Trends in D&O Insurance

1. **D&O Insurance Rates.**

   There is profit pressure on D&O insurers to charge higher rates due to historical mispricing that has created a significant gap in D&O reserves. Insurers have also realized that D&O insureds have an increasing appetite for risk and securities class action filings are soaring, as the rate of litigation in 2018 was 8.7%.

   Additionally, the total value of 2018 settlements was $5.064 billion, 50% higher than the annual average for the prior nine years.

2. **Premium Trends.**

   Overall premiums are increasing because corporate valuations are increasing, claims frequency is currently two times the historical average, and the probability of a publicly traded company being sued is nearing 10%.

3. **Claims Trends.**

   In 2018, plaintiffs filed 403 new federal securities class actions, making it the second-largest year on record. The number of filings in 2018 was 99% higher than the 1997 to 2017 average. The 182 M&A-related lawsuit filings in 2018 were the second-largest number since 2009 and remain the primary contributor to the total increase in overall litigation.

4. **Public Companies.**

   There are fewer publicly traded companies today than previously. At year-end 2017, there were slightly more than 3,600 U.S. publicly traded companies. Nearly 8.5% of all publicly traded companies were sued in securities class actions in 2018. This is the highest percentage since 2006, and a significant increase in the average annual litigation rate for 1996 to 2016, which was 2.9%.

5. **Private Companies.**

   More than 1 in 4 private companies reported experiencing a D&O loss in the last three years. Private companies also have much broader entity coverage than publicly traded companies. Therefore, coverage is often triggered and responds in situations that insurers do not adequately anticipate to be covered (*e.g.*, false advertising).

6. **Panels (Cost of Defense).**

   Most D&O insurers do not require the utilization of panel counsel to defend insureds. A significant issue insurance companies face is soaring litigation costs, as attorneys in large markets can charge more than $1,500/hour.

7. Merger Objection Cases.

Nearly every company that engages in merger activity faces litigation. Although these suits often end in disclosure only settlements, the defense costs and obligations to pay plaintiffs' attorneys' fees can be significant.

This situation has been somewhat mitigated by the 2016 Delaware Chancery court decision in *Trulia*, which held that Delaware courts would not award significant attorneys' fees in cases that resulted in a disclosure only settlement in merger objection cases. Nearly overnight, those cases previously filed in Delaware state courts migrated to federal court.

8. *Cyan* Decision.

Following the U.S. Supreme Court's decision in Cyan, which held that state courts have concurrent subject matter jurisdiction over class actions that exclusively allege claims against the Securities Act of 1933, an open question remained as to whether the Private Securities Litigation Reform Act of 1995's (PSLRA) automatic stay on discovery applied during the pendency of a motion to dismiss in state court. The PSLRA's automatic stay provision's applicability remains an open question. The lack of uniformity as to the PSLRA's automatic discovery stay will present practical and financial issues for litigants facing claims in state court under the '33 Act.

9. Derivative Lawsuits.

Derivative lawsuits are an important proxy for non-indemnifiable claims. Many derivative claim settlements are large in nature, with several recent examples in excess of $100 million. Several of the large settlements could be considered a part of the event driven litigation phenomena. The combination of rising derivative action frequency plus large derivative claim settlements, foreshadows an increasing concern for potential increased personal liability for individual directors and officers and is leading to significant increases in insurer payouts under "Side A" D&O insurance coverage.

10. Underwriting Meeting.

In order for D&O insurers to fully understand a risk and price coverage appropriately, they must receive appropriate information in the underwriting process. This makes underwriting meetings with their insureds' management teams critical. These meetings should be viewed by insureds as a dialogue with the insurers' underwriters and utilized as an opportunity to place their companies in the best light possible by focusing on steps the company has taken which mitigate their exposure to litigation.