

Alert Securities Litigation

Designing a New Playbook for the New Paradigm: Global Securities Litigation and Regulation

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Key developments in both the litigation and regulatory context are compelling multinational corporations to reassess their global securities litigation and regulatory compliance strategies. In the litigation context, recent U.S. Supreme Court activity has limited the ability of overseas plaintiffs to bring securities class action claims within the United States. As such, plaintiffs have shifted litigation to more flexible jurisdictions in Europe and overseas, thereby forcing global firms listed on multiple exchanges to increasingly defend against securities class action claims and regulatory investigations in numerous jurisdictions. At the same time, governments around the world have responded to the recent financial crisis by bolstering their regulatory capability. Governments have not only adopted more robust legislative regimes with respect to securities regulation, but they have also invested heavily in stronger enforcement protocols.

Clearly the rules of the game have changed within the global securities litigation landscape over the past few years. In turn, multinational companies are reevaluating their response and responsibilities to adapt to these new challenges. For instance, how do these new realities affect litigation and settlement strategy for securities class actions?¹ What is the impact of a shareholder derivative action being commenced against a multinational firm simultaneously in the United States and abroad? How can global firms comply effectively with heightened US and foreign regulatory investigations? Which of these trends could affect a company's compliance obligations in a post-Dodd-Frank world? Finally, how does all of this influence a company's purchase of directors and officers liability insurance?

A new securities litigation strategy, or "Playbook," is therefore key for global firms that must now compete under these new realities and regulations. Strategic suggestions are discussed below along with practical advice to help navigate global securities litigation and regulatory enforcement.

Litigation Context: An Increase in Overseas Securities Litigation

Traditionally, the United States was deemed by overseas plaintiffs as the premier forum in which to mount a securities class action claim against a publicly-traded company. Federal courts were comfortable applying US securities fraud laws to disputes arising outside of the United States and overseas plaintiffs enjoyed the efficiency and sophistication of the US litigation system. However, last year, in an abrupt reversal, the United States Supreme Court dramatically limited the extraterritorial application

of US securities laws in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010). This reversal not only bars plaintiffs from asserting claims in the United States over a multinational company traded on a non-US exchange, it also limits the extent to which claims can be made involving non-exchange-based securities transactions.

While *Morrison* will likely curb the filing of certain securities litigation actions in the US, the net effect of this case seems to be that such litigation will simply shift to other, more flexible, jurisdictions. For example, in 2010, the United States District Court for the Southern District of New York dismissed a securities fraud suit against Fortis, a Belgium-based financial services company.² Within one year of the SDNY decision, a Dutch law firm filed suit on behalf of foreign investors against Fortis in the Utrecht Civil Court.³ The Dutch suit, which includes as plaintiffs some of the largest pension funds in Europe, mirrors the same allegations that were previously dismissed in the United States.⁴

Below is a list of likely jurisdictions where modified versions of US-type securities litigation are likely to materialize. We also identify emerging jurisdictions that are expected to bolster their securities litigation and regulatory framework in the coming years.

Canada

Canadian securities class actions are sharply on the rise. Not only is there a record 28 active Canadian securities class actions currently being considered by Canadian courts, but these class actions are estimated to represent approximately \$15.9 billion in

claims.⁵ This rise can be partly attributed to the perception that Canada has very similar securities class action legislation as the US and therefore plaintiffs routinely launch parallel claims in Canadian jurisdictions. Some of these similarities include comparable certification requirements and the existence of both primary and secondary liability under the laws of most Canadian provinces.

Two recent developments, however, stand out in their ability to increase significantly the number of securities suits brought forward in Canada. First, some Canadian jurisdictions have recently statutorily revoked the "reliance" element of a securities fraud cause of action.⁶ By completely removing the reliance requirement in Ontario securities legislation, plaintiffs will no longer have to prove reliance at all, nor rely on a presumption, such as "fraud-on-the-market," to properly mount a statutory-based claim. It seems likely then that plaintiffs may look to Ontario to advance claims that would otherwise be blocked in the United States due to deficiencies in proving reliance. The other major development is the endorsement of litigation funding in Ontario. In *Dugal v. Manulife Financial Corporation*, (2011 ONSC 1785, ¶ 3 (2011)), the Ontario Superior Court approved a third party funding arrangement between the plaintiffs and Claims Funding International (CFI), an Irish corporation.⁷ In arriving at his decision Justice Strathy commented on how the "loser pays" system, which is currently the typical method of assigning the costs of the litigation in Ontario, disincentivizes a class representative from coming forward: "the grim reality is that

no person in their right mind would accept the role of representative plaintiff if he or she were at risk of losing everything they own . . . no rational person would risk an adverse costs award of several million dollars to recover several thousand dollars or even several tens of thousand of dollars."⁸ It is therefore not surprising that analysts have observed that Justice Strathy's comments "could prove persuasive to judges in other Canadian jurisdictions and could also encourage potential plaintiffs and litigation funders to enter into similar agreements"⁹ throughout the country.

There are, however, some limitations on the breadth and scope of Canadian securities fraud claims. In Ontario, damages are limited to the greater of 5 percent of the market capitalization of the company, or \$1 million.¹⁰ Damages pertaining to directors and officers are also generally limited to the greater of 50 percent of compensation or \$25,000.

United Kingdom

In the UK, class actions have not reached the scale of the US, but are routinely applied under current legislation. Class actions, or "group actions," may be brought under Part 19.11 of the English Civil Procedure Rules, which provides that a Group Litigation Order (GLO) can be made to provide for the management of cases alleging common issues of law and fact.¹¹ Securities fraud related claims, more specifically, can be made either under common law principles (*e.g.*, fraud, deceit, or negligent misrepresentation), or under Section 90 of the Financial Services Markets Act of 2000 (for liability relating to statements

made in a prospectus.)¹² Under these provisions, claims can be pursued in a representative action where one representative claimant or defendant acts on behalf of a class of individuals. Shareholders are also permitted to bring derivative suits for director negligence, breach of duty or breach of trust under the U.K. Companies Act 2006.¹³ The increased use of litigation funding in the UK may also make securities class action claims more viable.¹⁴

Netherlands

The Netherlands is also no stranger to securities fraud claims. In contrast to the US, the issue of jurisdiction has not been seriously challenged in Dutch courts. Therefore, courts in the Netherlands are much more flexible in asserting jurisdiction, such as *Fortis*, which we discuss above. Courts in the Netherlands have also adopted a class settlement procedure, known as WCAM, "to create legally binding multi-national settlements of class action suits alleging securities fraud."¹⁵ One such example is the landmark \$352 million Royal Dutch Shell settlement, which arose from allegations by European investors that Shell overstated its oil and gas reserves.¹⁶ As such, the Netherlands might be the new "place to be" for investors seeking large recoveries for their securities fraud claims.

Germany

Though not yet as class action friendly as other highly-industrialized countries, substantive securities fraud claims are filed in Germany. For instance, after a similarly-styled securities lawsuit was dismissed in the US

following *Morrison*, a Canadian bank brought suit in Stuttgart District Court alleging that Porsche manipulated the shares of Volkswagen common stock in 2008 when it was trying to take over Volkswagen.¹⁷

Important differences do, however, exist within the German approach to securities litigation. For instance, Germany passed the Capital Investors' Model Proceeding Law in 2005. This legislation serves as the primary legal authority for securities fraud class actions.¹⁸ Rather than providing a mechanism to certify a "class-type" claim, the German legislation instead provides for the designation or selection of a "model case." This "model case" allows common elements of claims to be litigated first, and its common rulings bind all petitioners.¹⁹ Another difference is Germany's use of an "opt-in" system. In contrast to the "opt-out" approach in US securities cases, only those claimants who actively choose to opt into the model case before a final judgment or settlement are bound by the decision.

Other Emerging Jurisdictions

While some jurisdictions may not have as robust of a securities litigation framework as the countries mentioned above, recent developments across different regions reinforce the need for global firms to monitor potential litigation venues around the world. Australia, for instance, has a well-established history of litigation funding and has adopted legislation that is highly similar to US-style securities laws. Mexico, also recently amended its laws to allow consumers and investors

to bring class actions.²⁰ High-profile restructurings in the Middle East (e.g. Dubai) have spurred shareholders in that region to seek better legislative protections and possible compensation. Finally, securities experts have also speculated that China, in an effort to attract even more investment capital into the country, is likely to introduce more stringent corporate governance and securities standards in the near term.²¹

Regulatory Context: Stronger Overseas Securities Regulatory Frameworks

Just as US-style securities fraud litigations are heating up in foreign jurisdictions, foreign governments are also enacting new laws and institutions designed to regulate securities and address corruption in the aftermath of Dodd-Frank.

Stronger Regulators in Canada and the United Kingdom

Canada and the United Kingdom are both undertaking substantial reform in order to implement stronger regulatory and enforcement agencies. One of the biggest adjustments in Canada is the recent initiative to consolidate the thirteen provincial securities commissions that currently exist into a single regulator at the federal level.²² The proposed consolidation will bolster regulatory and criminal enforcement across the country and allow for a more consistent approach to securities regulation.²³ In February 2011, the U.K. HM Treasury published a consultation paper providing more detail regarding recent financial regulatory reforms in the UK. These reforms would be

overseen by three new regulatory authorities: the Financial Policy Committee (which would regulate the UK financial system as a whole); the Prudential Regulation Committee (which would regulate financial institutions that carried significant risks on their balance sheets); and the Financial Conduct Authority (which would be the successor to the U.K. Financial Services Authority (FSA), the UK's equivalent of the U.S. Securities and Exchange Commission). Under this scheme, the Financial Conduct Authority will have "as its core purpose, protecting and enhancing the confidence of all consumers of financial services . . ." ²⁴ The introduction of these new institutions by 2012 highlights the commitment of each government to building a stronger enforcement regime for publicly-traded companies.

New Anti-Bribery Legislation in Europe

Many countries in Europe have also adopted new anti-bribery legislation that may affect international issuers. The U.K. Bribery Act, which went into effect earlier this year, creates new liabilities for companies that fail to prevent the use of bribery within their organizations. ²⁵ Similarly over the past year, Russia and China both enacted anti-bribery legislation, and Spain updated its anti-bribery statutes thereby criminalizing corporate bribery in that country. ²⁶

An Additional Layer of Regulatory Oversight

Finally, public-traded companies listed on multiple exchanges will now have to navigate another layer of regulatory oversight in Europe,

due to the recent introduction of a new European Union regulatory framework for securities and banking. ²⁷ The new European Securities and Markets Authority will provide overall guidance to the European financial markets and will be responsible for ensuring that a single set of harmonized regulations are applied by national regulators. ²⁸

The result of this torrent of regulatory reforms is clear: global firms must be able to navigate not only multiple jurisdictions, but multilateral regulatory initiatives as well. This requires an intimate and thorough understanding of the new rules of the game to develop successful, sustainable securities strategies.

Overseas Regulatory Enforcement Activity

As international securities regulation increases, so does international regulatory enforcement activity. In the US, Dodd-Frank reforms allow the S.E.C. and U.S. Department of Justice to assert jurisdiction under the more lenient "cause" and/or "effect" tests, thereby significantly increasing the reach of these regulators. In July 2010, French regulators pursued a large French hedge fund for insider trading, ²⁹ and in January 2011 filed insider trading charges against France's largest publisher. ³⁰ In 2010, regulators in Hong Kong prosecuted insider trading charges against a large hedge fund. ³¹ In 2011, the FSA levied a substantial fine against a large multinational company in the UK for failing to have proper anti-bribery controls in place. ³² Outside of the bribery context, the FSA also ordered another large

fine against the former Chairman of a large UK supermarket chain for failing to properly disclose voting rights in such company. ³³ In Canada, regulators have also been active. Most recently, the Ontario Securities Commission has been aggressively investigating allegations of securities fraud and insider trading against executives of Sino-Forest Corp. ³⁴

Cooperation among international securities regulators has also become commonplace. ³⁵ For instance, regulators in France, Costa Rica, and the United States recently collaborated, and later collected significant penalties from a global communications company relating to anti-bribery charges. ³⁶ International issuers would be prudent to update their regulatory protocols with the understanding that future cooperation with multiple regulators may require a much more rigorous response.

What Does All this Mean for the Multinational, Publicly Traded Company?

The possibility of trans-national securities litigation and enforcement activity is very real, especially as the plaintiffs bar adapts to the new landscape and foreign jurisdictions. Below are a few suggestions aimed at establishing the new "Playbook" regarding global securities litigation and regulation:

Designate a Global Quarterback – Internally and Externally

The potential for US-type securities litigation and enforcement activity abroad requires a reassessment of both internal and external resources. Internally, foreign companies

trading on multiple foreign exchanges need to devote legal resources toward understanding the securities laws and regulations in potentially problematic jurisdictions, jurisdictions where new regulations have been implemented, or in jurisdictions where there is likely to be significant groups of potentially-affected shareholders. This type of understanding is crucial in instances where companies are contemplating or have already completed securities offerings on foreign exchanges.

For similar reasons, the company should also identify outside legal resources in these jurisdictions that have experience dealing with class actions, and are well-versed with cross-border issues relating to both litigation and regulatory investigations. It is also important to manage the expectations of the parties and regulators to ensure that one jurisdiction investigating alleged misconduct does not outpace the other regulators, thereby unfairly advantaging both existing and potential plaintiffs. For instance, there are currently two class actions proceeding simultaneously in New York and Ontario relating to securities fraud allegations pertaining to IMAX Corporation, the makers of a propriety motion picture film format. The Ontario Superior Court has endorsed plaintiffs' ability to conduct some discovery, even though the litigation is still at an early stage.³⁷ Some commentators suggest that this discovery decision "may enable plaintiffs' classes composed of both US and Canadian investors to perform an end-run around the U.S. Private Securities Litigation Reform Act (PSLRA) by filing suit in Canada."³⁸

Counsel must also be acutely aware of complex data privacy laws in the European Union, which make electronic discovery considerably more difficult than in the US. Ideally, the best outside resource to coordinate all of these concerns is one international law firm that can efficiently plan and manage both litigations and investigations in multiple jurisdictions at the same time.

Review Compliance Activities

It has become especially apparent that Dodd-Frank did not just change the landscape of securities regulation and enforcement in the US. As noted above, the UK and the European Union are working mightily to coordinate regulatory measures already in place in the US. Similarly, many countries are either instituting for the first time, or revising already-established laws relating to insider trading and anti-bribery. As a result, it is important for companies to have the adequate internal compliance resources to monitor, train employees, and respond to a fast-changing international regulatory landscape.

Review D&O Insurance

Finally, with the increase in transnational securities-related litigation and regulatory investigations, it is critically important to verify that the company's directors and officers liability insurance policy (D&O policy) will adequately respond to these new challenges abroad. D&O policies are very tailored instruments and are often dependent on the specific jurisdiction where the litigation or investigation is commenced. Therefore a company must also investigate whether the

current D&O policy in place will actually apply not only to potential litigation or investigation in a foreign jurisdiction, but also with regards to any settlement resulting therefrom.³⁹ Also, it is important to confirm if the D&O policy in question for the particular claim provides coverage for investigations and shareholder derivative actions (as corporate indemnification obligations may vary from country to country). This is an important and complicated area; it is imperative that large companies carefully determine whether it is worth the expense to engage both experienced insurance counsel and a D&O broker experienced on the international playing field to review its D&O coverage from a transnational claims and investigations perspective. This is not an area to be penny wise and pound foolish, as the stakes have undoubtedly risen given the new paradigm of global securities litigation, regulation, and enforcement activity.

1 Certain jurisdictions refer to "class actions" as "mass plaintiff" actions.

2 *Copeland v. Fortis*, 685 F. Supp. 2d 498 (S.D.N.Y. 2010).

3 The Dutch firm filed in association with two plaintiff-side US law firms, Grant & Eisenhofer P.A. and Barroway Topaz Kellser Meltzer & Check, LLP.

4 English Translation of Dutch Writ, filed on January 10, 2011 in Utrecht Civil Court, Netherlands, [http://investorclaimsagainstfortis.com/Attachment/191_English%20translation%20of%20Writ%20\(00028785\).PDF](http://investorclaimsagainstfortis.com/Attachment/191_English%20translation%20of%20Writ%20(00028785).PDF).

5 See NERA Consulting, Trends in Canadian Securities Class Actions, 2010 Update, http://www.nera.com/67_7185.htm.

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- 6 See, e.g., Securities Act, R.S.O. 1990, c. S.5 at s.138.3 (Can.). See *Silver v. Imax Corp.* [2009], O.J. No. 5573 and [2009] O.J. No. 5585 (in certifying a global class of plaintiffs, Justice van Rensburg appears to have accepted that the “fraud-on-the-market” or “efficient market” theory can also be applied in common law claims in Ontario, at least at the pleading or class certification stage).
- 7 *Id.* at ¶ 4.
- 8 Dugal at fn 28.
- 9 David H. Kistenbroker, Alyx S. Pattison, Patrick M. Smith, *Recent Developments in Global Securities Litigation*, 1904 PLI Corp. 607 (2011) at 642 citing Kevin LaCroix, *A Closer Look at Litigation Funding and the “Loser Pays” Model*, THE D&O DIARY (Apr. 20, 2011), <http://www.dandodiary.com/tags/litigation-funding/>.
- 10 This cap or “liability limit” does not apply if a person or company knowingly misrepresents or knowingly fails to disclose certain information. Securities Act, R.S.O. 1990, c. S.5 at s. 138.7(2) (Can.). Liability limits also do not apply to common law fraud damages. In *Silver v. Imax Corp.*, the Ontario Superior Court certified common law fraud claims along with statutory claims.
- 11 Civil Procedure Rules, 2010, Parts 19.10-15. (U.K.).
- 12 See Financial Services and Markets Act, 2000, c.8, § 82-384. For a claim under Section 90 of the FSMA, the element of reliance is not required to be proven, nor is the element of scienter.
- 13 Companies Act, 2006, c. 46 (U.K.).
- 14 Litigation funding allows for a litigant to finance their litigation costs by entering into an agreement with a third party company. In exchange, the third party retains a right to a share in the settlement, pending a successful resolution for the litigant.
- 15 David H. Kistenbroker, Alyx S. Pattison, Patrick M. Smith, *Recent Developments in Global Securities Litigation*, 1904 PLI Corp. 607 (2011) at 626.
- 16 Importantly, the Dutch statute only provides for the resolution, and not the litigation of class claims, thereby rendering it highly attractive to plaintiffs. Kevin LaCroix, *Does the Royal Dutch Shell Settlement Approval Portend a Rush of European Collective Actions?* THE D&O DIARY (June 3, 2009), <http://www.dandodiary.com/2009/06/articles/international-d-o/does-the-royal-dutch-shell-settlement-approval-portend-a-rush-of-european-collective-actions/>.
- 17 A parallel investigation by German prosecutors of former Porsche company executives continue, as well. Jan Schwartz & Josie Cox, *VW’s Porsche Merger Knocked By German Probe*, REUTERS (Feb. 24, 2011), <http://www.reuters.com/article/2011/02/24/us-porsche-probe-idUSTRE71N1R020110224>.
- 18 David H. Kistenbroker, Alyx S. Pattison, Patrick M. Smith, *Recent Developments in Global Securities Litigation*, 1904 PLI Corp. 607 (2011) at 643.
- 19 Note that individual elements are litigated separately and that these individual proceedings are suspended pending the litigation and resolution of the model case. Kapitalanleger-Musterverfahrensgesetz “KapMuG” – the Capital Investors’ Model Proceeding Law (2005). For an excellent overview of Germany’s substantive securities laws, see Gerhard Wegen, *Congratulations from Your Continental Cousins, 10b-5: Securities Fraud Regulation from the European Perspective*, 61 Ford. L. Rev. S57 (1993).
- 20 See *Mexico Adopts a Class Action Procedure* (July 29, 2010), <http://globalclassactions.stanford.edu/content/mexico-adopts-class-action-procedure-july-29-2010>.
- 21 Dave Bradford, *European D&O Insurance Market: Reforms Cause a Shifting Landscape* (Sept. 22, 2011), http://corner.advisen.com/advisen/webinars/European_DO_Insurance_Market.html.
- 22 Several provinces petitioned the Supreme Court of Canada for its opinion on “whether the legislation drafted to implement the national regulatory system is within the constitutional jurisdiction of Parliament.” The Supreme Court is expected to render its decision by the end of 2011. Canadian Securities Transition Office Homepage, <http://csto-btcvm.ca/home.aspx>; Monica Gutsch, *Canada Securities Regulator Seen Mid 2012: Transition Office Head*, WALL STREET JOURNAL (September 15, 2011), <http://online.wsj.com/article/BT-CO-20110915-712291.html>.
- 23 See Canadian Securities Transition Office Homepage, <http://csto-btcvm.ca/home.aspx>.
- 24 See HM Treasury, *A New Approach to Financial Regulation: Building a Stronger System*, at 60 (Feb. 20, 2011).
- 25 See Weil Alert, *UK Bribery Act*, http://www.weil.com/files/Publication/c1e306e1-bf27-466e-8063-756ea952cbe9/Presentation/PublicationAttachment/fbb5317d-d916-4e0f-a290-7c91588b66a1/LO_UK_Bribery_Act_2010_May_2010.pdf.
- 26 See Joe Palazzolo, *Russia Criminalizes Foreign Bribery*, WALL STREET JOURNAL, (May 5, 2011), <http://blogs.wsj.com/corruption-currents/2011/05/05/russia-criminalizes-foreign-bribery/>. As to Chinese anti-bribery activity, see Amendment VIII of the Criminal Law of the People’s Republic of China, Feb. 25, 2011, which prohibits individuals and corporations from providing “money or property to any

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- foreign party performing official duties or an official of international public organizations for the purpose of seeking illegitimate business benefits." As to Spanish anti-bribery activity, see reforms to Law 10/1995 of the Spanish Criminal Code.
- 27 See Regulation (EU) No. 1095/2010 of the European Parliament and of the Council of 24 November 2010.
- 28 *Id.* at 331/85 (9); see also Jonathan Wilson, *Dodd-Frank Rules Will Extend SEC's Global Reach*, FINANCIAL TIMES, (Aug. 16, 2011).
- 29 Louise Armistead, *Hedge Fund B&G Faces French Insider Trading Charge*, THE TELEGRAPH, (July 28, 2010), <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/investmenttrusts/7913366/Hedge-fund-BandG-faces-French-insider-trading-charge.html>.
- 30 Bruce Carton, *Securities Enforcement and Litigation Goes Global*, SECURITIES DOCKET (Feb. 9, 2011, 2:32 pm), <http://www.securitiesdocket.com/2011/02/09/securities-enforcement-and-litigation-goes-global/>.
- 31 Robert Cookson, *Hong Kong Cracks Down on Insider Trading*, FINANCIAL TIMES (Apr. 29, 2010), <http://www.ft.com/intl/cms/s/0/a323c01a-533e-11df-813e-00144feab49a.s01=1.html#axzz1Zj91jwz6>.
- 32 CCL Compliance Services, *FSA Fines Willus Limited GBP 6.895 Million for Anti-bribery and Corruption Systems and Control Failings* (July 21, 2011), http://www.cclcompliance.co.uk/news_and_events/news/9861.
- 33 Natalie Holt, *FSA Fines Sir Ken Morrison £210k Over Share Sales*, MONEYMARKETING, (Aug. 15, 2011).
- 34 See Sean B. Pasternak & Doug Alexander, *Sino-Forest Executives Face Direct Hit From Regulator in Fraud Probe*, BLOOMBERG, (Sept. 8, 2011).
- 35 See, e.g., *Russian Regulator and Deutsche Börse Sign Cooperation Agreement* (May 21, 2010), http://deutsche-boerse.com/INTERNET/MR/mr_presse.nsf/maincontent/3490EB84EF8761D4C125772A004D19A1?OpenDocument&lang=en&.
- 36 Squire Sanders, *The DOJ and SEC Close 2010 with an FCPA Bang!* (Jan. 9, 2011), <http://www.anticorruptionblog.com/industry-investigations/>.
- 37 Dana Peebles and Paul Steep, "Shareholders granted wide pre-suit 'discovery' powers in proposed Securities Act cases" (2008) McCarthy Tetrault LLP, http://www.mccarthy.ca/article_detail.aspx?id=4120.
- 38 David H. Kistenbroker, Alyx S. Pattison, Patrick M. Smith, *Recent Developments in Global Securities Litigation*, 1904 PLI Corp. 607 (2011) at 641.
- 39 For example, many jurisdictions require D&O Policies to be issued by an insurer that is "locally admitted" in the particular jurisdiction, rather than a global insurer from another country, such as the US.

If you would like more information about global securities litigation and regulation, or about Weil's Securities Litigation practice, please speak to your regular contact at Weil, or to the authors:

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