“Fire on the Horizon”

Professional Liability Claim Trends in 2014 and Beyond

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1. The Halliburton Effect
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3. Boards duty of oversight with Respect Cyber Security
4. Coverage issues regarding False Claims Act
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The Halliburton Effect

• The Basic presumption of reliance:
  o Class certification and the commonality requirement
  o Market price as a proxy for actual reliance in 10(b)-5 cases

• Possible Outcomes:
  o Basic upheld/overruled/modified

• Potential Impact:
  o Upheld: status quo
  o Overruled:
    • Institutional shareholder litigation
    • Section 11 cases (no reliance requirement)
    • Fewer cases with higher settlement values
  o Modified: Events study of price impact?
Bankruptcy – Claims Against D&Os in Bankruptcy

- Impact of Automatic Stay and Payment of Defense Costs
- Duties of D&O’s in the Zone of Insolvency
- The Distinction between Trustee and Creditor Claims
- What is Deepening Insolvency
- The Business Judgement Rule Defense
- The Insured versus Insured Exclusion after Alstrin – does it matter?
- Settlement Protocol and Bar Orders
Board’s duty of oversight with respect to Cyber Security

- **Issue with obtaining sufficient coverage**
  - Sony ruling indicates need for stand alone cyber coverage (no coverage under GL policy)
  - Problem quantifying intangible losses from cyberattacks
  - Underwriters limited in ability to predict likelihood/cost of cyberattacks
  - Many breaches are unreported or go unnoticed
  - Advanced hacking capability/More data online/Cloud computing

- **Insurance Options**
  - Vary widely
  - Best cover immediate costs (forensics, notification, call centers, credit monitoring, possibly legal fees and crisis management)
  - Other costs are uncovered (brand value; trade secrets; secure technology; state-sponsored attacks)
  - New products (Coverage for PD/BI?)
Board’s duty of oversight with respect to Cyber Security (cont’)

• Duties in the event of a cyber attack
  o Create and provide response plan that meets industry best practices
  o How to disclose a cyber attack internally/externally to customers/investors
  o Difference in impact on company (eBay) vs. customers

• Key Questions
  o Who should handle
  o What are the risks to cyber assets
  o What are worst-case scenarios
  o Are you more susceptible than you think?
False Claims Act Actions and E&O Coverage

- What is False Claims Act (FCA)?
- Does and FCA claim truly raise a covered wrongful act?
- Is it fraud?
- What Damages are recoverable? Are they covered?
- Targeted Industries:
  - Healthcare and Pharmaceutical
  - Government Contractors
- Key Exclusions
  - Pending and prior litigation
  - Unfair profit
  - Unfair business practices or consumer protection laws
  - Dishonesty
Climate Change and the Impact Upon Directors and Officers

- Business Forecast Liability
- Property and Asset Protection – Failure to Plan
- Financial Disclosure for Material Events
- Exposure for Energy Companies and Manufacturers the Greenpeace Campaign
- Regulatory Liability
QUESTIONS.....
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