Howden Re

Casualty in focus

The shifting sands of securities litigation

Impact of event-driven litigation on D&O insurers

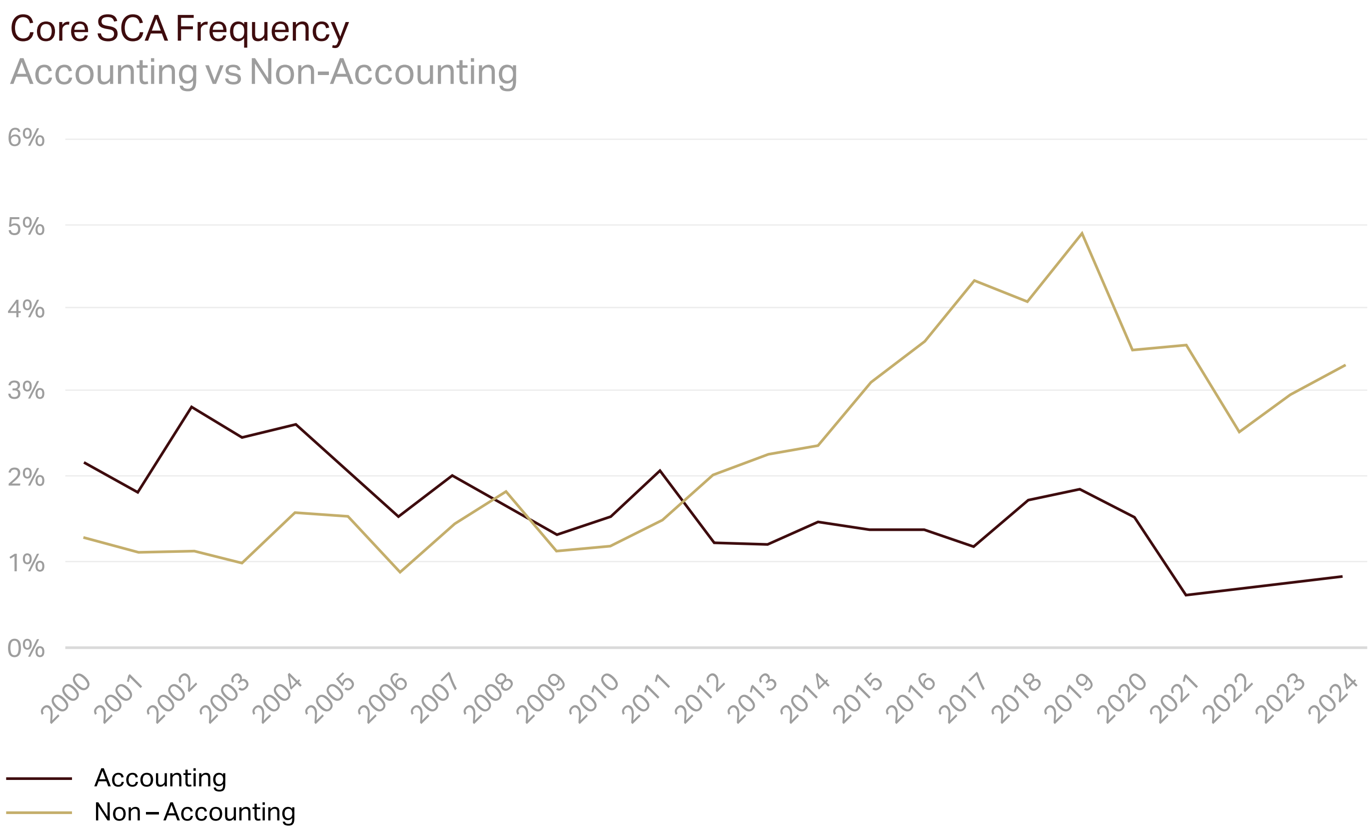
September 2025

HOWDEN

The past decade has seen a significant rise in large derivative settlements arising out of extreme events of a non-financial nature.

These events are what would be considered operational risk events and have become far more prevalent in securities litigation than the traditional securities suits arising out of financial misstatements or restatements. Plaintiff firms have had growing success turning extreme events, like a wildfire, a data breach, a product recall, a plane crash, or a public health crisis into allegations of failure of oversight by the board of directors of public companies traded on U.S. exchanges. This has resulted in costly derivative claims, typically filed in state courts, that are sometimes in addition to the federal securities class actions (SCAs). The changing legal landscape is forcing D&O carriers to re-assess their underwriting strategy, consider new ways to model expected loss costs, take a closer look at Side A pricing, and place more emphasis on portfolio management to better insulate against major events.

Before we get into the extreme events, let's take a step back and look at the bigger macro trends. If we examine the last 25 years of "core" (i.e. non-merger related) securities class action filings, we see a significant shift from claims arising out of accounting issues to claims of a non-accounting nature [graph 1]. The decline in accounting-related securities class actions (SCAs) is largely due to the positive impact of the Sarbanes-Oxley Act of 2002, which led to fewer financial restatements over time, except for a temporary increase in 2021 caused by Covid-related restatements. Less intuitive, however, is the significant increase in the frequency of non-accounting SCA claims, which has more than doubled in the past 10 years compared to the previous 10 years.

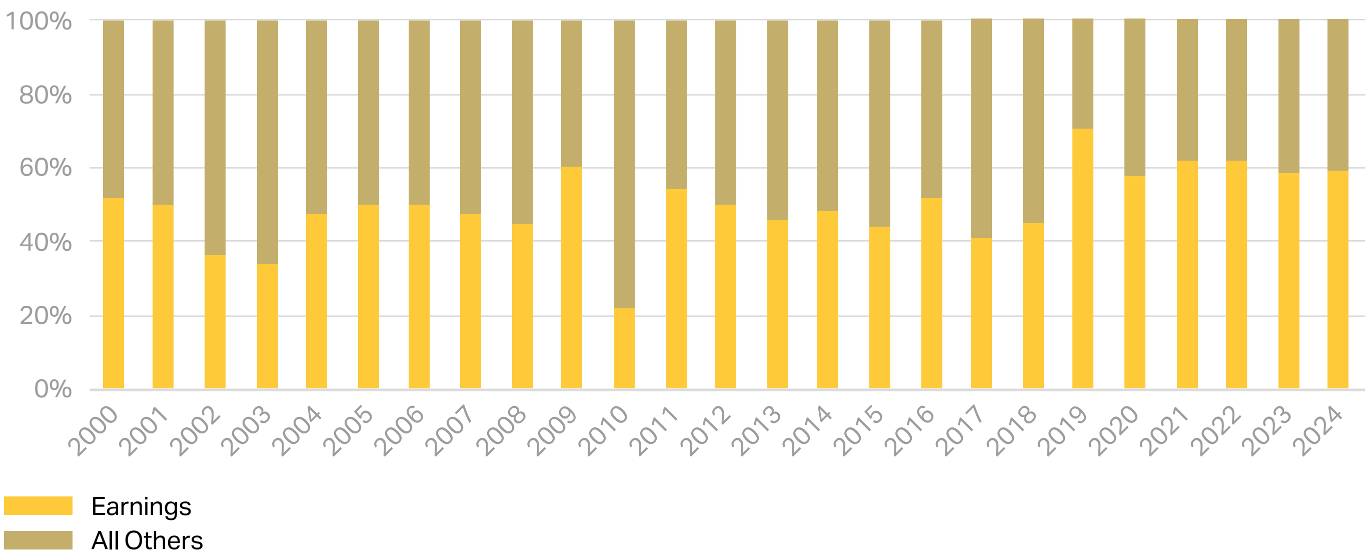


Graph 1
Source: Stanford Securities Litigation Analytics

The typical non-accounting SCA claim derives from a disappointing earnings report following some positive forward-looking statements about future earnings that turned out to be too optimistic.

This is true for about 60-70% of claims [graph 2] since 2019, where you will see cookie-cutter initial complaints that read 1) due to reasons a), b), and c) revenue and/or earnings fell short of expectations, 2) prior corporate disclosures regarding a), b), and c) were overly optimistic, and 3) that as a result of 1) and 2) investors experienced a loss. The remaining 30% are mostly made up of issues with product development, including disappointing clinical trials for biotech firms, and regulatory investigations or enforcements. The experienced insurance company professional sees many claims in this category as being fairly weak on the surface, given the non-specificity of the allegations and the safe harbor for forward-looking statements afforded by the Private Securities Litigation Act (PSLRA). However, dismissal rates have not changed much and continue to hover around 50%.

Non – Accounting SCA's
Earnings shortfall vs all others



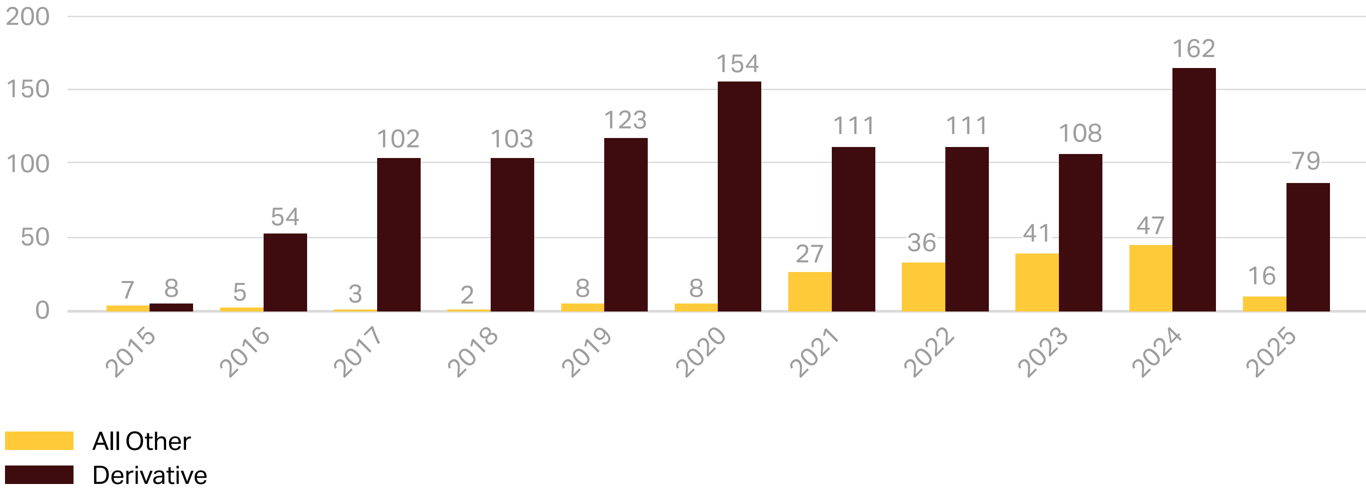
Graph 2
Source: Stanford Securities Litigation Analytics

Coinciding with the rise in non-accounting claims, is the rise in Breach of Fiduciary Duty claims, in which the majority are derivative claims. What used to be a handful of derivative claims per year is now steadily over 100 claims per year and rising [graph 3]. Roughly two-thirds of these derivative claims, which are filed in state court, are filed in parallel with a federal Securities Class Action. A cynic might say that this sudden increase in follow-on derivative actions since 2016 has been a coordinated shift in tactics by the plaintiff's bar looking to maximize potential fee awards to plaintiff law firms, rather than the primary goal of seeking recoveries for shareholders. At the very least, this practice is making matters more expensive to defend and defendants more willing to settle. Another potential incentive for follow-on derivatives might be the potential to bypass the PSLRA's automatic discovery stay on SCA's, which would otherwise halt the high expense of discovery until a ruling on the motion to dismiss.

It is worth a brief explanation to acknowledge the rise in non-derivative breach of fiduciary duty claims, the smaller bars on Graph 3. Perhaps a topic for a future deep dive, the claims in this category arise mostly out of M&A activity and have been quite costly. Of the 22 claims filed since 2018 that have already resulted in a settlement of $10M or more, 21 of them relate to a merger or take-private transactions. The settlements are not like the M&A claims of the past, where minor defense costs and possibly a 6- or 7-figure award for plaintiff fees were all those insurers needed to be concerned with. This recent vintage is seeing settlement magnitude at the level of core SCA settlements. The numbers can get quite large, especially for some of the big names involved like Santander ($162.5M), Warner Bros./Discovery ($125M), and Viacom/CBS ($122.5M).

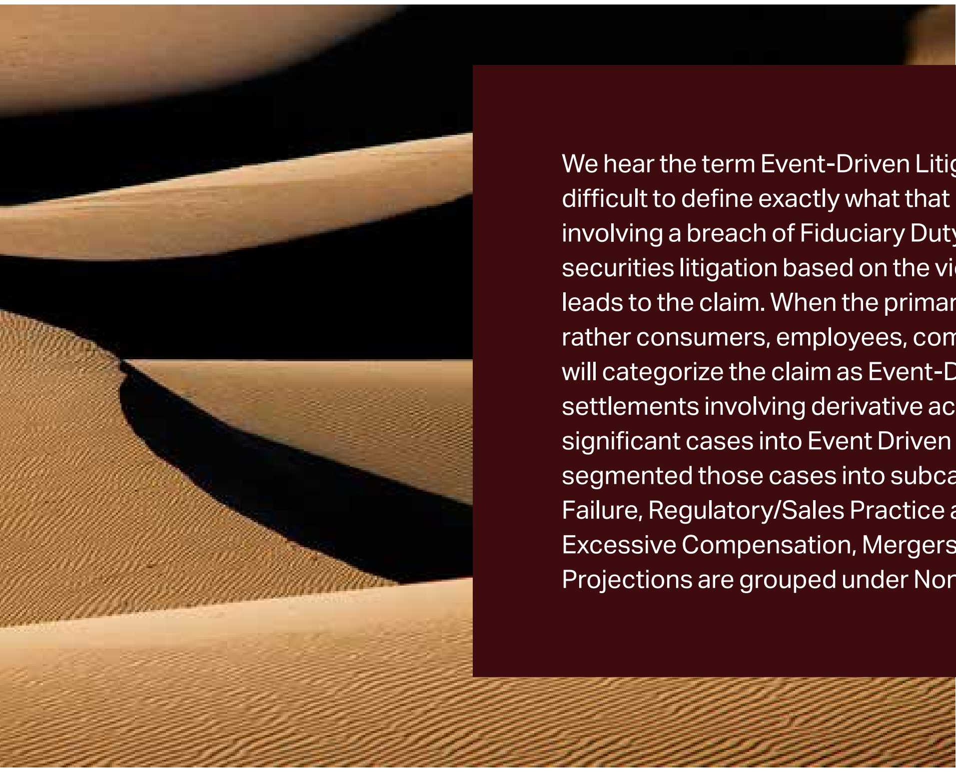
U.S. Public Company

Breach of Fiduciary Duty Suits (Excluding SPAC/DeSPAC Suits)



Graph 3

Source: Stanford Securities Litigation Analytics



We hear the term Event-Driven Litigation in the D&O world, though it is difficult to define exactly what that means. We will focus here on claims involving a breach of Fiduciary Duty suit and we will identify Event-Driven securities litigation based on the victim of the primary wrong-doing that leads to the claim. When the primary victims are not the shareholders, but rather consumers, employees, competitors, or the general public, then we will categorize the claim as Event-Driven. Looking at the last ten years of settlements involving derivative actions, we have attempted to split the significant cases into Event Driven and Non-Event Driven. We have further segmented those cases into subcategories: Product Safety/Operational Failure, Regulatory/Sales Practice are grouped under Event-Driven while Excessive Compensation, Mergers/Acquisitions, Misleading Financial Projections are grouped under Non-Event Driven.

Event Driven

Event Group

- Product Safety
- Operations
- Regulatory
- Sales Practice

Primary Victims

- Product Safety
- Operations
- Regulatory
- Sales Practice

Examples

- Opioids
- CA Wildfires
- Boeing 737 Crashes
- #MeToo
- Bribery Scandals
- Google Anti-Trust

Non - Event Driven

Event Group

- Excessive Compensation
- M&A
- Financial Projections

Primary Victims

- Investors
- Stakeholders

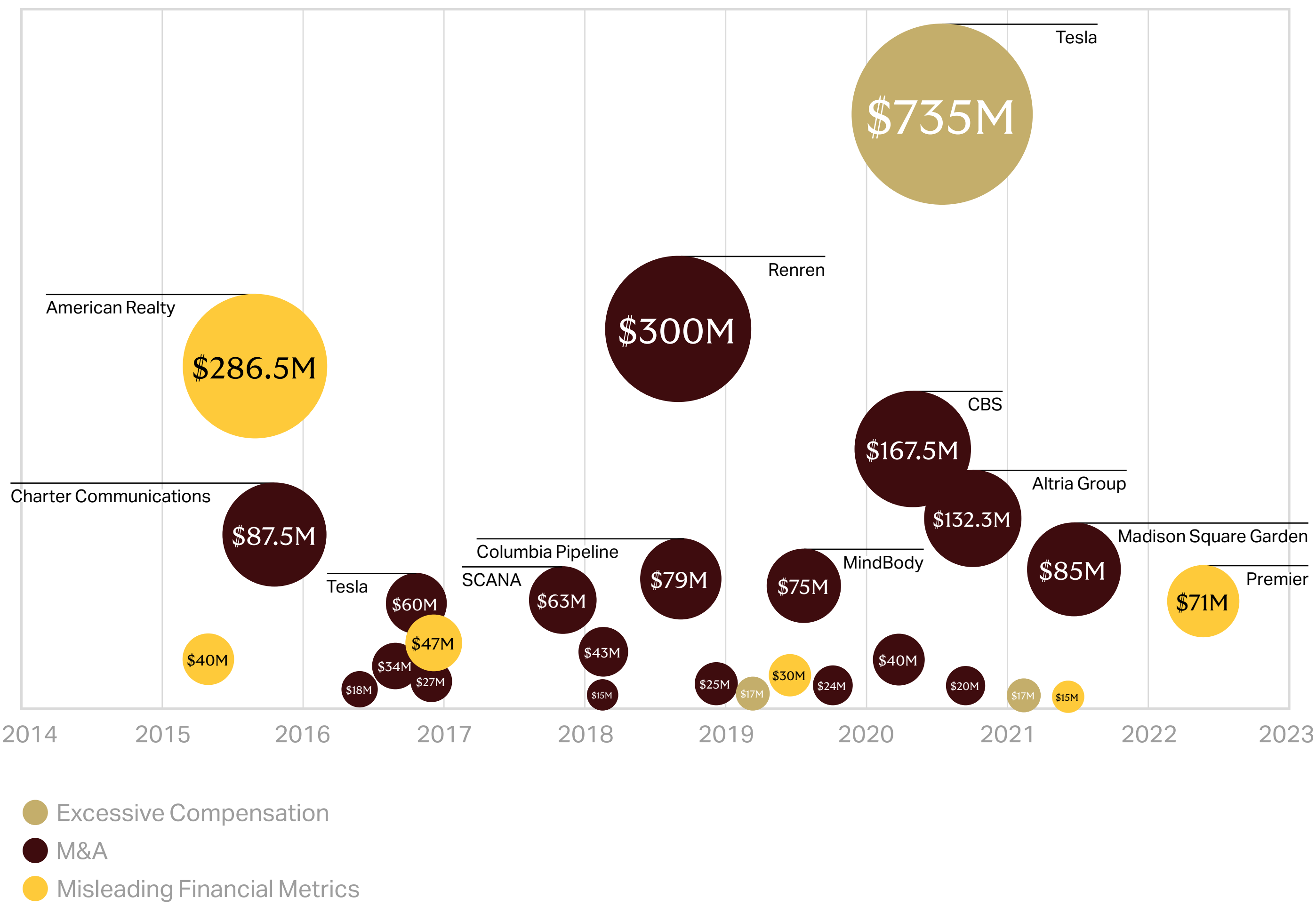
Examples

- Tesla Board Compensation Claim
- CBS/Via.com Merger
- American Realty Financial Fraud

The Financial/Transactional settlements are shown on graph 4. As mentioned, these settlements are driven mainly by M&A claims and are a significant contribution to the current legal climate.

Excessive compensation claims are less concerning to D&O carriers as they are less common and are not necessarily covered by a D&O policy as evidenced by the large Tesla settlement that was paid directly and entirely by the board members. The misleading financial metric claims are also less of a story on the breach of fiduciary side of things, since these claims are typically less successful than the SCA that they are tagged along to.

Financial/Transactional Driven Settlements

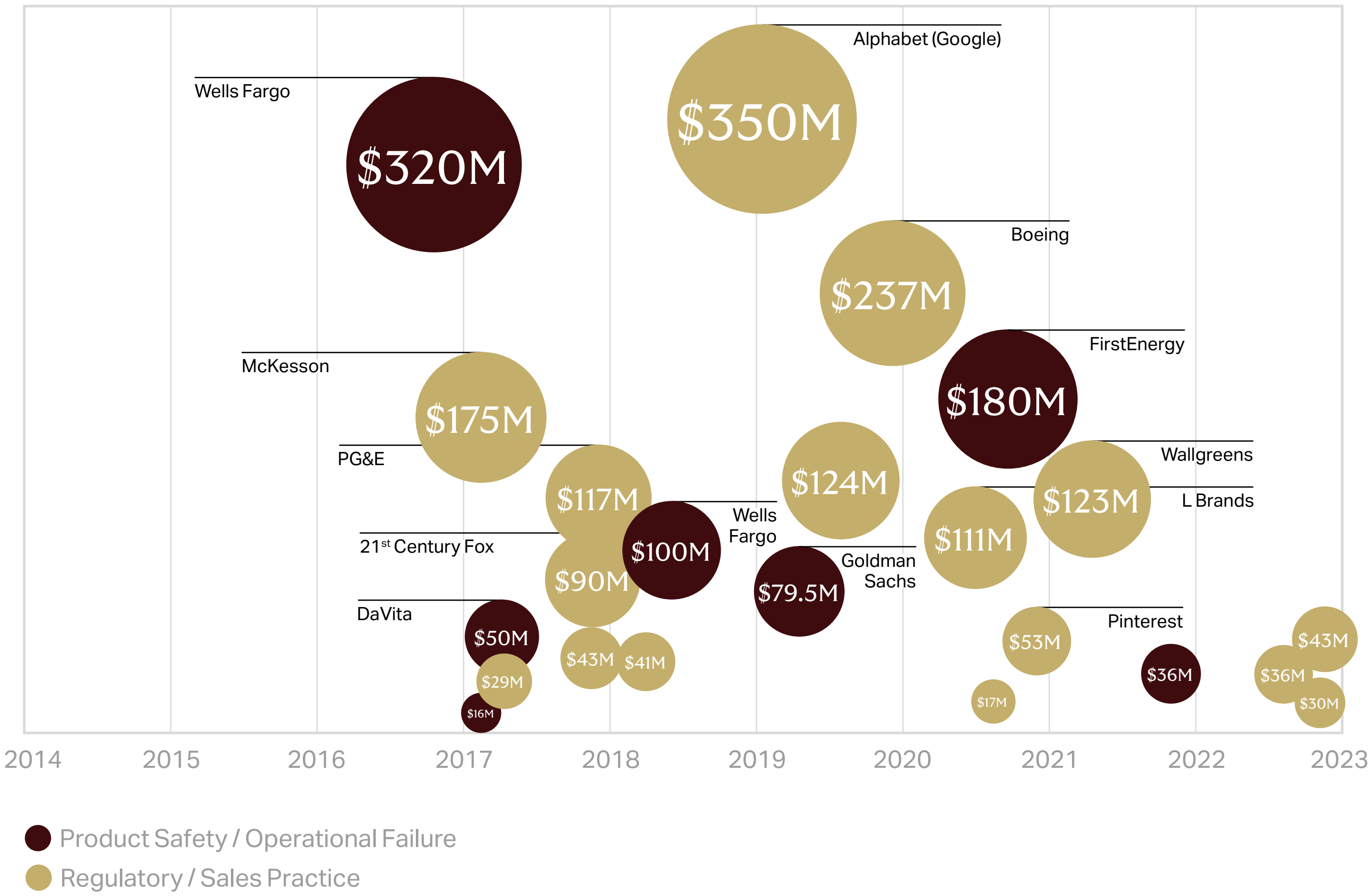


Graph 4
Source: Stanford Securities Litigation Analytics

Finally, the Event-Driven claims are shown on graph 5 below. Claims in this category are made against the board for failure of oversight or breach of fiduciary duty. The underlying matters or "events" consist of widespread sexual harassment (Alphabet, L Brands/Victoria's Secret, Twenty-First Century Fox), Opioids impact on public health (McKesson, Cardinal Health, Walmart, and others), airplane crashes (Boeing 737 Max), wildfires (PG&E), aggressive/fraudulent sales tactics (Wells Fargo), and bribery (First Energy, Goldman Sachs). The large cash settlements seen here in the past decade were quite rare to see in the prior decades. A similar caveat to this chart as was made above for the Tesla claim, is necessary.

Alphabet's $310M settlement for sexual harassment/ misconduct was not paid by insurers, but the $40M plaintiff fee award was paid by insurers. The settlement was an agreement by the company to spend $310M over 10 years on DEI initiatives and enhanced governance and oversight. A similar settlement was made in the L Brands (Victoria's Secret) sexual misconduct claim, whereby the company committed to funding $90M over 5 years to various governance measures. The plaintiff fee award was $21M in the L Brands settlement.

Event-Driven Settlements



Graph 5
Source: Stanford Securities Litigation Analytics

Some common themes run through this crop of derivative settlements. High profile incidents, companies with less than stellar governance track records, and widespread harm to large numbers of people are common elements we are seeing.

Failures in risk management (public safety), oversight of executives (#metoo), compliance and ethics (aggressive sales tactics, bribery) are now front and center for plaintiffs looking for the maximum recovery of their investment losses. Another characteristic of these successful derivative claims are the types of firms involved, typically large firms, leaders in their fields, deep pockets with large insurance towers. From an industry perspective, the usual health care and tech/media players seem to be the most frequent targets.

What are insurers doing about this?

In terms of portfolio management, we saw a contraction of the number of large policy limits offered during the hard market period from 2019-2022, which has endured up until now. This results in a larger spread of risk amongst individual insurers and reduces the impact a single mega settlement will have on a carrier's portfolio. Some insurers have diversified the attachment point strategy in their portfolios, in some cases moving down to lower attachment points where the pricing may be a bit stronger relative to the risk. Others have accelerated efforts to build out other segments to achieve more ballast, such as Private/ Non-Profit D&O.

In terms of pricing and underwriting selection, there is much work to do. Insurers are playing catch-up on finding the appropriate size of loss distributions given the claim trends discussed above and the significant rise in the market capitalization of public companies over the past 10 years. Additional variables used in underwriting and predictive models are also being sought in consideration of the rise in event-driven or non-accounting claims.

In a D&O market where pricing levels are at short-term lows and the stock market is near all-time highs, it is ever more important for insurers to keep a watchful eye on the latest trends, continually manage their overall portfolio composition, and challenge the market pricing where the reward doesn't match the risk. Howden Re's D&O Model was built with this in mind and is helping clients by giving them an independent view on rate adequacy of their portfolio across the various segments of the industry. By shining a light on portfolio construction in terms of rate adequacy, mix of business, limits management, attachment point strategy and more, the Financial Lines Team at Howden Re can help clients validate their underwriting strategies and find optimal risk transfer solutions.

Let’s discuss

Report Author

Brian Turner
Managing Director, FCAS, MAAA, CPCU

brian.turner@howdenre.com
+1 (646) 709 7018

The Team

Carrie Byler
Head of US General Casualty

carrie.byler@howdenre.com
+1 (646) 960 2422

Steve Hanke
Managing Director

steve.hanke@howdenre.com
+1 (203) 722 4510

Jim Walsh
Managing Director

jim.walsh@howdenre.com
+1 (201) 747 5046

Evan Glisson
Head of Casualty Analytics

evan.glisson@howdenre.com
+1 (718) 406 4912

One Creechurch Place, London EC3A 5AF

+44 (0) 20 7398 4888
howdenreinfo@howdenre.com

howdenre.com