JANUARY 2018

riskINSIGHTS

Top Ten D&O Stories of 2017

The world of directors' and officers' liability is always dynamic, but 2017 was a particularly eventful year in the D&O liability arena. The year's many developments have significant implications for what may lie ahead in 2018 – and possibly for years to come. These are the Top Ten D&O stories of 2017, with an eye towards future possibilities.

number*one* 1

Securities Lawsuit Filings at Historically High Levels in 2017

There were a total of 415 securities class action lawsuit filings in 2017, the highest annual number of securities lawsuit filings in any year except 2001, when a wave of IPO laddering cases swelled the figures. The 2017 filing figures were themselves inflated by the significant number of federal court merger objection lawsuits. However, even if the 193 federal court merger-related lawsuit filings are disregarded, the 222 traditional securities class action lawsuit filings alone represent the highest annual number of securities suit filings since 2004 (when there were 239 securities suit filings).

While the number of securities suit filings during the year is noteworthy, the more important story is the rate of litigation – that is, the number of securities suit filings relative to the number of public companies. The rate of securities litigation during 2017 was at historically high levels.

Using the number of publicly traded companies as of the end of 2016 for purposes of calculating an estimated litigation rate (in the absence of 2017 year-end figures), the 2017 litigation rate appears to be about 9% if all securities suit filings are taken into account, or about 4.8% if only the traditional securities suit filings are considered.

These 2017 litigation rate estimates are significantly higher than the equivalent 2016 figures of 5.6% for all filings and 3.9% for traditional securities suits filings. Both of the estimated 2017 litigation rates are also far above the 1997-

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2015 average annual litigation rate of 2.8%. Even if the merger objection lawsuits are disregarded, the chances of a U.S.-listed company being hit with a traditional securities lawsuit in 2017 was about 70% higher than the long-term historical average would otherwise suggest.

It may be important to note that the 2017 securities lawsuit filings were not evenly distributed throughout the year. There were significantly more securities suits filed in the first six months of 2017 than during the year's second half. While the annual figures for 2017 were elevated compared to historical norms, the declining number of filings as the year progressed may suggest a longer-term trend back toward more customary levels – or at least toward lower levels.

number*two* 2

Federal Court Merger Objection Lawsuits Surge

As previously mentioned, an important part of the surge in 2017 securities suit filings is the shift of merger objection lawsuits from state to federal court. Of the 415 securities suit filings during 2017, 193 (or about 46%) were merger objection suits. The 193 federal court merger objection lawsuits filed during 2017 far exceeded the 80 federal court merger objection lawsuit filings during the full year 2016.

The upsurge in the number of federal court merger objection lawsuit filings is a direct result of a series of Delaware state court rulings, culminating in the January 2016 ruling in the *Trulia* case, in which several Delaware judges evinced their hostility to the type of disclosure only settlements that frequently characterize the resolution of merger objection lawsuits. As a result of the unfavorable climate in the Delaware courts, the plaintiffs' lawyers have shifted many of their filings to federal court.

With merger objection lawsuits now most likely to be filed outside Delaware, the question of whether or not judges in other jurisdictions — and in particular, federal district court judges — will follow the lead of Delaware's courts in rejecting disclosure-only settlements takes on greater significance.

Last year, the Seventh Circuit, in a blistering opinion written by Judge Richard Posner in a merger objection lawsuit involving Walgreen's acquisition of Alliance Boots, affirmatively adopted the Delaware Chancery Court's position on disclosure-only settlements. Saying that these kinds of lawsuits are "a racket" and characterizing the additional disclosure that was the basis of the settlement as "worthless," the appellate court reversed the district court's approval of the settlement.

However, other courts have declined to follow the Delaware courts' lead. For example, in February 2017, the New York Appellate Division, First Department, applying New York law, reversed a lower court's rejection of the disclosure-only settlement of a suit that had been filed in connection with Verizon's proposed acquisition of Vodafone subsidiaries holding ownership interests in Verizon Wireless. The appellate court considered the *Trulia* decision, but noted that while some observers have opined that decisions like *Trulia* and others "may signal the extinction of 'disclosure-only' settlements," that conclusion, the court noted, "may be premature."

If the federal courts show the same level of scrutiny and hostility to disclosure-only settlements as have the Delaware courts, the flood of federal court merger objection suits may prove to be short-lived. However, if the federal courts decline to follow the Delaware courts' lead, federal court merger objection litigation could remain an important corporate and securities litigation phenomenon, representing a significant litigation exposure for companies and for their D&O insurers – turning D&O litigation into a frequency risk.

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The Trump Administration Re-Shapes the Federal Judiciary

President Trump's appointment of Neil Gorsuch to the U.S. Supreme Court represents one of his administration's early accomplishments. However, as important as the U.S. Supreme Court is, it is through appointments to fill vacancies in the lower federal courts that the Trump administration may have its most significant impact.

There are a significant number of vacancies on the federal bench for President Trump to fill. As of December 29, 2017, there were 143 federal court judicial vacancies, representing about 16% of the authorized federal judgeships.

As of December 29, 2017, the Senate has confirmed 19 Trump administration judicial nominees, including one Associate Justice of the Supreme Court, 12 judges for the United States Courts of Appeals, and six judges for the United States District Courts. Of even greater significance, and as of the same date, there are 50 Trump administration nominations to federal court judgeships awaiting Senate action, including seven for the Courts of Appeals and 43 for the District Courts.

As Democratic Senator Chris Coons, a member of the Senate Judiciary Committee, was recently quoted as saying, President Trump's influence on the federal judiciary as a result of his nominations "will be the single most important legacy of the Trump administration," adding with respect to the kinds of candidates that the Trump administration has been nominating, that "given their youth and conservatism, they will have a significant impact on the shape and trajectory of American law for decades."

Though some of Trump administration's nominees to the federal judiciary have proven to be controversial, other Trump judicial nominees have, as Jeffrey Toobin noted in a recent New Yorker article, "excellent formal qualifications." More to the point in terms of possible consequences of Trump's judicial nominations, Toobin noted that "Trump is poised to reshape the judiciary in a notably conservative direction."

Notwithstanding a few recent stumbles, the Trump administration is well-positioned to continue to place its nominees on the federal bench for at least as long as the President has the benefit of a Republican-controlled Senate.

The decidedly conservative cast of the administration's nominees will have a significant impact on lower federal courts proceedings for years to come. This impact may take a number of forms, but among other things, one likely impact could be a more defendant-friendly approach to business disputes and other commercial matters, at least to the extent the administration's nominees share the President's anti-regulation, business-friendly outlook. To the extent this defendant-friendly approach actually materializes, it could prove to provide a significant boost to corporate litigants and their D&O insurers.

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Event-Driven Securities Lawsuits Swell the Number of Securities Suit Filings

The archetypal securities lawsuit alleges financial misrepresentations, based on assertions that the company's financial statements falsely portrayed the company's financial condition – think Enron and WorldCom. But even though the number of securities lawsuit filings has increased every year for the last five or six years, lawsuits based on alleged financial misrepresentations are becoming increasingly rare.

There are fewer financially-driven lawsuits because there are fewer financial restatements. According to the most recent reports, the share of U.S. companies restating their financial statements in 2016 hit their lowest level since 2010, and the number of companies restating their financials during 2016 was at its lowest level since at least 2002.

With fewer financial restatements to target, plaintiffs' lawyers have had to shift their focus away from companies' financials and toward adverse developments in companies' operations. Event-driven lawsuits have been a significant factor in the run up in the number of securities suit filings in recent years.

One example of this kind of lawsuit is the suit filed against Arconic in the wake of the tragic Grenfell Tower fire in London this past summer. It is hardly surprising in the wake of news stories that Arconic had manufactured the metal cladding used on the apartment tower that the company has become involved in litigation. What may strike some as surprising among the litigation arising in the wake of the building fire was a securities class action lawsuit filed in the United States.

On July 13, 2017, plaintiffs' attorneys filed a complaint in the Southern District of New York against Arconic and certain of its directors and officers alleging: "(i) Arconic knowingly supplied its highly flammable Reynobond PE (polyethylene)

cladding panels for use in construction; (ii) the foregoing conduct significantly increased the risk of property damage, injury and/or death in buildings constructed with Arconic's Reynobond PE panels; and (iii) as a result of the foregoing, Arconic's public statements were materially false and misleading at all relevant times."

There were a number of these kinds of follow-on suits filed this past year. For example, in May 2017, Anadarko Petroleum was hit with a securities suit after the company closed down more than 3,000 of its vertical wells following an explosion at a home in Colorado that killed one person and injured others. In March 2017, Caterpillar was named in a securities class action lawsuit following media reports that government investigative agencies had raided the company's corporate headquarters in connection with an investigation of the company's tax strategy involving overseas units. And as discussed further below, several companies were sued in securities lawsuits this year following news reports that the company had been hit with a data breach or other cyber securities incident.

These kinds of event-driven lawsuits are nothing new; follow-on lawsuits have been a feature of the litigation landscape for years. To cite just one example from past years, a follow-on securities suit was filed against BP in the wake of the Deepwater Horizon disaster. Similarly, there have been numerous examples in the past of the filing of civil lawsuits following companies' announcement of the onset of a bribery investigation or enforcement action.

In many instances, these event-based lawsuits are being filed by what has been described as "emerging" law firms; that is, law firms that were not responsible for significant amounts of securities lawsuit filings in the past but have a significant share of securities lawsuits now.

The possibility of these kinds of cases arising is of course a problem for the companies involved, but it is also a problem for the companies' D&O insurers. The risk exposure that these kinds of claims represent is not necessarily susceptible to underwriting - as it is hard to deduce the possibility that a company might experience this type of incident, or event-based claim through objective underwriting that would permit risk segmentation and aid risk selection. The absence of objective underwriting criteria to allow underwriters to select away from this type of risk means that pricing will have to reflect this element of frequency exposure.

number*five* 5

Companies Hit with Data Breaches Are Targeted in Securities Class Action Suits

Observers have long been predicting that we would see significant amounts of data breach-related D&O litigation. However, at least until recently, the litigation never really materialized, at least not in volume.

Among the most significant reasons that we did not see much data breach-related securities class action litigation in the past is that by and large, companies' share prices have not reacted significantly to their announcements that they had sustained a data breach. In the absence of significant stock price movement, the potential securities class action lawsuits were unattractive to the plaintiffs' lawyers.

Without a stock price drop that might support a securities class action lawsuit, the plaintiffs' lawyers have filed shareholder derivative suits, at least in the few instances where a data breach has led to any kind of D&O claim. However, data breach-related shareholder derivative lawsuits have fared poorly, as these kinds of cases generally have been dismissed. The one exception is the Home Depot data breach-related shareholder derivative lawsuit. The Home Depot case was also dismissed but it eventually settled while the appeal of the dismissal was pending; the case settled for the company's agreement to pay the plaintiffs' attorneys' fees of about $1.1 million.

Despite the relatively poor prior track record in data breach-related D&O lawsuits, during this past year plaintiffs' lawyers filed a number of data breach-related securities class action lawsuits. The highest profile case among these suits is the securities class action lawsuits filed in September 2017 against Equifax and certain of its directors and officers in the wake of the company's announcement that it had sustained a data breach involving credit records of over 143 million of its customers.

The Equifax lawsuit was followed in December 2017 with the filing of a securities class action lawsuit against PayPal and certain of its officers relating to an apparent data breach at the operations of its newly acquired TIO division, a bill-pay management company. Yet another lawsuit followed later in December, when plaintiffs' lawyers filed a securities class

action lawsuit against Chinese online microfinancing lender Qudian following news reports that Chinese authorities and police were investigating a data leak at the company. These three new lawsuits follow the January 2017 data breach related securities class action lawsuit filed against Yahoo.

The flurry of filings this past year does raise the question of what it portends in terms of the likelihood for future data breach-related D&O litigation. How many of these lawsuits we might see is an interesting and important question for companies and their D&O insurers alike.

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Sexual Harassment Allegations Lead to Management Liability Lawsuits

During 2017, the news headlines were dominated by appalling revelations that leading politicians, entertainers, political candidates, and others engaged in sexual harassment, assault, and even worse misconduct. As the accounts of misconduct emerged, a dynamic has developed in which the victims come forward with their stories and seek to hold the wrongdoers accountable. A blockbuster settlement entered in November 2017 now suggests that this dynamic may not be limited just to attempting to hold individuals accountable, but also involve efforts to hold the wrongdoers' companies' executives accountable for allowing the misconduct or for turning a blind eye.

In what is one of the largest shareholder derivative settlements ever, senior officials of 21st Century Fox have agreed to a $90 million settlement (to be funded entirely by insurance) of allegations that the company's management permitted a culture of sexual and racial harassment to permeate the company, ultimately resulting in financial and reputational harm to the company. The settlement included provisions for governance and compliance enhancements, including the creation of a Workplace Professionalism and Inclusion Council.

While the 21st Century Fox lawsuit and settlement represents the highest profile example, it was not the only investor lawsuit filed during the year against company management as a result of allegations of sexual misconduct. For example, in March 2017, a plaintiff shareholder filed a securities class action lawsuit in the Northern District of Texas against Signet Jewelers Ltd., alleging that senior company management had not only tolerated but participated in an atmosphere of sexual harassment, including sexual assault. The victim's accusations were made in earlier arbitration proceedings, but came to light in media reports after the arbitration records were unsealed. The plaintiffs alleged that the company's share price declined following the media reports.

In addition to the 21st Century Fox and Signet Jewelers lawsuits, two of the lawsuits women filed against Harvey Weinstein alleging sexual misconduct have also named as a defendant The Weinstein Company itself; for example one of the lawsuits places blame on the company's "executives, officers, directors, managing agents and employees," alleging they had "actual knowledge of Weinstein's repeated acts of sexual misconduct with women."

The lawsuits against The Weinstein Company are, of course, categorically different than the lawsuits involving 21st Century Fox and Signet Jewelers. The Weinstein Company lawsuits were filed by the victim or victims, seeking damages for the harm caused by the alleged misconduct itself. The lawsuits against the senior managers of 21st Century Fox and Signet Jewelers were brought by company shareholders, not by sexual harassment victims, and the lawsuits seek damages not for the harm to the victims but rather for harm to the company or to investors arising from the companies failing to take steps to prevent the misconduct.

These D&O lawsuits represent a substantial statement that the ongoing revelations of sexual misconduct will mean not only that the individual bad actors will be held accountable, but also that corporate executives and company officials who permitted the behavior or turned a blind eye may also be called to account as well. The magnitude of the 21st Century Fox settlement – which is one of the top ten largest derivative lawsuit settlements ever – underscores the seriousness of these issues and the potential threat they represent in terms of management liability exposure.

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Under New Leadership, the SEC is an Agency in Transition, with New Priorities

On November 15, 2017, the SEC Enforcement Division released its annual report detailing its enforcement activity during the preceding fiscal year (which ended on September 30, 2017). The report's enforcement statistics suggest consistent levels of enforcement activity during the most recent year compared to the year before. But on closer review, the statistics in the report reflect an agency in transition. The changes under the new administration are particularly apparent with regard to the agency's enforcement activities involving publicly traded companies.

At first impression, the division's overall enforcement statistics of the 2017 fiscal year appear to reflect a drop in enforcement actions compared to the 2016 fiscal year, but this apparent drop is largely a reflection of activity during FY 2016 related to the Commission's Municipalities Continuing Disclosure Cooperation (MCDC) initiative. Thus, with the MCDC actions taken into account, the agency's 446 standalone actions during the 2017 FY appear to be significantly below the 548 standalone actions in FY 2016. However, if the MCDC actions in 2016 are disregarded, the 446 standalone actions in FY 2017 are only slightly below the 464 standalone enforcement actions in FY 2016, representing a year-over-year drop of only about 4%. Again, disregarding the MCDC actions, the 754 total actions in 2017 is only slightly below the 784 total number of actions in FY 2016, also representing a drop of about 4%.

In terms of monetary recoveries, the enforcement division recovered a total of $3.789 billion during FY 2017, representing a drop of about 7 percent. The report details how the vast bulk of the amounts recovered are attributable to a very small number of large cases. In terms of both penalties and disgorgements, well over two thirds of the amounts recovered are attributable to the top 5% largest cases.

While the statistics appear to reflect activity levels during FY 2017 largely consistent with the prior year, a more detailed look at the division's activity reveals significant declines in several activity measures during the second half of the year.

A November 14, 2017 report from Cornerstone Research and the NYU Pollack Center for Law & Business entitled "SEC Enforcement Activity: Public Companies and Subsidiaries, Fiscal Year 2017 Update" shows that while there were 62 new enforcement actions filed against public companies and subsidiaries in FY 2017, there were only 17 new actions in the fiscal year's second half, compared to 45 in the year's first half. As the Cornerstone Research and NYU report notes, "the timing of this drop corresponds with leadership changes at the SEC."

In a November 14, 2017 *Law 360* article commenting on the SEC's FY 2017 enforcement activity, NYU Law Professor Stephen Choi (one of the contributing authors to the Cornerstone Research and NYU report) is quoted as saying that activity levels and recoveries involving public companies in the second half of the year represent a "pretty dramatic drop" that clearly means that "something has changed." He cautioned that it is too early to tell if these sudden declines are due to leadership shakeups at the agency, a drier pipeline of cases, or a broad policy shift in the enforcement program.

number*eight* 8

Initial Coin Offerings (ICOs) Proliferate, Drawing Regulatory Scrutiny and Multiple Securities Lawsuits

Anyone reading the business pages these days has to be aware that there has been a surge of interest and activity involving cryptocurrencies, and in particular involving initial coin offerings ("ICOs"). According to news reports, the amount raised through ICOs in 2017 exceeded $4 billion. At least five of the 2017 ICOs raised over $100 million. This burgeoning activity notwithstanding, ICOs are at the center of controversy. Among other things, China and South Korea have banned ICOs. The SEC has already shown its willingness to pursue enforcement actions against ICO sponsors. At the same time, several of the 2017 ICO transactions have attracted securities class action litigation brought on behalf of offering investors.

An ICO is an alternative method for raising capital. The process is intended to allow private startups to raise funding outside of traditional capital markets. In an ICO, the firm

seeking funding creates a virtual coin or token and offers it for public sale. In an October article in which it explained the ICO process, the *Wall Street Journal* called the ICO process "a cross between a traditional initial public stock offering and a crowdfunding."

In July 2017, the SEC issued an Investor Alert concerning ICOs, noting that in some circumstances an ICO may involve the offer or sale of securities and therefore be subject to the U.S. securities laws, and in other circumstances, offerings made in reliance on exemptions from the securities laws may not in every instance be compliant with the requirements for the exemption. The Alert includes an express warning against fraudulent activity.

In a separate July 25, 2017 press release, the SEC released its findings that the tokens offered by a specific virtual organization (The DAO) were securities, and therefore, subject to the securities laws. In its report of its investigation of The DAO, the agency emphasized that "whether a particular investment transaction involves the offer or sale of a security – regardless of the terminology or technology used – will depend on the facts and circumstances, including the economic realities of the transaction."

In addition, on September 25, 2017, when the SEC announced the creation of an internal Cyber Task Force, among the specific areas the agency identified that the task force will explore was "violations involving distributed ledger technology and initial coin offerings." On December 1, 2017, the SEC's newly formed Cyber Task Force initiated its first enforcement action against two individuals who had organized an ICO.

In addition to this increased regulatory scrutiny, ICOs have also now attracted securities class action litigation. There were at least five ICO-related securities lawsuits filed in 2017's final weeks, as well as one of other securities class action lawsuit filed against a publicly traded blockchain services company.

The enforcement activity and the securities lawsuits suggest that at least some of these cryptocurrency transactions may have problems; yet ICOs continue to be all the rage. The attention and interest in ICOs seem likely to continue as long as the price of Bitcoin and other cryptocurrencies remain at stratospheric levels. The sharp drop in the price of Bitcoin and other cryptocurrencies just before Christmas suggests that these digital currencies could eventually fall back down to earth, which could leave a host of disappointed (and possibly angry) investors behind.

In light of the securities lawsuits, ICO investors are increasingly willing to assert securities law violations against ICO sponsors. At a minimum, it appears that ICOs have caught the attention of plaintiffs' attorneys. A significant downturn in the price of digital currencies could well attract even further attention from the plaintiffs' bar.

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Supreme Court's Recent Penchant for taking up Securities Cases Continues

For several years now, the Supreme Court's actions have supported a perception that the Court is particularly keen to take up securities cases. It turns out that this perception has a basis in objective fact. A recent paper by University of Toledo law school Professor Eric Chafee confirms that since John Roberts became Chief Justice in 2005, the Court has averaged two securities opinions per court term, twice the number of the prior Rehnquist Court.

The current term is no exception; the Court has three securities cases on its docket. The three cases will address some important securities law and securities litigation issues.

Cyan, Inc. v. Beaver County Employees Retirement Fund: A recurring question that has arisen in recent years is whether or not state courts retain concurrent jurisdiction over lawsuits alleging liability under the Securities Act of 1933.

Section 22(a) of the Securities Act of 1933 provides for concurrent state court jurisdiction for civil actions alleging violations of the '33 Act's liability provisions. Section 22(a) specifies further that when an action is brought in state court alleging a '33 Act violation, the case is not removable to federal court.

In the Securities Litigation Uniform Standards Act of 1998 (SLUSA), Congress enacted provisions to preempt state court jurisdiction over federal law securities suits and to require the "covered class actions" to go forward in federal court.

After SLUSA was enacted, the question arose whether or not SLUSA's provisions pre-empt the concurrent state court jurisdiction provisions in the '33 Act. The question is significant. In recent years, numerous IPO-related securities class action lawsuits have been filed in state court, particularly in California. The question of whether post-SLUSA state courts retain their concurrent '33 Act liability lawsuit jurisdiction has vexed the courts and litigants for years. This case offers the opportunity for these questions to be finally resolved.

Digital Realty Trust, Inc. v. Somers: In June 2017, the Court also agreed to consider whether or not the Dodd-Frank Act's anti-retaliation provisions protect individuals who did not make a whistleblower report to the SEC, but rather made internal reports within their own companies.

The Dodd-Frank Act's definitions seem to restrict the term "whistleblower" to those filing whistleblower reports with the SEC, but the Act's anti-retaliation provision seems to extend its protections to other whistleblowers. As one district court said with respect to the tension between these two provisions, "at bottom, it is difficult to find a clear and simple way to read the statutory provisions … in perfect harmony with one another."

Of potential relevance to the resolution of these issues, the SEC's regulations interpret the Act's provisions to extend the anti-retaliation protections to all those who make disclosures of suspected violations, whether the disclosures are made internally or to the SEC.

In taking up the case, the Court will not only address the split between the circuits on the issues surrounding the Dodd-Frank Act's whistleblower anti-retaliation protections, but it may also have the opportunity to take up the "Chevron deference" issue.

Under this doctrine, which refers to the U.S. Supreme Court 1984 decision in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., courts defer to agency interpretations of statutory mandates unless the interpretations are unreasonable.

To the extent the court takes up the Chevron deference issue, it will address the question of whether or not it should defer to the SEC's interpretation of the reach of the Dodd-Frank Act's anti-retaliation provisions.

China Agritech Inc. v. Resh: In December, the Court agreed to take up the second case the Court has accepted in successive terms involving statute of limitations tolling issues under the Court's American Pipe tolling doctrine.

In its 1974 decision in *American Pipe & Construction Co. v. Utah*, the U.S. Supreme Court held that the filing of a class action complaint tolls the running of the statute of limitations for other class members who might want to file their own individual action or intervene in the class action.

Last term in the case of *CALPERS v. ANZ Securities*, the Court held that while under the *American Pipe* doctrine, that filing of a securities class action tolls statutes of limitations, it does not toll the running of statutes of repose.

The China Agritech case raises the question whether *American Pipe* tolling tolls statutes of limitation to permit previously absent class members to bring a subsequent class action outside the applicable limitations period.

The plaintiffs in the China Agritech case filed their securities class action lawsuit after two prior class action lawsuits that were nearly identical had previously been filed. In each of the two prior suits, the trial court denied class certification. The district court dismissed the plaintiffs' third class complaint on statute of limitations grounds. But the Ninth Circuit allowed their lawsuit to go forward, reasoning that, under *American Pipe*, previously absent members can file new class actions because the limitations period is tolled while the earlier would-be class actions are pending.

In urging the Court to take up the case, China Agritech argued that while most of the circuit courts had refused to extend *American Pipe* as the plaintiffs sought to do here, three circuit courts, including the Ninth Circuit in the China Agritech case, as well as the Sixth and Seventh circuits, have permitted *American Pipe* to toll the statute of limitations for absent class members not only to pursue their own individual claims, but to pursue class action claims as well. China Agritech urged the court to take up the case in order to address the circuit split.

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Tough D&O Claims Environment and Record Cat Losses Means a Challenging Marketplace for Insurers

As the foregoing discussion shows, public company D&O insurers face a challenging claims environment. Record numbers of securities class action lawsuits and new threatening areas of potential future claims present the carriers with a grim claims outlook.

The claims challenges in the D&O arena during 2017 arose in what was overall a difficult year for Property and Casualty (P&C) insurers. 2017 was by some measures a record year for losses from natural catastrophes, with three Atlantic Ocean hurricanes making landfall, two sets of California wildfires, and a major earthquake in Mexico. With the insurers' financial results generally strained from the year's numerous significant natural events, D&O insurance underwriters likely will face corporate pressure to increase rates. In certain segments of the D&O insurance marketplace (for example, biotech and pharmaceutical companies), the carriers are in fact already pushing for rate increases. At least some carriers have already signaled their intent to try to seek increases in the management liability insurance lines during 2018.

Whether and to what extent the D&O insurers actually achieve rate increases across the marketplace will depend to a large extent on the level of competition. The fact is that notwithstanding the adverse D&O claims environment and the larger context of the year's significant cat losses, the D&O insurance marketplace remains competitive, at least for many accounts, particularly for excess coverage. The end result, at least for now, seems to be that even where the primary insurers are able to hold the line or even secure a rate increase, continuing competition at the excess levels means that many D&O insurance buyers' overall insurance costs will be stable – and in some cases even continuing to decline.

Whether these conditions will hold after the insurers' report their year-end results remains to be seen. There are clear suggestions that as a result of the significant property losses during calendar year 2017, P&C insurers will be pushing for rate increases. These changes, if they do come, will likely first materialize in the property lines. It could be some time before these industry-wide changes make their way to the other coverages, including the management liability insurance lines.

There is one particular part of the management liability insurance marketplace that warrants additional comment — the Employment Practices Liability (EPL) Insurance segment. There is a general sense that the "Weinstein Effect" could translate into a significant increase in the number of sexual harassment and discrimination claims in the months ahead. The extent to which there is a significant increase in the number of EPL claims could potentially impact both EPL premiums and retentions. Indeed, the expectation of increased numbers and severity of claims could by itself contribute to a premium increase. At a minimum, these concerns may mean increased underwriting. The extent of the impact of these factors on the EPL insurance marketplace will be an important issue to watch in 2018.

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