Boston College Law Review

Volume 53 | Issue 5 Article 6

11-26-2012

Going Dutch: The Effects of Domestic Restriction and Foreign Acceptance of Class Litigation on American Securities Fraud Plaintiffs

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GOING DUTCH: THE EFFECTS OF DOMESTIC RESTRICTION AND FOREIGN ACCEPTANCE OF CLASS LITIGATION ON AMERICAN SECURITIES FRAUD PLAINTIFFS

Abstract: This Note examines the intersection of two recent trends in aggregate litigation in the United States and Europe. In the United States, Congress and the U.S. Supreme Court have significantly restricted the utility of the class action mechanism, leaving many American plaintiffs with legitimate claims without recourse in the United States. Simultaneously, the European Union and its Member States have considered and implemented new mechanisms to facilitate the resolution of mass claims. The Netherlands employs a particularly useful aggregate litigation system. As a result of these two trends, this Note argues that Americans with securities fraud claims, who find themselves shut out of American courts, should seek redress in the Netherlands under the Dutch Settlement Act. This Note posits that American courts are likely to give res judicata effect to such judgments, and, barring a preemptive trans-European system of collective redress, the Netherlands is a viable alternative to U.S. federal courts for resolving securities fraud claims.

Introduction

Class actions in the United States began with a noble goal: to open the courthouse doors to groups of similarly injured plaintiffs who would otherwise be unable to bring claims individually.[1] Using class actions, victims of securities fraud, employment discrimination, and consumer fraud could easily join together to file mass claims.[2] In practice, however, class actions have been expanded beyond their original bounds

[1] *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974) (noting the value of the class action for plaintiffs with low-value claims, for whom "[e]conomic reality dictates that [their claims] proceed as a class action or not at all"); William B. Rubenstein, Newberg on Class Actions § 1:7 (5th ed. 2010) (explaining how the class action procedure enables litigation); Benjamin Kaplan, *A Prefatory Note*, 10 B.C. L. Rev. 497, 497, 500 (1969) (arguing that "class actions . . . enhance the forensic opportunities of hitherto powerless groups").

[2] *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 818 (2010) (analyzing class action settlements in federal courts in 2007, and finding that 35% of claims were for securities fraud, 14% were for labor or employment claims, and 12% were for consumer fraud).

and have been abused routinely by plaintiffs' lawyers.[3] As a result, during the last decade class action critics have succeeded in dramatically limiting class certification.[4] Unfortunately, this legislative and judicial tightening has left many truly aggrieved plaintiffs without relief.[5]

Across the Atlantic, European countries have historically rejected American-style class actions because such claims cede the state's regulatory authority to private actors.[6] Nevertheless, the European Union has recently studied and proposed a trans-European system for aggregate litigation.[7] Moreover, many EU Member States have independently

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[3] *See* S. Rep. No. 109-14, at 14–20 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 14–21 (Senate Report on the Class Action Fairness Act) (describing plaintiffs' lawyers' abuse of the contingency fee model); Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal F. 71, 73 ("[T]he modern class action has undermined the foundational precepts of American democracy.").

[4] *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

[5] *See, e.g.*, *id.* (expanding federal courts' diversity jurisdiction over class actions); Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2557 (2011) (denying class certification in an employment discrimination case due to lack of commonality); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011) (dismissing a plaintiff class's legitimate consumer fraud claim due to contractual class action waiver); Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2888 (2010) (prohibiting class adjudication of securities fraud claims related to securities listed on foreign exchanges); *infra* notes 69–114 and accompanying text.

[6] *See* Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 Vand. L. Rev. 179, 209 (2009) ("Both the strengths and the weaknesses of American collective procedures arise from the willingness to entrust a great deal of social regulation to private initiative and common law forms of adjudication."). Some commentators posit that the class action is an efficient and powerful way to regulate corporate conduct. *See, e.g.*, David Rosenberg, *The Regulatory Advantage of Class Action*, *in* Regulation Through Litigation 244, 245 (W. Kip Viscusi ed., 2002) (proposing a system of mandatory class actions in mass tort claims, in which the threat of enormous monetary damages "provides would-be tortfeasors with financial incentive to invest optimally in precautions that prevent unreasonable risk"). Others have criticized this thesis for giving the class action decisions of "activist judges . . . the sweep of a legislative action," and would instead rely on regulation by the free market. *See, e.g.*, James Wootton, *Comment on* The Regulatory Advantage of Class Action, *in* Regulation Through Litigation, *supra*, at 304, 304–08 ("There is no more effective regulatory device than the disaffected consumer who takes his or her business elsewhere.").

[7] *See European Parliament Resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress*, P7_TA-PROV(2012)0021, PE 479.894, at 36–43 (Feb. 2, 2012) [hereinafter *Resolution*], *available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+20120202+SIT+DOC+PDF+V0//EN&language=EN*; *Parliament Committee on Legal Affairs Report on 'Towards a Coherent European Approach to Collective Redress,'* at 1–30 (Jan. 12, 2012) [hereinafter *Legal Affairs Report*], *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2012-0012+0+DOC+PDF+V0//EN. The term "aggregate litigation" is broader than the term "class action" as conceived in the United States. *See* Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 Vand. L. Rev. 1, 20 (2009) ("The term 'aggregate litigation' creates a big tent."); *see also* Tanya J. Monestier, *Transnational Class Actions and the Illusory*

adopted legal mechanisms that permit private individuals to seek collective redress.[8] In 2005, for instance, the Netherlands enacted the Dutch Settlement Act, by which Dutch courts can certify out-of-court settlements of mass claims.[9] As a result of its extensive jurisdictional reach, the Dutch Settlement Act holds potential for both European and American plaintiffs.[10]

This Note traces the trends of aggregate litigation in both the United States and Europe, and examines the potential benefits of the European market to American plaintiffs.[11] Part I examines the state of the class action in the United States and the legislative and judicial tightening of Rule 23 of the Federal Rules of Civil Procedure that has left many plaintiffs without recourse.[12] Part II discusses Europe's historical rejection and recent embrace of aggregate litigation mechanisms, and analyzes the state of the law in individual Member States and the European Union itself.[13] Part III argues that, as a result of the trends identified in Parts I and II, American class plaintiffs with securities fraud claims who have been shut out of domestic courts should seek relief in Europe under the Dutch Settlement Act.[14] Part III then considers the res judicata effect that American courts might give to foreign aggregate litigation judgments, and concludes that courts are most likely to give such effect in securities fraud cases.[15] Finally, Part III analyzes the potential impact of a trans-European aggregate litigation regime on American plaintiffs' recourse in the Netherlands.[16]

Search for Res Judicata, 86 Tul. L. Rev. 1, 43 n.148 (2011) (noting that while eighteen countries have enacted some form of aggregate litigation, only six—Australia, Canada, Indonesia, Israel, Portugal, and Norway—permit "U.S.-style class action[s]").

[8] *See* Nagareda, *supra* note 7, at 21–25 (listing recent class action laws of EU Member States).

[9] *See* Wet Collectieve Afhandeling Massaschade [WCAM] [Dutch Settlement Act], *codified in* Burgerlijk Wetboek [BW] [Civil Code] bk. 7, arts. 907–10, *translated in* The Civil Code of the Netherlands 903–06 (Hans Warendorf et al. trans., Kluwer Law Int'l 2009), *and* Wetboek van Burgerlijke Rechtsvordering [Rv] [Code of Civil Procedure] bk. 3, tit. 14, arts. 1013–18, *translated in* Helene van Lith, The Dutch Collective Settlements Act and Private International Law 148–51 (2010), *available at* http://www.wodc.nl/images/1817_Volledige_tekst_tcm44-303998.pdf.

[10] *See id.*

[11] *See infra* notes 17–332 and accompanying text.

[12] *See infra* notes 17–114 and accompanying text.

[13] *See infra* notes 115–255 and accompanying text.

[14] *See infra* notes 256–305 and accompanying text.

[15] *See infra* notes 285–305 and accompanying text.

[16] *See infra* notes 306–332 and accompanying text.

I. The Evolving Standard for Class Action Certification in the United States

Courts have long accepted the class action as an integral element of American jurisprudence, but the standard used to evaluate class certification has not been consistent over time.[17] This Part identifies three significant developments in the recent history of the American class action.[18] Section A provides an overview of Rule 23, which governs class actions, and examines the policy considerations underpinning its creation.[19] Section B notes several real and perceived abuses of the class action structure.[20] Section C then details the judicial and legislative response to these abuses.[21]

A. *The Rule 23 Class Certification Standard*

Rule 23, which governs the procedure for class certification, was significantly reformulated in 1966 in response to widespread criticism.[22] Prior to this revision, class actions were relatively rare, due in large part to the rule's ill-defined certification requirements.[23] The 1966 revision provided clarity, and remains the standard today.[24] The revised rule permits federal courts to certify class actions if: (1) the proposed class is so large that joinder is impracticable; (2) the class is united by common questions of law or fact; (3) the representative parties' claims or defenses are typical of those of the class as a whole; and (4) the representatives will adequately protect the class's interests.[25] The numerosity and commonality requirements are the two central attributes of the modern class action, and focus on the characteristics

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[17] *See infra* notes 22–114 and accompanying text.

[18] *See infra* notes 22–114 and accompanying text.

[19] *See infra* notes 22–37 and accompanying text.

[20] *See infra* notes 38–68 and accompanying text.

[21] *See infra* notes 69–114 and accompanying text.

[22] *See* Fed. R. Civ. P. 23; Fed. R. Civ. P. 23 advisory committee's note (1966) (describing criticism of the prior version); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 Harv. L. Rev. 356, 375–400 (1967) (discussing changes to Rule 23).

[23] Fed. R. Civ. P. 23 advisory committee's note (1966). The previous version of Rule 23 defined three abstract categories of class actions—true, hybrid, and spurious—which were based upon the rights involved. *Id.* In the note accompanying its revision, the Advisory Committee on Civil Rules wrote that these classifications "proved obscure and uncertain," and that "[t]he courts had considerable difficulty with these terms." *Id.*; *see* Rubenstein, *supra* note 1, § 1:15.

[24] *See* Fed. R. Civ. P. 23; Kaplan, *supra* note 1, at 497.

[25] Fed. R. Civ. P. 23(a).

of the class.[26] Conversely, the typicality and adequacy of representation prerequisites set standards for the class's representatives.[27]

In addition to satisfying the prerequisites of Rule 23(a), parties seeking class certification must establish that, for one of the reasons defined in Rule 23(b)(1)–(3), class certification is appropriate.[28] First, under Rule 23(b)(1), a class action may be appropriate if separate actions by class members would result in inconsistent outcomes or would be dispositive of the interests of other similarly situated individuals not party to the proceedings.[29] Second, a class action may be maintained under Rule 23(b)(2) if the opponent of class certification has acted or failed to act with respect to the class such that injunctive or declaratory relief for the class as a whole is appropriate.[30] Third, Rule 23(b)(3) permits a court to certify a class if common questions of law or fact predominate over individual questions and class adjudication is the fairest and most efficient means by which to proceed.[31] In making this determination, a court may consider the class members' interests in controlling separate actions, any concurrent litigation regarding the same controversy, the appropriateness of the forum, and any potential administrative difficulties.[32]

The Advisory Committee on Civil Rules ("Advisory Committee") championed its revisions to Rule 23 as establishing "a ready and fair means of achieving unitary adjudication" for both plaintiffs and defendants.[33] Commentators at the time praised the amended rule for more

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[26] *See id.*; RUBENSTEIN, *supra* note 1, § 3:18 ("The commonality and numerosity requirements have long been the organizing principles of aggregate litigation.").

[27] *See* FED. R. CIV. P. 23(a); RUBENSTEIN, *supra* note 1, § 3:28.

[28] FED. R. CIV. P. 23(b).

[29] *Id.*

[30] *Id.*

[31] *Id.* Rule 23(b)(3) is a significant departure from the previous version of the rule because it permits an "opt-out" class action scheme. *See id.*; RUBENSTEIN, *supra* note 1, § 1:15. In an opt-out system, a class action judgment binds absent class members who decline to opt out of the plaintiff class, rather than only those who opt in, or request inclusion. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810 (1985) ("Unlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything."); RUBENSTEIN, *supra* note 1, § 1:15. The U.S. Supreme Court affirmed the constitutionality of Rule 23's opt-out regime in the 1985 case, *Phillips Petroleum Co. v. Shutts*. 472 U.S. at 812–13 ("Requiring a plaintiff to affirmatively request inclusion would probably impede the prosecution of those class actions involving an aggregation of small individual claims, where a large number of claims are required to make it economical to bring suit."). The Court held that constitutional due process is met as long as all potential class members receive notice of the class action and are informed of their right to opt out. *Id.*

[32] FED. R. CIV. P. 23(b).

[33] FED. R. CIV. P. 23 advisory committee's note (1966).

clearly promoting the class action's dual goals.[34] First, by explicitly delineating three categories of class actions, the amended rule considerably reduced duplicative litigation of similar claims.[35] Second, "even at the expense of increasing litigation," Rule 23 "provide[d] means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all."[36] This second goal was strongly rooted in the classic American jurisprudential concerns of due process and equal access to federal courts.[37]

B. *Real and Perceived Abuses of the American Class Action*

Despite revised Rule 23's admirable intentions, critics have argued that the class action has been stretched far beyond its appropriate limits and has been regularly abused by plaintiffs' lawyers.[38] One example of alleged rule-stretching was the introduction of the mass tort class action in the 1980s.[39] The Advisory Committee counseled in 1966 that mass tort cases were not well suited for class adjudication because the questions at issue frequently affect individual class members differently.[40]

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[34] *See, e.g.*, Kaplan, *supra* note 1, at 497.

[35] *Id.*; *see* Fed. R. Civ. P. 23(b).

[36] Kaplan, *supra* note 1, at 497.

[37] *See* Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 Harv. L. Rev. 78, 84 (2011) ("The 1966 class action rule . . . respond[ed] to power asymmetries in civil litigation."); *id.* at 91 (explaining that the revised rule paid homage to the phrase "equal justice under law," which is engraved on the facade of the U.S. Supreme Court building and "serves as a signpost for the hopes that democratic orders place in courts"). *But see* Thomas J. Weithers, *Amended Rule 23: A Defendant's Point of View*, 10 B.C. L. Rev. 515, 518 (1969) (arguing that such a "humanitarian purpose . . . is enunciated nowhere in Rule 23," and that "the (b)(3) class action device should not be employed, regardless of incidental salutary purposes, unless the basic goal of efficiency is achieved through the avoidance of multiplicity of litigation").

[38] *See, e.g.*, John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1462 (1995) (writing of the "sordid" results of mass tort class actions); Redish, *supra* note 3, at 74 (arguing that the class action was designed merely as a procedural device, not "a mechanism intended to serve as a roving policeman of corporate misdeeds . . . by which to redistribute wealth"); Charles W. Wolfram, *Mass Torts—Messy Ethics*, 80 Cornell L. Rev. 1228, 1231 (1995) (criticizing "a sizable number of [plaintiffs'] lawyers who are attracted to the big-money rewards of morally compromised (but legal) professional work").

[39] *See* Coffee, *supra* note 38, at 1356–58.

[40] *See* Fed. R. Civ. P. 23(b)(3) advisory committee's note (1966) ("A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways."); Richard A. Nagareda, Mass Torts in a World of Settlement 8 (2007) ("The drafters of Rule 23 in its modern form did not aspire to facilitate, much less to foment, tort litigation.").

Nevertheless, some mass tort plaintiffs found class action success in the mid-1980s.[41] In one notable case, a mass tort plaintiff class successfully used class certification—and the help of a creative federal judge—to pressure a defendant into a multi-million dollar settlement even though all parties recognized the plaintiffs' claim was weak.[42] This success was short lived, however, and during the 1990s, federal courts effectively eradicated mass tort class actions from their dockets.[43]

As a result of Rule 23's procedural limitations and the high bar for class certification in federal court, most class plaintiffs opted to pursue class actions in state courts.[44] In choosing forums in which to file suit,

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[41] *See In re* A.H. Robins Co., 880 F.2d 709, 747 (4th Cir. 1989) (approving Dalkon Shield litigation class certification), *abrogated by* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); *id.* at 727 ("The class action . . . is the manifest fair and expeditious procedure for disposing of . . . mass tort litigants."); *In re* Agent Orange Prod. Liab. Litig., 818 F.2d 145, 173–74 (2d Cir. 1987) (affirming certification of the Agent Orange class action).

[42] *In re* Agent Orange Prod. Liab. Litig., 597 F. Supp. 740, 746–48 (E.D.N.Y. 1984) (approving a settlement for a class of Vietnam War veterans who alleged injuries caused by exposure to the herbicide Agent Orange); NAGAREDA, *supra* note 40, at 74–75. In *In re Agent Orange Product Liability Litigation*, Judge Jack Weinstein, of the U.S. District Court for the Eastern District of New York, certified a mass tort class and "set the litigation on a swift schedule for trial with the objective of precipitating serious settlement negotiations." NAGAREDA, *supra* note 40, at 74; *see In re Agent Orange*, 597 F. Supp. at 746–48. Although Judge Weinstein acknowledged that "at best the evidence [was] inconclusive" of a causal relationship between Agent Orange and the plaintiffs' injuries, he nevertheless facilitated a $180 million settlement. *In re Agent Orange*, 597 F. Supp. at 747; *see* NAGAREDA, *supra* note 40, at 74.

[43] *See* Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 385–88 (2005) (describing "the short history of mass tort class actions"). The U.S. Court of Appeals for the Seventh Circuit started the trend in the 1995 case, *In re Rhone-Poulenc Rorer, Inc.*, where a class of hemophiliacs alleged that a medical products company negligently exposed them to AIDS-infected blood. *See* 51 F.3d 1293, 1298 (7th Cir. 1995). Writing for the majority, Judge Richard Posner decertified the class. *Id.* Judge Posner explained that certification of mass tort class actions is fundamentally unfair to defendants because it creates considerable pressure to settle. *Id.* He also cited concerns of applying the negligence laws of multiple states in one case. *Id.* Two years later, the U.S. Supreme Court, in *Amchem Products, Inc. v. Windsor*, dealt a crushing blow to the mass tort class action by rejecting a voluntary asbestos settlement. *See* 521 U.S. at 609–10. Like the Seventh Circuit, the Court cited the class action's coercive effect on settlements and the difficulty of applying different states' tort laws as reasons for decertifying the class. *See id.* at 600.

[44] *See* Victor E. Schwartz & Christopher E. Appel, *Exporting United States Tort Law: The Importance of Authenticity, Necessity, and Learning from Our Mistakes*, 38 PEPP. L. REV. 551, 572–73 (2011) (noting that the "explosion of class actions in the 1980s and 1990s" occurred, in part, because "not all states had adopted all of the rules and rational limits that are embodied in the federal rule"). Conversely, the Senate Report on the Class Action Fairness Act contended that "there are no wide variations between federal and state court class action policies," but that the surge in state court class action filings occurred because "some state court judges are less careful than their federal court counterparts about apply-

class plaintiffs tried to identify jurisdictions with notoriously favorable judges and jury pools.[45] Plaintiffs' "strategic manipulation of forum" created magnet jurisdictions which heard disproportionately large numbers of class action cases.[46] Some relatively unpopulated jurisdictions, such as Madison County, Illinois, and Jefferson County, Texas, became poster children for class action critics' arguments against abusive magnet forums.[47] Opponents contended that a small, unrepresentative group of state jurisdictions should not have authority over claims with eminently national implications.[48]

Another central critique of class actions concerns the contingency fee system.[49] In class actions, plaintiffs need not pay their attorneys up front; instead, they can voluntarily enter into contingency agreements that set aside as attorney's fees a certain percentage of the settlement or judgment should the plaintiffs' claim succeed.[50] The standard contingency fee rate is widely quoted at one-third of the final settlement, but is in reality much lower.[51] Between 1993 and 2002 the mean fee award was 21.9% of the total recovery.[52]

Nevertheless, class action critics repeatedly rallied their constituents in opposition to the supposedly out-of-control trial lawyer fees.[53] During

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ing the procedural requirements that govern class actions." S. Rep. No. 109-14, at 14 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 14.

[45] *See* Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. Pa. L. Rev. 1593, 1607 (2008).

[46] Issacharoff & Miller, *supra* note 6, at 190.

[47] *See* Erichson, *supra* note 45, at 1609–10. The American Tort Reform Association publishes a well-known annual ranking of America's most "plaintiff-friendly" jurisdictions, entitled *Judicial Hellholes*. *See, e.g.*, Am. Tort Reform Ass'n, Judicial Hellholes 2004, at 7 (2004), http://www.judicialhellholes.org/wp-content/uploads/2010/12/JH2004.pdf. During the early 2000s, Madison County and Jefferson County were consistently ranked in the top five. *Id.* at 14–18, 25–26.

[48] *See* Erichson, *supra* note 45, at 1609–10.

[49] *See* S. Rep. No. 109-14, at 14–20, *reprinted in* 2005 U.S.C.C.A.N. 3, 14–21.

[50] *See* Resnik, *supra* note 37, at 84. One justification of contingency fee agreements is that they "give consumers claiming statutory rights the capacity to attract lawyers through the potential for large monetary recoveries." *Id.* Without this incentive, many lawyers would likely spurn class action plaintiffs. *Id.* Critics contend, however, that contingency fee agreements may also encourage plaintiffs' lawyers to artificially inflate the number of class members to extract larger settlements. *See* Issacharoff & Miller, *supra* note 6, at 184–86 (discussing attorneys' attempts to expand class sizes by purporting to represent claimants with "substantially different" injuries).

[51] Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical Legal Stud. 27, 27 (2004).

[52] *Id.* The study also determined that there was "no robust evidence that either recoveries for plaintiffs or fees of their attorneys increased over time." *Id.*

[53] *See, e.g.*, Remarks at a Victory 2004 Luncheon in New York City, 1 Pub. Papers 630 (Apr. 20, 2004) (statement of President George W. Bush).

his reelection campaign in 2004, for example, President George W. Bush strongly criticized plaintiffs' lawyers and class actions.[54] In a campaign speech, President Bush sought to "remind the people on Capitol Hill you cannot be pro-small business and pro-trial lawyer at the same time."[55] Furthermore, the Senate Report on the Class Action Fairness Act listed more than six pages of class action settlements in which, it contended, lawyers received disproportionate shares of the recovery.[56] This repetitive criticism of class action lawyers proved persuasive.[57] A 2002 study by the American Bar Association on the public's perception of lawyers revealed that sixty-nine percent of respondents believed "lawyers are more interested in making money than in serving their clients."[58]

Certainly, there have been instances of plaintiffs' lawyers committing egregious legal and ethical violations.[59] One of the more offensive abuses by plaintiffs' lawyers was perpetrated by four managing partners of the New York law firm Milberg, Weiss, Bershad, Hynes & Lerach ("Milberg Weiss").[60] For two decades, Milberg Weiss was well known in corporate circles as one of the largest, most aggressive, and most successful securities class action law firms in the country.[61] In 2006, however, the firm was indicted for paying millions of dollars in illegal kickbacks to three plaintiffs connected to almost 180 cases spanning twenty-five years.[62] These pre-ordered plaintiffs owned shares in hundreds of

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[54] *See id.*; Remarks to the National Federation of Independent Businesses, 1 PUB. PAPERS 1074–75 (June 17, 2004).

[55] Remarks to the National Federation of Independent Businesses, *supra* note 54, at 1075. In a prior speech at a New York fundraiser, President Bush called for Congress to "reign in the junk and frivolous lawsuits that threaten capital formation" so that the nation's "great entrepreneurial spirit flourishes." Remarks at a Victory 2004 Luncheon in New York City, *supra* note 53, at 630.

[56] *See* S. REP. NO. 109-14, at 14–20 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 14–21.

[57] *See* AM. BAR ASS'N, SECTION OF LITIG., PUBLIC PERCEPTIONS OF LAWYERS: CONSUMER RESEARCH FINDINGS 8 (Leo J. Shapiro & Associates eds., 2002) (surveying the public's perception of attorneys).

[58] *Id.* Moreover, only thirty-nine percent of respondents agreed that "most lawyers try to serve the public interests well." *Id.* The results were not broken out by type of lawyer, but the report stated that "consumers found negative things to say about every type of lawyer," including criticizing "personal injury lawyers for chasing ambulances and pursuing frivolous cases." *Id.* at 11.

[59] *See* Peter Elkind, *The Law Firm of Hubris, Hypocrisy & Greed*, FORTUNE, Nov. 13, 2006, at 154, 156.

[60] *See id.*

[61] *See id.* at 155.

[62] *Id.* at 156, 158. One partner, David Bershad, was famously accused of keeping a large stash of cash in a safe in his office credenza for paying off lead plaintiffs. *See* Peter Elkind, *Mil-*

publicly traded companies.[63] When a company's stock price fell, Milberg Weiss was first in line to file a securities fraud suit.[64] The firm's stable of ready and willing plaintiffs helped make the firm's partners incredibly wealthy.[65] Ultimately, the firm's four managing partners were sentenced to federal prison for their involvement.[66]

Headline-grabbing abuses like those at Milberg Weiss not only tarnished the reputation of class action lawyers, but also emboldened corporate and political opponents of the class action device itself.[67] Instead of advocating for greater oversight of the plaintiffs' bar, class action critics successfully transformed the public's negative perception of plaintiffs' lawyers into a movement to curtail severely the class action's role in American courts.[68]

C. *Legislative and Judicial (Over)Reaction*

1. The Class Action Fairness Act of 2005

In response to growing public distaste for class actions and the attorneys behind them, Congress enacted the Class Action Fairness Act (CAFA) in February 2005 with broad support from both parties.[69] CAFA gives federal courts jurisdiction over class actions based in state law in which there is minimal diversity between the parties and the aggregate amount in controversy is over five million dollars.[70] Thus, CAFA substantially increased defendants' ability to remove class action cases to federal court.[71] A 2007 study by the Federal Judicial Center meas-

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berg Weiss Hits the Canvas, FORTUNE, Oct. 15, 2007, at 40, *available at* http://money.cnn.com/2007/10/01/news/companies/Melvyn_weiss.fortune/.

[63] Elkind, *supra* note 59, at 160, 163–64.

[64] *Id.* at 160, 163.

[65] *See* Robert Lenzner & Emily Lambert, *Mr. Class Action*, FORBES, Feb. 16, 2004, at 82, 84 *available at* http://www.forbes.com/forbes/2004/0216/082.html. The article contains a chart detailing sixteen Milberg Weiss settlements of $100 million or more and the firm's corresponding attorney fees. *Id.* at 86.

[66] *See* Elkind, *supra* note 62, at 40.

[67] *See* S. REP. NO. 109-14, at 14–20 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 14–21.

[68] *See* Erichson, *supra* note 45, at 1598, 1609–10 (discussing class action abuses and Congress's response).

[69] *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, (codified as amended in scattered sections of 28 U.S.C.); S. REP. NO. 109-14, at 14–20, *reprinted in* 2005 U.S.C.C.A.N. 3, 14–21 (discussing Congress's reasons for enacting CAFA).

[70] Class Action Fairness Act § 4, 28 U.S.C. § 1332 (2006).

[71] *Id.*; *see* S. REP. NO. 109-14, at 5, *reprinted in* 2005 U.S.C.C.A.N. 3, 6 ("[CAFA] makes it harder for plaintiffs' counsel to 'game the system' by trying to defeat diversity jurisdiction, creates efficiencies in the judicial system by allowing overlapping and 'copycat' cases to be

ured CAFA's impact, finding that during the sixteen months after CAFA went into effect, the number of diversity class action filings and removals increased in every circuit, and filings at least doubled in seven of twelve circuits.[72]

Supporters lauded the bill for bolstering federal courts' authority over class actions.[73] They contended that disparate treatment of class actions in state courts had inappropriately allowed lawyers to forum shop and obtain oversized settlements and fees in certain jurisdictions.[74] The bill's proponents claimed that CAFA would put an end to magnet jurisdictions and rein in abusive litigation.[75] Indeed, according to one commentator, CAFA's effective prohibition of large class actions in state courts and the federal judiciary's rejection of the mass tort have rendered the mass tort class action "dead as a doornail."[76]

Critics, however, argued that the legislation would close the courthouse door to potential litigants with legitimate claims.[77] They con-

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consolidated in a single federal court, [and] places the determination of more interstate class action lawsuits in the proper forum—the federal courts.").

[72] Thomas E. Willging & Emery G. Lee III, Fed. Judicial Ctr., The Impact of the Class Action Fairness Act of 2005 on the Federal Courts 2–3 (2007), http://www.fjc.gov/public/pdf.nsf/lookup/cafa0407.pdf/$file/cafa0407.pdf. The study also found a substantial increase in the average number of diversity class actions filed monthly in federal courts—from 27.0 cases per month prior to CAFA, to 53.4 cases per month after CAFA. *Id.* at 2.

[73] *See* S. Rep. No. 109-14, at 5, *reprinted in* 2005 U.S.C.C.A.N. 3, 5–6.

[74] *See id.* Researchers have contested the notion of higher fees in state courts. *See* Eisenberg & Miller, *supra* note 51, at 27 ("Fees as a percent of class recovery were found to be higher in federal than state court.").

[75] *See* S. Rep. No. 109-14, at 14, *reprinted in* 2005 U.S.C.C.A.N. 3, 14 (discussing class action abuse in state courts).

[76] *See* Erichson, *supra* note 45, at 1598 ("CAFA ensured that nearly all large-scale class actions could be filed in or removed to federal court."); Gilles, *supra* note 43, at 388; *supra* notes 38–43 and accompanying text (discussing federal courts' effective eradication of mass tort class actions). Most mass tort class actions involve class members from different states and an aggregate amount-in-controversy greater than five million dollars. *See* Class Action Fairness Act § 4, 28 U.S.C. § 1332 (outlining new requirements for diversity jurisdiction over class actions). A study of class action settlements in federal courts in the wake of CAFA found that, of the 688 settlements during 2006 and 2007, "there were almost no mass tort class actions . . . settled over the two-year period." Fitzpatrick, *supra* note 2, at 818–19.

[77] *See, e.g.*, Michael Isaac Miller, Note, *The Class Action (Un)Fairness Act of 2005: Could It Spell the End of the Multi-State Consumer Class Action?*, 36 Pepp. L. Rev. 879, 909–29 (2009) (discussing two potential legislative alternatives by which to mitigate CAFA's negative effect on consumers). Historically, federal courts have been less accepting of plaintiffs' arguments in class actions than state courts. *See* Erichson, *supra* note 45, at 1598; Gilles, *supra* note 43, at 385–88. Because CAFA makes it easier for defendants to remove to federal court, the effect is that plaintiffs have a lower chance of succeeding. *See* Erichson, *supra* note 45, at 1598; Gilles, *supra* note 43, at 385–88.

tended that the reform bill would be more beneficial if it prescribed harsh penalties for abusive firms like Milberg Weiss and banned excessive attorney's fees.[78] CAFA, they maintained, was a gift to large corporations that greatly reduced their liability by shielding them from valid claims.[79]

2. Case Law Post-CAFA

In the time since Congress enacted CAFA, the Supreme Court has further limited the class action's utility.[80] The Court's 2011 decision in *Wal-Mart Stores, Inc. v. Dukes* considerably raised the bar to entry for plaintiffs seeking relief under Rule 23.[81] Moreover, the Court's rulings in *AT&T Mobility LLC v. Concepcion* and *Morrison v. National Australia Bank Ltd.*, in 2011 and 2010 respectively, have left many American plaintiffs without recourse.[82]

a. *Employment and Consumer Class Actions:* Dukes *and* Concepcion

In the 2011 case, *Dukes*, the Court overturned a lower court ruling certifying a class of 1.5 million women that alleged that Wal-Mart engaged in gender-based employment discrimination.[83] The Court concluded that the class was erroneously certified under Rule 23(b)(2) because the case involved claims for individualized relief that could not be satisfied through a single injunction or declaratory judgment.[84] Additionally, five members of the Court, led by Justice Antonin Scalia, held that the class could not be certified under any of Rule 23's other provi-

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[78] *See, e.g.*, 151 Cong. Rec. E388 (2005) (statement of Rep. Betty McCollum) (urging Congress to adopt a substitute bill that would "put[] an end to 'coupon settlements' and court shopping" while ensuring that the "class action system [is] accessible and effective").

[79] *See, e.g.*, William Branigin, *Congress Changes Class Action Rules*, Wash. Post (Feb. 17, 2005, 3:55 PM), http://www.washingtonpost.com/wp-dyn/articles/A32674-2005Feb17.html. U.S. Representative Ed Markey, of Massachusetts, described the bill as "the final payback to the tobacco industry, to the asbestos industry, to the oil industry, to the chemical industry at the expense of ordinary families." *Id.* The Association of Trial Lawyers of America derided CAFA as "a shameful attack on Americans' legal rights." *Id.*

[80] *See Dukes*, 131 S. Ct. at 2557; *Concepcion*, 131 S. Ct. at 1748; *Morrison*, 130 S. Ct. at 2888.

[81] *See* Fed. R. Civ. P. 23; *Dukes*, 131 S. Ct. at 2557; Erwin Chemerinsky, *Closing the Courthouse Doors*, 14 Green Bag 2d 375, 378–80 (2011) (discussing the limiting effect of *Dukes*).

[82] *See Concepcion*, 131 S. Ct. at 1748; *Morrison*, 130 S. Ct. at 2888.

[83] *See Dukes*, 131 S. Ct. at 2557.

[84] *See* Fed. R. Civ. P. 23(b)(2) (permitting class actions to be certified only if injunctive or declaratory relief is appropriate for the class as a whole); *Dukes*, 131 S. Ct. at 2557.

sions because the claims lacked sufficient commonality.[85] Critics have argued that *Dukes* will make it nearly impossible for groups of legitimately aggrieved employees to collectively litigate employment discrimination claims.[86] Indeed, since *Dukes*, federal courts have applied the Court's narrow interpretation of Rule 23's commonality requirement to deny class certification.[87]

Additionally, in April 2011 the Court decided *Concepcion*, holding that the Federal Arbitration Act (FAA) preempts state laws prohibiting class action waivers in arbitration provisions of consumer contracts.[88] The plaintiffs in this case alleged that AT&T offered them free cell phones in exchange for signing phone service contracts.[89] After signing up for the service, the plaintiffs were charged $30.22 in taxes and fees corresponding to the retail price of the "free" phones.[90] The plaintiffs filed a class action against AT&T, even though their cell phone contracts contained a class arbitration waiver provision.[91] Courts in California and at least twelve other states had prohibited class action waivers as unconscionable.[92] Writing for a 5–4 majority, Justice Scalia held that the waiver was permissible because the FAA preempted these state laws, citing the need for federal uniformity and the efficiency of bilateral arbitration.[93]

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[85] *See* Fed. R. Civ. P. 23(a); *Dukes*, 131 S. Ct. at 2556–57. The dissenters disputed the majority's interpretation of subsection (a)(2)'s commonality requirement. *See Dukes*, 131 S. Ct. at 2566 (Ginsburg, J., dissenting). They argued that by conducting a dissimilarity analysis at the Rule 23(a)(2) stage, the Court rendered Rule 23(b)(3) meaningless. *Id.* Rule 23(a)(2) requires commonality, whereas Rule 23(b)(3) requires that common questions of law or fact predominate over questions affecting individual class members such that a class action is superior to other methods of adjudication. Fed. R. Civ. P. 23(a)(2), (b)(3).

[86] *See* Chemerinsky, *supra* note 81, at 380.

[87] *See, e.g.*, Walter v. Hughes Commc'ns, Inc., No. 09-2136, 2011 WL 2650711, at *7 (N.D. Cal. July 6, 2011) ("*Wal-Mart* . . . represents a significant restatement of the commonality requirement."); Lee v. ITT Corp., 275 F.R.D. 318, 325 (W.D. Wash. 2011) (holding that, in light of *Dukes*, the plaintiffs' claims for individualized awards of back wages did not satisfy Rule 23's commonality requirement).

[88] *See Concepcion*, 131 S. Ct. at 1748. The function of a class action waiver provision is to contractually limit a consumer's ability to seek recourse in concert with others—even if all members of a group of consumers are similarly aggrieved—and to force resolution of all claims by arbitration. Rubenstein, *supra* note 1, § 6:63.

[89] *Concepcion*, 131 S. Ct. at 1744–45.

[90] *Id.*

[91] *Id.*

[92] Benjamin Sachs-Michaels, Note, *The Demise of Class Actions Will Not Be Televised*, 12 Cardozo J. Conflict Resol. 665, 678–79 (2011) (noting that "the unconscionability of class action waivers has been widely recognized in state courts").

[93] *See Concepcion*, 131 S. Ct. at 1752–53.

In a strongly worded dissent, Justice Stephen Breyer argued that the majority's decision would have negative effects on potential claimants.[94] Justice Breyer maintained that collective redress, whether in arbitration or litigation, protects consumers and holds companies accountable for large-scale fraud or deception.[95] By precluding individuals with the same claim from engaging in class arbitration, Justice Breyer contended that the Court's opinion would result in millions of small-dollar claims going unaddressed.[96] In Justice Breyer's opinion, no "rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim."[97] Instead, Justice Breyer argued, the majority's holding encouraged corporations to circumvent class claims entirely by inserting class arbitration waiver provisions into every consumer contract.[98]

b. *Securities Fraud Class Actions:* Morrison

In the securities fraud context, the Supreme Court has also limited class actions by narrowly re-interpreting the scope of federal law.[99] In the 2010 case, *Morrison*, the Supreme Court reinterpreted the Securities Exchange Act so as to prohibit the extraterritorial application of its private right of action.[100] *Morrison* involved a foreign-cubed (f-cubed) claim—a class of foreign investors brought suit in the United States against a foreign corporation in connection with securities transactions that occurred on foreign exchanges.[101] The plaintiffs sued under section 10(b) of the Act, which prohibits "manipulative or deceptive" conduct "in connection with the purchase or sale of any security."[102] Section 10(b) is the provision under which plaintiffs file the majority of

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[94] *See id.* at 1756–62 (Breyer, J., dissenting).

[95] *Id.* at 1761.

[96] *Id.* at 1760–61 (quoting Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) ("The *realistic* alternative to a class action is not [millions of] individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.").

[97] *See id.* at 1761.

[98] *See id.*; Scott Dodson, *Squeezing Class Actions*, SCOTUSblog (Aug. 30, 2011, 3:35 PM), http://www.scotusblog.com/2011/08/squeezing-class-actions/ (arguing that "*Concepcion* permits . . . defendants, through private arbitration agreements, to eliminate the class mechanism altogether").

[99] *See Morrison*, 130 S. Ct. at 2888 (limiting the extraterritorial reach of the Securities Exchange Act).

[100] *Morrison*, 130 S. Ct. at 2888.

[101] *Id.* at 2875–77.

[102] Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78(j) (2006 & Supp. IV 2011); *Morrison*, 130 S. Ct. at 2876.

securities class actions.[103] The *Morrison* plaintiffs alleged that the defendant, National Australia Bank, artificially inflated the price of its ordinary stock, thereby causing those who purchased shares on the Australian Stock Exchange to incur losses.[104]

Prior to *Morrison*, federal courts applied a more expansive "conduct and effects" test to determine the Securities Exchange Act's reach.[105] Under this test, many courts permitted plaintiffs to bring section 10(b) claims related to securities listed and sold abroad.[106] In *Morrison*, however, the Court upheld dismissal of the f-cubed class claim, finding that Congress intended section 10(b) to apply only "in connection with the purchase or sale of a security listed on an American stock exchange."[107] Because the *Morrison* plaintiffs purchased securities listed abroad, their claim did not survive the Court's new "transactional test."[108] The majority expressed concern that the Act's extraterritorial application would unduly interfere with foreign markets and threaten international comity.[109] It also feared that a permissive reading of section 10(b) would further expand class litigation in American courts.[110]

Since *Morrison*, federal courts have considerably narrowed their application of section 10(b), utilizing the transactional test to dismiss claims arising out of foreign exchanges.[111] In some cases, this reinter-

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[103] *See* 15 U.S.C. § 78(j); Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 22:1 (4th ed. 2002).

[104] *Morrison*, 130 S. Ct. at 2876.

[105] *See id.* at 2889 (Stevens, J., concurring) (describing the conduct-and-effects test as "the 'north star' of § 10(b) jurisprudence").

[106] *See id.* (explaining that "courts have uniformly agreed that Section 10(b) can apply to a transnational securities fraud" if substantial conduct occurred or substantial effects were felt in the United States (quoting Brief for the United States as Amicus Curiae Supporting Respondents at 15, *Morrison*, 130 S. Ct. 2869 (No. 08-1191))).

[107] *Id.* at 2888.

[108] *Id.*

[109] *Id.* at 2885–86; *see* Monestier, *supra* note 7, at 74 ("It is arrogant and imperialistic for U.S. courts to attempt to bind foreign claimants to a result reached in an action thousands of miles away that they had no knowledge of or control over."). As a result of *Morrison*, however, foreign plaintiffs may find themselves without relief if their home jurisdictions do not permit class actions. *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, 7–9 (2011).

[110] *Morrison*, 130 S. Ct. at 2886 ("While there is no reason to believe that the United States has become the Barbary Coast for those perpetrating frauds on foreign securities markets, some fear that it has become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets.").

[111] *See, e.g.*, Cornwell v. Credit Suisse Grp., 729 F. Supp. 2d 620, 622 (S.D.N.Y. 2010) (dismissing a section 10(b) claim by American and foreign plaintiffs arising out of transactions on the Swiss Exchange); Stackhouse v. Toyota Motor Co., No. 10-0922, 2010 WL 3377409, at *1 (C.D. Cal. July 16, 2010) (dismissing American investors' section 10(b) suit

pretation has barred American plaintiffs who purchased securities abroad from seeking relief.[112] Thus, the Court's desire to maintain international comity has already left many American plaintiffs without American remedies.[113] In light of *Morrison*, *Concepcion*, *Dukes*, and CAFA, some have suggested that "it is not a stretch to wonder if we are hearing the death knell of the class action."[114]

II. Rebirth of European Aggregate Litigation

For much of the last two hundred years, European legal systems flatly rejected the class action.[115] Today, however, Europe is increasingly willing to look past the real and perceived abuses of the class action device to obtain its benefits.[116] This Part examines Europe's slow but steady acceptance of aggregate litigation.[117] Section A discusses Europe's historical rejection of the class action and its traditional criticisms.[118] Section B summarizes recent advancements in aggregate litigation by Member States of the European Union, including the Netherlands.[119] Section C then outlines two proposals for collective redress issued by the governance structure of the EU itself.[120] Finally, Section D describes three recent actions initiated under the Dutch Settlement Act.[121]

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against a foreign corporation because "the Exchange Act was not intended to regulate foreign exchanges"); *see also* Vincent M. Chiappini, Note, *How American Are American Depositary Receipts? ADRs, Rule 10b-5 Suits, and* Morrison v. National Australia Bank, 52 B.C. L. Rev. 1795, 1806–12 (2011) (discussing district courts' reactions to *Morrison*).

[112] *See Cornwell*, 729 F. Supp. 2d at 622. Courts have not limited the transactional test to the facts of *Morrison*—the f-cubed claim—but have restricted f-squared claims brought under section 10(b). *See id.* In f-squared claims, American plaintiffs have brought suit in the United States alleging fraud perpetrated by a foreign company regarding shares listed on foreign exchanges. *See id.*; Chiappini, *supra* note 111, at 1809 n.117.

[113] *See Morrison*, 130 S. Ct. at 2885–86; *Stackhouse*, 2010 WL 3377409, at *1.

[114] Dodson, *supra* note 98; *see* Erichson, *supra* note 45, at 1602 ("[A]t least some CAFA proponents viewed the legislation as a class action death knell."). One critic of the Supreme Court's recent class action jurisprudence has been more dramatic. *See* Resnik, *supra* note 37, at 169 ("Do courts in democracies remain legitimate if their doors are shut to many potential claimants?").

[115] *See* Tiana Leia Russell, *Exporting Class Actions to the European Union*, 28 B.U. Int'l L.J. 141, 142–43 (2010).

[116] *See id.*

[117] *See infra* notes 122–255 and accompanying text.

[118] *See infra* notes 122–136 and accompanying text.

[119] *See infra* notes 137–182 and accompanying text.

[120] *See infra* notes 183–223 and accompanying text.

[121] *See infra* notes 224–255 and accompanying text.

A. *The Death of European Collective Litigation?—Familiar Arguments Against the Class Action*

As the class action emerged in the United States during the early nineteenth century, it simultaneously fell out of favor across the Atlantic.[122] America derived its early notions of the class action from England, which was largely unique among European countries in permitting collective redress.[123] England had recognized some form of group litigation as far back as the Middle Ages.[124] During the mid-nineteenth century, however, England rapidly eliminated group litigation from the common law system.[125]

One of the major critiques of group litigation in England at the time was its theory of representation.[126] In group litigation, one individual or association represented an entire class of people and could make choices that significantly affected the rights of the other members.[127] During the early nineteenth century, as England considered codifying this common law tradition, the theory of class representation generated considerable controversy.[128] Despite emerging scholarship on the utility of representative litigation, Parliament enacted reforms that effectively killed group litigation in England by 1850.[129]

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[122] Stephen C. Yeazell, From Medieval Group Litigation to the Modern Class Action 211–13 (1987) (describing the state of group actions in England during the nineteenth century).

[123] *Id.*

[124] *See* Rubenstein, *supra* note 1, § 1:12.

[125] *See* Yeazell, *supra* note 122, at 210–12.

[126] *See* Rubenstein, *supra* note 1, § 1:12. Frederic Calvert, the nineteenth-century legal scholar, proposed implementing a representational system. Yeazell, *supra* note 122, at 211. The chief concern with his proposal was that there was seemingly no end to the theory of representation, to the point that "*any* interest [could] be represented by anyone finding himself in the same situation as others." *Id.* Professor Stephen Yeazell posits that the burden of imposing limits "may have seemed an unattractive and difficult project" to the Parliamentarians entrusted to implement such a system. *Id.* at 212.

[127] Yeazell, *supra* note 122, at 199.

[128] *Id.*; *see supra* note 126 (discussing the controversy).

[129] Yeazell, *supra* note 122, at 211 (explaining that "though group litigation remains to this day among the procedures theoretically available to English litigants, it is a device rarely employed"). England's prohibition on contingency fee agreements and its loser-pays principle traditionally made high-stakes group actions "prohibitively risky" for plaintiffs. Michael D. Goldhaber, *Shell Games: Amsterdam Could Become the Class Action Capital of Europe—If the U.S. Declines the Honor*, Am. Law., Jan. 7, 2008, at 27, *available at* http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=900005499991&slreturn=1; *see* Issacharoff & Miller, *supra* note 6, at 198 ("The contingency fee permits the attorney to fund the litigation and thus overcomes the problems of liquidity that may make it impossible for an individual to pursue his rights."). Today, however, England permits the "conditional fee model." Issacharoff & Miller, *supra* note 6, at 198 n.57.

Since that time, Britain and the rest of Europe have largely viewed the American class action with disdain.[130] European aversion to American-style class actions has been based on the same arguments espoused by the class action's domestic critics.[131] Most troubling to the European legal community has been the role of private entrepreneurial lawyers.[132] European legal systems have long relied solely on public authorities to enforce the law, in contrast with the United States, which permits lawyers to represent large groups of individuals and assume a role of a private attorney general.[133] Private enforcement is particularly foreign to civil law jurisdictions, which are wary of permitting aggregate litigation that would enable "non-state actors to assume the collective responsibility . . . traditionally reserved exclusively for the state."[134] Opponents of collective redress argue that introducing such a device in Europe could foster a culture of American-style litigiousness.[135] Despite these critiques, many EU Member States already have or are currently considering adopting class mechanisms modeled to some extent on the American system.[136]

B. *Aggregate Litigation Mechanisms in European Member States*

The class action, once "decried as the perversity of rapacious Americans," has started to gain traction throughout Europe.[137] The EU's measured acceptance of aggregate litigation has been driven largely by developments in its Member States.[138] Many Member States have implemented or are considering legislation that would permit group actions.[139] Legislatures in France, Ireland, and Finland, for ex-

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[130] *See* Issacharoff & Miller, *supra* note 6, at 179.

[131] *See id.* at 180.

[132] *See id.* at 191.

[133] *See* Russell, *supra* note 115, at 174; *see also* Issacharoff & Miller, *supra* note 6, at 180 (noting that for European countries, a "move away from centralized public enforcement is a sea change in legal structures").

[134] Issacharoff & Miller, *supra* note 6, at 209. This concern echoes that expressed by English legislators in the 1840s. *See* YEAZELL, *supra* note 122, at 210–11 (explaining how the increasing complexity and enforceability of legislation overtook the need for group litigation to enforce rights).

[135] *E.g.*, Issacharoff & Miller, *supra* note 6, at 181; U.S. Chamber Inst. for Legal Reform, Response to the Consultation on Collective Redress 1–2 (Apr. 2011); *see infra* notes 206–207 and accompanying text.

[136] *See* Nagareda, *supra* note 7, at 21–25 (including Denmark, England and Wales, Finland, France, Germany, Italy, the Netherlands, Norway, and Sweden).

[137] Issacharoff & Miller, *supra* note 6, at 179.

[138] *See* Russell, *supra* note 115, at 169–70.

[139] *See* Nagareda, *supra* note 7, at 21–25; Russell, *supra* note 115, at 168–69.

ample, are currently in the process of developing mechanisms for collective redress.[140] Furthermore, several Member States, including the Netherlands and Italy, have recently implemented significant legislation authorizing aggregate litigation.[141]

Because the European class action is a new and evolving phenomenon, it is difficult to present with certainty a reliable framework of any specific country's laws.[142] Indeed, the term "aggregate litigation" is itself a more expansive construct than the well-known American-style class action.[143] Several general characteristics are, however, commonly embedded in Member States' laws.[144] These commonalities are in many respects responsive to the perceived infirmities of the American system.[145] They include: (1) a restricted scope or function; (2) an opt-in, rather than opt-out, feature; (3) limitations on standing; and (4) a modest scheme for damages.[146] An outlier from the rest of Europe, the Netherlands actually permits mass claims to be brought in various legal sectors, requires plaintiffs to opt out of classes, and mandates only a loose connection between the alleged injury and the forum.[147] As a result, the Netherlands may offer plaintiffs—including Americans—a more favorable forum in which to bring mass claims.[148]

1. Restricted Scope and Function of Aggregate Litigation in Member States

Observers of the developing aggregate litigation mechanisms in EU Member States have noted that they "tend to be more circumscribed in scope" than Rule 23 in the United States.[149] Member States

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[140] *See* Russell, *supra* note 115, at 169.

[141] *See infra* notes 142–182 and accompanying text.

[142] Issacharoff & Miller, *supra* note 6, at 191–92 ("Analyzing European class actions is like shooting at a moving target."). Some critics of aggregate litigation on the Member State level have argued for trans-European uniformity. *See* Russell, *supra* note 115, at 169 ("The inconsistent and piecemeal attempts by Member States to introduce collective actions highlight the need for a community-wide response from the E.U.").

[143] *See* Nagareda, *supra* note 7, at 20; *supra* note 7 (discussing the difference between "aggregate litigation" and "class action"). Aggregate litigation includes mechanisms used only for settlement purposes, such as the Dutch Settlement Act. *See infra* notes 149–182 and accompanying text.

[144] Monestier, *supra* note 7, at 48.

[145] *See* Nagareda, *supra* note 7, at 27–28.

[146] *See* Monestier, *supra* note 7, at 48.

[147] *See infra* notes 149–182 and accompanying text.

[148] *See infra* notes 256–332 and accompanying text (discussing the Dutch Settlement Act and its value to American plaintiffs).

[149] Monestier, *supra* note 7, at 46 (contrasting the EU's Member States with the United States, where class plaintiffs can "pursue damages in a wide variety of substantive contexts").

typically restrict collective action to certain legal sectors.[150] In Germany, for instance, class plaintiffs can only bring claims for financial fraud.[151] Meanwhile, plaintiffs in Italy can bring class actions for damages on a broader range of issues, including tortious conduct, unfair commercial practices, and anticompetitive practices.[152] The Netherlands originally intended that its collective redress statute, the 2005 Dutch Act on Collective Settlement of Mass Damages ("Dutch Settlement Act"), apply only to mass tort claims.[153] Today, however, the Netherlands no longer enforces this limitation, and Dutch courts have confirmed class settlements in both securities and products liability actions.[154]

Additionally, some Member States permit claim aggregation for limited functions like settlement.[155] In the Netherlands, for example, the Dutch Settlement Act does not permit full adjudication of claims and lacks coercive authority to force settlement.[156] Instead, the Act provides for judicial approval and validation of voluntary out-of-court settlements.[157] In reviewing settlements, the Amsterdam Court of Appeals

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[150] *See id.* at 48.

[151] Nagareda, *supra* note 7, at 23–24.

[152] *See* Roald Nashi, Note, *Italy's Class Action Experiment*, 43 Cornell Int'l L.J. 147, 154 (2010). Observers have noted that "the Italian experiment is a significant advance" that comes close "to a full-blown, American-style class action." *Id.* at 150. Still, the Italian system has not yet been thoroughly tested in court, and thus its similarity to the American system in practice is unclear. *See id.*

[153] *See* M.J. van der Heijden, *Class Actions/Les Actions Collectives*, Electronic J. Comp. L., Dec. 2010, at 7, http://www.ejcl.org/143/art143-18.pdf. The Dutch Settlement Act is sometimes referred to as "WCAM," which is an abbreviation for its Dutch name, Wet Collectieve Afhandeling Massaschade. *Id.* at 1; *see* WCAM, *codified in* BW bk. 7, arts. 907–10 *and* Rv bk. 3, tit. 14, arts. 1013–18.

[154] *See* Ianika N. Tzankova, Professor, Tilburg University, Presentation at the Fourth International Conference on the Globalization of Class Actions at Florida International University, Trans-National Litigation: Dutch Developments 8 (Dec. 10, 2010), http://globalclassactions.stanford.edu/sites/default/files/documents/Transnational%20Litigation%20Dutch%20Developments.pdf.

[155] *See* Murtagh, *supra* note 109, at 36–39 (describing the Dutch Settlement Act in detail).

[156] *See id.* at 36–37. Plaintiffs in the Netherlands can, however, adjudicate collective actions under the Dutch Civil Code, but may only seek injunctive relief. *See* van der Heijden, *supra* note 153, at 14. Such collective actions are sometimes "considered as a springboard" to a settlement under the Dutch Settlement Act. *Id.* at 5. Thus, although the Dutch Settlement Act is not itself a coercive mechanism, class plaintiffs can sue or threaten to sue under the Dutch Civil Code to facilitate a settlement under the Act. *See id.* at 4–5.

[157] *See* van der Heijden, *supra* note 153, at 14 (noting that some observers compare the Dutch Settlement Act to an arbitration mechanism). One scholar has compared the Dutch Settlement Act's settlement certification process to the voluntary mass tort settlement in the 1997 case *Amchem Products, Inc. v. Windsor*, which the U.S. Supreme Court ultimately rejected. Nagareda, *supra* note 7, at 32 ("One might say that the Dutch procedure brings about a full-scale *Amchem*-ization of aggregate litigation, casting it exclusively as an avenue

can only entertain arguments on "the substantive and procedural fairness and efficiency of the settlement."[158]

2. The Opt-In vs. Opt-Out Debate

Rather than requiring individuals to opt out of a proposed class as is required under Rule 23 in the United States, Member States generally require class members to opt in.[159] Instead of enabling litigation, most European aggregate litigation devices prioritize closure.[160] An opt-in mechanism requires each member of the class to affirmatively join the proceeding.[161] This ensures smaller classes and facilitates swift resolution of claims, but also necessarily reduces access to courts.[162] Italy's class action statute, for example, provides a 120-day period following receipt of notice of the suit during which potential claimants may opt in.[163] Although this provides for peremptory closure of class actions, it may also undercut the ability of potential claimants to participate in suits in which they have legitimate claims.[164]

In contrast, some Member States follow the American opt-out model, in which class counsel defines the class, subject to certification by a court.[165] The Netherlands is a notable adherent to the American model, and, under the Dutch Settlement Act, permits class members to

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for peacemaking . . . ."); *see* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 600 (1997); *supra* note 43 (discussing *Amchem*).

[158] Murtagh, *supra* note 109, at 37.

[159] *See* Monestier, *supra* note 7, at 48; *see also* FED. R. CIV. P. 23 (setting forth the U.S. opt-out model).

[160] *See* Nagareda, *supra* note 7, at 28 ("[O]ne might say that Europe seeks to strike a precarious balance—to facilitate the closure of related civil claims in the aggregate but, at the same time, not to 'enable' litigation.").

[161] *Id.* at 28–29 (citing the "high-cost campaign of client recruitment" required by an opt-in class action regime).

[162] *See id.*

[163] Nashi, *supra* note 152, at 170.

[164] *Id.* (explaining that the original draft of the Italian statute contained a longer opt-in period, which "was important for robust participation"); *see* Issacharoff & Miller, *supra* note 6, at 206 (suggesting that countries with opt-in procedures should ensure adequate plaintiff participation by requiring sufficient notice, providing simple opt-in forms, and encouraging outreach by representative plaintiffs through incentives). Scholars have also contended that the opt-in systems in Europe are judicially inefficient. *See, e.g.*, Rachael Mulheron, *The Case for an Opt-Out Class Action for European Member States: A Legal and Empirical Analysis*, 15 COLUM. J. EUR. L. 409, 448–50 (2009) (noting "the utility of an opt-out regime for . . . low-value claims").

[165] Nagareda, *supra* note 7, at 21, 24–25 (noting that Denmark (Danish Class Action Act), the Netherlands (Dutch Settlement Act), and Norway (Mediation and Civil Procedure Act) all permit opt-out aggregate claims).

opt out.[166] There, as in the United States, the parties must provide notice of the claim to all similarly injured persons.[167] If the court approves a settlement, the agreement is automatically binding on all injured parties, except for those who have opted out.[168] Because actual opt-outs are few, plaintiffs' lawyers sometimes propose overly inclusive classes in hopes of certifying a larger class, increasing access to courts, and garnering a larger settlement.[169] Regardless, the Netherlands' opt-out system remains an anomaly in Europe.[170]

3. Organizational Standing

Member States also tend to restrict standing in aggregate claims to organizations or foundations, denying standing to individuals.[171] For example, in the Netherlands, only a foundation or association may act in the interests of the injured class to negotiate a settlement with the offending party.[172] The members of the class who are represented by the foundation, however, need only a loose affiliation with the forum to initiate a claim.[173] Because such organizations must be authorized by the state, some critics have noted that this model could be abused if only a select few organizations are authorized as representatives.[174] In contrast, Italy's recently revised class action statute addressed this issue,

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[166] *See* BW bk. 7, art. 908(2) ("The declaration that the agreement is binding shall have no consequences for a person entitled to compensation who has notified the [class representative] . . . that he does not wish to be bound."); Murtagh, *supra* note 109, at 36–37.

[167] Murtagh, *supra* note 109, at 36–37.

[168] *Id.*; *see* Monestier, *supra* note 7, at 52 n.178 (describing the process under the Dutch Settlement Act by which judgments issued by American courts are reviewed and enforced in the Netherlands).

[169] Nagareda, *supra* note 7, at 29.

[170] *See* Nagareda, *supra* note 7, at 30 ("Opt-out procedures remain very much the exception in Europe . . . ."); Russell, *supra* note 115, at 177.

[171] *See* Monestier, *supra* note 7, at 48.

[172] Murtagh, *supra* note 109, at 37; Willem H. van Boom, *Collective Settlement of Mass Claims in the Netherlands*, *in* Auf dem Weg zu einer europaischen Sammelklage? 171, 189 (Matthias Casper et al. eds., 2009) ("The law does not require consumers to become a member of a representative association in order to profit from settlements negotiated by such associations."), *available at* http://ssrn.com/abstract=1456819.

[173] van Lith, *supra* note 9, at 33–34; *see infra* notes 264–273 and accompanying text.

[174] van Boom, *supra* note 172, at 179–80; *see* Issacharoff & Miller, *supra* note 6, at 194 (noting that the interests of a consumer organization and the individual claimants it represents may not always align); Nashi, *supra* note 152, at 168 ("The potential for collusive settlement is increased where the consumer organization is not just a repeat player but the only player in the litigation and settlement of a type of claim.").

and now permits individual consumers, as well as representative organizations, to initiate aggregate claims.[175]

4. Limits on Damages

Lastly, Member States tend to limit windfall recoveries for both plaintiffs and their attorneys to a far greater extent than the United States.[176] Many states restrict the amount of damages a class can obtain to the amount of the actual loss, or do not permit court awarded damages at all.[177] In the Netherlands, courts cannot actually award damages in class claims.[178] Instead, they can issue injunctive relief under the Dutch Civil Code or, under the Dutch Settlement Act, issue declaratory judgments certifying out-of-court settlements between parties.[179] As both plaintiffs and defendants must jointly petition the Amsterdam Court of Appeals to approve the settlement, the Act assumes that the parties will reach an equitable accounting of damages and attorney's fees.[180] The Italian model is again more robust.[181] It offers a complete range of court-prescribed damages in a similar fashion to the United States.[182]

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[175] Nashi, *supra* note 152, at 169.

[176] *See* Monestier, *supra* note 7, at 48.

[177] *See id.* at 47.

[178] *See* Rhonda Wasserman, *Transnational Class Actions and Interjurisdictional Preclusion*, 86 Notre Dame L. Rev. 313, 357 (2011) (noting that under the Dutch Settlement Act, "the threat of a damages class action . . . is unavailable").

[179] *See* van Boom, *supra* note 172, at 178 (describing the Dutch Settlement Act's certification mechanism as "a composite of a voluntary settlement contract sealed with a 'judicial trust mark' attached to the contract").

[180] *See* BW bk. 7, art. 907(3)(b) (stating that the Amsterdam Court of Appeals will not certify a settlement if "the amount of the compensation awarded is not reasonable"); Wasserman, *supra* note 178, at 357–58 (discussing settlement under the Dutch Settlement Act).

[181] Nashi, *supra* note 152, at 151.

[182] *Id.* ("This development moves Italy's private enforcement mechanism away from its continental counterparts and closer to the American-style class action system under Rule 23 . . . ."); *see* Fed. R. Civ. P. 23. Although Europe has traditionally rejected contingency fee agreements, some member states—particularly those with collective litigation schemes—have begun to permit such agreements because they are an effective means of litigation funding. *See* Issacharoff & Miller, *supra* note 6, at 197–202. Both Italy and Germany, for example, repealed their bans on contingency fee agreements in 2006. *Id.* at 198 (Germany); Nashi, *supra* note 152, at 162 (Italy).

C. *Guidance from the European Union: Proposals for a Trans-European System of Collective Redress*

On a macro level, the EU has made strides in the past decade to study, support, and implement procedures for collective redress.[183] These policies have focused on improving the remedies available to those damaged by infringements of the European Community's (EC) competition laws.[184] This Section describes two major policy initiatives by Europe's supranational government.[185] First, it summarizes the European Commission's 2008 White Paper on collective damages actions.[186] Second, it outlines the proposals contained in the European Parliament's 2012 Resolution, *Towards a Coherent European Approach to Collective Redress*.[187]

1. Commission White Paper on Mass Damages Actions

In 2008, the Commission of the European Communities ("Commission") published the *White Paper on Damages Actions for Breach of the EC Antitrust Rules* ("*White Paper*"), which recommended using aggregate litigation to adjudicate mass claims of antitrust infringement.[188] The *White Paper* recognized two main benefits of aggregate litigation—compensation and deterrence—but prioritized the former over the latter.[189] Europe continues to rely heavily on public regulatory agencies to monitor and deter underhanded corporate conduct, and is hesitant to shift deterrence responsibility to private actors.[190] Therefore, the *White Paper*'s proposals were calculated to "create an effective system of private enforcement by means of damages actions that complements, but does not replace or jeopardise, public enforcement."[191]

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[183] *See* Russell, *supra* note 115, at 169–71.

[184] *See Commission White Paper on Damages Actions for Breach of EC Antitrust Rules*, at 3, COM (2008) 165 final (Apr. 2, 2008) [hereinafter *White Paper*]; Russell, *supra* note 115, at 169–71 (discussing the Commission's prior studies of collective redress).

[185] *See infra* notes 188–223 and accompanying text.

[186] *See infra* notes 188–202 and accompanying text.

[187] *See infra* notes 203–223 and accompanying text.

[188] *White Paper*, *supra* note 184, at 2–3.

[189] *Id.* at 3 ("Full compensation is . . . the first and foremost guiding principle."); *see* Russell, *supra* note 115, at 175 (discussing the dual benefits).

[190] *White Paper*, *supra* note 184, at 2–3. ("[T]he legal framework for more effective antitrust damages actions should be based on a genuinely European approach."); *see* Nagareda, *supra* note 7, at 3 (noting that some critics view American litigiousness "as the regrettable byproduct of a deep cultural hostility to the kind of robust bureaucratic administration by public regulatory bodies embraced in Europe").

[191] *White Paper*, *supra* note 184, at 3.

The *White Paper* suggested three limitations on aggregate antitrust litigation that significantly distinguish the envisioned European system from the American model.[192] First, the Commission recommended representative actions brought by qualified entities rather than individual plaintiffs.[193] This is similar to the organizational standing requirement under the Dutch Settlement Act.[194] Qualified entities, which could include trade and consumer associations as well as government agencies, could either be certified for particular actions or approved in advance for all potential claims.[195]

Second, the *White Paper* proposed an opt-in model of collective redress in which claimants must affirmatively join the class.[196] In an opt-in system, qualified entities would be able to advocate on behalf of "identified," rather than simply "identifiable," victims.[197] The Commission intended the opt-in rule to prohibit class attorneys from artificially inflating class sizes so as to obtain larger judgments.[198] As the *White Paper* made clear, however, "any individual" with a valid antitrust infringement claim would still be entitled to file an individual action even if they failed to opt into the class.[199]

Third, the *White Paper* recommended that damages in antitrust infringement claims be limited to the amount of actual losses the plaintiffs suffered, including lost profits.[200] Even though the Commission prioritized the compensatory function of aggregate litigation, it was intent on prohibiting "the unjust enrichment of the victims."[201] The Commission's central goal was to simplify, accelerate, and expand the

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[192] *See id.* at 4–10.

[193] *Id.* at 4.

[194] *See* BW bk. 7, art. 907(1) (requiring settlement to be negotiated by a foundation or association); *White Paper*, *supra* note 184, at 4; Murtagh, *supra* note 109 at 37.

[195] *White Paper*, *supra* note 184, at 4.

[196] *Id.* As noted in Part II.B.2, most of the Member States that have accepted aggregate litigation have also chosen the opt-in model. *See supra* notes 159–170 and accompanying text.

[197] *See White Paper*, *supra* note 184, at 4. The White Paper leaves open the possibility of representing identifiable victims in "restricted cases." *Id.*; *see* Issacharoff & Miller, *supra* note 6, at 202 (contrasting the opt-in model with the American opt-out scheme, "under which it is possible for a class member to be a part of a lawsuit and suffer a preclusive judgment without any knowledge").

[198] *See White Paper*, *supra* note 184, at 4.

[199] *See id.*

[200] *Id.* at 7. The White Paper notes the Commission's intention to provide further guidance for calculating damages. *Id.*

[201] *Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules*, at 58, SEC (2008) 404 final (Apr. 2, 2008); *see White Paper*, *supra* note 184, at 7.

process by which parties aggrieved by violations of the EC antitrust rules could collect reasonable damages.[202]

2. Towards a Coherent European Approach to Collective Redress

Recent developments in the European Parliament have brought the EU closer than ever to adopting a trans-European scheme for collective litigation.[203] In February 2011, the European Commission began to solicit public consultation on a proposal entitled *Towards a Coherent European Approach to Collective Redress.*[204] The Commission received over three hundred submissions from national governments, trade organizations, businesses (including law firms), and citizens from thirty-one countries around the world.[205] The responses were unsurprising: governments, consumer organizations, and citizens overwhelmingly favored new mechanisms for aggregate litigation to protect consumers,[206] while the majority of businesses and corporate law firms argued against such change.[207]

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[202] *White Paper*, *supra* note 184, at 3.

[203] *See Resolution*, *supra* note 7, at 36–43; *Legal Affairs Report*, *supra* note 7, at 1–30.

[204] Press Release, European Comm'n, Commission Seeks Opinions on the Future for Collective Actions in Europe (Feb. 4, 2011), http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/132&format=HTML&aged=0&language=EN&guiLanguage=en; *see Public Consultations: Towards a Coherent European Approach on Collective Redress*, Eur. Commission (Dec. 19, 2011) [hereinafter *Consultation Website*], http://ec.europa.eu/competition/consultations/2011_collective_redress/index_en.html (containing the responses to the Commission's Consultation).

[205] *See* Burkhard Hess, Evaluation of Contributions to the Public Consultation and Hearing: "Towards a Coherent European Approach to Collective Redress" 3 (2011) (summarizing responses), http://ec.europa.eu/competition/consultations/2011_collective_redress/study_heidelberg_summary_en.pdf.

[206] *See, e.g.*, European Competition Lawyers' Forum, Comments of the European Competition Lawyer's Forum on the Commission Staff Working Document 1–2 (Apr. 2011) (advocating for a broader application of collective redress to areas outside competition law); Nat'l Consumer Agency of Ireland, Towards a Coherent European Approach to Collective Redress 3 (Apr. 2011) ("A collective remedy . . . would go some way towards addressing the current shortcomings."); UK Competition Law Ass'n, Response to European Commission's Consultation on Collective Redress 1–13 (Apr. 2011). All responses are available on the Consultation Website. *See Consultation Website*, *supra* note 204.

[207] *See* Hess, *supra* note 205, at 5 (noting that opponents argued that "there is no conclusive evidence of an enforcement deficit"); *Consultation Website*, *supra* note 204. The Commission received twelve submissions from the United States. *See Consultation Website*, *supra* note 204. Several major American law firms, including Skadden, Arps, Slate, Meagher & Flom LLP and Covington & Burling LLP, submitted comments disfavoring collective redress. *See id.* (providing responses of Skadden and Covington & Burling). The Institute for Legal Reform, a branch of the U.S. Chamber of Commerce, also submitted a strongly-worded response arguing, somewhat ironically, against reform. *See* U.S. Chamber Inst. for Legal Reform, *supra* note 135, at 1–2.

In January 2012, after considering the submissions to the Commission's consultation, the Parliament's Committee on Legal Affairs ("Committee") issued a report ("*Legal Affairs Report*") containing recommendations should the Commission pursue a harmonized system of collective redress.[208] The Committee prefaced its *Report* by explaining that, in the near term, it was not convinced of the need for a trans-European remedy.[209] Moreover, the Committee questioned whether it was within the bounds of the Parliament's supranational governing authority to mandate such a reform.[210] Nevertheless, the *Legal Affairs Report* acknowledged that aggregate litigation could be "in the interest of victims of unlawful behaviour" who wish "to bundle their claims which they would not otherwise pursue individually."[211]

Despite the Committee's hesitance to endorse EU action, the recommendations in its *Report* formed the basis of a Resolution adopted by the Parliament on February 2, 2012.[212] In an effort to combat forum shopping, for example, the Resolution strongly urged that a trans-European mechanism for collective redress be available for all types of legal claims.[213] This was a marked departure from the *White Paper*, which proposed limiting collective redress to competition and antitrust claims.[214] Without a comprehensive and harmonized cross-border scheme, the Resolution contended, plaintiffs would aggressively forum shop between Member States' individual aggregate litigation laws.[215]

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[208] *Legal Affairs Report*, *supra* note 7, at 11. In addition to the Committee on Legal Affairs' recommendations, the *Legal Affairs Report* also contains the Opinions issued by the Committee on Economic and Monetary Affairs and the Committee on the Internal Market and Consumer Protection. *See id.* at 17–30.

[209] *Id.* at 11 ("[T]he Commission has so far failed to show the need for EU action.").

[210] *Id.* at 5 (noting that "the Commission must respect the principles of subsidiarity and proportionality with regard to any proposal that does not fall within the exclusive competence of the Union"); *see* Consolidated Version of the Treaty on the Functioning of the European Union arts. 101–102, Mar. 30, 2010, 2010 O.J. (C 83) 88–89 (delineating parameters of the Commission's and the Parliament's governing authority with respect to competition law). Moreover, the French and German submissions to the consultation also cast doubts on whether Member States would actually adhere to a trans-European regime. *See Legal Affairs Report*, *supra* note 7, at 11 n.2.

[211] *Legal Affairs Report*, *supra* note 7, at 11. It also noted that, by consolidating individual claims into one action, thereby "bringing legal certainty to the matter," aggregate litigation could appeal to defendants as well. *Id.*

[212] *Resolution*, *supra* note 7, at 36–43; *Legal Affairs Report*, *supra* note 7, at 11–16.

[213] *Resolution*, *supra* note 7, at 40 (stating that any procedural mechanism "must apply to collective redress actions in general irrespective of the sector concerned").

[214] *Compare id.* (suggesting the broad application of collective redress), *with White Paper*, *supra* note 184, at 3 (proposing a system narrowly tailored to competition claims).

[215] *See Resolution*, *supra* note 7, at 40. The Resolution stated that such a "fragmentation of national procedural and damages laws" would necessarily "weaken and not strengthen

Therefore, the Resolution insisted that any trans-European solution regulate both procedure and damages for all cross-border mass actions.[216]

The Resolution stressed that "Europe must refrain from introducing a US-style class action system," and many of its suggestions differed considerably from the American system.[217] For example, the Resolution called for the Commission to adopt an opt-in class model that permits aggrieved plaintiffs to file suit individually if they decline to join an aggregate claim.[218] Like the *White Paper*, the Resolution would prohibit punitive damages and explained that monetary damages must not exceed the actual injury sustained.[219] It also rejected contingency fees as incompatible with Europe's traditional legal payment system.[220]

Additionally, in its *Legal Affairs Report*, the Committee recommended that jurisdiction in class claims be limited to the court of the Member State in which the defendant is domiciled.[221] The *Report* also suggested implementing a €2000 cap on the claims individuals can pursue in aggregate adjudication.[222] This recommendation implicitly recognized one of the central benefits of collective redress: it enables plaintiffs with small individual claims, but large claims in the aggregate, to efficiently seek remedies in court.[223]

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access to justice within the EU." *Id.* Nevertheless, the Resolution was actually largely supportive of the aggregate litigation mechanisms introduced in individual Member States. *See id.* at 38.

[216] *Id.* at 40.

[217] *Id.* at 38. In fact, the Resolution cited the U.S. Supreme Court's 2011 decision in *Wal-Mart Stores, Inc. v. Dukes* as a positive example of American courts combating the "frivolous litigation and . . . abuse" that Europe must also prohibit. *Id.*; *see* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2557 (2011).

[218] *Resolution*, *supra* note 7, at 40. The *Resolution* explained that an opt-out mechanism would be "contrary to many Member States' legal orders and violates the rights of any victims who might participate in the procedure unknowingly and yet be bound by the court's decision." *Id.* at 41.

[219] *See id.* at 41 ("[P]unitive damages must be prohibited.").

[220] *Id.*

[221] *Legal Affairs Report*, *supra* note 7, at 16. The Parliament Resolution proposed that "Brussels I should be taken as a starting point for determining . . . jurisdiction." *Resolution*, *supra* note 7, at 43.

[222] *See Legal Affairs Report*, *supra* note 7, at 13. This recommendation is in conformity with the 2007 EC Regulation on small claims procedure. *See* Regulation 861/07, Establishing a European Small Claims Procedure, 2007 O.J. (L 199) 1 (EC).

[223] *See Resolution*, *supra* note 7, at 37; *Legal Affairs Report*, *supra* note 7, at 13. In his dissent in the 2011 U.S. Supreme Court case, *AT&T Mobility LLC v. Concepcion*, Justice Stephen Breyer acknowledged the same benefit. 131 S. Ct. at 1760–61 (Breyer, J., dissenting); *see supra* notes 94–98 and accompanying text (discussing Justice Breyer's *Concepcion* dissent).

D. *Trans-Atlantic Securities Actions and the Dutch Settlement Act*

In spite of the recent proposals by the European Commission and Parliament for a trans-European scheme for collective redress, the EU has not yet acted.[224] Instead, Member States have continued to develop disparate systems for mass actions.[225] Because they are so new and have not been thoroughly interpreted by national courts, the impact of these laws is yet unknown.[226]

In the Netherlands, however, multinational plaintiff classes have extensively used the Dutch Civil Code and the Dutch Settlement Act to resolve their disputes.[227] The Netherlands' opt-out scheme, broad jurisdictional reach, and permissive damages and attorney's fee rules have made it particularly attractive for plaintiffs resolving class disputes.[228] As one observer has noted, "the backdrop for the new trans-Atlantic . . . aggregate litigation" will be formed by "[t]he trading of securities on multiple markets."[229] Unsurprisingly, then, most of the transnational collective settlements thus far considered in the Netherlands have been securities claims.[230]

1. *Shell* Settlement

In May 2009, the Amsterdam Court of Appeals approved a $352 million securities fraud settlement against Royal Dutch/Shell Petroleum ("*Shell*").[231] This was the first transnational securities fraud settle-

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[224] *See Resolution*, *supra* note 7, at 36–43; S.I. Strong, *Regulatory Litigation in the European Union: Does the U.S. Class Action Have a New Analogue?*, 88 Notre Dame L. Rev. (forthcoming 2013) (manuscript at 75), *available at* http://ssrn.com/abstract=2123608.

[225] Russell, *supra* note 115, at 180 (explaining that "the process of legal and procedural harmonization" of aggregate litigation throughout Europe "will be long, complex, and the outcome is as yet uncertain").

[226] Monestier, *supra* note 7, at 49 ("[A]ggregate litigation procedures . . . have not yet been fully 'road tested.'"); Russell, *supra* note 115, at 173 (explaining that the overall impact of these statutes will depend on "the way regulations are interpreted and legal standards are applied by the courts").

[227] *See* van der Heijden, *supra* note 153, at 1.

[228] *See* Nagareda, *supra* note 7, at 41. Although the Netherlands is an attractive destination for class settlements, Professor Richard Nagareda explains that it remains to be seen "whether Amsterdam ultimately will emerge . . . as a kind of procedural 'red-light district' for aggregate dealmaking, like its namesake for other transactions pursued by consenting parties." *Id.*

[229] *Id.* at 32.

[230] *See* Tzankova, *supra* note 154, at 8–9. Interestingly, the Dutch Settlement Act actually evolved out of negotiations to establish a unified compensation scheme for a class of cancer patients. *See* van Boom, *supra* note 172, at 177–78.

[231] Gerechtshof [Hof] [Court of Appeals] Amsterdam May 29, 2009, no. 106.010.887, (Shell Petroleum N.V./Dexia Bank Nederland N.V.) (Neth.) (sworn translation), at 60–61,

ment validated under the Dutch Settlement Act.[232] In *Shell*, an international class of plaintiffs sued Royal Dutch/Shell in 2004 in the United States, alleging that the company violated federal securities law by overstating its petroleum and natural gas reserves.[233] While the U.S. case was pending, the Netherlands enacted the Dutch Settlement Act.[234] Royal Dutch/Shell, which is domiciled in the Netherlands, and the class's non-American plaintiffs agreed to negotiate a settlement under the new statute.[235] The non-American class, represented by the Stichting Shell Reserves Compensation Foundation, included institutional and individual investors from seventeen European countries, as well as Canada and Australia.[236]

In 2007, the parties reached a provisional settlement agreement, which the Amsterdam Court of Appeals approved two years later.[237] By approving the *Shell* settlement, the court firmly established the Dutch Settlement Act's broad extraterritorial scope.[238] Since *Shell*, the Act's international reach has expanded further.[239]

2. *Converium/SCOR* Settlement

One recent ruling by the Amsterdam Court of Appeals demonstrates the Dutch Settlement Act's transnational utility.[240] On January

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available at https://www.royaldutchshellsettlement.com/Documents/English-JudgmentTranslation2009.pdf.

[232] *Id.*; van der Heijden, *supra* note 153, at 10.

[233] *In re* Royal Dutch/Shell Transp. Sec. Litig., 380 F. Supp. 2d 509, 515–16 (D.N.J. 2005).

[234] *See id.*; Goldhaber, *supra* note 129, at 24.

[235] *See* Settlement Agreement at 3, Hof Amsterdam Apr. 11, 2007, (Shell Reserves Compensation Foundation/Shell Petroleum N.V.), *available at* https://www.royaldutchshellsettlement.com/Documents/Settlement%20Agreement.pdf.

[236] *List of Registered Participants*, Stichting Shell Reserves Compensation Found. 24–31 (Dec. 31, 2008), http://www.shellsettlement.com/docs/List%20of%20Participants.pdf.

[237] *See* Hof Amsterdam, (Shell Petroleum N.V. /Dexia Bank Nederland N.V.) at 60–61; Settlement Agreement, *supra* note 235, at 1–3. Before petitioning the Amsterdam Court of Appeals to approve the settlement, the parties waited for the U.S. court to decline jurisdiction over the non-American plaintiffs. *See In re* Royal Dutch/Shell Transp. Sec. Litig., 522 F. Supp. 2d 712, 724 (D.N.J. 2007) (holding that the court did not have subject matter jurisdiction over the non-U.S. purchasers); Goldhaber, *supra* note 129, at 24.

[238] *See* Hof Amsterdam, (Shell Petroleum N.V./Dexia Bank Nederland N.V.) at 30–34 (discussing international jurisdiction); van der Heijden, *supra* note 153, at 10.

[239] *See infra* notes 240–255 and accompanying text (discussing *Converium/SCOR* and *Fortis/Ageas*).

[240] *See* Gerechtshof [Hof] [Court of Appeals] Amsterdam Jan. 17, 2012, no. 200.070.039/01, (SCOR Holding (Switzerland) AG/Liechtensteinische Landesbank AG) (Neth.) (unofficial translation), at 11–12, *available at* http://www.cohenmilstein.com/media/pnc/9/media.1139.pdf; Press Release, Spector Roseman Kodroff & Willis, P.C., In Landmark Ruling, Dutch Court of Appeals Approves Settlements in the *Converium/SCOR* Securities Class

17, 2012, the Amsterdam Court of Appeals confirmed a transnational settlement agreement in the *Converium/SCOR* case.[241] The class, which consisted of both American and European investors, initially filed suit in U.S. federal district court under section 10(b) of the Securities Exchange Act.[242] In a 2008 ruling in *In re SCOR Holding (Switzerland) AG Litigation*, however, the U.S. District Court for the Southern District of New York excluded from the suit the foreign class members who purchased shares on the Swiss Exchange.[243]

As a result, the omitted European investors commenced settlement talks with Converium in the Netherlands.[244] Three American plaintiffs' law firms represented the class in these negotiations.[245] Ultimately, the parties reached a $58.4 million settlement, which included a combined twenty percent fee for the plaintiffs' attorneys.[246] Pursuant to its authority under the Dutch Settlement Act, the Amsterdam Court of Appeals certified the *Converium/SCOR* settlement.[247]

3. *Fortis/Ageas* Securities Class Action

In a recent groundbreaking development, American investors for the first time utilized the Dutch Settlement Act in an attempt to resolve a securities fraud claim.[248] On January 10, 2011, a global class of investors filed a class action against Fortis, a defunct financial services com-

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Action (Jan. 18, 2012), *available at* http://www.businesswire.com/news/home/20120118006723/en/Landmark-Ruling-Dutch-Court-Appeal-Approves-Settlements.

[241] Hof Amsterdam, (SCOR Holding (Switzerland) AG/Liechtensteinische Landesbank AG), at 6.

[242] *In re* SCOR Holding (Switzerland) AG Litig., 537 F. Supp. 2d 556, 559 (S.D.N.Y. 2008); *see* Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78(j) (2006 & Supp. IV 2011).

[243] *In re SCOR Holding*, 537 F. Supp. 2d at 558–59.

[244] Hof Amsterdam, (SCOR Holding (Switzerland) AG/Liechtensteinische Landesbank AG), at 4–5. As a result of the pending suit in the United States, American investors were explicitly excluded from settlement negotiations in the Netherlands. *See id.* at 4 (describing a separate settlement in federal district court for American investors).

[245] *Id.* at 7. The three plaintiffs' firms were Bernstein Litowitz Berger & Grossmann LLP, Cohen Milstein Sellers & Toll PLLC, and Spector Roseman & Kodroff, P.C. *Id.*

[246] *Id.*

[247] *Id.* at 11–12.

[248] *See* Arrondissementsrechtbank [Rb.] Utrecht Jan. 10, 2011, (Stichting Investor Claims Against Fortis Foundation/Ageas N.V.) (Neth.) (writ of petitioners) (unofficial translation), at 1, *available at* http://www.investorclaimsagainstfortis.com/Attachment/191_English%20translation%20of%20Writ%20(00028785).PDF.

pany, in Utrecht Civil Court.[249] The claim alleged that Fortis misrepresented both its holdings of subprime mortgage-backed securities and its growing debt.[250] Plaintiffs contended that, as a result of the company's actions, Fortis's investors lost hundreds of millions of euros.[251] The plaintiffs filed suit under the Dutch Civil Code in an effort to win a declaratory judgment against Fortis; the plaintiffs intended to use the suit and potential judgment to force Fortis to settle for monetary damages under the Dutch Settlement Act.[252] Although the class consisted mostly of institutional investors from Europe, it also included Americans.[253] Notably, as a result of the U.S. Supreme Court's 2010 decision in *Morrison v. National Australia Bank Ltd.*, the claimants would have been barred from bringing suit in the United States because they purchased Fortis securities on European exchanges.[254] Thus, the *Fortis/Ageas* action may signal a new opportunity for American claimants seeking redress against European defendants in class litigation.[255]

III. Go *East*, Young Man: The Potential of Emerging Legal Markets for American Plaintiffs

In crafting new legal mechanisms for collective redress, the EU's Member States have been keenly aware of the familiar critiques of American class litigation—mass settlements, large attorney's fees, ag-

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[249] *Id.* Due to the Netherlands' standing requirements, a specifically incorporated foundation, the Stichting Investor Claims Against Fortis, represented the individual class members. *See id.* at 2–3.

[250] *See* David Bario, *Dutch Treat? With Doors to U.S. Courts Closed by* Morrison*, Securities Class Action Lawyers Sue Fortis in Holland*, Am. Law. Litig. Daily (Jan. 10, 2011), http://www.law.com/jsp/tal/digestTAL.jsp?id=1202477589137&Dutch_Treat_With_Doors_to_US_Courts_Closed_by_Morrison_Securities_Class_Action_Lawyers_Sue_Fortis_in_Holland.

[251] Rb. Utrecht, (Stichting Investor Claims Against Fortis Foundation/Ageas N.V.) (writ of petitioners), at 47–49.

[252] *See id.* at 4–5; Bario, *supra* note 250.

[253] Bario, *supra* note 250. The American class action firms Grant & Eisenhofer P.A. and Kessler Topaz Meltzer & Check, LLP (formerly Barroway Topaz) represent the class's American plaintiffs. *Id.*

[254] Rb. Utrecht, (Stichting Investor Claims Against Fortis Foundation/Ageas N.V.) (writ of petitioners), at 3; *see* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2886 (2010) (adopting a transactional test for securities fraud claims); Mark Cobley, *US Investors Are Under-Compensated and Over Here*, Fin. News (Jan. 11, 2011), http://www.efinancialnews.com/story/ 2011-01-11/us-investors-dutch-class-actions; *supra* notes 99–214 and accompanying text.

[255] *See* Rb. Utrecht, (Stichting Investor Claims Against Fortis Foundation/Ageas N.V.) (writ of petitioners), at 2–3. This claim is still pending before the court in Utrecht. *See id.*

gressive lawyers, and magnet jurisdictions.[256] Some reformers have been confident that in Europe, "the American entrepreneurial ways . . . will be resisted fully, in much the same way that Europe has held off the unwelcome presence of McDonald's or Starbucks in its elegant piazzas."[257] Indeed, with opt-in actions and limits on standing and damages, European legislatures have consciously fashioned aggregate litigation schemes distinct from the American model.[258]

Despite European efforts to craft a subdued class action regime, opportunities for American plaintiffs endure.[259] There is, after all, a McDonald's in Rome's Piazza di Spagna and a Starbucks on Paris's Champs-Élysées.[260] This Part argues that American class plaintiffs—whose access to domestic courts has been stripped away by legislative and judicial decree—should take advantage of Europe's new legal structures.[261] Section A contends that American victims of securities fraud relating to transactions on foreign exchanges should seek relief under the Dutch Settlement Act.[262] Then, Section B analyzes the potentially negative consequences for American plaintiffs in the event that the EU enacts a trans-European collective redress system.[263]

A. *American Plaintiffs Should Use the Dutch Settlement Act*

1. The How: Amsterdam's Far-Reaching Jurisdiction

The Dutch Settlement Act holds potential for American plaintiffs because of its extensive jurisdictional scope.[264] Under the Dutch Code of Civil Procedure, Dutch courts can assert jurisdiction over non-European parties as long as at least one petitioner or interested party is

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[256] *See* Issacharoff & Miller, *supra* note 6, at 181–91; *id.* at 191 ("Each of the controversies in American practice returns to the issue of the incentives operating on lawyers who will predictably push the boundaries of the system.").

[257] *Id.* at 180.

[258] *See* Monestier, *supra* note 7, at 44; *supra* notes 137–182 and accompanying text.

[259] *See* Nagareda, *supra* note 7, at 7.

[260] *See* Loren Jenkins, *Eternal City Gets Pair of Golden Arches*, Wash. Post, Mar. 20, 1986, at E3; Arcades Champs Elysees, Starbucks Coffee Company, http://www.starbucks.fr/store/50974/ (last visited Oct. 25, 2012).

[261] *See infra* notes 264–332 and accompanying text; *see also* Goldhaber, *supra* note 129, at 23 ("The widespread replication of the Shell model depends on two things: the willingness of Dutch courts to open their gates to foreign plaintiffs, and the proclivity of U.S. courts to close their gates.").

[262] *See infra* notes 264–305 and accompanying text.

[263] *See infra* notes 306–332 and accompanying text.

[264] *See* BW bk. 7, art. 907(1); van der Heijden, *supra* note 153, at 11.

domiciled in the Netherlands.[265] In claims under the Dutch Settlement Act, this condition is particularly easy to fulfill because of the Act's standing requirement.[266] The Dutch Settlement Act explicitly mandates that individual claimants be represented by a representative foundation that is domiciled in the Netherlands.[267] Thus, even though the claimants in the *Shell* settlement were from nineteen countries, they were sufficiently connected to the Netherlands because they were represented by a Dutch foundation.[268] Additionally, the Amsterdam Court of Appeals may assert jurisdiction even if the Netherlands is substantially unconnected to the underlying fraud.[269] In the *Converium/SCOR* settlement, for example, the court maintained jurisdiction even though the alleged fraud related to purchases and sales of securities on the Swiss Exchange.[270]

Moreover, because the Dutch Settlement Act requires all parties to petition the Amsterdam Court of Appeals for a declaration to validate the out-of-court settlement, it is highly unlikely that any defendant would object.[271] Defendants have an interest in ensuring that the Netherlands has jurisdiction because, as a result of the Dutch Settlement Act's opt-out scheme, its binding settlements have preclusive effect and create finality.[272] Unsurprisingly, no party has ever challenged the Am-

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[265] Wetboek van Burgerlijke Rechtsvordering [Rv] [Code of Civil Procedure] bk. 1, tit. 1, art. 3, *translated in Code of Civil Procedure*, Brecht's Dutch Civil Law, http://www.dutchcivillaw.com/civilprocedureleg.htm (last visited Oct. 25, 2012) ("Dutch courts have jurisdiction . . . if either the petitioner or, where there are more petitioners, one of them, or one of the interested parties mentioned in the petition has his domicile or habitual residence in the Netherlands . . . ."); van Lith, *supra* note 9, at 33; van der Heijden, *supra* note 153, at 11.

[266] *See* Rv bk. 3, tit. 14, art. 1014 (requiring claimants to be represented by "[a] foundation or association"); van Lith, *supra* note 9, at 34.

[267] van Lith, *supra* note 9, at 34.

[268] *Id.* at 33–34; *see* Gerechtshof [Hof] [Court of Appeals] Amsterdam May 29, 2009, no. 106.010.887, (Shell Petroleum N.V./Dexia Bank Nederland N.V.) (Neth.) (sworn translation), at 60–61, *available at* https://www.royaldutchshellsettlement.com/Documents/English-JudgmentTranslation2009.pdf; *List of Registered Participants*, *supra* note 236, at 1–8.

[269] *See* van der Heijden, *supra* note 153, at 11.

[270] *See* Hof Amsterdam Jan. 17, 2012, no. 200.070.039/01, (SCOR Holding (Switzerland) AG/Liechtensteinische Landesbank AG) (Neth.) (unofficial translation), at 4, *available at* http://www.cohenmilstein.com/media/pnc/9/media.1139.pdf.

[271] *See* BW bk. 7, art. 907; van der Heijden, *supra* note 153, at 10.

[272] *See* van Lith, *supra* note 9, at 34 (noting that "[t]he alleged responsible party has an interest in binding as many foreign interested parties as possible to build critical mass for adhesion of representative parties to the settlement and to minimize individual damage actions abroad").

sterdam Court of Appeals' jurisdiction under the Dutch Settlement Act.[273]

2. The Who: American Securities Fraud Class Action Plaintiffs

American plaintiffs should use the Dutch Settlement Act for securities class actions related to foreign-listed securities.[274] As a result of the U.S. Supreme Court's 2010 reinterpretation of section 10(b) of the Securities Exchange Act in *Morrison v. National Australia Bank Ltd.*, American investors who are defrauded on their purchases of foreign securities on foreign exchanges can no longer seek relief in American courts.[275] Thus, in an age in which Americans purchase more foreign-issued securities than ever before, millions of investors are without recourse at home.[276] The Dutch Settlement Act presents a real opportunity for individual and institutional investors to find relief.[277]

Until now, the only Americans to have sought collective redress in the Netherlands have been institutional investors.[278] Going forward, however, American plaintiffs' firms are positioned in Europe to facilitate access to Dutch courts for less sophisticated, small-claim plaintiffs.[279] Indeed, U.S. plaintiffs' lawyers began expanding across the Atlantic prior to *Morrison*, intent on attracting European class members to join ongoing securities fraud suits in the United States.[280] One American attorney representing plaintiffs in the *Fortis/Ageas* claim explained that his firm's American "clients are increasingly looking to forums where they're going to be able to receive compensation for their non-

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[273] *See id.*

[274] *See* WCAM, *codified in* BW bk. 7, arts. 907–10 *and* Rv bk. 3, tit. 14, arts. 1013–18.

[275] *See* 130 S. Ct. 2869, 2888 (2010); *supra* notes 99–114 and accompanying text.

[276] *See Morrison*, 130 S. Ct. at 2888; U.S. Dep't of the Treasury et al., Report on U.S. Portfolio Holdings of Foreign Securities 3 (2011) (charting trend in annual U.S. holdings of foreign securities, which more than doubled between 2003 and 2010), *available at* http://www.treasury.gov/resource-center/data-chart-center/tic/Documents/shc2010r.pdf.

[277] *See* WCAM, *codified in* BW bk. 7, arts. 907–10 *and* Rv bk. 3, tit. 14, arts. 1013–18.

[278] *See* Arrondissementsrechtbank [Rb.] Utrecht Jan. 10, 2011, (Stichting Investor Claims Against Fortis Foundation/Ageas N.V.) (Neth.) (writ of petitioners) (unofficial translation), at 1, *available at* http://www.investorclaimsagainstfortis.com/Attachment/191_English%20translation%20of%20Writ%20(00028785).PDF.

[279] *See* Inst. for Legal Reform, Examples of U.S. Legal Community Interest in Europe 1–2 (2010) [hereinafter ILR Examples], http://www.instituteforlegalreform.com/sites/default/files/images2/stories/documents/pdf/international/examplesofuslegalcommunityinterest ineuroperev.pdf. American plaintiffs' firms in Europe include Quinn Emanuel Urquhart & Sullivan, LLP, Grant & Eisenhofer P.A., Kessler Topaz Meltzer & Check, LLP, and Cohen Milstein Hausfeld & Toll PLLC. *Id.*; Nagareda, *supra* note 7, at 5.

[280] *See* Nagareda, *supra* note 7, at 5–6.

U.S. losses."[281] Thus, in the aftermath of *Morrison*, firms have viewed Europe as a lucrative new avenue for growth and have continued to expand there.[282] Plaintiffs' firms have incentive to make potential American plaintiffs aware of European opportunities and to make it easy to join these settlements.[283] The recent involvement by American plaintiffs' firms in aggregate settlements in the Netherlands shows the potential of Europe for American plaintiffs with small claims.[284]

3. The Issue: Will U.S. Courts Enforce Dutch Settlements?

The Netherlands' expansive jurisdictional reach will only benefit American plaintiffs if the settlements approved under the Dutch Settlement Act are respected and given res judicata effect by American courts.[285] Because the Full Faith and Credit Clause of the U.S. Constitution does not apply to judgments rendered by foreign courts, enforcement in the United States is not guaranteed.[286] Instead, parties with

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[281] *See* Bario, *supra* note 250, at 1 (quoting Jay Eisenhofer, managing director of Grant & Eisenhofer P.A.).

[282] *See* Nagareda, *supra* note 7, at 5 (describing the trans-Atlantic expansion of American plaintiffs' firms); *International Practice*, SPECTOR, ROSEMAN, KODROFF, & WILLS, P.C., http://www.srkw-law.com/areas-of-practice/international.html (last visited Oct. 25, 2012) (touting the firm's work on the *Shell* and *Converium/SCOR* settlements). Moreover, some plaintiffs' firms have been very active in Europe despite not having offices there. *See The Counsel*, CONVERIUM HOLDING AG INT'L SETTLEMENT, http://www.converiumsettlements.com/EN/counsel.php (last visited Oct. 25, 2012) (listing two American plaintiffs' firms—Spector Roseman Kodroff & Wills, P.C., and Bernstein Litowitz Berger & Grossmann LLP—as counsel to this transnational settlement, even though the firms do not have offices abroad).

[283] *See* Nagareda, *supra* note 7, at 5.

[284] *See* Hof Amsterdam, (SCOR Holding (Switzerland) AG/Liechtensteinische Landesbank AG), at 6; Rb. Utrecht, (Stichting Investor Claims Against Fortis Foundation/Ageas N.V.) (writ of petitioners). Subsequently, several of the largest American corporate law firms have opened class action defense departments in their European branch offices. *See* ILR Examples, *supra* note 279, at 3.

[285] *See* Murtagh, *supra* note 109, at 47 ("Unfortunately, in some cases, it is incredibly difficult to predict whether a judgment will be recognized abroad."). *See generally* Monestier, *supra* note 7 (analyzing res judicata in the sphere of transnational class actions). In EU Member States, the Brussels I Regulation simplifies the enforceability determination for foreign legal judgments. *See* Council Regulation 44/2001, Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, arts. 33–34, 38, 41, 2000 O.J. (L12) 1 (EC). The Regulation requires all Member States to honor and enforce legal judgments from other members. *See id.* As a result, the Amsterdam Court of Appeals technically labels its decisions under the Dutch Settlement Act as "judgments," instead of "declarations." *See* VAN LITH, *supra* note 9, at 125.

[286] *See* U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the . . . judicial Proceedings of every other State . . . ."); Jaffe v. Accredited Sur. & Cas. Co., 294 F.3d 584, 591 (4th Cir. 2002) ("Neither the full faith and credit statute, nor the Full Faith and Credit Clause of the Constitution, applies to judgments issued from foreign coun-

foreign judgments who want to collect on them in the United States must petition an American court to recognize and enforce the judgment.[287] American courts typically recognize foreign judgments that satisfy the requirements of the doctrine of international comity.[288] Courts may, however, still decline to recognize judgments "rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law" or based in claims "repugnant to the public policy of the state or the United States."[289]

Securities fraud settlements approved under the Dutch Settlement Act should be enforceable in the United States because the Netherlands provides sufficient due process.[290] The Act requires class members to be notified of the settlement and permits them to opt out.[291] The Act also mandates that both parties to the out-of-court settlement petition the Amsterdam Court of Appeals to make the agreement bind-

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tries."); Robert L. McFarland, *Federalism, Finality, and Foreign Judgments: Examining the ALI Judgments Project's Proposed Federal Foreign Judgments Statute*, 45 New Eng. L. Rev. 63, 71 (2010) (explaining that foreign judgments are not self-executing in part because of "the potential abusive practice of foreign, forum-shopping plaintiffs who secure judgments on the basis of foreign laws that impair the rights of citizens of the U.S.").

[287] *See* Uniform Foreign-Country Money Judgments Recognition Act [hereinafter FCMJRA] (2005), *available at* https://www.law.upenn.edu/library/archives/ulc/ufmjra/2005final.pdf; Montré D. Carodine, *Political Judging: When Due Process Goes International*, 48 Wm. & Mary L. Rev. 1159, 1166–70 (2007) (discussing recognition of foreign judgments in U.S. courts). Although most foreign judgment recognition cases are heard in federal courts, "the force and effect of foreign judgments are matters of state law." McFarland, *supra* note 286, at 84; *see* Carodine, *supra*, at 1191. To date, thirty-three states have enacted the FCMJRA or its predecessor, the Uniform Foreign Money-Judgments Recognition Act of 1962. *See Legislative Fact Sheet—Foreign-Country Money Judgments Recognition Act*, Nat'l Conf. of Commissioners on Uniform State Laws (NCCUSL), http://www.uniformlaws.org/LegislativeFactSheet.aspx title=Foreign-Country%20Money%20Judgments%20Recognition%20Act (last visited Oct. 25, 2012).

[288] *See* Hilton v. Guyot, 159 U.S. 113, 163–64 (1895). In the 1895 case *Hilton v. Guyot*, the U.S. Supreme Court defined comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Id.* Today, the principle of comity is embedded in the FCMJRA; states that have not adopted the FCMJRA have incorporated the principle of comity into their common law. *See* FCMJRA § 4(b)–(c); Carodine, *supra* note 287, at 1167–68.

[289] FCMJRA § 4(b)(1), (c)(3); Soc'y of Lloyd's v. Turner, 303 F.3d 325, 330 (5th Cir. 2002) (noting that foreign procedures must comport with the spirit but not the letter of American due process).

[290] *See* WCAM, *codified in* BW bk. 7, arts. 907–10 *and* Rv bk. 3, tit. 14, arts. 1013–18; *Soc'y of Lloyds*, 303 F.3d at 330.

[291] Rv bk. 3, tit. 14, art. 1013(5).

ing.[292] Additionally, the Amsterdam Court of Appeals may not certify a settlement under the Act unless it determines that the interests of the parties were adequately safeguarded, the plaintiff foundation was "sufficiently representative" of its members interests, and the settlement amount was reasonable.[293] Of course, U.S. courts may be concerned with preclusive opt-out foreign judgments that, if given res judicata effect in the United States, would bind all American class members.[294] Nevertheless, because federal courts have foreclosed the possibility of recovery for foreign securities transactions under U.S. law—thereby denying due process *entirely*—courts should respect settlements procured by proactive Americans who seek relief abroad.[295]

Moreover, securities settlements under the Dutch Settlement Act do not conflict with American public policy.[296] In fact, the United States provides a private right of action for securities fraud under section 10(b) of the Securities Exchange Act.[297] Although the U.S. Supreme Court in *Morrison* declined to provide relief for fraud related to foreign transactions, the Court justified its limitation of section 10(b)'s extraterritorial application as necessary because "the regulation of other countries often differs from ours."[298] Thus, the application of *foreign* laws to *foreign* transactions actually supports the Court's policy, and U.S. courts should recognize and enforce such foreign judgments.[299] Securities fraud class settlements related to transactions on foreign exchanges in which American plaintiffs assert rights similar to those protected by section 10(b) of the Securities Exchange Act should be enforceable in the United States.[300]

The Dutch Settlement Act is not, however, a panacea for all of the recent class action restrictions in the United States.[301] Although U.S. courts should give preclusive effect to foreign securities fraud judgments, they are not likely to extend such preclusion to other judgments

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[292] BW bk. 7, art. 907(1); *see* Wasserman, *supra* note 178, at 357–58.

[293] BW bk. 7, art. 907(3) (listing the reasons for which the Amsterdam Court of Appeals must reject a settlement).

[294] *See* Monestier, *supra* note 7, at 75 n.260.

[295] *See Morrison*, 130 S. Ct. at 2888; Monestier, *supra* note 7, at 75 n.260.

[296] *See* Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78(j) (2006 & Supp. IV 2011); *Morrison*, 130 S. Ct. at 2885–86 (discussing the policy of American courts of avoiding conflict with foreign legal systems).

[297] 15 U.S.C. § 78(j).

[298] *See Morrison*, 130 S. Ct. at 2885 (noting the "probability of incompatibility with the applicable laws of other countries").

[299] *See id.*

[300] *See* 15 U.S.C. § 78(j); *Morrison*, 130 S. Ct. at 2888.

[301] *See* WCAM, *codified in* BW bk. 7, arts. 907–10 *and* Rv bk. 3, tit. 14, arts. 1013–18.

based on claims that are contrary to U.S. public policy.[302] For example, American plaintiffs should not expect U.S. courts to enforce consumer class settlements based on contracts that included express class litigation or arbitration waiver provisions; as the U.S. Supreme Court held in the 2011 case *AT&T Mobility LLC v. Concepcion*, class arbitration is inconsistent with U.S. law.[303] Similarly, U.S. courts would not likely honor a settlement for a large-scale employment discrimination claim; as the U.S. Supreme Court held in the 2011 case *Wal-Mart Stores, Inc. v. Dukes*, such a claim would fail Rule 23's commonality requirement.[304] Nevertheless, in mass damage securities fraud claims, Americans can use the Dutch mechanism to their advantage.[305]

B. *A Harmonized European Remedy Would Harm American Plaintiffs*

The diffusive state of collective redress in EU Member States is beneficial to American plaintiffs.[306] Even after the recommendations in the Commission's 2008 *White Paper* and the Parliament's 2012 Resolution, substantial differences persist between Member States' class mechanisms.[307] The lack of European uniformity has created exploitable nuances between Member States' conceptions of aggregate litigation.[308] As shown in Section A of this Part, in the absence of a harmonized trans-European system, American plaintiffs can take advantage of the Netherlands' Dutch Settlement Act.[309] In analyzing American prospects for collective redress in Europe, however, a major unanswered question is whether, and to what extent, the EU will act on the recent proposals for a trans-European aggregate device.[310]

In its response to the Commission's 2011 consultation, the Netherlands urged the EU not to create a separate system for cross-border

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[302] *See id.*; Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2557 (2011); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011).

[303] *See Concepcion*, 131 S. Ct. at 1750–51; *supra* notes 88–98 and accompanying text.

[304] *See Dukes*, 131 S. Ct. at 2557; *supra* notes 83–87 and accompanying text.

[305] *See* BW bk. 7, art. 907; *Morrison*, 130 S. Ct. at 2888.

[306] *See* Russell, *supra* note 115, at 169–70 (discussing Member States' "inconsistent and piecemeal attempts" to establish aggregate litigation schemes).

[307] *See* Nagareda, *supra* note 7, at 21 ("[T]he new configuration of the forest today is striking, for all the remaining variations in the trees."); Russell, *supra* note 115, at 169–70.

[308] *See* Monestier, *supra* note 7, at 49.

[309] *See supra* notes 264–305 and accompanying text.

[310] *See* Russell, *supra* note 115, at 169–70 (describing the uncertainty regarding aggregate litigation currently permeating the EU); S.I. Strong, *supra* note 224, at 75 (contending that "it appears highly likely that the procedures outlined in the Resolution will ultimately result in a new [trans-]European [system of collective redress]").

class adjudication.[311] Instead, the Netherlands advocated for a sort of European federalism.[312] It suggested that the EU encourage Member States to develop their own systems of collective redress, and to provide Member States with guidelines for best practices.[313] The Netherlands argued that although coordination across borders is important, individual Member States should be free to develop their own mechanisms for collective redress "without being harmonised."[314] Thus, it recommended that the Commission "use soft law to ensure a greater degree of coherence."[315] This coordinated, but not harmonized, approach would "create a level playing field" but also recognize that "[o]ne size does not fit all."[316]

Nevertheless, after considering the Netherlands' response, the 2012 Parliament Resolution emphatically stressed the need to harmonize Member States' aggregate litigation laws so as to reduce plaintiffs' incentives to seek remedies in particular national jurisdictions.[317] Proponents of harmonization have contended that the differences between the collective redress mechanisms of the EU's twenty-seven Member States could be substantial.[318] As a result, there is a chance that "the substantive law of one state—perhaps an outlier—effectively will govern" aggregate settlements throughout the entire continent.[319] Currently, to the benefit of American plaintiffs, that "outlier" is the Netherlands' Dutch Settlement Act.[320]

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[311] Kingdom of the Neth., Dutch Response to the Public Consultation on a Coherent European Framework for Collective Redress 7–8 (Apr. 2011) [hereinafter Dutch Response] ("The Netherlands favours an approach to collective redress in which Member States are free to develop national initiatives.").

[312] *See id.*

[313] *Id.* at 7.

[314] *Id.* at 8.

[315] *Id.* at 7 (emphasis omitted).

[316] *Id.* (emphasis omitted).

[317] *Resolution*, *supra* note 7, at 39–40 (stressing the need for horizontal uniformity across Member States); *Legal Affairs Report*, *supra* note 7, at 15 ("[Q]uestions of jurisdiction and the applicable law are of the utmost importance in order to prevent forum shopping."); *see* Dutch Response, *supra* note 311, at 7–8.

[318] *See Resolution*, *supra* note 7, at 39–40.

[319] *See* Nagareda, *supra* note 7, at 48; *see also Resolution*, *supra* note 7, at 43 ("[A] horizontal framework should . . . lay down rules to prevent a rush to the courts . . . ."); *Legal Affairs Report*, *supra* note 7, at 16 ("In the absence of full harmonisation of most areas of national law, such a rule could not exclude situations in which the applicable law grants fewer rights than the material laws of other Member States in which some of the victims that opted in are domiciled.").

[320] *See* Nagareda, *supra* note 7, at 48.

Accordingly, a harmonized European system could significantly reduce American plaintiffs' access to Dutch courts.[321] If the EU preempts its Member States' laws and imposes a system based on the specific recommendations outlined in the *Legal Affairs Report*, the Dutch Settlement Act's utility would be considerably decreased.[322] For example, the *Legal Affairs Report* proposed that only the court of the Member State in which the defendant is domiciled should have jurisdiction over class claims.[323] This bright-line rule is considerably narrower than the jurisdictional scope of the Dutch Settlement Act, and would insulate defendants from liability.[324] Defendants domiciled outside the EU would thus be immune from securities fraud class actions even if they sold securities on European exchanges and thereby injured European investors.[325] Americans who purchased those fraudulent securities abroad would, of course, be without recourse in the United States as a result of *Morrison*.[326]

Beyond these concerns, the *Legal Affairs Report* also proposed a €2000 cap on individual claims brought under the aggregate device.[327] This restriction contrasts starkly with the Dutch Settlement Act, which permits both individual and institutional investors to have their settlements approved by the Amsterdam Court of Appeals.[328] If the *Report*'s recommendation were enforced throughout the continent, plaintiffs and defendants alike would be impacted significantly.[329] A cap on individual damages would ensure that only plaintiffs with claims that could be inefficient and expensive to bring on an individual basis would seek class redress.[330] This would seriously alter securities class actions in which large institutions, pension funds, and wealthy private investors

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[321] *See Legal Affairs Report*, *supra* note 7, at 16. Additionally, defendants could also be negatively affected because the Resolution's prescription for an opt-in model would subject them to an increased amount of litigation, in contravention of the EU's goal to provide defendants with finality. *See* Monestier, *supra* note 7, at 31 ("Most defendants would prefer to buy global peace and have all claims, including foreign claims, swept up in one . . . proceeding.").

[322] *See Legal Affairs Report*, *supra* note 7, at 16.

[323] *Id.*

[324] *See* Rv bk. 1, tit. 1, art. 3 (codifying the Netherlands' permissive rules for establishing jurisdiction); *Legal Affairs Report*, *supra* note 7, at 16.

[325] *See Legal Affairs Report*, *supra* note 7, at 16.

[326] *See Morrison*, 130 S. Ct. at 2886 (establishing the "transactional test").

[327] *Legal Affairs Report*, *supra* note 7, at 13.

[328] *See* BW bk. 7, art. 907(1)–(2); *Legal Affairs Report*, *supra* note 7, at 13.

[329] *See Legal Affairs Report*, *supra* note 7, at 13.

[330] *See id.* at 15. This is the same reasoning used by Justice Breyer in his dissent in *Concepcion*. *See* 131 S. Ct. at 1760–61 (Breyer, J., dissenting) (describing the inefficiency of individually litigating or arbitrating small claims).

are frequently claimants.[331] Eliminating large claimants from the class could also reduce the class's ability to pay litigation expenses and decrease lawyers' incentive to represent the class at all.[332]

Conclusion

American class plaintiffs who are shut out of domestic courts should seek relief in Europe under the Dutch Settlement Act. In the United States, recent legislative and judicial restrictions on class certification have narrowed the class action's utility, particularly in securities fraud cases. Simultaneously, across the Atlantic, the EU and its Member States have proposed and implemented aggregate litigation schemes. In the Netherlands, the Dutch Settlement Act provides American plaintiffs with a limited but powerful opportunity to redress securities fraud claims related to foreign transactions. Although not a cure-all for American plaintiffs, and though it may be preempted in the future by a harmonized, trans-European system for collective redress, the Dutch Settlement Act is currently a viable alternative to U.S. federal courts for resolving securities fraud disputes.

Michael Palmisciano

[331] *See Legal Affairs Report*, *supra* note 7, at 13.

[332] *See id.*; *see also Concepcion*, 131 S. Ct. at 1761 (discussing plaintiffs' lawyers' lack of incentive to represent small claims).