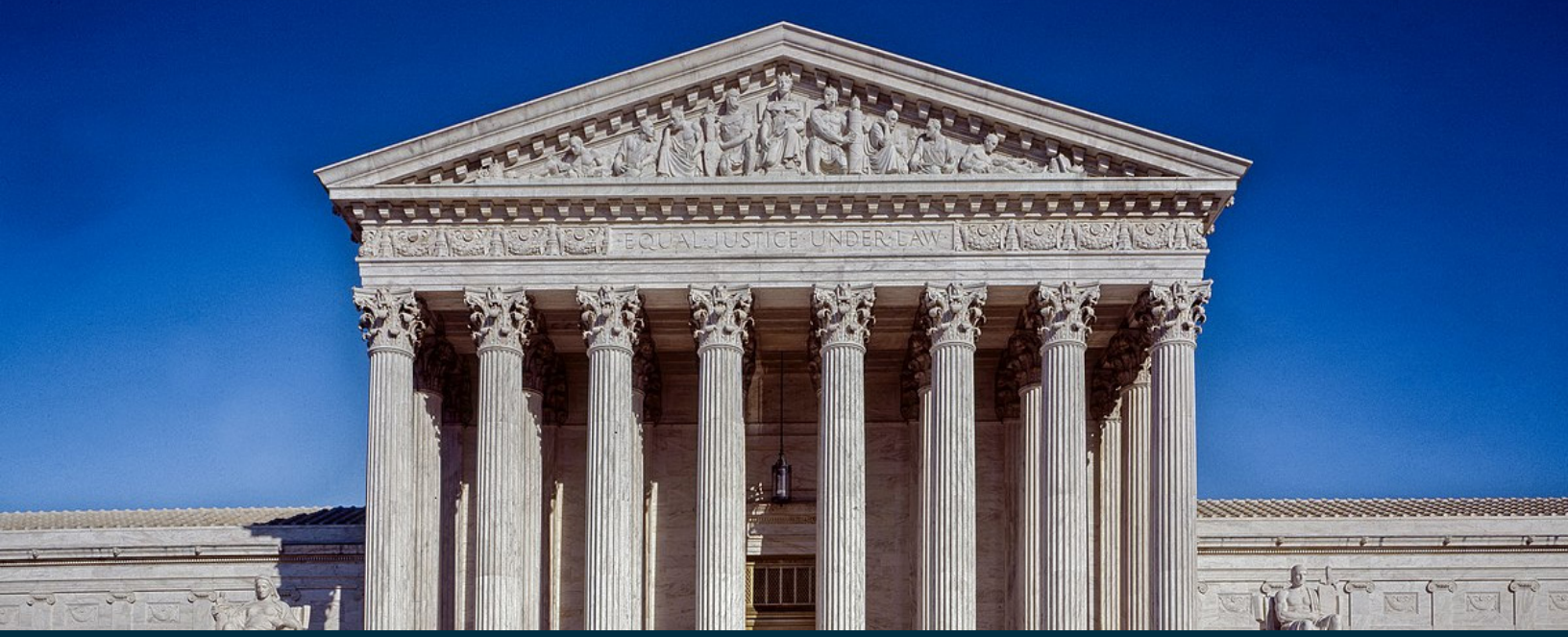

EXECUTIVE LIABILITY INSIGHTS

Claims & Legal | March 2021

Alliant

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PRIOR ACTS EXCLUSION AND BUMP-UP PROVISION IN D&O POLICIES DO NOT PRECLUDE COVERAGE FOR STOCKHOLDER SUITS

Northrop Grumman v. Zurich, 2021 WL 347015 (Del. Super. Ct. Feb. 2, 2021)

In the underlying suit, stockholders filed a class action following a merger of two defense contracting firms. The suit alleged violations of Sections 10(b) and 14(a) of the Securities Exchange Act of 1934, claiming the proxy solicitation materials distributed in advance of the transaction contained false and misleading statements, and post-merger, the defendants intentionally disseminated false and misleading data about the financial health and prospects of the go-forward entity.

Three separate towers of directors and officers liability ("D&O") insurance were implicated: one for each of the merger participants under their respective run-off policies, and one for the go-forward entity and the go-forward policy. With respect to the pre-merger alleged wrongful conduct, the insurers denied coverage and cited the bump-up exclusionary language contained in the run-off policy's definition of loss. Under the go-forward policy, the insurers denied coverage with respect to the post-merger alleged wrongful conduct, citing the policy's prior acts exclusion. Coverage litigation ensued.

The go-forward insurers denied coverage on the grounds the alleged post-merger wrongful conduct was related to the pre-merger alleged wrongful acts,

and therefore the prior acts exclusion barred coverage. The court disagreed, however, finding the two buckets of claims were not interrelated and the alleged wrongful conduct occurred in different insured capacities. Specifically, the court found part of the underlying suit was brought against directors and officers in their capacities for the pre-merger firms, while other allegations claimed wrongdoing by the go-forward entity and various individuals in their capacity as directors and officers of the brand new entity, which was first born at the consummation of the merger.

The Takeaway

The plaintiffs' bar remains aggressive in the pursuit of transaction-related litigation. M&A activity and a skyrocketing number of SPAC/de-SPAC transactions indicate the elevated levels of such filings will continue into the foreseeable future. The *Northrop Grumman* decision will assist in rebutting insurers' arguments in an attempt to disclaim coverage for such matters. Additionally, the decision suggests avoiding overly broad language in prior acts exclusions. Instead, focus should be on including language such as "that part of a Claim" and using the defined term "Wrongful Act" so the exclusion essentially would not apply to alleged wrongdoing by an insured in their capacity as director or officer of a go-forward entity.

...the court rejected the insurer's argument that the prior acts date barred coverage.

PROFESSIONAL SERVICES EXCLUSION DOES NOT BAR COVERAGE UNDER D&O POLICY

Atlantic Healthcare v. Argonaut Ins. Co., 2021 WL 266281 (S.D. Fla. Jan. 27, 2021)

In the underlying action, the estate of a patient of a healthcare facility alleged the facility was understaffed in a direct effort to generate as much profit as possible, exploiting vulnerable adults by taking their assets. The healthcare facility sought coverage for the suit under its directors and officers liability ("D&O") policy, but the insurer denied coverage, citing the policy's professional services exclusion, managed care activity exclusion, and prior acts exclusion.

In finding for the facility, the court determined the allegations regarding staffing and compensation did not constitute professional services under the D&O policy, noting that staffing and compensation involve business decisions. Furthermore, the court found the policy's managed care activity exclusion was not a bar to coverage because the alleged exploitation of vulnerable adults did not arise out of any managed care activity. Finally, the court rejected the insurer's argument that the prior acts date barred coverage. The insurer claimed the alleged breach of care commenced when the patient entered the facility, which preceded the policy's prior acts date. The court, however, disagreed, noting the wrongful acts alleged were not all based on prior acts.

The Takeaway

This case is a good example of the aggressive use of the professional services exclusion by an insurer in an effort to avoid coverage. It is essential to carefully review the use and wording of professional services exclusions in D&O policies to avoid potential expensive and time-consuming litigation with your insurer.

COMMON SCHEME KEY FACTOR IN DETERMINING RELATEDNESS OF WRONGFUL ACTS

Perdue Farms v. Civil Nat'l Union Fire Ins. Co. of Pittsburgh, PA., 2021 U.S. Dist. LEXIS 23613

In the underlying suits, an insured meat processing and agricultural products company was sued by consumers and purchasers of its chicken, alleging antitrust violations (the "Purchaser Action"). The following year, various growers who raise chickens for the company also brought suit for antitrust allegations (the "Grower Action"). The company reported each action to its insurer under the respective policy in effect at the time each matter arose. Coverage litigation ensued after the insurer sought to relate the Grower Action with the earlier Purchaser Action, citing related wrongful acts, which would require both actions be handled as a single claim under one policy period and subject to one retention.

The U.S. District Court of Maryland found in favor of the company. Citing *Northrop Grumman v. Zurich*, the court stated the related wrongful acts clause must be construed "broadly," but "at some point, a relationship between

two claims, though perhaps 'logical,' might be so attenuated or unusual that an objectively reasonable insured could not have expected they would be treated as a single claim under the policy." In its analysis, the court noted that "relatedness" is determined by whether the actions from a "common nucleus of facts," and looked to a common scheme but did not find one. Consequently, the court determined the Grower Action did not arise from the Purchaser Action, and since there were two distinct conspiracy schemes restricting competition for the respective groups, the plaintiffs in both actions were not injured by the same anticompetitive acts.

CEO SENTENCED TO SIX MONTHS IN PRISON AFTER PARK DOCTRINE PLEA

The *Park* doctrine, which is based on the 1975 Supreme Court case, *United States v. Park*, provides that a "responsible corporate officer" can be held responsible for an organization's violation of the federal Food, Drug and Cosmetic Act ("FDCA"). By way of example, the CEO of a pharmaceutical company was sentenced to six months of imprisonment for his conviction on one misdemeanor count of misbranding. His conviction, which arose from the company's marketing of its opioid-based product, was based on his role as a responsible executive who failed to prevent or correct the company's illegal acts, rather than his direct involvement in those illegal acts and despite the lack of any criminal intent, which is not required for a misdemeanor offense.

United States v. Facteau, 2020 U.S. Dist. LEXIS 167169

Similarly, in this recent case before the U.S. District Court for the District of Massachusetts, defendants were convicted of multiple counts of misdemeanor adulteration and misbranding. Although not a *Park* doctrine case, the defendants raised post-trial arguments that would typically be found in a *Park* doctrine case. Specifically, defendants argued their convictions, without proof of intent, violated due process. Although the judge expressed some concern about the potential scope of individual criminal liability where the defendant lacked knowledge of the wrongful conduct, she found *Facteau* did not present that issue because there was evidence the defendants participated in the misconduct.

The Takeaway

While *Park*-type strict liability claims remain uncommon, they do provide excellent reminders of the importance of strong indemnification and directors and officers liability insurance coverage for companies and executives. It remains to be seen whether the government will pursue such cases more frequently or if there were facts and circumstances in the cases at hand that were unique and resulted in these prosecutions. Regardless, the fact that these cases can lead to jail time for the corporate executive should serve as a cautionary tale for directors and officers to be careful to ensure their organization's compliance with the FDCA.

...defendants argued their convictions, without proof of intent, violated due process.

COURT ENFORCES CONSENT TO SETTLEMENT PROVISION IN D&O REIMBURSEMENT POLICY

Apollo Educ. Group v. Nat'l Union Fire Ins. Co., 2021 Ariz. LEXIS 8

In the underlying case, a class action lawsuit filed against an insured higher education service provider alleged backdating stock options for corporate executives. The insureds settled the matter post mediation, despite the directors and officers liability ("D&O") insurer's repeated refusal to consent to the settlement. Coverage litigation ensued when the insureds filed suit against the D&O insurer for breach of contract and bad faith.

The Arizona Supreme Court held that under a reimbursement policy, the objective reasonableness of a settlement is to be independently assessed by the insurer, giving fair consideration to the settlement offer. In doing so, the court found the consent to settlement provision in the D&O policy was unambiguous, also noting that where the insurer has no control over the litigation, it is more reasonable that the insurer's perspective should prevail. The court held the insurer is obligated to conduct a full investigation into the claim, including an evaluation of the merits of plaintiff's theory of liability, defenses to the claim, and any comparative fault.

According to the court, the determination as to whether a third-party settlement is reasonable should

factor in the added risk of subjecting the insured to liability in excess of the policy limits because of the insurer's bad faith refusal to settle within those limits. Moreover, the implied covenant of good faith and fair dealing requires an insurer to give equal consideration to its interests as well as the interests of its insureds.

The Takeaway

This decision casts some doubt and is likely to generate more litigation regarding consent to settlement provisions in reimbursement policies. While insurer consent is critical, the scenario in the case at hand is avoidable. Robust and proactive claims advocacy is essential to facilitate early and constructive discussions and avoid time-consuming and potentially costly litigation.

CONDUCT EXCLUSION IN D&O POLICY DOES NOT BAR COVERAGE FOR SETTLEMENT OF NEGLIGENT MISREPRESENTATION CLAIMS

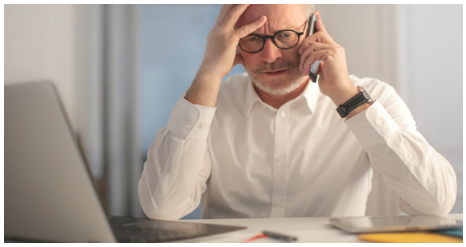
Scottsdale Ins. Co. v. Fineman, 2021 WL 411360 (N.D. Cal. Feb. 5, 2021)

In the underlying suit, plaintiffs claimed they were fraudulently induced to invest in a start-up biotechnology company and sought relief based upon breach of fiduciary duty, negligent misrepresentation, and fraud. The biotechnology company tendered the suit under its directors and officers liability ("D&O") policy and the insurer provided the individual insured with a complete defense.

The matter proceeded to arbitration and a final award was entered against the insured on the breach of fiduciary duty and negligent misrepresentation counts. Before the court entered the arbitration award, the insurer negotiated a full settlement of the claim on behalf of the insured. Subsequently, the insurer sought recoupment for the uncovered portion of the defense and settlement of the claim based upon the application of the D&O policy's conduct exclusion, which held the insurer was not liable for "loss" on account of any claim "involving … any dishonest, deliberately fraudulent or criminal act of an Insured," provided that there is a "final judgment against such Insured as to such conduct." Coverage litigation ensued.

The court ultimately found the final judgment language in the conduct exclusion inapplicable to the unconfirmed arbitration award, holding it was not a final judgment because the case settled prior to court confirmation. The court also noted that even if the exclusion only required a final adjudication (a lower and more common standard), the settlement would likely preclude its application.

Additionally, the court noted the arbitrator's findings, which determined



that although there were no reasonable grounds for the individual insured's beliefs about the prospects of the company, the insured was not being dishonest, but rather acted negligently in making the misrepresentations.

The Takeaway

While the conduct exclusion trigger of a final judgment is often referred to as "final adjudication," this decision highlights the distinction that can be dispositive language and a higher standard, and is thus more favorable to insureds than final adjudication language.

INSURED VS. INSURED EXCLUSION BARS COVERAGE UNDER D&O POLICY

Tarter v. Navigators Ins. Co., 2021 WL 149302 (E.D. Ky. Jan. 15, 2021)

In the underlying case, shareholders filed suit against the president of a company, alleging various wrongful acts. When the president sought coverage under the company's directors and officers liability ("D&O") policy, the insurer asserted the policy's insured vs. insured ("Ivl") exclusion was a complete bar to coverage.

The Ivl exclusion barred coverage for claims "made against any Insured by or on behalf of any Insured or any security holder of the Company; provided, however, that this exclusion shall not apply to any Claim brought by any security holder of the Company, whether directly or derivatively, if the security holder bringing such Claim is acting totally independently of, and without the solicitation, assistance, active participation or intervention of, the Company or any Insured Person."

The court held the Ivl exclusion was unambiguous and therefore required a straightforward application. Upon review of the facts, the court found the underlying action was brought by security holders, including the secretary/treasurer of the company, who acted in her capacity as such

in connection with the prosecution of the underlying action. The court determined the assistance exception to the lvl exclusion was inapplicable.

In coming to its decision, the court declined to follow a line of cases that applied the allocation provision to afford partial coverage where not all plaintiffs were insureds or security holders, noting those policies did not contain an assistance exception.

Moreover, the court noted the allocation provision is a general clause, which is silent as to insured persons and others bringing claims against an insured, and to allow it to control over the specific lvl exclusion would contradict state contract law and render the assistance exception meaningless.

The Takeaway

In recent years, D&O insurers have agreed to replace the Insured (including Insured Person) vs. Insured exclusion, like the one examined in this case, with the entity vs. insured exclusion. The terms of the entity vs. insured exclusion are typically more favorable for insureds and should be contemplated when brokering a D&O policy.

NO COVERAGE FOR INSURED PERSON ACTING IN THEIR CAPACITY ON BEHALF OF ENTITY OTHER THAN INSURED ENTITY

XL Specialty Ins. Co. v. AR Cap., LLC, 2021 N.Y. Misc. LEXIS 444

The case at hand arose as a result of an insured company's sponsorship and management of a publicly traded real estate investment trust ("REIT"). The individual defendants were members of the company, but also served respectively as Chairman of the Board, CEO, Executive Officer, and Chief Investment Officer of the REIT.

The REIT shareholders filed a class action and derivative claims against the REIT, the individuals, and the company, claiming misrepresentation in violation of securities laws. The U.S. Securities and Exchange Commission ("SEC") also brought an action against the company for securities violations, for which the company was ultimately required to pay disgorgement and penalties. The company sought coverage under its directors and officers liability ("D&O") policy and coverage litigation ensued.

The capacity exclusion in the company's D&O policy precluded coverage for claims "made against an Insured Person, based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving an Insured Person acting in their capacity as an Insured Person of any other entity other than the Company." The company, in an effort to find coverage, asserted the capacity exclusion did not apply to covered portions of the settlements, contending the words "Loss in connection with" showed that only the particular loss attributable to an uncovered claim was excluded from coverage. In addition, the company maintained this reading was consistent with the policy's allocation of loss provision, which provided that if "Loss covered by this Policy and Loss not covered by this Policy are incurred … because a Claim made against the Insured contained both covered and uncovered matters," the insurer and the insured must "use their best efforts to determine a fair and appropriate allocation."

In finding no coverage existed for the individuals, the New York Supreme Court held that while they were insured persons under the company's policy, the settlements the individuals paid arose out of actions taken on behalf of the REIT, rather than their wrongful acts in a company capacity. In other words, but for their actions taken on behalf of the REIT, there would have been no liability against them.

In regards to the SEC action, coverage was precluded because the action did not meet the definition of a securities claim, which was a requirement for entity coverage under the D&O policy. Moreover, because the policy's definition of loss did not cover disgorgement and punitive damages, the claim was further excluded against the company.

The Takeaway

The capacity exclusion in a D&O policy must be carefully consider where, as exemplified here, individuals may act in multiple capacities. Even absent an express capacity exclusion, policies will limit coverage for wrongful acts by individuals "solely" in their capacities for the insured entity.

…coverage was precluded because the action did not meet the definition of a securities claim…

ANTI-TRUST EXCLUSION DOES NOT BAR COVERAGE FOR ALLEGED CONSUMER PROTECTION VIOLATIONS UNDER D&O POLICY

James River Ins. Co. v. Rawlings Sporting Goods, 2021 WL 346418 (C.D. CAL. JAN. 25, 2021)

This directors and officers liability ("D&O") coverage dispute arose out of an underlying class action complaint filed against a sporting goods company alleging it misrepresented the weight of its baseball bats. The class action, which asserted several consumer protection claims, was tendered under the company's D&O policy, but the insurer denied coverage, pointing to the policy's anti-trust exclusion. The exclusion barred coverage for "any Claim alleging, arising out of, based upon or attributable to any violation of any law … as respects … anti-trust, business competition, unfair trade practices or tortious interference." The company asserted the anti-trust, business competition, and tortious interference categories of the exclusion all referred to conduct targeted at its business competitors, and therefore should not include false advertising targeted at consumers.

The court, while acknowledging the dispute was "admittedly a close one," determined the phrase "unfair trade practices" was ambiguous. The exclusion did not expressly include mention of consumer protection claims or laws or address conduct directed at consumers. According to the court, accepting the insurer's extremely broad reading of the exclusion would run contrary to the principle of interpreting policies broadly so as to afford the

greatest possible protection to the insureds, while construing exclusionary clauses narrowly against the insurers.

The Takeaway

This "admittedly close" outcome reinforces the critical importance of policy drafting. While ambiguities can often result in coverage, as was the case here, uncertainty and the expense of time-consuming litigation can be avoided with narrowly crafted exclusionary language.

RECENT DECISIONS HIGHLIGHT IMPORTANCE OF HAVING DELAWARE LAW APPLY

RSUI Indem. Co. v. Murdock, et al., 2021 WL 803867 (Del. March 4, 2021)

In this matter, Delaware's high court recently affirmed an eighth layer excess directors and officers liability ("D&O") insurer owed its share of settlements that an insured agricultural company and its CEO struck to resolve stockholder suits over alleged fraud in a take-private deal, clarifying that Delaware state law permits coverage for claims of fraudulent conduct.

The court held Delaware law, rather than California law, applied to the excess insurer's position that "public policy" would preclude coverage for a claim alleging fraud against the company, which is headquartered in California but incorporated in Delaware. California law potentially bans insurance for fraudulent conduct, which, according to the excess insurer, would bar coverage for the settlements. Delaware, though, has no such prohibition, making the court's determination on choice of law of particular importance. While the Delaware high court did consider the company's considerable ties to California, it emphasized the fact that, as a Delaware corporation, the company and its directors and officers are subject to Delaware's business laws and it should govern.

Alternatively, the insurer argued that even if Delaware law applied, the high court should affirm D&O coverage is unavailable for fraud-based claims. The court, however, was unconvinced fraudulent conduct is uninsurable in the state. The policy had an expansive definition of covered losses, including "punitive, exemplary and multiple damages," and "allegations of fraud fit comfortably within these terms." Moreover, the court noted Delaware law empowers a company to buy insurance to shield its directors and officers against "any liability," even claims for which the company itself cannot provide indemnification. Lastly, the Delaware high court said it must show deference to the parties' right to negotiate private insurance contracts and the will of state lawmakers, who have not forbidden insurance for fraud.

Sycamore Partners Mgmt. LP et al. v. Endurance Am. Ins. Co., 2021 WL 761639 (Del. Super. Ct. Feb. 26, 2021)

In another recent decision out of Delaware, the court found insurers cannot get out of covering an investment group's settlement in litigation over a buyout of a fashion retailer just because the deal may represent payback for disgorgement and ill-gotten gains. Specifically, the conflict-of-law analysis turned upon whether Delaware or New York law applied to the coverage dispute and the insurers' request that the settlement be deemed "uninsurable" as a matter of law.

The court here applied the policy's "most favorable" jurisdiction clause as a choice of law provision to determine whether Delaware law, which does not have a public policy against insuring restitution or disgorgement, or New York law, which does have a public policy against insuring such damages, controlled. In finding Delaware law controlled, the court noted the "'law most favorable' clause unambiguously is a choice of law provision and the insurers do not meaningfully argue otherwise." Accordingly, "Delaware public policy determines the uninsurability defense's fate," the court added.

...as a Delaware corporation, the company and its directors and officers are subject to Delaware's business laws and it should govern.

SEC INVESTIGATION FEES AND COST NOT COVERED UNDER D&O POLICY

Hertz Global Holdings v. Nat'l Union Fire Ins. Co., 2021 U.S. Dist. LEXIS 60911 (S.D. NY March 21, 2021)

After a securities class action was filed against a rental car company, the U.S. Securities and Exchange Commission ("SEC") opened an investigation into the entity, issuing a formal order of investigation. The entity sought coverage for the SEC investigation under its directors and officers liability ("D&O") policy, but the insurers denied coverage for more than $27 million in fees and cost the entity incurred responding to the investigation and coverage litigation ensued.

The D&O policy covered any loss "arising from a Securities Claim made against" the organization. "Securities Claim" was defined as "a Claim, other than an investigation of an Organization ... alleging" violation of securities laws or regulations. The court concluded this language unambiguously excluded an SEC investigation against the entity from coverage, as the phrase "other than an investigation of an Organization" was not susceptible to "more than one meaning when viewed objectively."

The definition of securities claim also included "an administrative or regulatory proceeding against an Organization," but the court rejected the entity's argument that the formal order of investigation from the SEC constituted an administrative or regulatory proceeding. The court stated that "undoubtedly, the SEC Formal Order of investigation initiates an investigation, not an administrative proceeding," observing it was clear from the face of the order of investigation that the SEC was only investigating potential wrongdoing as opposed to bringing any kind of action or proceeding against the company. The court further found it needed to look no further than the terms of the policy to conclude the parties did not consider an SEC formal order of investigation to be an administrative or regulatory proceeding, observing the policy provided coverage for individual insureds (i.e. not the organization) not only for "administrative or regulatory proceedings" brought against them, but also for "an investigation by the SEC ... after the service of a subpoena, entry of a formal order of investigation, or Wells notice ... upon such Insured Person."

The Takeaway

Expenses incurred by an organization responding to an SEC investigation can be exorbitant. Coverage disputes over such costs are common and frustrating to insureds, particularly where, as was the case here, there is a concurrent covered shareholder class action pending and the efforts in responding to the SEC are also beneficial to the defense of the covered shareholder action. Entity SEC investigation costs is a coverage extension that, for an additional premium, should be considered and discussed.

LATE NOTICE UNDER CLAIMS-MADE-AND-REPORTED POLICIES PRECLUDES COVERAGE

Peachstate Health Mgmt. v. Chubb Ins. Co., 2020 WL 8184143 (C.D. Cal. Nov. 24, 2020)

A California Federal District Court upheld a lower court ruling that an insurer was not required to cover a lawsuit where an email exchanged constituted a claim first made against the insured prior to the inception of the policy. The email from the president and underlying claimant sought renegotiation of an agreement and a settlement based on a pervasive misogynistic, harassing, and retaliatory culture. Following the email, the insured terminated the agreement for failure to perform. The claimant then filed a formal charge of discrimination with the U.S. Equal Employment Opportunity Commission ("EEOC"), alleging assault, discrimination, retaliation, and wrongful termination.

More than a year later, the claimant filed suit and the insured submitted the suit to its insurer for coverage. The insurer denied coverage on the grounds that the email, EEOC charge, and lawsuit were related claims first made at the time the initial email was received and prior to the inception

of the policy under which the claim was submitted. The court agreed, finding the "email and the lawsuit are Related Claims because they arose from 'related facts, circumstances or Wrongful Acts.'" The court further noted the policy covered only claims "first made against the Insured Person during the Policy Period." Since the email was received before the policy period, the claim was not covered.

Pine Bluff Sch. Dist. v. Ace Amer. Ins. Co., 2020 WL 768772 (8th Cir. Dec. 28, 2020)

The 8th Circuit Court of Appeals recently confirmed that reporting a claim during the policy period in which the insured becomes aware of the claim goes to the scope of coverage. The court went on to say that legal doctrines of waiver and estoppel, under Arkansas Law, could not be used to enlarge or extend coverage.

In the underlying suit, a former teacher filed an EEOC Charge of Discrimination against an insured school district, alleging sexual harassment and retaliatory discharge. The school district received and responded to the EEOC charge, including issuing a position statement and a mediation statement. The teacher then filed a lawsuit.

Several months after the end of the policy period in which the EEOC charge had been received, the school district tendered the suit to its insurer. The insurer issued an initial coverage letter reserving its rights, which specifically stated nothing should be deemed as an admission of coverage or a waiver of any right to withdraw the defense and deny coverage. Upon receipt of the EEOC documents, the insurer issued a denial, stating coverage was precluded in its entirety because the claim was made prior to the policy in effect at the time of notice. Coverage litigation ensued.

The insured argued that under the doctrines of waiver and estoppel, the insurer's delay in denying coverage should serve to preclude the denial because the insured reasonably believed there was coverage. The court held that Arkansas law concerning waiver and estoppel could not provide, expand, or enlarge, coverage that did not exist in the contract, as estoppel serves to preserve rights already acquired, not create new rights. The policy did not contract for coverage of claims made outside the policy period, the court noted, finding coverage was appropriately denied.

Certain Underwriters at Lloyd's London Subscribing to Policy No. PGIARK01449-05 v. Advance Transit Co., 2020 WL 6731791 (N.Y. App. Div. Nov. 17, 2020)

Further highlighting the harsh consequences of the claims-made-and-reported constraints, the New York State Appellate Court recently interpreted what had previously been considered an insured favorable statute, New York Insurance Law § 3420(a)(5) ("section 3420(a)(5)"), to allow insurers to set a definite time frame, including reinforcing claims-made-and-reported conditions, irrespective of prejudice.

This coverage litigation arose when an insured tendered notice of a claim to its insurer outside the policy period and the insurer denied coverage for late notice. The insured argued that under section 3420(a)(5), claims-made policies issued or delivered in New York must include a provision that claims arising during the policy period may be reported during the renewal policy period.

Section 3420(a)(5) states, "failure to give any notice required to be given by such policy within the time prescribed therein shall not invalidate any claim made by the insured … unless the failure to provide timely notice has prejudiced the insurer … With respect to a claims-made policy, however, the policy may provide that the claim shall be made during the policy period, any renewal thereof, or any extended reporting period." Based upon the plain and ordinary meaning of the term "however" within section 3420(a)(5), the court ruled a claims-made policy can set a definite time frame for reporting claims, irrespective of prejudice, which can include "the policy period, any renewal thereof, or any extended reporting period." The use of the disjunctive "or" provides the claim shall be made during the policy period, or the renewal, or any extended reporting period. Thus, section 3420(a)(5) does not require renewal coverage under a claims-made and reported policy.

The Takeaway

These cases serve as an important reminder of the harsh nature of claims-made-and-reported policies. A critical takeaway here is to consult with your Alliant team early and often regarding noticing of claims or circumstance. Notice must be provided during the policy period or extended reporting period, or you risk forfeiting coverage for that matter and any future related matters. The court's decision in *Lloyds* will likely serve to embolden insurers on claims and New York amendatory endorsements. In addition, *Lloyd's* serves as a cautionary tale to follow the policy instructions regarding reporting and noticing claims.

CYBER CORNER

NEW YORK DFS SHARPENS FOCUS ON CYBER INSURERS

New York's insurance regulators are calling attention to a "systemic risk" presented by the underwriting of cyber insurance, where a single event could trigger widespread losses. Recently, the New York Department of Financial Services ("DFS") issued guidelines regarding a "Cyber Insurance Risk Framework," urging insurers to take a more rigorous approach to underwriting cyber risk. Citing the 2020 SolarWinds attack that gave hackers access to thousands of companies and government offices using the compromised software, DFS outlined best practices for balancing the growth of the cyber insurance market with the need to ensure financial stability. Specifically, the guidelines are designed to:

- Manage and eliminate exposure to "silent cyber" insurance risk, meaning coverage under a policy that does not explicitly mention cyber;
- Evaluate the risk associated with the increasing reliance of businesses upon third-party vendors for cloud computing and other IT services, since a single event at one of these vendors could impact multiple insureds;
- Measure insured risk by gathering information regarding an organization's cybersecurity program through surveys and interviews, as well as the use of external evaluations of a company's network security;
- Educate producers and policyholders about cyber risk through pricing that rewards effective cybersecurity measures and promotes cyber risk management training;
- Obtain the necessary expertise to properly underwrite cyber risk, through a combination of in-house personnel, with technical skills as well as the use of outside vendors as needed; and
- Require notice to law enforcement by victims of cyberattacks as part of any insurance policy.

The Takeaway

The DFS guidelines may result in insurers scaling back coverage for cyber events through sub-limits and exclusions. Insurers will also be looking to eliminate non-affirmative grants of cyber coverage on other product lines, further highlighting the need for companies to purchase stand-alone cyber coverage. Policyholders should have their policies reviewed to identify coverage gaps, flag problematic exclusions, and advise on potential enhancements.

PAYING RANSOM OR SETTLEMENT? DON'T GET CAUGHT FUNDING THE BAD GUYS

The U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") recently published an advisory reiterating the prohibition against paying funds to any person on the Specially Designated Nationals and Blocked Persons ("SDN") list. OFAC's regulations are based upon strict liability, meaning U.S. companies can be held liable for violations even if they do not personally execute a transaction or are unaware that a payment is being made to a prohibited organization or person.

OFAC suggests companies implement compliance programs specifically focused on mitigating the risk that a ransom payment may involve sanctioned individuals or jurisdictions. Timely self-reporting of a ransomware attack to law enforcement, as well as cooperation during and after the incident will be treated as significant mitigating factors when OFAC is determining its response to an apparent violation. Finally, the advisory encourages ransomware victims and their service providers to "contact OFAC immediately if they believe a request for a ransomware payment may involve a sanctions nexus," and further urges victims to contact the Treasury Department's Office of Cybersecurity and Critical Infrastructure Protection if the incident involves a U.S. financial institution or could cause significant disruption to critical financial services.

WHEN A PATCH IS NOT ENOUGH

Microsoft Exchange Vulnerability

Numerous related cyber claims have arisen as a result of cybercrime groups exploiting the Microsoft Exchange vulnerability affecting over 30,000 organizations. While IT forensics firm Kroll has indicated the vast majority of these infiltrations will require nothing more than patching and scrubbing the network, a small percentage have

created back door access input into the network, enabling the threat actors to inject malware, conduct social engineering, and ex-filtrate protected data.

The unauthorized access to personal data could lead to statutory reporting requirements and notifications, including the provision of credit monitoring services and more.

The Takeaway

Expect cyber insurers to ask whether companies are using Microsoft Exchange and how they responded to this exposure (including whether they conducted a compromise assessment) on both new and renewal policy applications.

JUDGE WON'T CUT THE CORD IN EMPLOYEES' LAWSUIT AGAINST CABLE COMPANY

Hellyer et al. v. Altice USA, Inc., 1:20-CV-01410 (S.D. NY)

In a data privacy lawsuit brought by current and former employees of cable and telecom service provider, a court recently found the plaintiffs had established standing to bring what could end up being certified as a class action against the company. The case arose when a group of nine employees filed suit in the wake of a phishing e-mail campaign against the company and its employees, alleging the company failed to take adequate security measures to protect itself and its workforce from hackers.

In finding the plaintiffs had standing to sue, the judge noted three named plaintiffs had already experienced some form of identity theft, and the potential harm to the other plaintiffs was more than merely speculative. The judge made particular note of the theft of the employees' Social Security numbers, which he termed "immutable" and, unlike a credit card number, can "forever be used to identify [the victim] and target him in fraudulent schemes and identity theft attacks." While finding the employees had a plausible claim for breach of implied contract, the judge dismissed their claims under state labor laws. The court also deferred any decision on the company's request that the case be sent to arbitration, pending amendments to the complaint intended to clarify whether the plaintiffs have brought suit in their capacity as employees or cable subscribers.

The Alliant Cyber Team recently issued an alert, which includes a link clients may use to assess whether their systems have been affected.

To get a copy of the alert, please reach out to any of the Alliant newsletter contributors.

EMPLOYMENT CORNER

EEOC FY 2020 TRENDS

The U.S. Equal Employment Opportunity Commission's ("EEOC") 'Fiscal Year (FY) 2020 Annual Performance Report' ("APR") shows a substantial decrease in the number of lawsuits filed by the agency. However, the APR also indicates a dramatic increase in the amount of monetary recoveries by the EEOC in litigation compared to FY 2019. The agency filed 93 merit lawsuits in FY 2020, a decrease from 144 in FY 2019, and fewer than half the number of merit lawsuits filed FY 2018 (199). For FY 2010-2019, the EEOC filed an average of 165 merit lawsuits a year.

In total, the EEOC recovered $333.2 million in pre-litigation relief for those who work in the private sector and state and local government (down 4% from 2019), and an additional $106 million through its litigation efforts, nearly tripling its 2019 litigation total of $39.1 million. The EEOC also secured $96.2 million for federal employees and applicants through its federal sector process, a 4% decrease from 2019. The EEOC's total claimed monetary achievements for FY 2020 was $535.4 million, a 10% increase from 2019.

In FY 2020, the EEOC successfully resolved 62 harassment suits, 14 more than in FY 2019, and 24 more than in FY 2018. According to the EEOC, it recovered about $84.4 million for 902 victims through its litigation program. The $84.4 million for harassment victims appears to be overstated in the APR. Of the EEOC's $106 million in litigation recoveries, it can be readily determined that at least $36 million were for three lawsuits unrelated to harassment, and the EEOC recovered no more (and probably significantly less) than $70 million for harassment victims. In any event, the EEOC appears to have recovered tens of millions of dollars for harassment cases, a dramatic increase from FY 2019, when it recovered $10.7 million for 207 victims.

According to the APR, the EEOC resolved 165 merit lawsuits in FY 2020, for a total monetary recovery of approximately $106 million, up dramatically from the $39.1 million recovered in FY 2019. This is the highest litigation recovery amount since 2004. Approximately 70% of the litigation recovery involved claims under Title VII of the Civil Rights Act (accounting for $72.6 million), with the remaining 30% split nearly evenly between claims under the Americans with Disabilities Act and the Age Discrimination in Employment Act. The EEOC estimates 25,925 individuals received monetary relief as a direct result of the 165 merit lawsuits. In FY 2020, the top 5 bases on which the EEOC sued were Sex, Disability, Retaliation, Race, and Age.

COVID-19 AND 2020 WORKPLACE CLASS ACTION TRENDS

The legal system saw a spike in workplace class actions during 2020 and the COVID-19 pandemic. As state and local governments responded to the threat of COVID-19, many employers laid off/furloughed workers or moved employees to work-from-home arrangements. While businesses and courts were forced to shut down or postponed all operations, the pace of court filings did not trend similarly. After workplace class action settlement numbers reached an all-time high in 2017, numbers fell radically in 2018, leveling off in 2019. Employers expected the pandemic to reduce the size and pace of settlements in 2020, but instead workplace class actions rose. The collective economic value of workplace class action settlements increased from $1.34 billion in 2019 to $1.58 billion in 2020 as settlement numbers went up and plaintiffs' lawyers and government enforcement actions monetized their claims at a higher rate.

During 2020, COVID-19 gave rise to at least 1,005 workplace lawsuits, filed across 47 states and 28 industries. Plaintiffs have asserted 46 different issues with 5 primary theories as key drivers of COVID-19 workplace litigation: 1) failure to provide a safe work environment; 2) discrimination; 3) FLMA leave associated with federal and state laws; 4) retaliation; and 5) wage and hour.

Workers certified more class and collective actions in the wage and hour space in 2020 than in any other area of workplace law. Despite the unprecedented pandemic-related court closures, the overall number of rulings increased in 2020, and plaintiffs prevailed on those first-stage motions at an unprecedented rate. This trend is predicted to continue in 2021, with a more worker-friendly U.S. Department of Labor likely to make supposed wage theft its enforcement priority and shift its regulatory focus toward a plaintiff-friendly agenda. Despite the number of filings, by the end of 2020, few COVID-19-related cases had matured to the class action certification stage.

SEC CORNER

CLAWBACK UNDER SOX 304 UPHELD BY SEC

Since the U.S. Securities and Exchange Commission ("SEC") enacted the clawback provision of SOX 304 almost a decade ago, which provides clawback of compensation against CEOs and CFOs when the issuer has restated its financial statements, it has only been used a handful of times.

As established in *SEC v. Jensen*, clawback is appropriate even where there was no alleged misconduct. More recently, the SEC brought charges against the former CEO and CFO of a technology services company, alleging the officers obtained money or property through false and misleading statements and omissions and engaged in fraudulent or deceitful transactions. These false and misleading statements and omissions were also alleged to have been made to the company's outside audit firm, leading to improper revenue recognition and ultimately resulting in a financial restatement. Further allegations included falsifying books and records, false certifications, and failure to reimburse the company under SOX 304. Under this provision, the settlements with both former executives included reimbursement of incentive-based compensation. Both the CEO and CFO were required to reimburse the company and pay civil penalties.

SEC ENFORCES ACTION AGAINST REGULATION FD VIOLATIONS

SEC vs. AT&T, Inc., et al., 1:21-cv-01951 (S.D. NY March 5, 2021)

In what has become a rare occurrence, the U.S. Securities and Exchange Commission ("SEC") recently charged an issuer with repeatedly violating Regulation FD by selectively disclosing material nonpublic information to research analysts. Regulation FD aims to promote full and fair disclosure by requiring that issuers disclosing material information do so broadly to the investing public, not just to select analysts.

The complaint alleged that in order to avoid falling short of the consensus revenue estimate, a telecommunications and technology company made private, one-on-one phone calls to analysts in violation of Regulation FD. On these calls, the company allegedly disclosed sales data and the impact of that data on internal revenue metrics, despite the fact internal documents specifically informed investor relations personnel the information was generally considered "material" to investors, and therefore prohibited from selective disclosure under Regulation FD. The complaint further alleged that as a result of what they were told on these calls, the analysts substantially reduced their revenue forecasts, leading to the overall consensus revenue estimate falling to just below the level ultimately reported to the public.

In its press release on the matter, the SEC stated that it "remains committed to assuring an even playing field by taking appropriate action, including litigation when necessary, against public companies and their executives who selectively disclose material nonpublic information."

SEC ENVIRONMENTAL, SOCIAL, AND GOVERNANCE REPORTING

Investment advisers and investment funds, public companies, and other market participants should expect environmental, social, and governance ("ESG") matters to be a priority for the U.S. Securities and Exchange Commission ("SEC"). In a press release, the SEC recently announced of the formation of a Climate and ESG task force, which "will develop initiatives to proactively identify ESG-related misconduct." The initial focus of the task force will reportedly be to look for "material gaps or misstatements in issuers' disclosure of climate risks under existing rules" and to "analyze disclosure and compliance issues relating to investment advisers' and funds' ESG strategies."

The SEC identified ESG and climate issues as an examination priority for 2021. This was further confirmed in the Senate's confirmation hearing of Gary Gensler, President Biden's nominee to lead the SEC, when Mr. Gensler testified that investors increasingly "want to see climate risk disclosures."

The SEC is also reviewing the current ESG disclosure framework for public companies. In a recent statement, acting Chair Lee noted she was directing Division of Corporate Finance staff "to enhance its focus on climate-related disclosure in public company filings."

MARCH 2021: NOTEWORTHY ENFORCEMENT ACTIONS FILED*

Director/Officer	Role	Company
Christopher C. Womack	Executive Director	AT&T, Inc.
Michael J. Black	Finance Director	AT&T, Inc.
Seth P. Levine	Owner	Norse Holdings, LLC
Jessica Richman	CEO	uBiome Inc.
Zachary Apte	Chief Scientific Officer	uBiome Inc.

MARCH 2021: NOTEWORTHY SETTLEMENTS AND JUDGEMENTS*

Amount	Director/Officer	Role	Company
$215,125	Scott T. Wolfrum	Owner	Wolfrum Capital Management LLC
$60,000	Peter Ettro	Chief Investment Officer	Ettro Capital Management Corp.
$35,000	Joel M. Frank	Chief Financial Officer	Och-Ziff Capital Management Group LLC
$30,000	Tyler Sadek	Owner	Foundry Capital Group, LLC

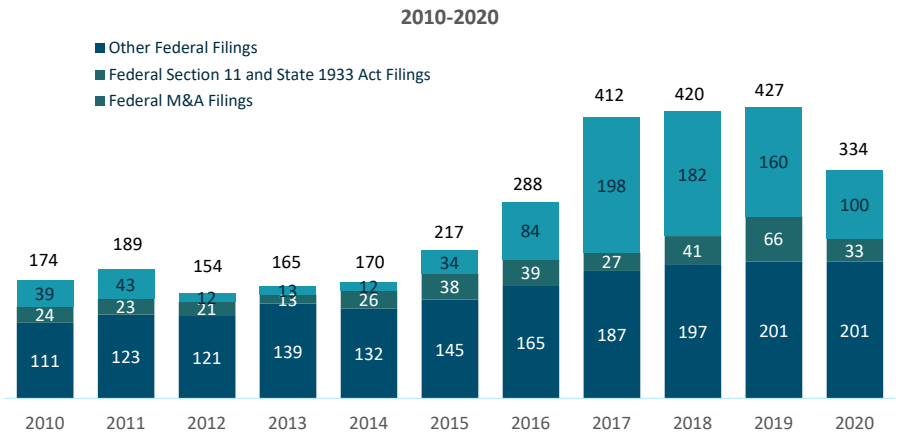
**Source: U.S. Securities and Exchange Commission*

SHAREHOLDER CORNER

2020 SHAREHOLDER LITIGATION TRENDS

Filings fell in 2020, with 334 new securities class action cases filed in federal and state courts, down from 427 in 2019. Also of note, the number of state court filings alleging claims under the Securities Act of 1933 fell sharply, possibly as a result of to the Delaware Supreme Court's March 2020 decision in *Salzberg v. Sciabacucchi*, which upheld the validity of federal forum-selection provisions in corporate charters. Nevertheless, 2020 saw 30 filings with a Maximum Dollar Loss of at least $10 billion, more than twice the historical average.

Federal Filings 2010-2020*



Despite the global COVID-19 pandemic, securities class action settlements totaled $5.84 billion in 2020, an increase of 61% over the $3.62 billion in settlements during 2019. The number of mega settlements (cases settling for $100 million or greater) in 2020 were comparable quantity-wise to 2019 numbers; however, the largest settlements in 2020 were exceedingly higher dollar amounts. In 2019, the two largest settlements were Cobalt International Energy at $389.6 million and Alibaba Group Holding at $250 million. In 2020, Valeant Pharmaceuticals and American Realty Capital topped the list, coming in at $1,210,000,000 and $1,025,000,000, respectively, making 2020 the first year since 2016 with two settlements totaling more than one billion dollars.

The federal court that saw the most action in 2020 was the USDC New York (Southern), with 29 settlements. The next highest quantity was seen in both the USDC New York (Eastern) and USDC New Jersey, with 7 cases each. At the state level, the most frequent venue was the Delaware Chancery Court, with 9 settlements, followed by both the Nevada District Court, Clark County and New York Supreme Court, New York County at 2.

Settlements 1996-2020*

	1996-2019	2019	2020
Number of Settlements	1,848	74	77
Total Amount	$107,296.4	$2,055.1	$4,199.8
Minimum	$0.2	$0.5	$0.3
Median	$9.0	$11.6	$10.1
Average	$58.1	$27.8	$54.5
Maximum	$9,285.7	$394.4	$1,210.0

*(*Source: Cornerstone Research: Securities Class Action Filings 2020 Year in Review)*

ABOUT ALLIANT INSURANCE SERVICES

Alliant Insurance Services is the nation's leading specialty broker. In the face of increasing complexity, our approach is simple: hire the best people and invest extensively in the industries and clients we serve. We operate through national platforms to all specialties. We draw upon our resources from across the country, regardless of where the resource is located.

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