

Collective redress in the Netherlands

Berlin, 27 May 2015

Dr. Charlotte Pavillon – University of Leiden



Universiteit
Leiden

Collective enforcement and redress

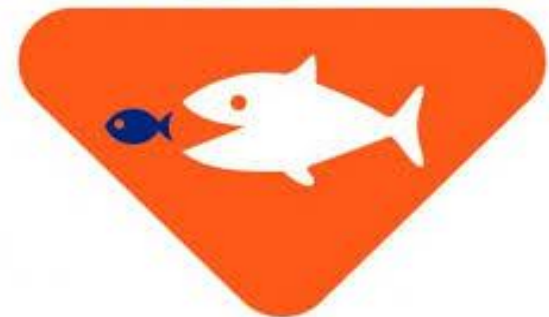
The case of the Netherlands State Lottery (*Staatsloterij*)

⇒ advertisements between the years 2000 and 2007 which referred to a set number of guaranteed big prize winners for each draw, even though there was no guarantee that the prizes could be won since the majority of the lots had not been sold. Prizes were drawn from 21 million lots and only 3 million had been sold.

⇒ misleading advertising

⇒ loss suffered by consumers

Staatsloterij



Collective enforcement and redress

Authority for
Consumers & Markets



Public supervision:

⇒ Priorities (agenda)

⇒ Sanctions: fines up to € 450.000

⇒ Primacy of **private** enforcement!

⇒ ACM did not take any action in this case

Collective enforcement and redress

Private collective redress:

⇒ injunctive and declaratory collective redress

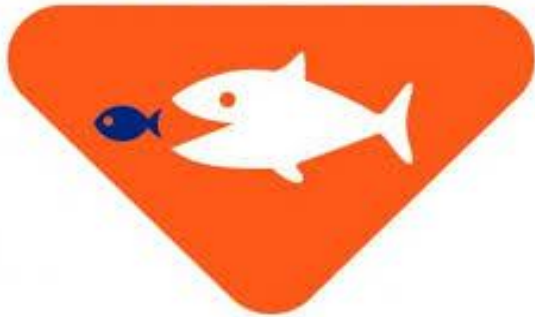
- action lodged by the Lottery Loss foundation (*Stichting Loterijverlies*)
- decision by the Dutch Supreme Court on January 30th 2015: misleading advertising (tortious act under Dutch civil law) ECLI:NL:HR:2015:178

Collective enforcement and redress

But **no** collective damages claim!

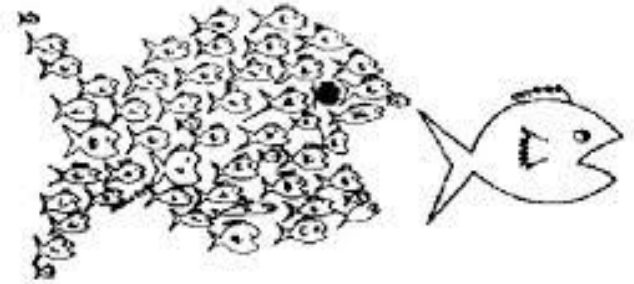
Art. 3:305a(3) Dutch Civil Code

Staatsloterij



≠

CLASS ACTION



This might change...

Collective enforcement and redress

What are the options to obtain compensation **after a declaratory ruling?**

- individual follow-on proceedings
- aggregation (via assignment or mandate) of damages claims (often in combination with a profit sharing agreement...)
- **a mass damages settlement agreement (on a voluntary basis) that can be made binding on all interested parties (WCAM)**

Collective enforcement and redress

Private collective ‘compensatory’ redress: other options

- ‘informal’ test-case/pilot proceedings on liability
+ aggregation of damages claim or voluntary collective settlement agreement
- aggregation of individual claims (informal opt-in) without collective or pilot proceedings
- settlement agreement without a court ruling

The Dutch Collective Settlement of Mass Damages Act (WCAM)

- joint voluntary application
- no lead-plaintiff
- no certification
- agreement based on damages scheduling
- no opt-in
- but an opt-out after the approval by the Amsterdam Court of Appeal (representativity- and marginal reasonableness-tests)
- notification of interested parties

⇒ swift settlement of mass securities claims!

The shortcomings of the WCAM and the need for reform

Victim of its success?

- proliferation of foundations

⇒ **WCAM-amendment of July 2013: stricter standing requirements**

- The Netherlands as ‘the favored venue’ (‘class settlement tourism’): pressure on the Dutch judiciary
- funding & freeriding

The shortcomings of the WCAM and the need for reform

Success is relative

- no low value damages cases
- reluctance to negotiate

⇒ **WCAM-amendment of July 2013: pre-hearing**

- suboptimal compensation

The draft bill mass damages claim

What was not or insufficiently addressed by the amendment to the WCAM?

- the absence of a 'stick'
- the scope rule (too large)
- the proliferation and quality of foundations (market for lemons/dubious claim-vehicles)



The draft bill mass damages claim

A five stage procedure:

1. the (strict) admissibility test
2. a declaratory judgment
3. the hearing of the parties
4. the submission of a proposal by the parties
5. the establishment of a scheme for collective redress by the court (*ultimum remedium*)

The draft bill mass damages claim

Founded criticisms:

- length and costs of the procedure
- no clear choice for an opt in or opt out-mechanism
- not a suitable procedure for low value damages claims

Debatable criticisms:

- impossibility of an abstract assessment of causation and damages
- risk of frivolous litigation

Dutch collective *compensatory* redress in a nutshell

For now:

- aggregation of individual claims or
- (binding) settlement agreements

And maybe in the future:

- **collective** damages claims