

Exporting Class Actions, CLM Magazine

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Countries Are Implementing Laws and Regulations That Could Heighten Exposure to D&O Claims

It has often been said that America's greatest export is its culture. This notion conjures up images of Coca-Cola and blue jeans, but a more recent American cultural export is class actions and regulatory investigations that often implicate directors & officers (D&O) insurance policies. Let's discuss the proliferation of more complex, and costly, international laws and regulations that are likely to increase exposure for insurance carriers that underwrite international D&O accounts, as well as look at certain claims-handling implications.

In *Morrison v. Nat'l Australia Bank*, the United States Supreme Court held that U.S. securities laws do not apply extraterritorially. But while the U.S. has rejected securities class actions based upon conduct outside of the U.S., other countries have stepped up their focus on the class-action arena, which has led to very large settlements and an increase in the filing of class actions outside the U.S. The Fortis settlement in the Netherlands for \$1.3 billion and the RBS settlement in the United Kingdom for \$1.28 billion show that a securities class action does not have to be filed in the U.S. to lead to a mega-sized settlement.

India passed the New Companies Act in 2013, which imposes stricter statutory duties on directors and officers of companies, along with more severe penalties. The European Union is grappling with the "New Deal for Consumers," which would greatly expand the ability of consumers to pursue collective redress (class actions) in Europe. In many other respects, Europe is clearly moving toward a model inspired by the U.S. Australia, spurred by litigation funding, is now second behind the U.S. in class actions. Thailand amended its Civil Procedure Code in 2015 to include provisions for class actions. Hong Kong introduced a report in 2012 proposing the introduction of mechanisms for class actions, and a working group was later formed by the Hong Kong Department of Justice, which is still reviewing the proposal.