Massive $1.3 Billion Settlement of Fortis Investor Actions Under Dutch Collective Settlement Procedures

By Kevin LaCroix on March 14, 2016 POSTED IN INTERNATIONAL D & O

In what is by far the largest investor settlement ever under the Dutch collective settlement procedures, several shareholder foundations have reached an agreement to settle the Fortis shareholder claims for a total of €1.204 billion ($1.3 billion). The shareholder foundations' settlement with Ageas, as Fortis is now known, relates to Fortis's ill-fated October 2007 participation in the ABN AMRO acquisition just before the global financial crisis. Under a parallel settlement, €290 million ($313 million) of the shareholder settlement will be funded by Fortis's D&O insurers. The shareholder settlement is subject to the approval of the Amsterdam Court of Appeals. This massive settlement undoubtedly will boost current initiatives by the shareholders of other companies – such as VW, Tesco, and Petrobras – to use the Dutch collective settlement procedures to secure collective investor relief.

A copy of Ageas's March 14, 2016 press release about the shareholder settlement can be found here. Ageas's March 14, 2016 press release about the insurance settlement can be found here. The website that Ageas has established for shareholders regarding the settlement can be found here.

Background Regarding Fortis

Prior to the financial crisis, Fortis was a global banking and financial services company based in Belgium. Fortis participated in a consortium of banks (including RBS and Banco Santander) in acquiring ABM AMRO, which was at the time the largest-ever bank acquisition. The transaction depleted Fortis's balance sheet just as the financial crisis began to emerge.

On September 29, 2008, the governments of Netherlands, Belgium and Luxembourg agreed to bail out Fortis, but only if it were to sell its troubled stake in ABN AMRO. A September 30, 2008 *Wall Street Journal* article about the action of the three governments, and the role of the ABN AMRO transaction, can be found here.

On October 4, 2008, the Dutch government took over the company's operations for 16.8 billion Euros ($23 billion). An October 6, 2008 *Wall Street Journal* article describing the government takeover, including the sale of Fortis banking and insurance assets to BNP Paribas, can be found here.

The U.S. Securities Class Action

As discussed here, on October 22, 2008, Fortis shareholders filed a securities class action lawsuit against Fortis, certain of its directors and officers, and its offering underwriters in the Southern District of New York, seeking damages based on alleged violations of the U.S. securities laws. In their amended complaint, the plaintiffs alleged that the defendants misrepresented the value of its collateralized debt obligations; the extent to which its assets were held as subprime-related mortgage backed securities; and the extent to which its ill-fated decision to acquire ABN-AMRO had compromised the company's solvency.

In a February 2010 decision (discussed here), then-District Judge Denny Chin entered an order, applying the then-applicable jurisdictional standards under the Second Circuit's opinion in the *Morrison* case, granting with prejudice the defendants' motion to dismiss.

The Shareholder Foundation Actions

As discussed here, in a January 10, 2011 press release (here), two U.S. securities law firms announced that they had filed an action in Utrecht Civil Court on behalf of a specially formed foundation, Stichting Investor

Claims Against Fortis. An English translation of the lawsuit can be found here. The lawsuit action was filed against Ageas NV/BV, as Fortis is now known, certain of its directors and officers, and its offering underwriters.

A separate Dutch shareholder foundation, Stichting FortisEffect, organized in part by the U.S. shareholder law firm DRRT, also was organized on behalf of Fortis shareholders (as discussed here). In addition, the Dutch shareholder group VEB also organized an effort in the Netherlands on behalf of Fortis shareholders (refer here). Shareholder rights group Deminor separately filed an action against Fortis and its directors and officers in the Commercial Court in Beligium (as discussed here).

The Dutch Collective Settlement Procedure

By way of background with respect to the Netherlands class settlement procedures, the Dutch procedures are derived from the Act on the Collective Settlement of Mass Claims, known in the Netherlands as the "WCAM." The Act, which became effective in 2005, allows parties to a settlement agreement to request that a Dutch court declare the settlement agreement binding. The agreement must be concluded between, on the one hand, one or more potentially liable parties, and, and on the other hand, a foundation or association representing persons on whose behalf the settlement agreement was negotiated. If the Court does declare the settlement agreement binding, the agreement then binds everyone covered by its terms, unless an affected person decides to opt out in writing within a certain time period after the binding declaration. A summary of the Act, its procedures, its binding effect, and its use in connection with the settlement of international claims, can be found here.

The procedures described under the Act have been used in the past in connection with several high profile collective investor actions. In the first and (at least until the recent Fortis settlement) highest-profile use of the Dutch procedures, on May 29, 2009, the Amsterdam Court of Appeals approved the $381 Royal Dutch Shell settlement (as discussed here). As described here, two groups acting on behalf of the non-U.S. investors in Comverium Holding entered settlement agreements with Scor and Zurich. The total amount of the two settlements was $58.4 million. As discussed here, on January 12, 2012, the Amsterdam Court of Appeals held the Comverium settlements to be binding, meaning that it is presumptively enforceable throughout the EU.

The Fortis Settlement

According to Ageas's March 14, 2016 press release, the recent settlement agreement pursuant to the Dutch collective settlement procedures includes the various Dutch shareholder foundations and also encompasses the separate proceeding in Belgium. The parties will now submit the settlement agreement to the Amsterdam Court of Appeals in accordance with the WCAM procedures and will jointly request the Court to declare the settlement to be binding. Investors who do not want to be bound by the settlement will have the opportunity to opt out of the settlement.

The accompanying press release regarding the insurance arrangements states that Ageas has reached an agreement with the insurers that had issued D&O insurance policies to Fortis during the period 2007-2008, including two successive D&O insurance policies, as well as a separate public offering of securities insurance ("POSI) policy issued to Fortis in connection with a 2007 public rights issue. The amount of the insurance settlement is €290, which represents about 24 percent of the proposed investor settlement.

Discussion

The massive Fortis settlement under the Dutch Act is a game changer. The large settlement is significant in and of itself, but it is also significant for what it may foreshadow for the use of the Dutch collective settlement procedures.

For many years, and in particular in the years after the U.S. Supreme Court's June 2010 decision in the *Morrison* case, there had been speculation that the procedures available under the Dutch Act might become a preferred mechanism for resolving collective investor claims, particularly after the January 2012 decision of the Amsterdam Court of Appeals in which the court held the Comverium settlement to be binding and presumptively enforceable in the EU. While the use of the procedures for global resolution of collective investor claims was much-anticipated, the use of the procedures proved to be slow to emerge. However, several developments, in conjunction with this recent massive Fortis settlement, suggest that we could be about to enter a very interesting period in which the Dutch procedures are indeed used as a preferred mechanism for global resolution of collective shareholder claims.

The sheer size of the Fortis settlement, rivaling even the largest class action settlements under the U.S. securities laws, obviously is noteworthy – only seven U.S. securities class action settlements have been larger. But it is not just the size of the Fortis settlement that is noteworthy; there are several other features of the

settlement that are notable, and that may suggest the likelihood that investors could seek to use the Dutch procedures to seek global resolution of collective shareholder claims in the future.

First and foremost, the Fortis settlement represents the first instance where the Dutch Act's procedures were used to reach a settlement and resolve claims in a context that did not involve a prior settlement of a U.S. securities class action lawsuit. In the Fortis context, there had indeed been a prior U.S. securities class action lawsuit, but the U.S. lawsuit was dismissed. So the parties to the Dutch settlement of the Fortis claims were not simply building on or extending a prior U.S. settlement, they were fashioning their own settlement.

Interestingly, Aegis, the defendant party to the settlement as Fortis's successor in interest, is a Belgium company, not a Dutch company, and the Dutch procedures are being used to resolve the claims of investors in a variety of countries and who purchased Fortis shares on a variety of exchanges located in several different countries.

Both investor claimants and securities claim defendants, interested in resolving collective shareholder claims on a global basis that would presumptively be enforceable at least within the E.U., may be drawn to these procedures, as a way to reach a settlement on an opt-out basis. The opt-out aspect of the procedures may be of particular interest to defendants, who will want to secure the most comprehensive form of claim resolution.

These aspects of the Dutch procedures were are already sufficiently attractive and well known that investor claimants seeking to pursue claims against a variety of companies from outside the Netherlands and that are currently embroiled in high-profile scandals have formed shareholder foundations to seek to try to utilize the Dutch procedures to achieve a global collective investor settlement. Among other companies whose shareholders have recently initiated efforts to try to pursue collective settlements under the Dutch Act are VW (about which refer here); Tesco (refer here); and Petrobras (refer here). The recent massive Fortis settlement will undoubtedly reinforce these claimants interest in pursuing these initiatives under the Dutch Act, but undoubtedly will also encourage shareholder claimants seeking to pursue claims against other companies to try to use the Dutch procedures as well.

In other words, we may now have reached the point, which had been the subject of so much speculation and anticipation in the past, that the Dutch procedures will now be a preferred mechanism for aggrieved investors to use to try to pursue global resolution of collective investor claims.

One of the next battlegrounds in the development of the Dutch collective settlement procedures as a preferred mechanism for global resolution of collective investor claims will be the confrontation of the question of what happens when there are multiple competing procedures in different jurisdictions each seeking to address the shareholders' claims. In the Fortis case, the separate Belgium proceeding was wrapped into and resolved as part of the Dutch settlement. In other cases (for example, in the VW investor actions), it may prove much more challenging to come up with a settlement that does not create potential conflicts with procedures in other jurisdictions.

One particularly interesting aspect of the Fortis settlement is the extent to which the settlement initiative was driven in significant part by the active involvement or at least financial support of U.S. plaintiffs' securities class action law firms. Several of the more recent initiatives to use the Dutch procedures (including, in particular, the efforts to use the procedures on behalf of VW and Tesco claimants) are being driven by or at least financed by U.S. plaintiffs' firms. These firms' product and geographic diversification efforts arguably are a significant factor in the important evolutionary development of collective shareholder mechanisms, in the Netherlands and elsewhere.

In any event, the massive insurance contribution to this settlement represents a significant development for the European D&O insurance community. While there have been prior collective investor settlements under the Dutch procedures, there has been nothing on the scale of the Fortis settlement and no settlements in which insurers contributed so substantially. I suspect strongly that this settlement is a watershed development in the European D&O insurance community, particularly given the prospect that the Dutch procedures could become a preferred mechanism for the resolution of collective shareholder claims. The European insurers may have reached a point where it is not longer sufficient to question whether or not a given company has U.S. securities litigation exposure in order to determine whether or not the company has a heightened securities litigation risk.

Special thanks to a loyal reader for sending me a link to the press releases regarding the Fortis settlement.

A Billion Dollars Here, A Billion Dollars There: The case could be made that the Fortis settlement, as massive as it is, does not represent the first billion dollar collective investor settlement in Europe.

As I previously noted (here), on February 17, 2016, the troubled Spanish banking firm Bankia announced that it had set aside a €1.84 billion euros fund to be used to buy back shares from retail investors who had purchased shares in the bank in its 2011 IPO.

As I had discussed in an earlier post (here), as a result of a ruling from Spain's highest court, the bank faced the prospect of a collective investor action that various individuals had been pursuing on behalf of the IPO investors. Rather than test its litigation prospects and incur the legal fees involved, the bank agreed to make all of the IPO investors whole, by buying back the shares for the full amount they paid plus an implied interest for the value of the money during the interim.

The Bankia settlement may not have been entered into directly in connection with a securities lawsuit, but it the settlement fund was set up because of the existing lawsuits. Because of the unusual nature of the proposed settlement, it may not provide an example that will prove helpful in other situations. But it does represent an example where a defendant company facing collective shareholder claims agreed to pay well in excess of $1 billion to settle the shareholders' claims.

http://www.dandodiary.com/2016/03/articles/international-d-o/massive-1-3-billion-settlement-of-fortis-investor-actions-under-dutch-collective-settlement-procedures/