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RECENT D&O CLAIMS DEVELOPMENTS

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The D&O claims environment is now and will likely continue to be more active and dynamic than in recent years. The frequency of D&O claims in several important areas, and the potential for significant D&O exposure in other areas, has increased with few signs of relief on the horizon. Plus, some recent case law, claims developments, a changing regulatory climate, evolving business challenges and new dynamics within the plaintiffs' bar create a troubling future for directors, officers and their insurers.

Several factors impacting D&O claims send mixed signals regarding D&O claims in the foreseeable future. Record high stock prices, strong financial performance by many corporations, a robust economy and somewhat reduced enforcement activity by the SEC all create an environment which does not fuel D&O claims. However, the recent high degree of volatility in the stock markets, the increased frequency of event-driven D&O claims and the emergence of more "second tier" plaintiff lawyers increases the likelihood of securities class actions and derivative lawsuits. As a result, directors, officers and their insurers face an unusually confusing and uncertain time period.

The following summarizes many of the more important recent developments involving D&O claims. During these uncertain times, it is especially important for those who advise and insure directors and officers to carefully monitor and react to these and other developments.

1. Securities Class Action Litigation. The single biggest development relating to D&O claims activity is the resurgence of securities class action litigation in the last couple of years. The frequency of this litigation reached record levels in 2018. But, despite the significant increase in securities class action filings, the number of classic securities class actions against directors and officers (which remains the primary source of D&O exposures) has remained relatively stable. When combined with the decreasing number of public companies, the increased number of securities lawsuits means that about eight percent (8%) of all public companies are likely to be the target of a securities claim, although that percentage drops to four point five percent (4.5%) if merger-objection suits are ignored.

   The increase in other types of securities class action lawsuits is primarily attributable to the following four dynamics, which demonstrate the limited impact most of these other types of proceedings are having on most companies.

First, the type of securities class action lawsuits which experienced the largest increase in filing activity during 2017 and 2018 was merger-related litigation. More than forty percent (40%) of all securities filings in 2017 and nearly fifty percent (50%) in 2018 were M&A related. Although the higher frequency of this type of claim is likely to continue or even increase (see discussion below), the severity of this type of claim is likely to remain modest in most instances. These M&A-related claims do not reflect a new exposure for directors, but merely reflect a change in litigation strategy by the plaintiffs' bar. In the past, virtually all M&A-related claims were filed in state court alleging breaches of fiduciary duty by the directors of the target company. However, largely because of the *Trulia* decision by the Delaware Chancery Court in January 2016, most plaintiff lawyers now prefer to file merger-related claims in federal court, alleging misrepresentations and omissions by directors and officers in connection with the merger violated federal securities laws, rather than alleging breaches of fiduciary duty by the target's directors and officers. Prior to the *Trulia* decision, the vast majority of state court M&A-related claims were quickly settled pursuant to which the company agreed to make some additional disclosures to the shareholders in connection with the transaction and the plaintiff lawyers received a modest fee award. But the Delaware court concluded in *Trulia* that this type of disclosure-only settlement in M&A claims is highly suspect because the shareholders receive very little, if any, benefit from the settlement but grant to the defendants broad releases. As a result, most M&A-related D&O claims are now filed as securities class actions in federal court, where the plaintiffs' bar hopes to enjoy greater flexibility in structuring settlements.

Second, the number of securities class actions against foreign issuers has materially increased in the last two years. Nearly fifteen percent (15%) of all securities class actions filed in 2017 and more than seventeen percent (17%) in 2018 were against non-U.S. companies. This development reflects an increased scrutiny by plaintiff lawyers of foreign companies, many of which lack the experience, discipline and culture to comply with rigorous U.S. regulations of public companies. As the U.S. dollar continues to strengthen, it seems likely that foreign countries will continue to access the U.S. capital markets more often, thereby fueling a continuation of these foreign company securities class actions.

Third, the industry segment which has experienced the largest growth in securities class actions is the life sciences industry. Between 15% and 20% of all securities filings in 2017 and 2018 were against companies in that industry. Because many of these companies are heavily dependent upon regulatory approvals and are highly susceptible to regulatory sanctions, these companies can suffer dramatic and sudden consequences without warning, resulting in very large and immediate stock drops. That fact pattern will inevitably generate securities class action litigation which often will have a large settlement value due to the large alleged damages, as evidenced by the large stock drop.

Fourth, the increase in IPOs and secondary stock offerings as a result of the record high stock markets has and will likely continue to fuel securities class actions when those companies encounter financial or operational difficulties after the stock offering. A U.S. Supreme Court decision in March 2018 further aggravates those exposure concerns. In *Cyan Inc. v. Beaver County Employees' Retirement Fund*, the Court ruled that plaintiffs may prosecute claims under the Securities Act of 1933 in either state court or federal court, thereby affirming existing case law in California and rejecting contrary case law in most other jurisdictions. The plaintiffs' bar is reacting to this ruling in two ways. More securities class actions arising out of a company's initial or secondary offering of its securities are now being filed in state courts throughout the country. According to one report, at least thirty-three (33) state court securities class actions were filed in 2018, primarily in California (16) and New York (13). Because state courts have fewer resources and typically see far fewer securities cases than federal judges, state court securities cases are dismissed less frequently than federal cases. In addition, 1933 Act state court cases are now settling for materially larger amounts due to plaintiff lawyers wanting to "penalize" defendants generically for unsuccessfully trying to defeat such state court proceedings via the *Cyan* case. Some commentators have suggested a bylaw provision which requires any securities lawsuits be filed in federal court may effectively circumvent the *Cyan* ruling, but in December 2018, the Delaware Chancery Court ruled that such a bylaw provision is invalid under Delaware law because it seeks to regulate external relationships by overriding federal securities law. See, *Sciabacucchi v. Slazberg*. Assuming that decision is not reversed on appeal and is followed in other states (which seems likely), new legislation by Congress will be necessary to correct this troubling development.

Four other developments in securities class action litigation are worth noting:

a. A potentially alarming potential development in securities class action litigation is the emergence of very large opt-out settlements. Members of the class of shareholders for whom the class action is litigated have always had the right to opt-out of the class action and separately litigate their claims. Because it is extremely expensive to litigate these separate claims when compared to the modest potential recovery in that separate claim, opt-out claims historically have been relatively unusual absent extraordinary circumstances. But, in 2018, claimants who opted out of the VEREIT securities class action litigation settled their individual claims for a total of $217.5 million, which may signal an increased popularity in asserting opt-out claims. The additional defense costs and settlement exposure for defendants and their insurers attributable to such large opt-out claims can greatly complicate settlement strategies in the related securities class action.

b. The plaintiffs and plaintiffs' bar in securities class actions are evolving. Fewer large institutional investors are choosing to serve as lead plaintiff in

these cases because they view any benefits from serving in that role to be outweighed by the burden, cost and distractions created by that service. In part because of that development, some of the premier plaintiff law firms in this area have curtailed or largely withdrawn their focus on securities class actions, which has resulted in a number of "second-tier" plaintiff firms becoming more active in this area. For example, in 2018, more than one-half of the non-M&A securities class action lawsuits were filed by three small "emerging" plaintiff firms. The cases filed by these three firms were dismissed at an unprecedented 51% rate. This dynamic is a mixed bag for defendants and insurers. Although these firms at times are less effective litigants, they often have unreasonable settlement expectations.

c. The potential securities liability exposure created by improper use of social media was highlighted by the highly publicized tweets in August 2018 by Tesla CEO Elon Musk which stated that funding to take the Company private for $420 per share was secured. Within days following those tweets, Musk and Tesla settled claims by the SEC by agreeing to pay $20 million each and by Musk agreeing to certain other non-monetary terms (including his resignation as Chair of the Board). Remarkably, just a few months later, Musk again made questionable tweets regarding Tesla's production estimates, which the SEC alleges violated his earlier settlement and should result in Musk being held in contempt of court. Similarly, in March 2019, the U.S. Supreme Court ruled that a person can be personally liable for violation of the federal securities laws by reason of forwarding to prospective investors a misleading email written by his boss. *Lorenzo v. SEC*. These cases are a stark reminder that *any* public disclosure by executives, whether through conventional channels or through social media or other "new age" technologies, must be accurate and not misleading, and that involvement in disseminating false information about a public company via an email written by someone else can create personal liability.

d. In February 2019, a jury in a rare securities class action trial entered a verdict in favor of the defendant company and certain of its directors and officers with respect to three of the four alleged misleading disclosures and found the defendants liable for the fourth alleged misrepresentation. The jury awarded damages of $4.50 per share, which is payable only to those class members who present a valid proof of claim. By reason of the per share damages verdict, the defendants will undoubtedly pay much less than the typical aggregate settlement amount which requires the defendants to pay the full aggregate settlement amount regardless of the number of class members who present a valid proof of claim. Interestingly, the defendants were forced to litigate the case through trial because (i) the company had a relatively small D&O insurance program which was largely eroded by defense costs, and (ii) plaintiffs refused to

accept a settlement amount which reflected the company's limited financial ability to pay an uninsured settlement.

2. SEC Enforcement. In addition to private securities litigation, D&Os need to also be concerned about SEC enforcement activity. During 2017 and the first half of 2018, SEC enforcement activity involving public companies decreased noticeably, perhaps due to new leadership at the SEC and a less aggressive enforcement philosophy under the Trump Administration. However, during the second half of 2018, those enforcement actions nearly tripled when compared with the preceding two six-month periods. About one-quarter of those actions included claims against individuals—most often the CEO or CFO of the company.

The two main factors which continue to create concern for D&Os in this context are summarized below.

First, the new leaders at the SEC's Division of Enforcement have repeatedly stated that "individual accountability" is one of the Division's "core principles," and that "pursuing individuals has continued to be the rule not the exception."

Second, during its 2018 fiscal year, the SEC received a record 5,282 whistleblower reports, primarily from insiders at companies who identified illegal behavior. The increased frequency of whistleblower reports to the SEC appears to be attributable at least in part to the February 2018 U.S. Supreme Court decision in *Digital Realty Trust, Inc. v. Somers*, in which the Court held that the Dodd-Frank Act's provision which protects whistleblowers against retaliation only applies to whistleblowers who report to the SEC, not to whistleblowers who report internally within their company. As a result, whistleblowers are highly incentivized to report their complaints to the SEC.

The potential to receive a whistleblower bounty award from the SEC is another strong incentive to report wrongdoing to the SEC. The amount of whistleblower bounty awards paid by the SEC increased significantly in 2018, which will likely fuel even more whistleblower reports in the future. During 2018, the SEC authorized awards totaling $168 million, which exceeded the $158 million in total awards granted throughout all of the program's prior years, combined. In March 2019, the SEC announced a $37 million bounty payment to an individual who provided information that lead to a $267 million recovery from JP Morgan, which was the third largest bounty payment in the history of the SEC whistleblower program.

The most common complaints by SEC whistleblowers are disclosure and financial irregularities, offering fraud and manipulation, all of which typically implicate directors and offices. A new category of whistleblower reports during 2018 related to initial coin offerings and cryptocurrencies. These complaints obviously give to the SEC valuable information upon which strong claims against directors and officers can be brought.

SEC enforcement actions can be particularly problematic for D&Os because they frequently last a long time and usually cannot be resolved at the same time as parallel securities class action and shareholder derivative litigation. As a result, a sufficient amount of the company's D&O insurance limits should be preserved following a settlement of the private litigation to fund the ongoing and potentially very large costs in the SEC action.

3. <u>M&A Claims</u>. M&A transactions continued at a high rate in 2018 due in large part to many large international corporations bringing huge cash reserves into the U.S. as a result of the 2017 federal income tax reforms. Those transactions have and will continue to spawn D&O litigation, but the nature, forum and success of those claims is less certain today than in the past.

As explained above, in light of the Delaware *Trulia* case, far fewer M&A cases are filed in state court and far more M&A cases are filed in federal court. Several courts outside of Delaware have followed the *Trulia* decision and rejected disclosure-only settlements in these types of cases. But, a few cases have declined to follow *Trulia* and have approved a disclosure-only settlement. As a result, M&A objection cases are still filed in selective states, but most cases are now filed in federal court, alleging inadequate or incorrect disclosures relating to the transaction.

The 2015 Delaware Supreme Court ruling in *Corwin* has also reduced the number of M&A-related cases, at least in Delaware. In that case, the Court held that shareholder approval of a merger effectively ratifies the transaction, and thus insulates directors and officers from liability if all relevant facts were disclosed to shareholders prior to the shareholder approval.

The plaintiffs' bar initially responded to the *Trulia* and *Corwin* Delaware decisions by filing more appraisal actions as the preferred means to attack an inadequate price in a completed M&A transaction. In an appraisal action, the court determines a fair price per share and requires the buyer to pay that fair price whether or not the directors and officers committed any wrongdoing. However, that strategy has not been too successful for plaintiffs based primarily on two obstacles. First, particularly the Delaware Supreme Court has not been supportive of expansive efforts by plaintiffs to use appraisal actions as the preferred means to attack an M&A transaction. In several recent decisions (including the *Dell* decision in December 2017), the Court ruled that if the factual record demonstrates a strong sale process, the merger price negotiated by the parties should be given "heavy, if not dispositive, weight." Second, any shareholder who wishes to benefit from the appraisal action must affirmatively opt-in to the litigation. As a result, far fewer shareholders typically participate in an appraisal action settlement than in a traditional class action against directors and officers for breach of fiduciary (all shareholders participate in a traditional class action unless they opt-out). As a result, the number of appraisal actions filed in Delaware have decreased in 2017 (by 21%) and again in 2018 (by another 57%). Appraisal

actions also create difficult insurance coverage issues. Insurers frequently deny coverage under D&O insurance policies for an appraisal action because the lawsuit is against only the company, is not a "Securities Claim" as defined in the policy and is not for a Wrongful Act by the Insureds.

Although the vast majority of M&A-related claims (whether filed in state or federal court) are resolved for little if any financial payment, some M&A-related claims have very high settlement values. The most important criteria in separating meritless merger claims versus high exposure merger claims is the existence of perceived conflicts by the target's decision makers or advisors. Such conflicts prevent the defendants from relying upon important defenses such as the business judgment rule and state exculpation statutes, and thus expose the defendants to potentially enormous damages. Ironically, these perceived conflicts of interest can almost always be prevented with careful planning and advice from qualified advisors. But, if anyone involved in the decision process ignores this simple loss prevention concept, a routine and meritless D&O claim can become an extremely expensive claim to defend and settle.

4. Derivative Suits. Historically, shareholder derivative lawsuits (which are cases brought by shareholders on behalf of a company against D&Os seeking damages incurred by the company as a result of alleged wrongdoing by the D&Os) have presented relatively benign exposures. Although frequently filed in tandem with a more severe securities class action, derivative suits usually have been dismissed by the court or settled for relatively nominal amounts because of the strong defenses available to the D&O defendants. For example, a committee of independent directors who were not involved in the alleged wrongdoing may determine that prosecution of the derivative suit on behalf of the company is not in the company's best interest, in which case the court may dismiss the case. Likewise, the defendant D&Os usually have several strong defenses in the derivative suit, including pre-suit demand requirements, the business judgment rule, state exculpation statutes, and reliance on expert advisors.

Despite these procedural and substantive defenses, an increasing number of derivative suits are now settling for large amounts. The following summarizes many of the more recent "mega" derivative settlements.

Company	Type of Incident	Derivative Settlement
Wells Fargo	Widespread company practice of opening unauthorized customer accounts	$320 million ($240 million from insurance and $80 million compensation claw-backs)
Activision Blizzard	Executive officers unfairly acquired a controlling interest in the company	$275 million
News Corp.	Relative of majority owner personally benefitted from acquisition of company; company's employee journalists used illegal reporting tactics	$139 million
Freeport-McMoRan	Merger fraught with allegations of sweetheart deals and self-dealing	$137.5 million
PG&E	Failure to maintain safe gas pipelines, resulting in huge explosion	$90 million
21st Century Fox	Allegedly rampant sexual harassment by former Fox executives	$90 million
Del Monte Foods	Leverage buyout of company by private equity firms	$89.4 million
Pfizer	Off-label marketing of drugs resulting in federal investigations and claims under the False Claims Act	$75 million
Bank of America	Acquisition of Merrill Lynch based on allegedly false statements about Merrill's losses	$62.5 million

A number of factors appear to be contributing to this troubling trend of large derivative suit settlements, including:

- Duplicate Lawsuits. Unlike most securities class actions which must be litigated in federal court, derivative litigation is usually filed in state court. Also, unlike securities class action litigation, there is no mechanism to consolidate multiple derivative lawsuits into one state court proceeding. As a result, multiple derivative cases, each prosecuted by a different plaintiffs' firm, will often proceed in different courts, even though all of the lawsuits assert essentially the same claims on behalf of the company.

This results in higher defense costs, inconsistent court rulings in the parallel cases, and the potential for higher settlement amounts to resolve all of the lawsuits.

- Large Event Exposures. The most troubling recent phenomenon involving shareholder derivative litigation is the increasing frequency of large derivative settlements arising out of an unexpected event which causes huge financial loss to the company. There is now a higher likelihood that such large company losses will result in a large derivative suit settlement. Although it is tempting to question why directors and officers should be liable for the unexpected event, plaintiffs' lawyers allege that the D&Os could have prevented or at least mitigated the company loss through better management practices. Types of incidents that have or are likely to fuel this type of derivative lawsuit include very large cyber breaches, a large environmental catastrophe, decommissioning of nuclear plants, large product recalls or product liability claims, gas line explosions and unforeseen oil spills, gas leaks, and large-scale energy outages. Equally alarming is the increased frequency of securities class actions arising out of these unexpected events if there is even a modest stock price decline following the event. These disclosure-based lawsuits test the age-old distinction between mismanagement claims (i.e., derivative lawsuits) and disclosure claims (i.e., securities class action lawsuits).

Although large derivative suits typically are based on allegations of classic mismanagement or poor business decisions, which have historically been protected by the business judgment rule, three dynamics contribute to more of these cases surviving that defense and resulting in large settlements:

First, when the losses to the company are extremely large, thereby creating significant harm to shareholders, some state court judges (who are usually elected officials) are reluctant to dismiss the case absent a very compelling justification.

Second, plaintiffs' lawyers can avoid many of defendants' liability defenses by basing their claim on some type of alleged conflict of interest or alleged breach of the duty of loyalty rather than the more common, and harder to prove, breach of the duty of care.

Third, when the derivative lawsuit is prosecuted in state court where the underlying incident occurred, there are often high emotions by local residents who were impacted by the incident and heightened attention by local politicians and media outlets. The judge often either shares that emotion or feels political pressure to respond to that emotion. As a result, these local cases frequently are not dismissed. In light of the huge damages and hostile venue, the D&Os (and their insurers) are then forced to pay exorbitant settlement amounts as the only viable exit strategy in the case.

A forum selection clause in a company's bylaws is an increasingly important tool in defending derivative lawsuits. Under relatively new statutes in Delaware (Section 115, Delaware General Corporation Law) and a few other states, public companies chartered in those states may adopt a forum selection bylaws provision, which requires all proceedings relating to internal affairs of the company (such as derivative suits) to be filed and adjudicated only in the state designated in the bylaws. Such forum selection bylaw provisions can prevent multiple derivative lawsuits being prosecuted in multiple and hostile forums. As evidenced by a December 2018 decision by a California appellate court, most courts outside of Delaware have enforced these bylaw provisions which select Delaware courts as the required forum. See, *Drulias v. 1st Century Bancshares, Inc.*

5. Criminal Proceedings. In recent years, regulators, prosecutors and commentators have repeatedly discussed the importance and purported commitment by the government to hold executives criminally accountable for wrongdoing. In the aftermath of the financial crisis, there was a large public outcry for the prosecution of responsible individuals. In 2015, the DOJ issued the so-called Yates Memorandum, which strongly incentivized companies to provide to the DOJ relevant facts relating to director and officer criminal misconduct. More recently, senior officials in the Trump Administration, including Attorney General Jeff Sessions and SEC Chairman Jay Clayton, have expressed the importance of creating individual and corporate accountability through criminal prosecution of executives.

Despite this rhetoric, the prosecution of white-collar crime is at a 20-year low, and many of the white-collar prosecutions that do occur are against mid-level managers rather than senior executives. Why? Commentators offer several explanations, but two theories seem the most plausible.

First, as corporations grow ever larger and the roles of senior executives grow more complex, it is increasingly difficult for prosecutors to prove a senior executive was directly involved in or had knowledge of the wrongdoing. Unlike financial fraud (which usually can be attributed to senior executives), operational wrongdoing is frequently more difficult to attribute to specific senior executives. But, if the wrongdoing relates to public health and safety issues, the broad "responsible corporate officer" doctrine can impose virtually strict criminal liability upon senior executives who had the power to prevent or mitigate the violation, even if the executives did not know about or participate in the wrongdoing. Absent the narrow applicability of that doctrine, though, the reality of diffuse corporate governance structures today makes criminal prosecutions of executives quite difficult.

Second, prosecutors today generally appear to be more risk averse when evaluating a possible white-collar case. In a new book entitled The Chickenshit Club: Why the Justice Department Fails to Prosecute Executives, by Jesse

Eisinger (Simon & Schuster, 2017), the author contends Federal prosecutors today, as a whole, have less criminal trial experience and are more inclined to settle or forego prosecution of executives out of a fear that an unsuccessful prosecution would blemish their record, reputation and opportunities in the more lucrative private sector.

But, those inhibitors to prosecuting highly visible senior executives generally do not apply to the prosecution of mid-level managers who were directly involved in the illegal activity and whose prosecution is less newsworthy. So, the risk of criminal claims against lower-level officers is very real today, particularly with respect to Foreign Corrupt Practices Act violations.

The white-collar prosecutions that do occur today primarily relate to violations of the Foreign Corrupt Practices Act and insider trading laws, consistent with historical practices. A growing area of concern, though, is under the "responsible corporate officer" doctrine, which imposes criminal liability on corporate executives who, due to their position of authority, have the power to prevent and correct violations of the Food, Drug and Cosmetic Act ("FDCA"). An executive may be liable under this doctrine even when he or she did not know of or personally participate in the company's violation of the FDCA. The most publicized recent prosecution under this doctrine involved several officers of the company that developed and marketed the drug OxyContin. Following their guilty pleas, three senior officers were required to disgorge $34.5 million in compensation and barred from service in the drug industry for 12 years. Examples of other recent prosecutions of executives under this doctrine include: (i) three executives of a medical device company that promoted a medical device for an unapproved use pleaded guilty to a violation of the FDCA even though there was no proof that the executives knew about or participated in the illegal conduct, (ii) the former CEO of a pharmaceutical company pleaded guilty to two violations of the FDCA and was ordered to pay a $1 million fine, forfeit $900,000 of compensation and serve 30 days in jail, and (iii) several executives were convicted in connection with their company's failure to prevent or promptly correct their company's illegal test marketing and promotion of medical devices.

6. Cyber Claims. Unquestionably, cyber-related losses and claims are one of the most troubling future exposures for companies. It is virtually impossible for companies to prevent cyber attacks. Loss mitigation, rather than loss prevention, seems to be the only strategy available for most companies.

In contrast, the liability exposure of directors and officers for cyber-related claims is less predictable. Until recently, no cyber-related securities class action lawsuits were filed even with respect to very large and highly-publicized cyber intrusions at large companies. Although still uncommon, some plaintiff lawyers have filed a growing number of such securities class actions, including cases against Yahoo!, PayPal, Equifax, Marriott, Chegg, Google/Alphabet, and their D&Os. These cases are still uncommon despite the large number of companies which

experience data breaches because in most cyber attack situations, the company's stock price does not materially drop following disclosure of the attack. But, if there is a material stock drop following disclosure of the cyber breach (often due to the company failing to make its disclosure for an extended period of time after the breach was discovered), a securities class action is likely, and those securities class actions can be expensive. For example, the Yahoo! cyber-related securities class action was settled in March 2018 for $80 million while a motion to dismiss was pending.

It is far from clear whether these cases will ultimately be successful on a widespread basis. The PayPal securities class action, for example, was dismissed by the court in December 2018 because the plaintiffs failed to sufficiently allege the defendants' acted with the requisite scienter (i.e., plaintiffs did not allege facts showing the defendants knew the size or impact of the breach at the time of the allegedly incorrect disclosures).

Shareholder derivative lawsuits against directors and officers are another litigation response when a company suffers large cyber-related losses. However, this type of derivative litigation is also challenging for plaintiffs in light of the business judgment rule, the applicable state exculpatory statute for directors, and other state law defenses for the defendant directors and officers. A cyber incident will rarely involve conflicts of interest, and therefore should rarely give rise to large derivative litigation settlements absent unusual circumstances. But, a few cyber-related derivative lawsuits have settled within the last year. Most notably, the *Yahoo!* derivative suit settled for $29 million, due in large part to the extraordinary number of people impacted by the breach (i.e., as many as 1.5 billion users) and the two-year delay in disclosing the breach. Other far smaller settlements include (i) the *Home Depot* cyber derivative suit settlement pursuant to which the company agreed to certain governance reforms and the defendants agreed to pay a $1.125 million plaintiff attorney fee award, and (ii) the *Wendy's* cyber derivative lawsuit settled for certain governance reforms and a $950,000 plaintiff attorney fee award. Such fee awards in cases with strong liability defenses may encourage further derivative litigation against D&Os in this context.

The area of greatest potential exposure for directors and officers regarding cyber matters does not arise from acts or omissions by directors and officers prior to the attack, but rather from conduct of directors and officers once the attack is identified. Disclosures regarding the scope, effect and cause of the attack, and the response by management immediately following the attack, can potentially create either securities class action or shareholder derivative litigation. Therefore, companies should develop and implement long before a cyber attack actually occurs effective protocols and action plans which describe what should and should not be done if a cyber attack against the company occurs. Careful advanced planning in this area can provide a unique opportunity to minimize the potential personal liability of directors and officers for post-attack conduct.

Another related D&O exposure in this context is the potential for criminal charges against a director or officer for insider trading based on sales of company stock after the cyber event was discovered, but before it was publicly disclosed. For example, the former chief information officer of Equifax was indicted for insider trading based on his sale of $950,000 of company stock before the company's massive data breach was publicly disclosed.

7. #MeToo Claims. It is hard to overstate the scope and effect of the so-called #MeToo movement. Following the public allegations of sexual misconduct by Harvey Weinstein beginning in late 2017, virtually every type of industry has experienced allegations of inappropriate or illegal sexual misconduct, and most organizations have adopted or updated their policies and practices in this area.

   Not surprisingly, wide-spread publicity of salacious allegations has spawned an increasing number of claims against the alleged perpetrator and employers. Most of those claims impact EPL insurance policies rather than D&O insurance policies, but in the more egregious situations, mismanagement and disclosure claims against directors and offices can be and have been filed. The D&O claims most likely arise where the company suffers large losses due to the allegations. For example, shareholder litigation was filed against directors and officers of Alphabet (Google's parent company), seeking to recover the allegedly "billions" of dollars of losses incurred by the company as a result of purported widespread sexual misconduct by senior executives at the company. In response to published reports about this behavior and the terms of lucrative severance agreements with some of the alleged perpetrators, thousands of company employees staged a worldwide walkout to protest the company's practices, and the company's market capitalization reportedly fell by $12 billion. In addition, securities class actions have been filed when the sexual misconduct public disclosures result in a material stock drop, such as the July 2018 class action suit against National Beverage Corporation and certain of its officers.