Agenda

- Introductions
- Back to Basics Primer – Cynthia Zimmerman
- EPLI Hot Trends – Christine Hanley, Esq.
- D&O Hot Trends - Public / Private/ NFP – Rob Faber & Michelle Eason
- Claims Trends – Serge Adam
Speakers

- Cynthia Zimmerman – Vice President, Socius Insurance Services
- Christine Hanley, Esq. – Partner, Ford & Harrison LLP
- Rob Faber – Senior VP, AIG
- Michelle Eason – Senior VP, RSUI
- Serge Adam – AVP Claims, Monitor Liability Managers
What is Directors & Officers Insurance?
Defining “Management Liability”

- Management Liability Insurance is inclusive of the following lines of insurance:
  - Directors & Officers Liability
  - Employment Practices Liability
  - Internet Liability
  - Professional Liability
  - Fiduciary Liability
  - Fidelity Bonds
  - Workplace Violence
  - Kidnap & Ransom

- In this seminar we will focus on D&O and EPLI
Directors & Officers Liability Insurance

- An insurance policy to protect the D&Os of public, private and non-profit organizations
- Insurance for the personal liability that can be incurred by individuals and officers of corporations
- Errors & Omissions coverage to protect individuals who serve on the board of corporations or who are officers of these organizations
- The policy protects D&O’s (and in some instances the entity) from claims from 3rd parties for the decisions that D&O’s make while running the company
- A Difference in Conditions policy as a companion to your GL Policy
- D&O has evolved from a limited policy just covering the individual D&O’s, to a broad form that also reimburses the company for its indemnification, and also covers the entity as a defendant.
PLUS D&O Policy Insuring Agreements

• Side A: Individual coverage when no indemnification available (Insureds = D&Os)
  – Bankruptcy
  – Derivative Cases
• Side B: Payment to the company for its obligation to indemnify (Insureds still = D&Os)
• Side C: Coverage for the Entity (Insured = The Company)
  – Private and Nonprofits – Full Entity
  – Public – SEC Only
Side A DIC Forms

- Stand-Alone form providing Side A only coverage. Usually written excess over ABC program.
- DIC provisions drop down to fill in holes in primary forms
  - Insolvency
  - Exclusions
Market Segments

• Non-Profit
  – Very competitive for charitable organizations
  – Associations can tougher
  – Healthcare its own market with unique coverages
  – Broad form including full entity coverage and EPLI

• Private
  – Competitive but firming for small to mid-sized risks
  – Much fewer players for large private companies
  – Broad policy form that can include Entity coverage, EPLI, Fiduciary, Crime, Employed Lawyers, E&O, etc.
  – Market firming for EPLI
  – Wage & Hour an issue
Market Segments

• Public
  – Small to Mid-Cap market is competitive but firming
  – Much fewer players for large cap companies
  – Recent Form enhanced (No IvI, No Pollution, Pre-Claims)
  – Side A Towers very popular now

• Financial Institutions
  – Much narrower market than commercial
  – Systemic Market Issues (credit crisis, options backdating, etc.)
  – Troubled community banks still an issue
  – Few Markets for small FI
10 Solid Reasons your clients need D&O/EPL

1. Involvement in day to day operations makes private company directors and officers particularly vulnerable to claims brought by employees.

2. Third-party discrimination claims, brought by customers and clients, are increasingly common.

3. D&O insurance from a quality insurer can take private companies through their IPO and into public ownership well protected.

4. Complex claims brought by competitors, such as anti-trust and unfair competition claims against D&Os, can generate sky-high defense costs.

5. Investigations by government and regulatory agencies can generate enormous defense costs – even if no wrongdoing.
6. Company assets can be closely tied to the personal wealth of directors and officers, making protection for claims brought solely against the company vital.

7. When the company cannot indemnify its directors and officers in D&O claims, D&O insurance can set in instead.

8. Shareholders of private companies frequently sue for inadequate or inaccurate disclosure in financial reports and statements made in private placement materials.

9. D&O insurance can protect the personal assets of a director’s or officer’s spouse as well as the assets of a deceased director’s or officer’s estate.

10. With D&O insurance in place, management can focus on managing the company rather than managing protracted litigation.
History of the coverage

- First introduced in the US in the 1960s
- Merger Mania and shareholder activism in the 1970s drove more interest in the coverage
- Hardening market during the 1980s
- 1990s though 2000s soft market, broadening coverage, increased exposure
- Current market flat to firming
Claims Trends

- Mergers & Acquisition Claims
- Whistleblower actions
- Regulatory investigations, litigation, activism
- EPLI Frequency and Severity continues to increase
- Increased creditor claims due to economic issues.
Current Trends in the Market

- 50+ markets offering some variation of the coverage.
- Most markets have a combo policy. Most private companies and Non-Profits buy suite of coverages.
- Market flat to firming
  - EPLI firming
  - Public firming
- Private investors and private equity firms requiring coverage.
- Many markets making overall “book” changes
Hot Topics

• Mergers & Acquisition Claims
• International policies/issues
• Jobs Act Issues
• Issues within the Healthcare Space
• Regulatory Environment & Claims
• Side A DIC Coverage
• Firming marketplace
What is Employment Practices Liability Insurance?
What is Employment Practices Liability

- Claims from Employees
  - Wrongful termination
  - Harassment
  - Discrimination
  - Wage & Hour Claims
  - Retaliation / Whistleblower
  - Employee Privacy

- Claims from others
  - 3rd party coverage (harassment & discrimination from non-employees)
  - Illegal Immigration Defense Coverage
Employment Related Laws

- Equal Pay Act of 1963 (EPA)
- Civil Rights Act of 1964 (Title VII) amended in 1991 (CRA)
- Age Discrimination in Employment Act (ADEA)
- Pregnancy Discrimination Act of 1978 (PDA)
- Americans with Disabilities Act of 1990 (ADA)
- Older Workers Benefit Protection Act of 1990 (OWBPA)
- Family and Medical Leave Act of 1993 (FMLA)
- State and City Anti-Discrimination Laws
- Fair Labor Standards Act of 1938 (FLSA)
- Immigration Reform and Control Act of 1986 (IRCA)
History of the coverage

- Inherently coverage by D&O policies (but no entity coverage).
- Stand Alone policies started in the Mid-80s
- Anita Hill / Clarence Thomas hearings early 90s increased public awareness
- Proliferation of policies during the 90s / 2000s
- Combo forms
## Claims Trends

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<tr>
<th>Category</th>
<th>2010</th>
<th>2011</th>
<th>% Increase / Decrease</th>
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<tbody>
<tr>
<td>Race</td>
<td>35,890</td>
<td>35,395</td>
<td>-1.4%</td>
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<td>Sex</td>
<td>29,029</td>
<td>28,534</td>
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<td>National Origin</td>
<td>11,304</td>
<td>11,833</td>
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<tr>
<td>Religion</td>
<td>3,790</td>
<td>4,151</td>
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<td>Retaliation (all)</td>
<td>36,258</td>
<td>37,334</td>
<td>3%</td>
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<tr>
<td>Retaliation (Title VII only)</td>
<td>30,948</td>
<td>31,429</td>
<td>1.6%</td>
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<tr>
<td>Age</td>
<td>23,264</td>
<td>23,465</td>
<td>Flat</td>
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<tr>
<td>Disability</td>
<td>25,165</td>
<td>25,724</td>
<td>2.2%</td>
</tr>
<tr>
<td>Equal Pay Act</td>
<td>1,044</td>
<td>919</td>
<td>-12%</td>
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<tr>
<td>Total</td>
<td>99,922</td>
<td>99,947</td>
<td>Flat</td>
</tr>
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• Over 50% of all Employment claims have a wage & hour component.

• Increased funding of EEOC
  – More claims brought directly by EEOC
  – Record recoveries; $455mm in 2011 versus $404mm in 2010
  – More Resolutions; 112,499 in 2011 versus 104,999 in 2010
  – More litigation filed; 300 lawsuits in 2011
• In the last decade, the EEOC has averaged over 80,000 new cases per year.
• 30% of all civil claims in the U.S. every year are employment related.
• Private companies with 100 or less employees are by far the most often sued, accounting for over 40% of claims
• Employment lawsuits can take up to 2 years to get to trial with defense costs averaging $125k to $150k.
• The median jury award has increased to $250k up from $168k in 2010.
• In California, the probability for an employer of 30 employees or more to have an EPLI claim within a 5 year period is 100%
Current Trends/Hot Topics

- Market firming, especially in CA, FL, TX, NY.
- Wage & hour an issue in many states
- Tough class getting tougher (restaurant, retail, healthcare, lawyers, auto dealers)
- Accounts with multiple claims can be problematic
Sutton’s Law

Because that is where the money is.
Statute of Limitations

2 years

3 years if willful
Willful

“Willfulness” is whether the employer knew or showed reckless disregard as to whether its conduct was prohibited by FLSA.

Remedial Scheme

Make Whole

Double Damages (as form of Liquidated Damages)
Mother Lode

Prevailing Plaintiff Fee Statute

“The...logical conclusion is that FLSA cases are heavily weighed in favor of the plaintiff.... It is clear that the volume of cases in the Southern District is attorney-driven.” Hamm v. TBC Corp., 597 F. Supp. 2d 1338, 1340 (S.D. Fla. 2009)
An *employer* is any *person* acting directly or indirectly in the interest of an employers.

A *person* is any individual, partnership, association, business host, legal representative, or any organized group of persons.
Individuals can be held liable for FLSA violations.
More than 130 million American workers are protected (or “covered”) by the FLSA.
An *employee* is any individual employed by an employer.
An *independent contractor* is an individual who performs services, but is not an employee of the person utilizing the services.
Independent Contractor or Employee?
Department of Labor Factor Test

Nature and degree of control by the principle
Extent to which the services in question are an integral part of the employer’s business
Permanency of the relationship
Amount of investment in facilities and equipment
Opportunity for profit and loss
Amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent enterprise

Consider all Circumstances
Economic Reality Test

Is the individual economically dependent upon the employer?

Yes?  Employee

No?  Independent Contractor
The Simple Premise

FLSA requires payment of at least the federal minimum wage for all *hours worked* in a workweek and time and one-half an employee’s *regular rate* for time worked over 40 hours in a workweek *unless an employee is otherwise exempt*. 
Failure to Capture Hours Worked
Hours Worked

Work not requested, but suffered or permitted is work time.
What in the world does “Suffer” or “Permit” mean?
Where is work performed?

On employer’s premises

Away from the premises or job site

At home

Anywhere...so long as beneficial to employer
When is work performed?

During the workday

Before or after the workday

_**Anytime**...so long as beneficial to employer_
How is work performed?

On the telephone

At the office

On the computer (at the office or by remote access)

On a BlackBerry® or iPhone

*Anyhow...so long as beneficial to employer*
The Simple Premise

FLSA requires payment of at least the federal minimum wage for all *hours worked* in a workweek and time and one-half an employee’s *regular rate* for time worked over 40 hours in a workweek *unless an employee is otherwise exempt.*
Failure to Pay Proper Overtime Rate (Regular Rate) For Hours Worked Over 40 in a Workweek
Workweek

Basis
Minimum Wage

$7.79/hour

Overtime

1 ½ times the regular rate of pay

($7.67/hour)
The Regular Rate
Is an hourly rate.

Not less than applicable minimum wage.

Includes all compensation that is not properly excludable.
Discretionary Gifts,
Bonuses or Payments as a Reward for Service
The Simple Premise

FLSA requires payment of at least the federal minimum wage for all *hours worked* in a workweek and time and one-half an employee’s *regular rate* for time worked over 40 hours in a workweek *unless an employee is otherwise exempt.*
Failure to Properly Classify
What does exempt mean?

Exempt from what?
Executive Exemption

• Does the employee receive weekly salary of more than $455?
  – No? Non-Exempt
  – Yes? Go to next question.

• Is the employee’s primary duty management of the enterprise or a subdivision of the department in which employed?
  – No? Non-Exempt
  – Yes? Go to next question

• Does the employee regularly direct the work of two or more full-time employees?
  – No? Non-Exempt
  – Yes? Go to next question.

• Does the employee have the authority to hire/fire or are such suggestions given particular weight?
  – No? Non-Exempt
  – Yes? Executive exemption applies.
Professional Exemption

• Does the employee receive weekly salary of more than $455?
  – **No?** Non-Exempt
  – **Yes?** Go to next question.

• Does the employee’s primary duty require advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or require invention, imagination or talent in a recognized artistic field?
  – **No?** Non-Exempt
  – **Yes?** Go to next question.

• Does the employee consistently exercise discretion and independent judgment?
  – **No?** Non-Exempt
  – **Yes?** Professional exemption applies.
Administrative Exemption

• Does the employee receive weekly salary of more than $455?
  – No? Non-Exempt
  – Yes? Go to next question.

• Is the employee’s primary duty the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers?
  – No? Non-Exempt
  – Yes? Go to next question.

• Does the employee’s primary duty include the exercise of discretion and independent judgment on matters of significance?
  – No? Non-Exempt
  – Yes? Administrative exemption applies.
Whose Burden
Is It?

It is the employer’s burden to ensure that employees are properly classified and paid correctly.
• Time Records

• Audit

• Cure
Questions
and
Answers
The D&O Insurance Market

- Market capacity & competition
- What’s important to clients?
- Litigation trends
- Public company litigation
- Globalization of risk
The D&O Insurance Market

- Market Capacity & Competition
  - Loss costs
  - Investment income
  - Profitability of the industry
What’s Important to Clients?

• Program structure
  – Carrier selection (financial stability, reputation, claims handling)
  – Side A DIC/IDL coverage
  – Program cost
  – Benchmarking and analytics
  – Locally admitted international D&O policies
What’s Important To Clients?

• Coverage evolution
  – “Personal misconduct” exclusions
  – Severability (application and exclusions)
  – Rescission
  – “Insured v. Insured” exclusion
  – Coverage for regulatory investigations
  – “Failed” indemnification
  – Advancement of defense expenses
Public Company Litigation

- Institutional shareholders as plaintiffs
- Balkanization of securities litigation – venue shopping
- Discovery and legal cost trends
- E-discovery
- M&A cases
- Industry Dynamics
Public Company Litigation

- Regulatory concerns - DOJ, SEC, UK Bribery Act
  - Leadership at the SEC; reinvigorated enforcement program
  - SEC enforcement actions and investigations
  - FCPA liability
- Insider trading cases
- Dodd-Frank:
  - Clawback claims
  - Whistleblower actions
Globalization of Risk

• Has the way companies buy insurance changed?
  – Local D&O policies
  – Litigation trends overseas
Industry wide D&O private company results are deteriorating

As a result:
- Rates are firming
- Less coverage being offered
- Carriers are managing limits
- Some carriers are pulling out of certain geographic regions (i.e. CA)

Tougher classes of business
- Social Media
- Hospitality/Restaurants
- Real Estate
- Financial Institutions
- Educators
Increased frequency & severity of claims

Higher defense costs

Tougher underwriting:
- Class underwriting
- Non-renewals
- Higher premium & retentions

Tougher classes of business:
- Healthcare
- Educators
- Social Services
- Foster home & adoption services
- Financial services entities
Healthcare Top Exposures

- Antitrust Violations
- Peer Review/Credentialing Violations
- EPL
- Regulatory
Antitrust Exposures

• Essentially, antitrust laws prohibit business practices that unreasonably deprive consumers of the benefits of competition, resulting in higher prices for products and services.

• Healthcare entities may face allegations of monopolies, price fixing, collusion & unfair competition
Peer Review/Credentialing

• Peer Review is self regulation in healthcare profession & a process of evaluating qualifications for doctors to be in the field.

• Credentialing is the process of establishing qualifications for licensed professionals. Many healthcare systems conduct their own credentialing to grant certain clinical privileges.

• Both are susceptible to allegations of violating the process.
• Larger employee base which leads to frequency
• Higher than normal defense costs
• Highly compensated individuals seek higher damages which leads to severity
• Whistleblower & retaliation claims prevalent due to regulatory environment
Regulatory Top 3 Concerns

1. Medicare Audits:
   - RAC Audits (Recovery Audit Contractor)
   - ZPIC Audits (Zone Program Integrity Contractors)

2. Enforcement of Privacy Rights:
   - HITECH Act (Health Information Technology for Economic & Clinical Health)
   - HIPAA (Health Insurance Portability & Accountability Act)

   - Qui Tam/Whistleblower
   - Anti-Kickback
Jumpstart Our Business Startups Act (aka JOBS ACT)
The JOBS Act

• Enacted by President Obama, April 5, 2012
• Expectations are to allow small & mid-sized companies access to capital
• Estimate 97% of all US businesses will qualify
• It will promote business growth & fuel the country’s economy
Key Provisions

- Emerging Growth Company IPO’s
- General Advertising of Private Offerings
- Crowdfunding
- $50M Regulation “A” Private Offerings
- Public Company Reporting Obligations
Practical Consequences of the Act

- More IPO’s
- Private Company Financing Flexibility
- Increased Securities Litigation
- Voluntary Disclosures
D&O Insurance Considerations

- Public Company vs. Private Company Distinction
- Private Company Securities Exclusions
- More Public Companies
Conclusion

• The JOBS Act is a significant change in how small & mid-sized private companies can raise capital
• There will be both positive & negative effects on companies that take advantage of the Act
• More capital will be raised & more investors will acquire securities of emerging companies
• Fewer disclosures will be made to investors
• Increase in Securities & Derivative Suits
• Will take years to identify unexpected consequences which will further increase D&O claims
THE COVERAGE FOR FOLKS WITH BIG IDEAS
A D&O Program has one shared and aggregated limit for all of its Insuring Clauses. The limit is used to pay both Settlements and Defense Costs.

- **Side A** pays on behalf of the individual Ds/Os if Company cannot indemnify them. Examples of non-indemnifiable losses could include: derivative actions, company insolvency, and whistleblower suits.
- **Side B** pays on behalf of Company’s obligation to indemnify individual Ds/Os.
- **Side C** pays on behalf of Company’s liability.

*D&O Insurance can also cover costs associated with inquiries/investigations/enforcement actions brought by regulatory bodies (e.g. DOJ, DOL, SEC, FINRA)*

FOR allegations that they have suffered FINANCIAL LOSS due to “management” decisions/actions*
WHY DO I NEED COVERAGE?

IT’S A FAMILY AFFAIR
LONE RANGER
MERGERS AND ACQUISITIONS

MARRIAGE MADE IN HEAVEN?
NO GOOD DEED GOES UNPUNISHED
IT CAN PAY TO BE A TATTLE TALE?
PERFECT STORM
SAVING GRACE