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Executive Liability alert

Securities Lawsuits Trends and What to Expect in 2010

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According to the annual study of securities class action litigation jointly published by the Stanford Law School Securities Class Action Clearinghouse (<http://securities.stanford.edu/>) and Cornerstone Research, there were 172 securities class action filings in 2009. This is 23% below the 223 filings in 2008 and 13% below the annual average of 197 filings from 1997-2008.

This sharp decline from 2008 to 2009 is most likely due to two reasons. Firstly, the significant drop off in subprime and credit crisis related filings in the second half of 2009 and secondly due to the decline in stock market volatility-the Dow climbed 57% and the NASDAQ 79% from the lows of March 2009 to year end.

The potential loss severity of these 2009 filings (as judged by the market capitalization decline disclosed in each case) was down 40% from the average between 1997 to 2008.

Another interesting trend evident in the 2009 filings is the much longer lag time between the filing date and the end of the class period for the typical filing. Almost 1 in 5 filings were brought more than a year after the end of the class period compared to 1 in 20 in 2005. The most likely reason for this trend is that the plaintiff bar started to refocus on the whole universe of public companies having been preoccupied with subprime and credit crisis cases for the past 18/24 months. This could obviously lead to situations where there is a renewal between the stock price drop and the filing which emphasizes why we would recommend building continuity with one primary carrier. Please note my comments later on this subject.

Along with the significant drop in the number of filings against companies affected by the credit crisis, the filings against technology companies dropped as well, to only 10 filings in 2009 versus an average of 23 annually from 1997 to 2008.

Whilst frequency of these types of claims may be down, a report by Risk Metrics which annually lists the top 100 securities class action lawsuit settlements would suggest that severity continues to climb. In 2005, the amount of the 100th largest settlement was \$39 million, whereas in 2009 the 100th largest settlement was \$79.75 million. It is also a startling fact that the top 25 each settled at \$400 million or more!

What effect will all this have on the D&O market in 2010?

As in 2008 and 2009 the answer to this question will largely depend on the type of business the client is in. Financial institutions and real estate related companies will most likely continue to bear the brunt of more restrictive terms and higher premiums, although the significant increases witnessed in 2008 and 2009 should start to abate.

For the market generally, there remains abundant capacity and indeed some new capacity gearing up (CV Starr, Freedom Specialty, a new Lloyds syndicate).

Underwriters will continue to have a very strong appetite for well run middle market publicly traded companies (market capitalizations of \$500 million and under). Although many people, including me, have been calling the bottom of the market for the past couple of years, we were still achieving premium decreases of over 20% for a number of our publicly traded clients in 2009. I would not be confident predicting similar decreases again this year but with a robust marketing campaign and with no dramatic changes to risk profile, clients should enjoy improved coverage with premiums flat to a 10% decrease. We would always highly recommend building a strong relationship and continuity with one's primary carrier (even at the expense of some premium). Excess capacity remains more of a commodity but it is also important to maintain another tier one carrier on the excess who could easily step into the primary position if required.

A side DIC policy forms continue to broaden and capacity for this product is also plentiful but we would continue to caution against having the same insurer on the ABC primary and on the A side DIC primary.

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