STATE OF THE PUBLIC D&O MARKET

Directors and officers liability insurance is becoming increasingly challenging to both purchase and maintain. An extremely important tool to protect companies and their management against claims for violations of securities laws, it is now at a crossroads of markedly increased premiums along with a limited pool of insurers willing to cover this market.

KEY INFLUENCERS OF CURRENT D&O MARKET TRENDS

With rates up for virtually every D&O risk, securities class actions and litigation following high-profile events lead the way as the primary causes. Expected to continue to grow are environmental, social and governance failings, political challenges and the impact of reputation events on stock prices. Here are a few of the major issues that have helped to create havoc in the current marketplace:

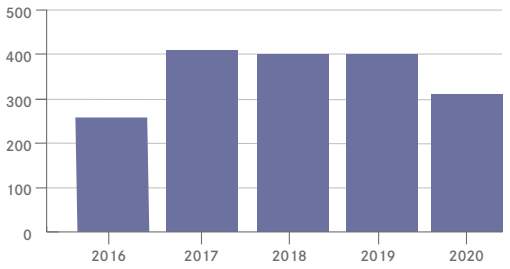
› Securities Class Action (SCA) Settlements

Both the average and median settlement values more than doubled throughout 2017 and 2018 with historically high settlement amounts persisting in 2019. That year the average was $27.4 million with a median settlement up to $11.5 million, 34% higher than the prior nine-year median.

› Rise in SCA Filings

In the last ten years, SCA lawsuits continue to be filed at a breakneck pace. Some of the attributing factors include changes in the laws governing mergers and acquisitions, a disproportionate number of filings by so-called “emerging” plaintiff’s firms, and a shift of filings from federal to state courts. The increase in the number of IPO’s has also contributed to the high level of filings.

FEDERAL SECURITIES CLASS ACTION CASES - LAST FIVE YEARS



2020 filings have fallen greatly due to COVID-19 lockdowns impacting court accessibility.

› Cyan Decision and Impact on IPO’s and Secondary Offerings

The U.S. Supreme Court's decision in the Cyan case alleged breaches of certain sections of the 1933 Securities Act could not be removed from state court jurisdiction. This opened the door for litigation over registration statements, in particular, S1 registration statements used by IPO's. With cases now in both federal and state courts, defense litigation expenses continue to grow due to multiple venues. Recently, secondary offerings are also starting to raise the risk profile.

› Merger Objection Litigation

Suits relating to public company acquisitions continue unabated; however, we are now seeing them in federal instead of state courts. Even when a merger objection suit is settled, one of the leading causes of securities class action suits is now related to merger and acquisition integration issues. Virtually every merger announcement ends up in litigation.

	Low Risk Profile Companies No Losses/Strong Financials/Stable Market Cap/Low Risk Industry	Medium Risk Profile Companies One or more of these is negative: Loss History/ Weakened Financials/ Market Cap Fluctuations/ Higher Risk Industry	High Risk Profile Companies Loss History/ Weakened Financials/ Market Cap Fluctuations/ Higher Risk Industry	IPO’s
RATES				Rates range from $750k to $2M to Primary $5M layers. Excess rates average in the 80-95% Rate on Line of the Underlying Layer
PRIMARY	10 – 50%	50 – 100%	100%+	
EXCESS	20 – 70%	70 – 100%	100%+	
SIDE A DIC	15 – 40%	40 – 75%	75 – 100%	
RETENTIONS	50 – 75% Retension Increases	75% – 100% Retention Increases. Merger Objections Claims Retentions continue to increase due to continued Merger Related Claims	100%+ Retention Increases	IPO Retentions can range from $5 million/ $10 million/$15 million or more depending on the Offering Size/Industry/ Risk Factors
CAPACITY	$2.5M – $10M per layer	$2.5M – $5M per layer	$2.5M – $5M per layer	Limits being drastically reduced to $2.5 and $5 million layers
COVERAGE CHANGES	Not experiencing any significant changes/ reduction in coverage grants	Some reductions in coverage grants, such as, lower Derivative Demand Costs Sublimits, Reg FD Demands and Freedom/Asset Protection Costs being eliminated	Significant Coverage Limitations	Significant Coverage Limitations

Note: Side A DIC Layers are seeing rate increases after years of significant rate cuts

STATE OF THE PUBLIC D&O MARKET

› Historical Rate Erosion and Reserve Inadequacy

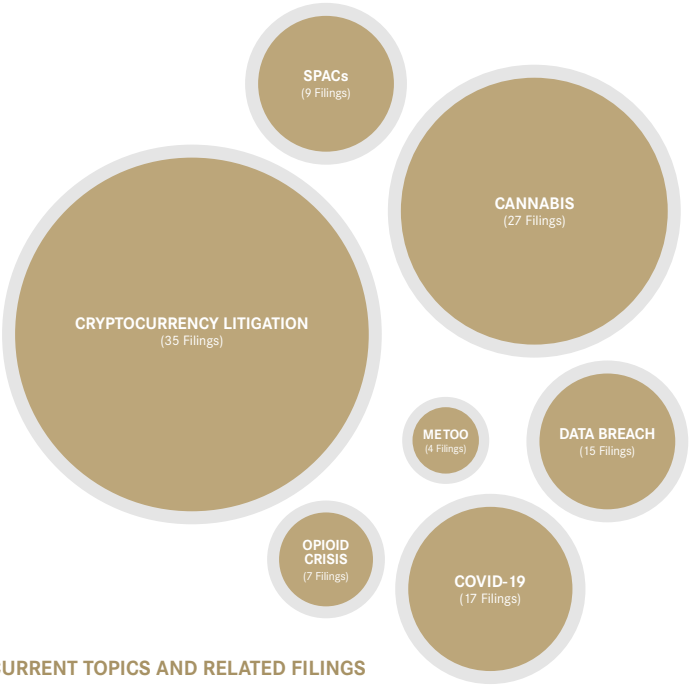
Within the D&O marketplace, there has been an extended period of eroding market conditions. Pricing has been inadequate to support the heavy level of losses, and carriers are now having to strengthen their reserves, with expectations that this trend will continue, perhaps even at a faster rate.

› Event-Driven ESG Litigation

Environmental, social and governance (ESG) concerns cover a broad range of topics. The hottest issues include board diversity, climate change, social movements such #MeToo and #BLM, diversity, cyber breaches, and conscious consumption. Risks rising from ESG issues expected to drive litigation in the coming years. They are also often a source of derivative suits, separate from a securities class action.

› COVID-19

A wave of Covid-19 related lawsuits and claims are expected as companies face significant revenue and profit losses from the pandemic. There have been 17 filings already year to date. Industries hit particularly hard include travel, hospitality, auto dealerships and retail. Risks should be evaluated now including securities litigation and regulatory investigations tied to management's response to the impact of the virus.



CURRENT TOPICS AND RELATED FILINGS

› SCA Filings and Derivative Actions

Breadth of fiduciary suits brought by shareholders on behalf of a company against its directors and officers are an increasing threat. As companies cannot indemnify their directors and officers for these settlements, if insurance doesn't pay, the directors and officers are forced to make personal payments to settle the suits. Plus, event-driven derivative suits can create large headlines, embarrassment and large settlements.

THE BOTTOM LINE

With extreme market volatility, dramatic increases in pricing, and carriers seeking higher retentions, a hard reset is needed on every company's D&O policy. Adjustments to retention levels, changes to insuring agreements, and taking a closer look at the construction of the program can customize the program to the company's needs. Planning a renewal or purchase well in advance is critical. Also crucial is holding substantive underwriting discussions which differentiate the organization as attractive to insure. A highly skilled D&O insurance expert that understands the rapidly changing market dynamics can provide detailed analysis and and comparisons that can help the organization make the right decision for their evolving needs.