENSION].

public legal bodies.⁸⁷ As previously observed, these actions can be brought solely for injunctive or declaratory relief—*not for monetary damages*—and they focus primarily on the alleged wrongful conduct of the defendant.⁸⁸ Resultant judgments are binding solely on the representative organization and the defendant.⁸⁹ They are not binding on the individuals or entities purportedly represented or on nonrepresented parties that have not opted-in to the proceeding.⁹⁰ Once a favorable judgment has been entered for the plaintiffs, the parties actually injured by the defendant's conduct must then bring their own individual actions on the same grounds and must establish causation, liability, and damages. In other words, the group action is a “stepping stone” or springboard for subsequent individual actions for monetary compensation.⁹¹ Despite the existence of the debilitating factors previously addressed, the Dutch group action procedure was applied thirty-two times in the period 1994–2007.⁹² The procedure is now being used by a special purpose vehicle formed solely to bring securities fraud claims against Fortis N.V., after a class action asserting similar claims was dismissed by a federal court in the United States.⁹³ The plaintiff foundation, directed by a U.S. class action lawyer, has indicated that its Dutch lawsuit is intended to provide a way around the Supreme Court's decision in *Morrison*.⁹⁴ The U.S. lawyers involved in the Fortis litigation seem poised to use the leverage of favorable declaratory relief to extract a large out-of-court settlement from the defendant, which could then be submitted for judicial approval and preclusion of further claims pursuant to the collective settlement procedure under WCAM.⁹⁵

87. EU Overview, *supra* note 47, at 29–30; see also Deborah Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306, 311 (2011) [hereinafter Hensler, *The Future of Mass Litigation*].

88. Rhonda Wasserman, *Transnational Class Actions and Interjurisdictional Preclusion*, 86 NOTRE DAME L. REV. 313, 349–51 (2011).

89. *Id.*

90. *Id.*

91. DEFINING TENSION, *supra* note 86, para. 2.

92. van der Heijden, *supra* note 82, at 4, para. 2.1.

93. In *Copeland v. Fortis*, 685 F. Supp. 2d 498, 501–07 (S.D.N.Y. 2010), the court applied the recent Supreme Court decision of *Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010) to find that the plaintiff class did not satisfy the “conducts” or “effects” test for the court to have jurisdiction over the case. The case was dismissed with prejudice.

94. Evan Weinberger, *Fortis Dutch Fraud Suit Could Enable Non-US Claims*, LAW360 (Jan. 10, 2011), <http://www.law360.com/articles/219127/print?section=securities>.

95. See generally Kevin LaCroix, *Plaintiffs' Lawyers Pursue Non-U.S. Securities Litigation Alternatives After Morrison*, D&O DIARY (Jan. 11, 2011),

(2) *Collective Settlement Mass Damages Actions*

The WCAM statute permits a representative organization, whether preexisting or created solely for the purpose of the proceeding, together with the adverse party alleged as the wrongdoer, to jointly petition the Amsterdam Court of Appeals to approve an out-of-court settlement the parties have voluntarily negotiated.⁹⁶ Most significantly, the WCAM statute makes judicial approval of the settlement binding on all class members who do not “opt-out” of the settlement.⁹⁷ After the petition has been filed, notice of the proposed settlement must be provided to the designated members of the class.⁹⁸ To secure approval of the settlement, the parties must satisfy the following criteria:

- (1) the compensation provided is not unreasonable,
- (2) the defendant’s performance is sufficiently guaranteed,
- (3) the representative organization adequately represents the class, and
- (4) the number of class members is sufficient to warrant certification.⁹⁹

If the court then approves the settlement, notice of that approved settlement must be provided and class members are given a statutory minimum of three months in which to exercise their rights to opt-out of the class and pursue their own individual actions.¹⁰⁰ The opt-out feature provides significant settlement incentives to defendants who obviously prefer their settlements of disputes to have preclusive, binding effect on both actual and potential claimants.

The WCAM procedure has been used in a number of high-profile securities fraud cases, including the significant Shell Petroleum settlement on

<http://www.dandodiary.com/2011/01/articles/securities-litigation/plaintiffs-lawyers-pursue-nonus-securities-litigation-alternatives-after-morrison/>.

96. Hensler, *The Future of Mass Litigation*, supra note 87, at 311; Murtagh, supra note 24, at 37.

97. Hensler, *The Future of Mass Litigation*, supra note 87, at 311; Murtagh, supra note 24, at 37.

98. Hensler, *The Future of Mass Litigation*, supra note 87, at 311; Murtagh, supra note 24, at 37.

99. van der Heijden, supra note 82, at 8, para. 2.5.2.

100. Mulheron, supra note 79, at 425 n.94 (citing MARCO LOOS ET AL., CIVIC CONSULTING, EVALUATION OF THE EFFECTIVENESS AND EFFICIENCY OF COLLECTIVE REDRESS MECHANISMS IN THE EUROPEAN UNION—COUNTRY-REPORT THE NETHERLANDS 3–4 (2008), available at http://ec.europa.eu/consumers/redress_cons/nl-country-report-final.pdf).

behalf of non-U.S. investors in 2009.¹⁰¹ The Shell Petroleum settlement was negotiated after class actions had been filed and consolidated in a U.S. federal court on behalf of United States and non-U.S. investors, alleging Shell had misrepresented its oil reserves. During the initial phase of the litigation, the court denied Shell's motion to dismiss the non-U.S. claimants based on lack of jurisdiction, given that they were foreign investors making investments in a foreign company's securities in foreign securities markets, the so-called "F-cubed" jurisdictional scenario later addressed in *Morrison*.¹⁰² Subsequently, and perhaps without full disclosure to class counsel, the law firm for a Dutch pension fund that had filed an individual action against Shell on similar grounds, separately negotiated a settlement with Shell on behalf of non-U.S. investors.¹⁰³ Shell advised the federal court of the settlement and sought to dismiss the non-U.S. claims. Class counsel sought to enjoin the settlement, mediation ensued, and ultimately, on a special master's recommendation, the federal court declined jurisdiction over the non-U.S. claims.¹⁰⁴ Shell soon settled with the U.S. investors for roughly \$83 million.¹⁰⁵ Then Shell, together with a special purpose foundation representing numerous institutions and various shareholder organizations, a shareholders' advocacy group, and two Dutch pension funds, successfully petitioned the Amsterdam Court of Appeals to approve the settlement of the non-U.S. investors' claims for roughly \$354 million.¹⁰⁶ The Dutch court's approval of the settlement agreement purportedly resolved the claims of Dutch investors and all other non-U.S. investors, excluding only U.S. resident purchasers of shares on U.S. exchanges.¹⁰⁷ U.S. counsel that negotiated the Dutch settlement, apparently under contingency fee agreements with the Dutch pension funds, received fees totaling \$47 million, while Shell

101. See Michael Goldhaber, 'Shell Model' Opens Door to European Class Actions, AM. LAW. (Jan. 7, 2008, 3:04 AM), <http://www.law.com/jsp/tal/PubArticleFriendlyTAL.jsp?id=900005499991>.

102. *In re Royal Dutch/Shell Transp. Sec. Litig. (Shell I)*, 380 F. Supp. 2d 509, 573 (D.N.J. 2005).

103. See Hensler, *The Future of Mass Litigation*, *supra* note 87, at 315–16.

104. *In re Royal Dutch/Shell Transp. Sec. Litig. (Shell II)*, 522 F. Supp. 2d 712, 724 (D.N.J. 2007).

105. Press Release, Shell Worldwide, Shell Announces Settlement of Reserve-Related Claims with U.S. Investors (June 3, 2008), available at http://www.shell.com/home/content/media/news_and_media_releases/archive/2008/us_re_serves_settlement_06032008.html.

106. See Hensler, *The Future of Mass Litigation*, *supra* note 87, at 317.

107. See *id.* The U.S. investors' claims against Shell had already settled in the U.S. for \$83 million. It was the exclusion of foreign investors from the American settlement that served as a springboard for the Dutch settlement proceedings. See *id.*

agreed to pay an additional \$27 million to U.S. class counsel on top of the \$33 million in fees and expenses already awarded in the settlement of the U.S. class action.¹⁰⁸ The settlement agreement specifically provided that Shell would pay reasonable legal fees and expenses to counsel for shareholders and that these payments would not be deducted from the total settlement amount.¹⁰⁹ Interestingly, local Dutch counsel for the foundation charged conventional hourly fees and expenses, while U.S. counsel were paid fees typical under contingency fee arrangements.¹¹⁰ Apparently, in contrast to U.S. class action procedures, attorney fees in Dutch collective actions do not have to be approved by the court, but rather by the representative foundation.¹¹¹ It is unclear how these U.S. law firms avoided the Dutch prohibition on contingency fees, although a plausible argument might be advanced that (1) they were not members of the Dutch bar and not subject to its code of professional responsibility, and (2) there was no *contingency* since substantive litigation was never filed in the Netherlands.

In any event, the Shell case suggests “that the lawyers retained by the association representing the class need not be Dutch and may be paid according to the fee rules of another jurisdiction.”¹¹² The case further intimates that U.S. class counsel, not attorneys from EU member states, will continue to animate, if not dominate, the WCAM procedure for approval of preclusive settlements in securities litigation. A U.S. securities class action lawyer, now directing the representative foundation in the *Fortis* case, stated that the *Shell* case demonstrates “that the Old World is not a toothless tiger anymore.”¹¹³

The WCAM procedure has also been employed to secure approval of a settlement by Converium Holdings, AG, a Swiss company now owned

108. *See id.*

109. Royal Dutch Shell Settlement Agreement, § I(F) Settlement Payments 10 (Apr. 11, 2007), available at <https://www.royaldutchshellsettlement.com/Documents/Settlement%20Agreement.pdf>.

110. Hensler, *The Future of Mass Litigation*, *supra* note 87, at 317–18.

111. *See id.* at 318; van der Heijden, *supra* note 82, at 13, para. 3.4. van der Heijden notes that although the loser pays rule is applied to WCAM settlements, the rule only covers the successful party’s expert fees and a small amount of court related lawyer fees from the pre-action phase. Any other negotiation of attorneys’ fees is outside of the court’s authority to review. van der Heijden, *supra* note 82, at 13, para. 3.4.

112. Hensler, *The Future of Mass Litigation*, *supra* note 87, at 320.

113. Alexander Reus, *A Turning Point for Global Securities Litigation: Royal Dutch Shell Settlement in Europe May Signal Greater Investor Protection for Non-US Investors*, DRRT.COM 4 (2009), http://drdt.com/drrt/images/uploads/A_Turning_Point_for_Global_Securities_Litigation_by_Alexander_Reus_20090629.pdf.

by the French company, SCOR.¹¹⁴ Following the filing of a securities fraud class action against it in the United States, Converium decided to settle the case. However, it moved to have non-U.S. investors excluded from the class on grounds that the company was pursuing a collective settlement with them in the Netherlands.¹¹⁵ The court agreed, concluding that the non-U.S. investors' claims should be "rightfully resolved in the courts of another land."¹¹⁶ Representative associations founded by SCOR represent the non-U.S. investors in the settlement, 97% of whom are not from the Netherlands.¹¹⁷ The settlement agreement provides for a total gross payment of \$58 million, but this includes a 20% contingency fee for U.S. class counsel, amounting to almost \$12 million, which was approved by the board of the representative foundation.¹¹⁸ Again, under WCAM, these attorney fees may not be subject to judicial approval, thus allowing U.S. firms to be paid fees on a basis prohibited by local law. The settlement agreement is widely expected to be approved by the Amsterdam Court of Appeals within the next several months.¹¹⁹

Despite these noteworthy successes by U.S. class action counsel utilizing the WCAM procedures to achieve favorable settlements, many question whether the Netherlands will emerge as a transatlantic "red-light district" for class actions.¹²⁰ First, both the *Shell* and *Converium* proceed-

114. Hensler, *The Future of Mass Litigation*, *supra* note 87, at 319.

115. See Mulheron, *supra* note 79, at 443; HÉLÈNE VAN LITH, MINISTERIE VAN JUSTITIE, THE DUTCH COLLECTIVE SETTLEMENT ACT AND PRIVATE INTERNATIONAL LAW 22, 22 n.25 (2010) (Neth.), available at www.wodc.nl/images/1817_Volledige_tekst_tcm44-303998.pdf.

116. *In re SCOR Holding (Switzerland) AG Litig.*, 537 F. Supp. 2d 556, 569 (S.D.N.Y. 2008) (citing *Fidenas AG v. Compagnie Internationale Pour L'Informatique CII Honeywell Bull S.A.*, 606 F.2d 5, 10 (2d Cir. 1979)).

117. VAN LITH, *supra* note 115, at 22. Residents from the Netherlands only constituted 3% of the Stichting SCOR Compensation Fund which represents the interests of non-U.S. shareholders. *Id.* Dr. van Lith suggests this creates a wide range of issues including whether the 97% of class members that are not from the Netherlands will be bound by the agreement reached in the Netherlands. *Id.*

118. Converium Settlement Agreement, Ex. 16: Resolution of the Board of Directors (Sept. 21, 2009), available at http://www.converiumsettlements.com/EN/Exhibit_16_Foundation_Board_Resolution_21_September_2009.pdf.

119. See Quinn, Emanuel, Urquhart & Sullivan, LLP, *Converium Decision by Dutch Court Promotes European Venue for Binding Settlement of Mass Claims*, QUINN EMANUEL 1-3 (Mar. 2011), available at <http://www.quinnemanuel.com/media/203459/march%202011%20business%20litigation%20report.pdf>; see also Kevin LaCroix, *A "Global" Approach to Securities Settlement?*, D&O DIARY (May 7, 2008), <http://www.dandodiary.com/2008/05/articles/securities-litigation/a-global-approach-to-securities-settlement/>.

120. Nagareda, *supra* note 40, at 41.

ings to settle the claims of non-U.S. shareholders arose from pending U.S. securities class actions prior to the Court's decision in *Morrison*. It is reasonable to doubt whether Shell or Convergium would have vigorously pursued settlements with non-U.S. investors if those investors had no class action remedies in the United States and had to deal with daunting legal obstacles in the EU member states in filing individual or collective claims. Post-*Morrison*, it appears unlikely that companies accused of securities fraud will be inclined to reach massive settlements with U.S. class action law firms regarding claims of non-U.S. investors that can no longer be asserted in U.S. courts.

Most would acknowledge the practical reality that once a European class complaint has been dismissed by U.S. courts, there is little chance, if any, that the foreign shareholders will ever initiate an action overseas. When plaintiffs have no access to U.S. courts, it is unlikely that foreign corporate defendants will be amendable to settlement with non-U.S. investors.¹²¹ One writer has noted that because WCAM does not provide an avenue for "representative or aggregate litigation, it cannot be used to compel an unwilling defendant to change its behavior (*e.g.*, to reform the prison system) nor can the threat of a damages class action be used to induce the defendant to settle."¹²² Similarly, another observed that without access to U.S. courts for non-U.S. investors, it is unlikely that a claim will be initiated in Europe worth settling via WCAM, and, accordingly, the U.S. dismissal of non-U.S. investor claims under *Morrison* is really "tantamount to plaintiffs having no remedy at all."¹²³

Moreover, courts in other jurisdictions, whose shareholders may have been purportedly denied their day in court by WCAM procedures, may conclude that the Amsterdam Court of Appeals exceeded its jurisdictional reach. There are major unresolved issues as to whether the Dutch court's judgments will be recognized and enforced in EU member states or in jurisdictions outside the EU. As one scholar has noted, "the landscape for collateral review of such judgments remains . . . uncharted."¹²⁴ The EU's Regulation on Jurisdiction and the Recognition and Enforcement of Judgments¹²⁵ does not specifically address the recognition of judicially approved collective *settlements*, much less those that

121. See Wasserman, *supra* note 88, at 325–29.

122. *Id.* at 359.

123. Derek N. White, *Conducts and Effects: Reassessing the Protection of Foreign Investors from International Securities Fraud*, 22 REGENT U. L. REV. 81, 101 (2010) (citing Thompson, *supra* note 48, at 1133).

124. Nagareda, *supra* note 40, at 45.

125. Council Regulation 44/2001, 2001 O.J. (L 12) (EC).

did not involve substantive pleadings or adjudications in any court.¹²⁶ The EU Regulation, however, does deny recognition and enforcement of judgments where it would be “manifestly contrary to public policy in the member state in which recognition is sought.”¹²⁷ Clearly, the Dutch judgment binding parties who were not represented solely on the basis of their failure to take the initiative to opt-out raises significant policy concerns, including constitutional restraints, among the numerous member states that require voluntary opt-in decisions by those who would be bound by legal judgments.¹²⁸ At least one U.S. court has noted that the U.S. class action’s opt-out feature might violate French constitutional principles.¹²⁹ Certainly, the questions of adequate representation by counsel, among others, provide substantive grounds for collateral attacks of court-approved mass settlements in the Netherlands.

Lastly, it is at least curious that the Netherlands’ WCAM procedure has been widely heralded by securities class action counsel as the “tiger” of European collective redress schemes.¹³⁰ The inherent flaw in this claim is that the Dutch procedure simply cannot be classified as a “class action.” There may be a “class,” although most investors may not know they are in it, but there certainly is no “action.” The WCAM procedure might be better described as a glorified alternative dispute resolution technique, with a kicker that offers preclusion of claimants who fail to opt-out of the settlement. Moreover, no pending lawsuit is even required by the Dutch statute.¹³¹ While the act permits mass *settlement* of unfiled claims, it does not in any sense provide for class action *litigation*.¹³² Another scholar has described the procedure as “a composite of a voluntary settlement contract sealed with a ‘judicial trust mark.’”¹³³ It has also been

126. See Murtagh, *supra* note 24, at 39–40.

127. Council Regulation 44/2001, *supra* note 125, art. 34, at 10.

128. Nagareda, *supra* note 40, at 45.

129. See *In re Alstom SA Sec. Litig.*, 253 F.R.D. 266, 285–87 (S.D.N.Y. 2008); see also *In re Vivendi Universal, S.A. Sec. Litig.*, No. 02 Civ. 5571, 2009 U.S. Dist. LEXIS 110283, at *28 (S.D.N.Y. Nov. 19, 2009). See generally Stephen Choi & Linda Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 465, 479, 502–03 (2009).

130. See, e.g., Geraint Howells, *Collective Consumer Redress Reform—Will it Be a Paper Tiger?*, in *NEW FRONTIERS OF CONSUMER PROTECTION* 329, 329–43 (Fabrizio Cafaggi & Hans-W. Micklitz eds., 2009).

131. Murtagh, *supra* note 24, at 40. Murtagh states that the WCAM “exists only to help promote settlement, not litigation of claims” and that its design can be “described as a composite of a voluntary settlement contract sealed with a ‘judicial trust mark.’” *Id.* at 36–37.

132. *Id.* at 36 (quoting Choi & Silberman, *supra* note 129, at 485).

133. *Id.* (quoting Willem H. Van Boom, *Collective Settlement of Mass Claims in the Netherlands*, in *AUF DEM WEG ZU EINER EUROPÄISCHEN SAMMELKLAGE?* 171, 178 (Mat-

referred to as “a back-end device without a front-end,” given that the Netherlands has not adopted a class action or collective redress scheme in which a class can pursue monetary damages.¹³⁴ If WCAM is the best collective redress scheme currently on offer from the member states, one must ask whether a supranational scheme is likely to soon be on offer from the EU.

VI. SUPRANATIONAL COLLECTIVE REDRESS IN THE EUROPEAN UNION

A. Background

The European Union, beginning with its 1992 initiatives to create a single securities market through a combination of minimum uniform standards and mutual recognition, has long sought to harmonize and strengthen the securities regulatory regimes of the member states.¹³⁵ While the European Commission has encouraged the development of competent regulatory authorities in all the member states and broader cooperation among those authorities, it has not extensively addressed issues of private enforcement through private individual or collective civil actions in member state courts to recover damages arising from securities law violations.

The European Commission has begun to address collective redress procedures in fields other than securities law. In 1998 the European Council of Ministers adopted a harmonizing directive in the consumer protection area directing the member states to enact national laws providing for minimum standards for group actions by “qualified entities,” such as consumer associations or public entities, for injunctive or declaratory relief.¹³⁶ While mandating the development of injunctive and declaratory relief for violations of member state consumer protection laws, it did not provide those organizations with standing to sue for monetary damages.¹³⁷ Subsequently, the Council adopted a regulation on consumer pro-

tias Casper et al. eds., 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1456819). Murtagh states that the “Dutch Collective Settlement Act exists only to help promote settlement, not the litigation of claims.” However, the lack of any legitimate primary threat of litigation presents obstacles to induce settlement. *Id.* at 37.

134. Hensler, *The Future of Mass Litigation*, *supra* note 87, at 312.

135. See generally WARREN, *supra* note 1, at 1–12.

136. Council Directive 98/27, Injunctions for the Protection of Consumers’ Interests, 1998 O.J. (L 166) 51, 52–53.

137. See *Commission Green Paper on Consumer Collective Redress*, at 6–7, COM (2008) 794 final (Nov. 27, 2008).

tection cooperation that substantially strengthened public enforcement, but again did not provide for monetary compensation to consumers.¹³⁸ Finally, in late 2008, the Commission, concerned that current laws did not allow large number of consumers affected by single violations of consumer protection laws to obtain monetary relief, published its Green Paper on Consumer Collective Redress addressing whether collective redress schemes might provide an appropriate solution.¹³⁹

The European Commission has extended its focus from consumer protection to encompass competition or antitrust law as well. It published its Green Paper on damages actions for breach of EU antitrust rules in 2005,¹⁴⁰ which emphasized the importance of private as well as public enforcement of competition law. Expressing concerns that the system for private enforcement was inadequate, it proposed consideration of collective redress schemes.¹⁴¹ In 2008, the Commission followed up on this initiative with publication for public consultation of its White Paper on damages actions for breach of EC antitrust rules.¹⁴² In this report, the Commission concluded that competition law was an area where collective redress could enhance consumers' access to justice.¹⁴³ It recommended EU legislation to establish an opt-in collective action that could be brought by public entities, consumer organizations, and trade associations to pursue damages claims on behalf of victims.¹⁴⁴

B. The European Commission's Public Consultation on Collective Redress

The European Commission recently shifted its focus on sectoral areas like antitrust and consumer protection to a broader, horizontal approach to collective redress. In February 2011, the Commission launched for public consultation its working document, *Towards a Coherent European Approach to Collective Redress*.¹⁴⁵ The purpose of the consultation was to identify common legal principles on collective redress among the

138. Council Regulation 2006/2004, of the European Parliament and of the Council of 27 October 2004 on Cooperation Between National Authorities Responsible for the Enforcement of Consumer Protection Laws, 2004 O.J. (L. 364).

139. *Commission Green Paper on Consumer Collective Redress*, *supra* note 137, at 2–3.

140. *Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, at 9, COM (2005) 672 final (Dec. 19, 2005).

141. *Id.* at 8–9.

142. *Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM (2008) 165 final (Apr. 2, 2008).

143. *Id.* at 4.

144. *Id.*

145. See *Towards a Coherent European Approach*, *supra* note 3.

member states.¹⁴⁶ The consultation was designed to determine how those common principles could fit into the EU legal system and into the legal orders of the member states.¹⁴⁷ The objective, according to the Commission, was “to ensure from the outset that any proposal in this field, while serving the purpose of ensuring a more effective enforcement of EU laws, fits well into the *EU legal tradition* and into the set of procedural remedies already available for the enforcement of EU law.”¹⁴⁸ These common legal principles and the EU legal tradition certainly include, among others, those features previously identified as debilitating for U.S.-style class actions. Moreover, the Commission reiterated in its working document that “a system of collective redress that results in lengthy and costly litigation is neither in the interests of consumers nor business and should be avoided.”¹⁴⁹

The Commission’s working document sets forth in some detail its opposition to most of the features that have long facilitated class actions in the United States. The Commission’s guidance in its public consultation document demonstrates rather dramatically that any collective redress scheme ultimately proposed must be modeled to avoid any close resemblance to the U.S.-style class action and the legal system in which it has flourished.¹⁵⁰ The Commission, in the section of its working document entitled, *Strong Safeguards against Claims Litigation*, states as follows:

Any European approach to collective redress (injunctive and/or compensatory) would have to avoid from the outset the risk of abusive litigation. Many stakeholders have expressed concern that they wish to avoid certain abuses that have occurred in the U.S. with its “class actions” system. This system contains strong economic incentives for parties to bring a case to court even if, on the merits, it is not necessarily well founded. These incentives are the result of a combination of several factors, in particular, the availability of punitive damages, the absence of limitations as regards standing (virtually anybody can bring an action on behalf of an open class of injured parties), the possibility of contingency fees for attorneys and the wide-ranging discovery procedure for procuring evidence. The Commission believes that these features taken together increase the risk of abusive litigation to an extent

146. *Id.* at 5.

147. *Id.*

148. *Id.* (emphasis added).

149. *Id.* at 7, para. 16.

150. *See id.*; *see also* Response from Prof. Christopher Hodges, Univ. of Oxford, to Eur. Comm’n Public Consultation: Towards a Coherent European Approach to Collective Redress 3 (Apr. 28, 2011) [hereinafter Hodges, Response to Consultation], available at http://ec.europa.eu/competition/consultations/2011_collective_redress/university_of_oxford_en.pdf.

which is not compatible with the European legal tradition Any European approach to collective redress (injunctive and/or compensatory) should not give any economic incentive to bring abusive claims. In addition, effective safeguards to avoid abusive collective actions should be defined. These should be inspired by the existing national judicial redress systems in the EU Member States. The existing national mechanisms show that various safeguards, or their combinations, can be used.¹⁵¹

The Commission's insistence on inclusion of its member states' debilitating factors as safeguards against abuse creates what one noted scholar has characterized as "an inherent and inescapable problem—*either the procedure does not work effectively, or it will produce abuse.*"¹⁵² What Europeans see as abuses in the American system "are the *intended* consequences of a policy of private enforcement based on a *post facto* deterrence policy."¹⁵³ In other words, if European safeguards are put in place, collective redress schemes in the EU are unlikely to provide any significant degree of compensatory redress.¹⁵⁴ Obviously, the Commission has not labeled all U.S.-style class actions as abusive, but it does suggest that the basic features of the U.S. litigation scheme are anathema to litigation in the member states of the EU. Not to unduly belabor the point, but it is critical to appreciate what the Commission believes are U.S. principles to be avoided in the development of collective redress schemes for the EU member states. Instead of an outright rejection of the U.S. class action model, the Commission rejects bedrock U.S. civil litigation principles that it believes have combined to result in abuse:

- (1) liberal standing requirements,
- (2) contingency fees,
- (3) the absence of the loser pays rule,
- (4) liberal discovery processes, and
- (5) the availability of punitive damages.¹⁵⁵

Presumably because juries largely play no role in European civil actions, the Commission had no basis for adding this feature as another

151. *Towards a Coherent European Approach*, *supra* note 3, at 9, paras. 21–22.

152. Hodges, Response to Consultation, *supra* note 150, at 3, para. 9.

153. *Id.* at 3, para. 12.

154. *Id.* at 3–4.

155. See *Commission Green Paper on Consumer Collective Redress*, *supra* note 137; *Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, *supra* note 140; *Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules*, *supra* note 142.

principle contributing to the abuse. In the evolutionary development of collective redress schemes, the U.S. class action and litigation rules have become “the model of what not to do.” The European Commission’s working document poses some thirty-four questions for public comment, including, among others, the following:

- (1) Should private redress be independent of, complementary to, or subsidiary to enforcement by governmental authorities?¹⁵⁶
- (2) Should the scope of relief be extended from injunctive relief to monetary damages?¹⁵⁷
- (3) Should proposals on collective redress be compliant with a set of common principles?¹⁵⁸
- (4) Should ADR be promoted for resolution of multiple claims?¹⁵⁹
- (5) Should prior efforts to resolve disputes through collective consensual dispute resolution be a mandatory prerequisite to collective redress in the courts?¹⁶⁰
- (6) Which safeguards should be considered particularly successful in limiting abusive litigation?¹⁶¹
- (7) Should “loser pays” principles be applied to injunctive or compensatory collective redress schemes?¹⁶²
- (8) Who should be allowed to bring collective redress actions?¹⁶³
- (9) Are non-public solutions like third party funding or legal costs insurance advisable in achieving the right balance between providing access to justice and avoiding abuse?¹⁶⁴
- (10) “Should the Commission’s work on compensatory collective redress be extended to other areas of EU law besides competition and consumer protection,” e.g., financial services law or securities regulation?¹⁶⁵

156. *Towards a Coherent European Approach*, *supra* note 3, at 6.

157. *Id.*

158. *Id.* at 7.

159. *Id.* at 9.

160. *Id.*

161. *Id.* at 10.

162. *Id.*

163. *Id.*

164. *Id.* at 11.

165. *Id.* at 12.

The public consultation process, including the period for public response to these questions, concluded on April 30, 2011.¹⁶⁶ The European Commission received over 300 comments from various institutions, representing the interests of consumers, businesses, lawyers, academia, and member state governments.¹⁶⁷ In addition, it received almost 20,000 comments from individuals.¹⁶⁸ The author reviewed over 200 of the institutional responses and summarized his findings in Appendices 1 and 2 to this Article. The vast majority of the institutional responses rejects contingency fees, supports the loser pays rule, objects to any liberalization of discovery, opposes punitive damages, and overwhelmingly favors opt-in versus opt-out class determination procedures. Although there is a substantial divergence of views regarding a requirement of mandatory prior submission of claims to some alternative dispute resolution mechanism, the responses strongly favor standing to bring collective redress actions for governmental entities. One can only conclude from these responses that the EU will find it politically impractical, if not impossible, to develop a collective redress scheme that incorporates any of the features that facilitate U.S.-style class actions. Indeed, according to the European Federation of Investors, no consumer organization in the EU has ever asked for something “remotely resembling” the American class action.¹⁶⁹

Notably absent from the debate are the member states’ securities regulatory authorities, who seemingly have abstained from expressing any support for collective redress by governmental authorities, investor associations, or individual victims of securities fraud. In addition, the European Securities Committee,¹⁷⁰ created by the Commission in 2001 to advise on securities regulatory policies and legislation, and the European Securities Market Authority¹⁷¹ created by Council regulation in late 2010

166. *Id.* at 13.

167. Directorate-General Justice, *Public Consultation: Towards a Coherent European Approach to Collective Redress*, EUR. COMM’N JUSTICE, http://ec.europa.eu/justice/news/consulting_public/news_consulting_0054_en.htm (last updated July 14, 2011) [hereinafter *Public Consultation*].

168. *See id.*

169. Response from Eur. Fed’n of Investors’s [EuroInvestors], to Eur. Comm’n Public Consultation: Towards a Coherent European Approach to Collective Redress 4 (2011) (Belg.), *available at* http://ec.europa.eu/competition/consultations/2011_collective_redress/euroinvestors_en.pdf.

170. Commission Decision 2001/528, on Establishing the European Securities Committee, 2001 O.J. (L 191/45), *available at* http://www.esma.europa.eu/system/files/establishESDec_2001_528.pdf.

171. Commission Regulation 1095/2010, 2010 O.J. (L 331/1), *available at* http://www.esma.europa.eu/system/files/Reg_1092_2010_ESRB.pdf.

to promote convergence among member state regulatory authorities and to facilitate stronger investor protection, have apparently been totally silent throughout the consultation process.

Many of the institutional responses to the Commission's public consultation, in addition to expressing their loudly ringing endorsements of the debilitating factors previously discussed, also challenge the Commission's authority to undertake any reform in the area of collective redress. For example, the Law Society of England and Wales has argued that principles of subsidiarity,¹⁷² essentially an EU states' rights concept, foreclose the European Commission's development of a "pan-European procedure for collective redress."¹⁷³ In its view, "it is neither appropriate nor proportionate to impose a new set of procedural rules, to be followed in all courts in all member states."¹⁷⁴ Instead, it suggested that the Commission recommend minimum standards for the development of collective redress under national law and focus on the mutual recognition of judgments in collective actions.¹⁷⁵ The European Banking Federation also expressed its doubts regarding the EU's competence in establishing judicial procedures for collective redress in the member states,¹⁷⁶ while also questioning the need for any EU initiative at all.¹⁷⁷ Similarly, the Bar Council of England and Wales commented that the Commission is simply not empowered under the Treaty for European Union¹⁷⁸ to engage in reform of the various member states' collective redress schemes, whether related to the substance or procedure of those schemes.¹⁷⁹

172. Response from the Law Society of England & Wales, to Eur. Comm'n Public Consultation: Towards a Coherent European Approach to Collective Redress 1 (2011), *available at* http://ec.europa.eu/competition/consultations/2011_collective_redress/law_society_of_england_and_wales_en.pdf.

173. *See id.* at 1, para. 3.

174. *Id.* at 1, para. 6.

175. *Id.* at 2.

176. Response from the Eur. Banking Fed'n [EBF], to Eur. Comm'n Public Consultation: Towards a Coherent European Approach to Collective Redress 2-3 (Apr. 29, 2011) (Belg.), *available at* http://ec.europa.eu/competition/consultations/2011_collective_redress/ebf_en.pdf.

177. *Id.* The European Banking Federation emphasizes its belief that an EU mechanism is not warranted since procedures for collective relief have been instituted in many Member States. *Id.* at 4. The Federation believes the recently instituted features do not provide any support that a collective overhaul of redress schemes is warranted. *Id.*

178. Response from the Bar Council of England & Wales, to Eur. Comm'n Public Consultation: Towards a Coherent European Approach to Collective Redress 12 (2011), *available at* http://ec.europa.eu/competition/consultations/2011_collective_redress/bcew_en.pdf.

179. *Id.*

C. The Prospects for EU Reform

The European Commission's Justice Commissioner announced in a speech last July her intention to issue a communication by year-end 2011 regarding the Commission's further intentions regarding collective redress.¹⁸⁰ She identified three options that will be considered by the Commission. The first option is to terminate the Commission's collective redress initiative on the basis that the arguments in favor of EU interaction are "not compelling."¹⁸¹ The second option is for the Commission to issue a Recommendation to the member states for their consideration in developing national collective redress schemes.¹⁸² The final option would be for the Commission to propose EU-level legislation for either a sectoral or horizontal collective redress scheme.¹⁸³ She concluded by stating that "any initiative in this area would have to respect the legal traditions of the member states and will have to avoid abuses of the system which have occurred in other legal systems, such as the USA."¹⁸⁴ Her remarks certainly signal adherence to prohibitions on contingency fees, continuation of the loser pays rule, limited discovery, restrictive standing requirements, and rejection of punitive damages.

The Justice Commissioner's speech was followed several days later by a draft report issued by the European Parliament's Committee on Legal Affairs, which set forth a motion for a European parliamentary resolution on collective redress. The proposed resolution, in its recitations, notes the U.S. Supreme Court's "efforts" this year, through its *Wal-Mart Stores, Inc. v. Dukes*¹⁸⁵ decision, "to limit frivolous litigation and the abuse of the U.S. class action system"; stresses that Europe must not introduce a U.S.-style class action or any system which would lend itself to similar abuse; commends member state efforts at collective redress litigation "while avoiding an abusive litigation culture;" and questions the Europe-

180. Viviane Reding, Justice Comm'r, Eur. Comm'n, Speech before the European Parliament Legal Affairs [JURI] Committee: A horizontal instrument for collective redress in Europe? (July 12, 2011) (Belg.), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/517&format=HTML&aged=0&language=EN&guiLanguage=en>.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (plaintiffs, alleging sex discrimination based on a flawed corporate culture but not on specific employment practices, failed to demonstrate the requisite commonality of law and fact). See generally Jess Bravin & Ann Zimmerman, *Justices Curb Class Actions: High Court Tosses Wal-Mart Bias Suit, Rules Plaintiffs Had Too Little in Common*, WALL ST. J., June 21, 2011, at A1.

an Commission's authority, under both subsidiarity principles¹⁸⁶ and the European Union Treaty, to even consider collective redress measures.¹⁸⁷ The body of the draft parliamentary motion, among other provisions, underscores the necessity for the following required safeguards:

- (1) Standing must be restricted to representative organizations designated by the member states.¹⁸⁸
- (2) The group members represented must be clearly identified before the claim is brought pursuant to opt-in procedures.¹⁸⁹
- (3) An opt-out system must be rejected on the grounds that it is contrary to many Member States' constitutions and "violates the rights of any victim who might participate in the procedure unknowingly and yet would be bound by the court's decision."¹⁹⁰
- (4) Victims must in all cases have the right to pursue individual compensatory redress in the courts.¹⁹¹
- (5) Punitive damages must be prohibited.¹⁹²
- (6) Compensation must be distributed to individual victims in proportion to their individual harm.¹⁹³
- (7) Contingency fees must be prohibited.¹⁹⁴
- (8) Each claimant must provide evidence for his individual claim.¹⁹⁵
- (9) Defendants must not be required to disclose documents to claimants since discovery "is mostly unknown in Europe and must be rejected at [the] European level."¹⁹⁶
- (10) There can be no action "without financial risk," and "the unsuccessful party must bear the costs of the other party."¹⁹⁷

186. Rapporteur on Towards a Coherent European Approach to Collective Redress, *Draft Rep. on a Motion for a European Parliament Resolution*, Comm. on Leg. Affairs, Doc. 2011/2089(INI), at 4 (July 15, 2011) (by Klaus-Heiner Lehne) [hereinafter *Draft Rep. on a Motion for a Eur. Parliament Resolution*].

187. See *id.* at 8 (referring specifically to Article 5 of the Treaty on European Union).

188. *Id.*

189. *Id.* at 10.

190. *Id.* at 6.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

(11) The Commission must not set any conditions on funding of claims, since "it is mostly unknown in Member States' legal systems to seek third-party funding, for instance, by offering a share of the damages awarded."¹⁹⁸

These safeguards, as delineated in the draft motion, seem not only to sound the death knell for the development of European class actions, but to almost any meaningful form of collective redress not funded entirely by member state governments. Assuming some form of collective redress mechanism is established, the motion further calls for a legal obligation of the parties to first seek a collective consensual resolution through alternative dispute resolution prior to filing collective court proceedings.¹⁹⁹

The report's draft parliamentary motion is followed by the Rapporteur's Explanatory Statement that even more strongly adheres to the debilitating features of European legal traditions. He questions the need for any EU action in the field, citing negative responses to the Commission's public consultation by the governments of France and Germany.²⁰⁰ The Rapporteur then asserts strongly that *public enforcement* of EU and national laws must be predominant, given investigative authority that "cannot be made available to private parties," and that private enforcement should continue to be solely "complementary."²⁰¹ He even suggests that any collective redress scheme proposed be limited to claimants who have suffered losses of €2,000 or less.²⁰² The Rapporteur insists on the loser pays rule, prohibitions on contingency fees and punitive damages, the rejection of third-party funding, and no discovery rights.²⁰³ He states that "a defendant cannot be required to provide evidence for the claimant,"²⁰⁴ that "it is of decisive importance that collective claimants should not be in a better position than individual claimants when it comes to evidence,"²⁰⁵ and that "disclosure requirements unnecessarily raise the cost of litigation and encourage unmeritorious claims and must therefore be rejected at the European level."²⁰⁶ He also slams opt-out provisions as violative of both the constitutions of certain member states and as prob-

198. *Id.*

199. *Id.* at 6, para. 15.

200. *See id.* at 11.

201. *Id.*

202. *Id.* at 8.

203. *Id.* at 9.

204. *Id.* at 11.

205. *Id.*

206. *Id.*

lematic under Article 6 of the European Convention of Human Rights,²⁰⁷ which provides that “everyone is entitled to a fair and public hearing by impartial tribunals.”²⁰⁸ Although this draft motion and explanatory statement do not yet constitute the official views of the European Commission, the policies expressed may well signal the end for now of any progress toward an effective U.S.-style class action for aggrieved investors. From the European perspective, American class actions remain “the poster children of the ‘American litigation disease.’”²⁰⁹

European hostility not only to the U.S.-style class action, but also to virtually the entire panoply of private litigation standards in the United States, works a formidable impasse to aggrieved investors seeking redress as victims of securities fraud. In situations where an entire class of a particular company’s individual securities investors have been defrauded, important questions exist as to whether such investors would have effective private access to justice in the EU’s member states. To the extent the European Commission determines that lack of access raises serious EU-wide public policy concerns, it should strongly consider development of a publicly-administered collective redress scheme. For example, the Commission could direct member states to grant standing either to a competent governmental authority or to a government-funded independent ombudsman to assert claims on behalf of aggrieved classes of investors. These authorities, in addition to public funding, should be granted broad governmental investigatory power and given the competence to pursue monetary recoveries and to establish common funds for distribution to investors. In its development of a publicly funded collective redress authority, the Commission might look to the “fair funds” provisions of the United States’ Sarbanes-Oxley Act of 2002.²¹⁰ Those provisions, in effect, have established a publicly-administered collective redress scheme for aggrieved securities investors in the United States. These fair funds provisions empower the U.S. Securities and Exchange Commission (“SEC”) to impose and collect monetary penalties against companies that have violated the securities laws and authorize the SEC to distribute those penalties to investors who were harmed by those violations.²¹¹ The SEC’s imposition of penalties and development of distri-

207. European Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR] art. 6, Nov. 4, 1950, 213 U.N.T.S. 222.

208. *Draft Rep. on a Motion for a Eur. Parliament Resolution*, *supra* note 186, at 13.

209. *Harbour & Shelley*, *supra* note 40, at 33.

210. 15 U.S.C. § 7246(a) (2006).

211. *Id.*

bution plans, while subject to a “fair and reasonable” standard,²¹² often serve to protect investors by both deterrence of fraudulent conduct and compensation of defrauded investors.²¹³ The European Commission should consider this model, as opposed to the U.S.-style class action model it abhors, as a platform for constructing a collective redress scheme that pursues monetary recoveries, whether in the form of civil penalties, actual damages or both, on behalf of investors. As the Commission continues to integrate its financial markets and the regulatory scheme governing those markets, it should view development of a publicly-administered collective redress scheme as an integral part of its work by ensuring increased deterrence against securities violations and increased access to monetary recoveries for investors.

CONCLUSION

This Article addresses the major factors in the U.S. litigation system that have developed and nurtured the private class action for investors victimized by securities fraud. The author discusses the negating corollaries of those factors in the EU’s member states, both those that are common to civil litigation in Europe generally and those that have been added as specific features of the EU member states’ various collective redress schemes. No effective scheme has yet been enacted by any member state, and the one most frequently lauded, the Netherlands’ WCAM procedure, does not provide a mechanism for class recovery of monetary damages, but only a mechanism for securing court approval of voluntary out-of-court settlements of class claims.

212. See, e.g., *S.E.C. v. WorldCom, Inc.*, No. 02 CIV. 4963, 2004 WL 1621185, at * 1 (S.D.N.Y. July 20, 2004) aff’d sub nom. Official Comm. of Unsecured Creditors of WorldCom, Inc., v. S.E.C., 467 F.3d 73, 81 (2d Cir. 2006).

213. Incidental to their respective WCAM proceedings, Royal Dutch Shell and Zurich Financial Services separately agreed to pay massive penalties into SEC Fair Funds to be redistributed to harmed investors. *Claims Fund: Zurich Financial Services*, U.S. SEC. & EXCH. COMM’N (Apr. 14, 2010), <http://www.sec.gov/divisions/enforce/claims/zurichfinserv.htm>. Zurich Financial, for their role in the Convergium Holding scandal, paid a \$1 disgorgement and a \$25 million penalty to the SEC. *Id.* Prior to Fair Funds, only the \$1 disgorgement could be redistributed to injured shareholders. *Id.* Due to the Fair Funds provision of Sarbanes-Oxley, the entire Zurich payment of \$25,000,001 was redistributed. *Id.* Royal Dutch Shell agreed to pay \$113.5 million into an SEC Fair Fund as a penalty for their overstatement of gas reserves. Press Release, Sec. & Exch. Comm’n, SEC Announces \$113.5 Million Distribution in Royal Dutch Shell Fair Fund (Apr. 30, 2010), *available at* <http://www.sec.gov/news/press/2010/2010-67.htm>. Interestingly, the Fair Fund distribution was allocated to over 84,000 investors living in 56 countries. *Id.* Had some of those investors been f-cubed claims, questions might be raised regarding the international dispersal of Fair Funds in the post-*Morrison* world.

Moreover, the European Commission, in its efforts toward the development of more efficient collective redress schemes, whether for horizontal application or for specific application to securities fraud, has not demonstrated any enthusiasm for class-based private remedies. Indeed, its own guidance suggests abhorrence of the U.S.-style class action. The institutional responses to the Commission's recent public consultation evidence overwhelming opposition. Furthermore, securities regulatory authorities both at the EU and member state levels apparently have been silent throughout the consultation process. When those charged with public enforcement of the securities laws, presumably the regulatory zealots, have been unsupportive of stronger private remedies to supplement their work, the alarm bells of prospective failure ring loudly. Perhaps the best outcome would be an EU directive that each member state grant standing to a competent governmental authority, or, in the case of group actions against a government itself, independent ombudsmen to pursue claims on behalf of aggrieved investors, supported by public funds and facilitated by governmental investigatory power, to pursue recoveries and establish common funds for distribution to aggrieved investors. Even this, for now, seems a distant dream.

Appendix 1—Responses to the EU Public Consultation: Towards a Coherent European Approach to Collective Redress

The data below is representative of the responses to the EU Public Consultation *Towards a Coherent European Approach Toward Collective Redress*.²¹⁴ Only responses by organizations registered in the EU's Interest Representative Register were included. The statistics display EU member states collective attitude toward various collective redress procedures.²¹⁵

Issue	Percentage of Public Consultation Responses	
	Support %	Oppose %
Contingency Fees	8.2	91.8
Loser Pays Rule	93.3	6.7
Liberal Discovery Procedures	7.6	92.4
Punitive Damages	4.5	95.5
Opt-In	79.3	20.7
Opt-Out	20.7	79.3
Mandatory Pre-Litigation ADR	19.8	80.2

Notes:

Results reflect 225 responses sampled. Excluded from the data are responses by individuals, responses by organizations or authorities located in non-EU member states, and responses that do not expressly opine on any of the issues studied ("maybe" responses not included).

Although many responses did not support an EU collective redress mechanism, they provided their opinions about the ideal makeup of an EU system if it were to happen. These responses were included in the above data.

The percentages for each issue do not include responses that did not address the specific issue. For example, out of ten responses, if five responses supported an issue, and three were against the issue, the percentages were determined using a denominator of eight, instead of ten.

214. *Public Consultation*, *supra* note 167.

215. Data compilation on file with the author.

Appendix 2—Official Government Responses by EU Member-States

This data set displays the official attitudes taken by various EU member states on the various issues related to the EU Public Consultation: *Towards a Coherent European Approach to Collective Redress*.²¹⁶

Country	Contingency Fees	Loser Pays Rule	Liberal Discovery Procedures	Punitive Damages	Opt-In or Opt-Out	Mandatory or Voluntary ADR
Austria	—*	Support	—	—	In	Voluntary
Bulgaria	Support	Oppose	Oppose	Support	—	Voluntary
Czech Republic	Oppose	Support	—	Oppose	In	Voluntary
France	Oppose	Support	Oppose	Oppose	In	Voluntary
Germany	Oppose	Support	—	Oppose	In	Voluntary
Greece	Oppose	Support	Oppose	Oppose	In	Voluntary
Hungary	Oppose	—	Oppose	Oppose	—	—
Italy	—	Support	—	Oppose	In	Voluntary
Netherlands	Oppose	Support	Oppose	Oppose	Out	Voluntary
Latvia	Oppose	Support	Oppose	Oppose	In	Mandatory
Poland	Oppose	Support	Oppose	—	In	Voluntary
Portugal	—	Support	Support	Oppose	Out	Voluntary
Sweden	Oppose	Support	—	Oppose	In	—
U.K.	Oppose	Support	—	—	Out	Mandatory

Notes:

Only responses provided by federal ministerial agencies were included in the data set. Responses by nongovernmental, nonprofit, or statutorily independent agencies were excluded. European Consumer Centre responses were also excluded.

The * denotes that the member state did not expressly opine on the specific issue. Conditional or non-conclusive discussion of an issue is likewise indicated by the symbol.

216. *Public Consultation*, *supra* note 167; Data set on file with the author.

Fourteen of the twenty-seven EU member states are represented in the data. The majority of these responses were provided by a member state's Ministry of Justice.