



PROFESSIONAL LIABILITY UNDERWRITING SOCIETY

“Fire on the Horizon”

Professional Liability Claim Trends in 2014 and Beyond

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1. The Halliburton Effect
2. Bankruptcy – Claims Against D&Os in Bankruptcy
3. Boards duty of oversight with Respect Cyber Security
4. Coverage issues regarding False Claims Act
5. Climate Change and the Impact Upon Directors and Officers E&O

- The Basic presumption of reliance:
 - Class certification and the commonality requirement
 - Market price as a proxy for actual reliance in 10(b)-5 cases
- Possible Outcomes:
 - Basic upheld/overruled/modified
- Potential Impact:
 - Upheld: status quo
 - Overruled:
 - Institutional shareholder litigation
 - Section 11 cases (no reliance requirement)
 - Fewer cases with higher settlement values
 - Modified: Events study of price impact?



PLUS

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
 - Create and provide response plan that meets industry best practices
 - How to disclose a cyber attack internally/externally to customers/investors
 - Difference in impact on company (eBay) vs. customers
- Key Questions
 - Who should handle
 - What are the risks to cyber assets
 - What are worst-case scenarios
 - 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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