EXPORTING CLASS ACTIONS

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

By Robert J. Usinger and Ivan Dolowich

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.

The above represents a sampling of new and developing law, but it should be noted that the new laws do not guarantee an explosion of class actions outside the U.S. Canada, for example, offers a contrast to this concern. Canada introduced legislation in 2006 that many thought would make the country a preferred venue for securities class actions. However, after an initial wave following the legislation, filings actually decreased for 2017. The Canadian judiciary took a conservative interpretation of new legislation through two cases that made it to the Supreme

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Court of Canada. While not exhaustive on the topic, it is possible that new legislation in foreign jurisdictions initially leads to results similar to Canada—a flurry of filings that test the new climate, followed by a decrease after disappointing results for plaintiffs.

CONSIDERATIONS FOR CARRIERS

As insurance carriers express an apparent desire to export their D&O products to foreign jurisdictions, many of those jurisdictions are enhancing their laws in ways that could make those markets less profitable by increasing investor protections and facilitating the class-action process. Carriers could adopt best practices to handle claims in foreign jurisdictions. In certain countries, D&O claims have to be handled in the country where the policy is issued. Regardless, D&O insurers are likely to encounter new challenges to handling claims in unfamiliar places.

For instance, when you are insured by a foreign insurer, be sure that the forum selection clause is for a U.S. forum. In *Dick's Sporting Goods Inc. v. PICC Prop. & Cas. Co. Ltd. Suzhou Branch*, for example, a federal judge found that Dick's Sporting Goods had to assert its coverage claims in a Chinese court based on the policy's forum selection clause. The carrier could also be the victim of such a foreign selection clause subjecting it to unique and unpredictable legal systems. If the foreign market dictates that such clauses are required to issue policies in their country, then carriers could find themselves involved in costly coverage litigation overseas. It is also plausible that companies could be subject to a foreign judgment even in light of a properly drafted, U.S.-directed forum selection clause.

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In another example, consider that what "intent" means in English may not comport with what it means in French. In *E.T.P.M-U.S.A Inc. v. Natural Gas Pipeline Co. of America*, the court ruled that policies written in a foreign language may be ambiguous where different translations of terms are presented. This presents a significant issue for insurance carriers that will be penalized for an ambiguity, and it illustrates a challenge presented by drafting policies in foreign languages.

FRAUD

Securities class actions often involve some type of allegation pertaining to securities fraud. While D&O polices have exclusions for fraud and other intentional acts, they almost always contain carve backs requiring a final, non-appealable adjudication. In practice, D&O carriers reimburse insureds for the defense of securities fraud complaints, and, since almost none ever get to a final non-appealable adjudication, carriers also pay the settlements of these claims despite the exclusions.

Internationally, indemnification of fraud in this context is uncertain. Greek insurance law, for example, does not allow for insurance coverage for willful misconduct, which is probably a lower barrier than fraud. Many countries have "good-faith requirements" for individuals to be indemnified by their corporations. Most of these issues are yet to be decided internationally, but by looking at the indemnification allowed to directors and officers by the company, and its limitations in certain countries, we can anticipate that some nations will not allow D&O carriers to indemnify alleged fraud as broadly as it is done in the U.S.

Of course, non-indemnification by the company does not necessarily mean that D&O insurance cannot assist insured defendants, since certain insurance products exist specifically for non-indemnifiable situations. However, a different issue arises where the subject nation prohibits indemnification from any source or is unclear about this. ■