



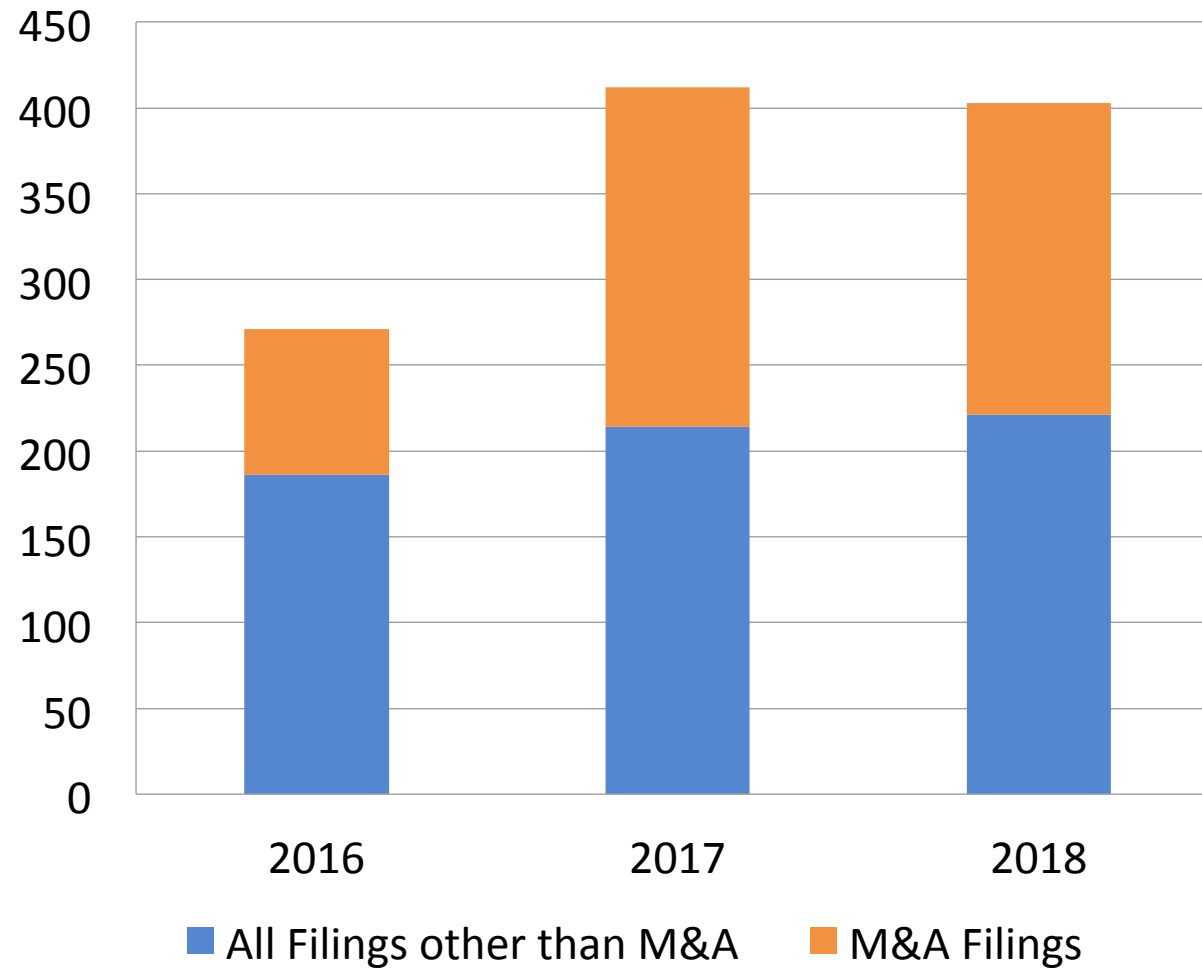
# Current Trends in D&O

# 2018 Overview Securities Class Actions

Where are we now  
and how did we get  
here?

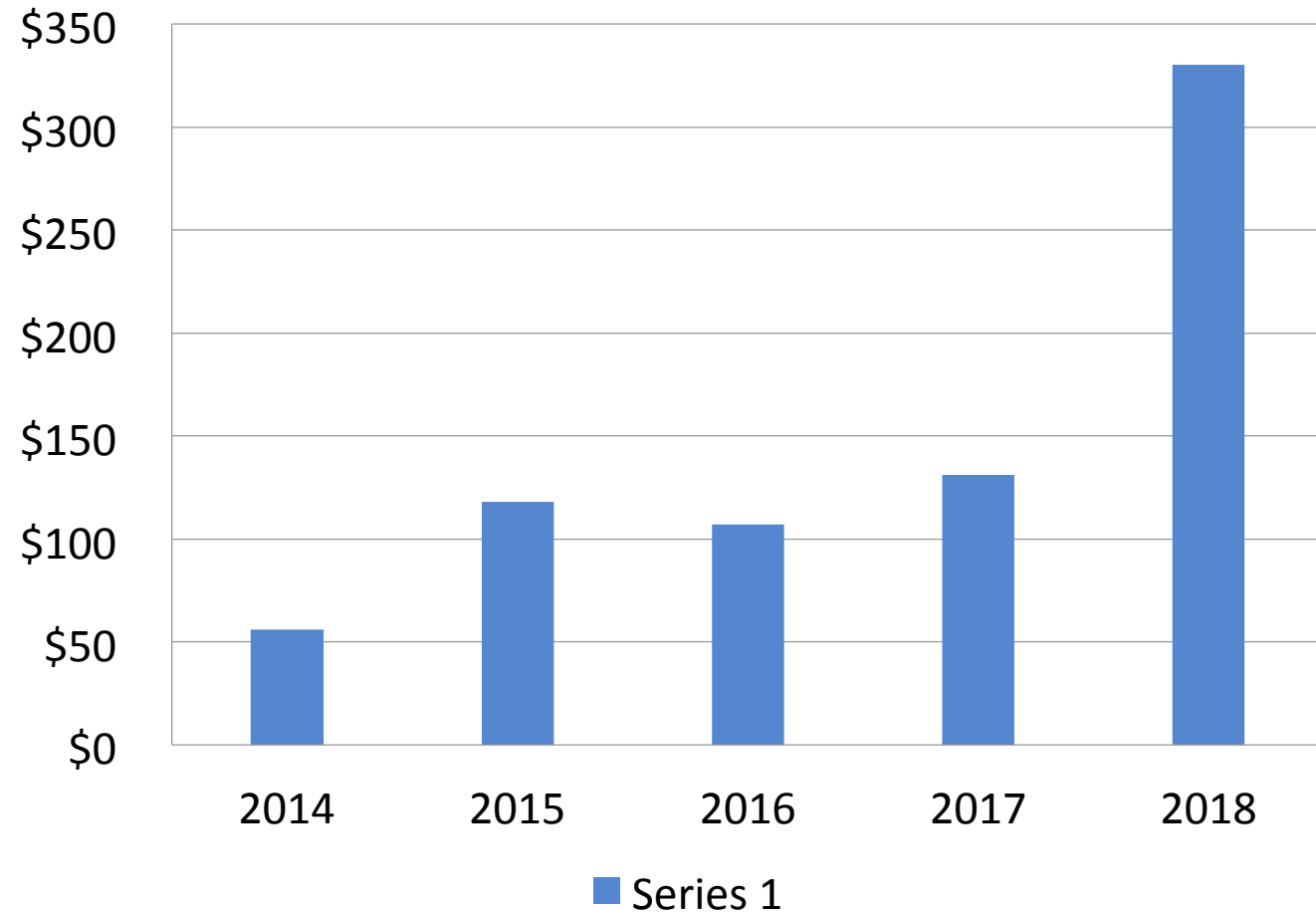
- 403 federal class action securities cases were filed in 2018
- While slightly lower than 2017, the number of 2018 federal class action securities cases were double the 1997-2017 average
- M&A filings made up 182 of the total cases filed; slightly lower than 2017 (198 M&A filings)
- ICO/Cryptocurrency filings, first seen in 2017, are increasing
- While the number of filings is down slightly, the aggregate market capital loss for 2018 filings was at an all time high

Securities  
Class Action  
Filings  
2016-2018



Aggregate  
capital market  
loss reflected  
in Class Action  
Securities  
Filings  
2014-2018

Dollars in Billions



# The rise of the event driven Securities Class Actions



Wild Fires in California – class action filed against Edison International and PG&E



Lion Air Flight 610 Disaster – class action filed against Boeing



Starwood data breach – class action against Marriott



Will plaintiffs be able to show scienter in event driven class actions?

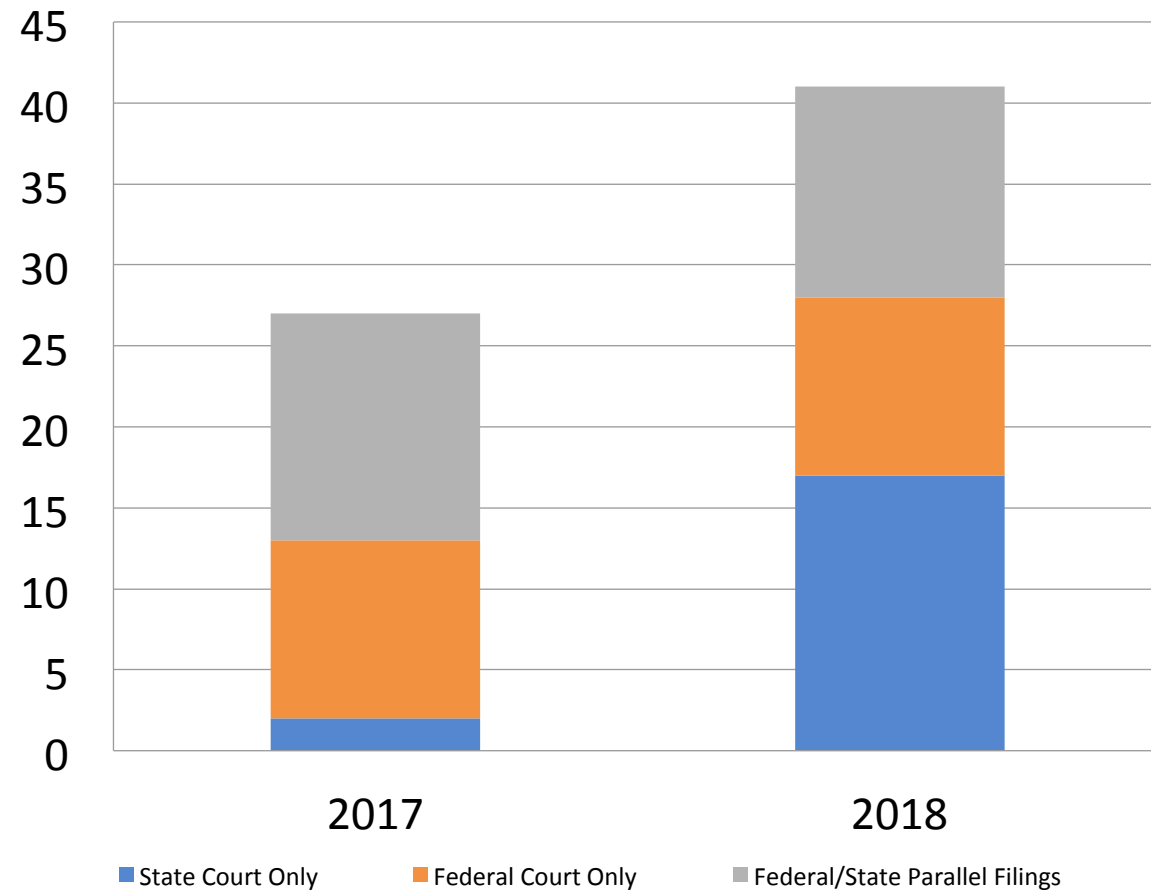


How does event driven litigation impact underwriting – how to predict large unanticipated events?

What about state court filings?  
Has *Cyan* changed the trend for Section 11 cases or is it too soon to tell??

- Federal and State Court Section 11 cases, including both state and federal court filings, totaled 41 in 2018
- 2018 Section 11 filings included 13 parallel filings (federal and state), 17 state only filings and 11 federal only filings
- Of the 17 state court only section 11 cases in 2018, 15 were filed post-*Cyan*
- Section 11 filings in 2017 totaled 27 cases – 14 in both state and federal courts, 11 federal only filings and 2 state only filings

Section 11  
decisions filed  
pre and post  
3/20/2018  
*Cyan* decision



Class Action  
Securities Claims  
are on the rise –  
what about  
settlement  
amounts?

- 2018 saw the approval of 78 securities class action settlements
- Total settlement amount was over \$5 Billion
- 2018 included 5 mega settlements with amounts ranging from \$110 million to \$3 billion driving the average settlement amount up to almost \$65 million
- 32 cases settled for amounts between \$10 million and \$49 million; only 25 cases settled for less than \$5 million



Aggregate  
Settlement  
Amounts  
(Dollars in  
Millions)

|                                | 1996-2017  | 2017      | 2018      |
|--------------------------------|------------|-----------|-----------|
| Number of Settlements          | 1697       | 81        | 78        |
| Aggregate of Total Settlements | \$96,982.2 | \$1,511.1 | \$5,064.3 |
| Median                         | \$8.6      | \$5.1     | \$11.3    |
| Average                        | \$57.1     | \$18.7    | \$64.9    |

# Derivative Actions

## The new “mega” settlements?

- For many years, derivative actions were filed as the “mismanagement” counterparts to securities class actions – often settled at the same time as the securities class action for a combination of therapeutics and plaintiff attorney fees
- There may be the start of a trend of “mega” derivative settlements with settlements including corporate management changes, plaintiff attorney fees and monetary damages going back to the corporation and paid by Side A D&O coverage
- Should we expect this trend to continue?

Largest  
Derivative  
Settlements  
prior to 2018

| Case             | Derivative Settlement | Securities Settlement |
|------------------|-----------------------|-----------------------|
| United Health    | \$900 mm              | \$925.5 mm            |
| Activision       | \$275 mm              | n/a                   |
| News Corp        | \$139 mm              | 0—MTD granted         |
| Freeport McMoran | \$137 mm              | n/a                   |
| Oracle           | \$122 mm              | 0—MSJ granted         |
| Broadcom         | \$118 mm              | \$160.5 mm            |
| AIG              | \$90 mm               | \$725 mm              |
| Pfizer           | \$75 mm               | \$400 mm              |
| Bank of America  | \$62.5 mm             | \$2.425 bb            |
| Comverse         | \$62 mm               | \$225 mm              |
| Cendant          | \$54 mm               | \$3.1865 bb           |
| McAfee           | \$43.75 mm            | n/a                   |

# Well Fargo Derivative Settlement

- 2018 brought about a new “mega” derivative settlement – Wells Fargo
- Approved by the court on 5/14/19, the Wells Fargo settlement was valued at \$320 million
- The Wells Fargo settlement includes a \$240 million payment to Wells Fargo funded by the Side A tower
- The court also approved a \$68 million plaintiff attorney fee.

# Large Derivative Settlements = Pressure on Side A market?

- Monetary Payments to corporations in derivative settlements are not indemnifiable
- Defense costs in derivative cases are indemnifiable
- There are differing opinions as to whether derivative plaintiff attorney fees should be deemed an obligation of the nominal defendant corporation or a non indemnifiable obligation of the defendant directors and officers – does it depend on whether the corporation is receiving a monetary payment?
- Should Side A underwriters anticipate more derivative settlements with monetary payments to the corporation?

Event driven  
derivative  
litigation – more  
pressure on the  
Side A market?

- Similar to the trends seen in federal securities class actions, event driven derivative actions are on the rise
- Are event driven derivative cases more dangerous than the class action counterparts?

“Me Too”  
movement – no  
longer just an EPL  
coverage  
exposure; sexual  
harassment issues  
underlying  
derivative cases

- 21<sup>st</sup> Century Fox derivative action – settled for \$90 million
- Wynn Resorts Derivative action filed 2/2018
- Nike Derivative Action filed 8/2018

# Data Breaches – no longer just a Cyber coverage exposure; data breach related derivative actions

- Derivative actions related to mismanagement claims arising out of data breach events have been filed against a number of companies including Wyndham Worldwide, Target and Home Depot with little traction and modest resolution
- In January 2018, Yahoo settled a data breach derivative action for \$20 million – does this settlement change the landscape for data breach derivative cases?



# Opioid Related Derivative Litigation

- Ongoing investigations on local, state and federal level
- Litigation filed by municipalities and states
- Consumer litigation filed
- Is this all a prelude to massive derivation actions against companies involved in the opioid crisis - pharmaceuticals and distributors

# Developing D&O Exposures -ICOs

- Initial Coin Offerings (“ICOs”) and cybercurrency
- Nine securities class actions filed in 2018 arising out of ICOs and cybercurrencies – compared to five such actions in 2017
- Increased regulatory scrutiny of ICOs
- Are ICOs governed by federal securities laws?
- Are cyber tokens securities?
- Is it time to review the definition of “Securities” in D&O products?
  - Does the definition of “Securities Claim” in Public D&O policies encompass ICOs, cyber tokens and cybercurrencies?
  - Does the securities claim exclusion in Private Company D&O forms apply to ICOs?

# Developing D&O Exposures – New Privacy Law Legislation

- On May 25, 2018 the EU General Data Protection Regulation (GDPR) became effective – putting into place one of the most stringent privacy laws to date
- In June 2018, California enacted its “Consumer Privacy Act” – referred to by some commentators as the “mini GDPR”
- Other states have followed with Ohio passing legislation in August 2018 and Colorado passing similar legislation thereafter
- New privacy laws increase the complexity for many companies and increase the time and expense to keep up with the compliance requirements
- Securities suits have been filed against both Facebook and Nielsen Holdings for share price declines after announcements of their failure to comply with GDPR regulations

## How will the new privacy laws impact D&O exposure?

- Is it just a matter of time before new privacy legislation results in consumer lawsuits, fines and penalties and ultimately a derivative action?
- What types of companies are at risk – all companies?
- Privacy laws are not just with respect to personal data accumulated online by companies like Facebook or Google and they are not just related to health care privacy – that can impact all companies
- Financial privacy (credit cards, bank accounts); medical privacy; workplace privacy such as drug test and background checks; online privacy (collection and use of online data and breach notification); securing servers for employee emails, etc.

# Looking Ahead...

- Is it time to re-think how D&O policies are underwritten in light of changing exposures?
- Is it time to re-think some of the standard D&O policy language?
- Without much in the way of historical data – how do we evaluate the “new” exposures under D&O policies?