



# **D&O and Financial Related Lines Claim Trends**

# Litigation Environment

- A. Pressure to Control Claim Costs
- B. Defense costs continue to spiral out of control
- C. Are we too quick to agree to ADR, mediation?
- D. Who can effectively mediate my case? Bueller?

# Class Action Overview

## A. Securities Class Actions

- Increase in Filings
- What is driving the increase?
  - Reduction in Financial Restatements



## B. Consumer Fraud (internet, social media)

- “Healthy” “organic” “all natural” false marketing and labeling claims

## C. ERISA Class Actions

# 2017 Trends in Class Action Filings

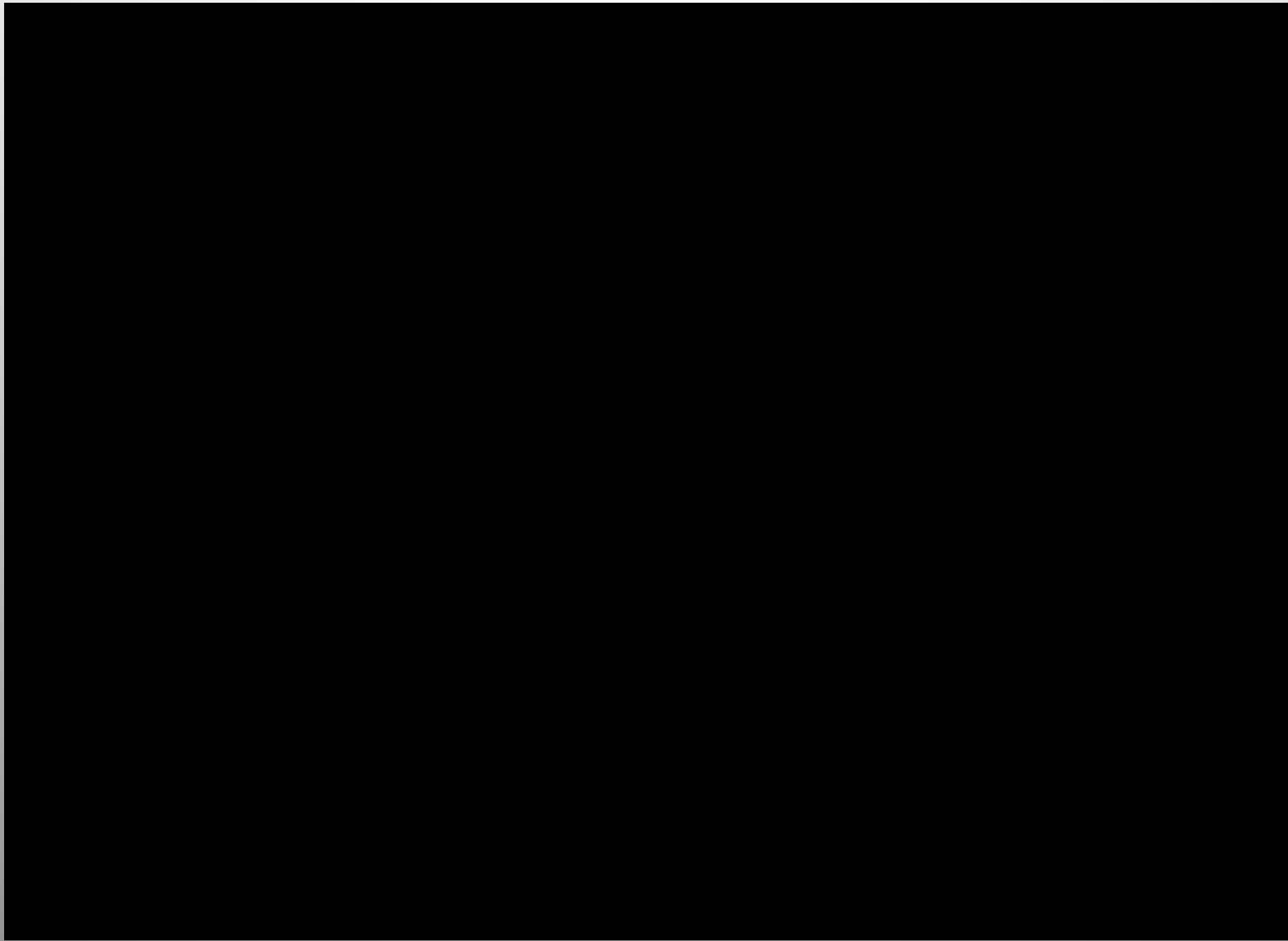
- A. There were 125 securities class actions filed during the first quarter of 2017.
- On pace to nearly double amount of securities class actions filed in 2016 (270).
  - Projected year-end total of 500 securities class actions would represent more than 2.5 times the annual average of filings between 1995 – 2015 (188).
- B. During the first quarter, publicly traded companies were being sued at an annualized rate of nearly 11% (up from 5.6% in 2016).



# Financial Institutions Claim Trends

A. Captive Agents

B. Working With Underwriters



# ERISA Class Action – Types

- A. Stock Drop
- B. Imprudent Investments
- C. Excessive Fees
- D. Proprietary Funds



# ERISA Class Action – Targets

- A. Plan Sponsors
- B. Investment Committees
- C. Service Providers





# ERISA Class Action – Trends

A. Case Law – *Fifth Third, Tibble*, ...

B. Takeaways

1. Relationships
2. Selection
3. Monitoring
4. Disclosures



# Reps & Warranties Claims

- A. How does coverage work?
- B. What are typical claim scenarios?
- C. Insurance Coverage Issues



# R & W Insurance

- A. RWI steps in and becomes the escrow?
- B. There are both buy side and sell side policies, but buy side are most prevalent given current market dynamics



# Loss

- A. Buy Side – Amounts Buyers Contractually Entitled to in Response to a Breach
- B. Sell Side – Loss Seller's Obligated to Pay Indemnitees
- C. Definition of Loss typically matches definition set forth in Acquisition Agreement



# Exclusions

- A. Manuscripted to specific deal so exclusions are becoming narrower
- B. Actual Knowledge of a Breach of a R&W
  - Conscious awareness = difficult to prove
- C. Material Inaccuracy in a Warranty Letter or similar document (“no claims declaration”)

# Coverage Issues

- A. Actual knowledge of exclusions present procedural hurdles
- B. Big issue is claims management, managing costs of defense
- C. Other insurance issues

# M&A/Bump Up Claims

- A. Review metrics
- B. Impact of recent case law
- C. Nuisance v. Severity
- D. Delaware and other states



# 2017 Trends in M&A Lawsuits

## A. There were 44 merger objection lawsuits filed in Federal Court in the first quarter of 2017

- On pace for a total of 176 merger objection suits filed in federal courts in 2017, a dramatic increase from the number filed in 2016 (80) and 2015 (17).
- Likely a result of the *Trulia* decision issued by the Delaware Chancery Court, which rejected “disclosure settlements”

## B. Overall rate of M&A litigation has declined following the *Trulia* decision in January 2016

- In 2016 the number of transactions attracting a lawsuit fell to 73% of all completed deals, down from a high of 96% in 2013



# Policy Wording/Coverage Issues

- A. Investigations Cost Coverage
- B. Claims Made/Claims Made and Reported Issues
  - Late Notice
- C. Related Claims
- D. Unfair Trade Practices
- E. Warranty/Application Issues
- F. Disgorgement

# Predictions for Remainder of 2017

- A. Impact of Public Company Consolidation
- B. Where will the SEC focus its resources and will this impact D&O Liability?
- C. Will securities cases continue to increase?
- D. Will we continue to see more industry consolidation?
- E. From an exposure standpoint what is the next shoe to drop?