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ALLIANZ FINANCIAL LINES CLAIMS BRIEFING

Welcome valued customers, business partners and friends. We hope you enjoy the second edition of our *Financial Lines Claims Briefing*.

We changed our format for this edition to provide you with the candid thoughts of some prominent securities litigation defense attorneys, cyber data breach legal coaches, crisis management experts and a prominent employment-related defense litigator. In addition, this edition provides an in-depth look at the Canadian securities litigation landscape. We hope you'll find this issue to be thought provoking and gain some practical insights you can utilize. The comments expressed by the authors are their personal opinions. They should not be construed as legal advice and do not represent the opinions of their respective firms.

Topics contained in this edition are:

- The Cyan decision and its affect upon securities litigation one year later
- The Grundfest Provision – Will it become reality or is Congress the only solution
- Weighing in on "Event Driven" Securities Litigation & Merger Objection cases
- Skyrocketing Defense Costs – Solutions Anyone
- Keeping a Watchful Eye As We Go Forward...
- Canadian Securities Litigation – A Very Deep Dive into the Northern Landscape
- Cyber Risk – Down to Earth Advice from Two Data Breach Coaches
- Crisis Communications Management – Straight Talk from A Global Expert
- Employment Practices Litigation – The Defense Tours the Current Landscape

DIRECTORS & OFFICERS LIABILITY

GREG MARKEL, CO-CHAIR NATIONAL SECURITIES LITIGATION PRACTICE GROUP SEYFARTH SHAW, LLP
Mr. Markel is a nationally known trial lawyer who concentrates his practice on securities litigation, corporate governance litigation, mergers and acquisition litigation, directors and officers defense, and antitrust litigation particularly in bet your company cases.

He is a recognized leader in the profession. He has for years been ranked by Chambers for Securities Litigation. He was named by Best Lawyers as M&A Litigation, Lawyer of the Year, for 2017. LawDragon magazine recently inducted Mr. Markel into its Hall of Fame and recognized Mr. Markel as a "legend" and one of only 50 lawyers and judges in the legal profession in the United States who have been named to the Law Dragon 500 in each of the prior ten years.

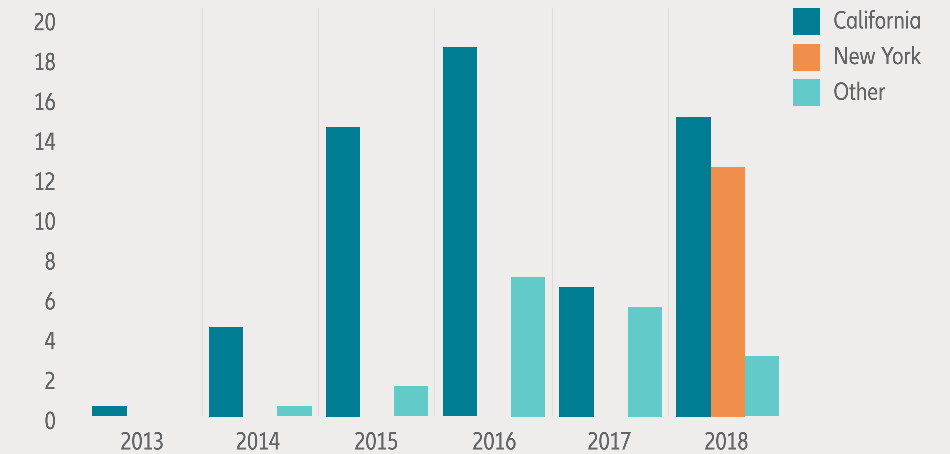
BORIS FELDMAN, LITIGATION PARTNER WILSON SONSINI GOODRICH & ROSATI
Mr. Feldman specializes in securities litigation and federal appellate work. He has defended more than 200 shareholder class actions, derivative suits, and merger challenges around the country, and has handled over 50 appeals in federal and state courts. Boris also represents audit committees and boards of directors in internal investigations and represents companies and individuals in SEC-enforcement proceedings around the country. He regularly advises public companies on fiduciary duty and disclosure issues.

During his 30 years in Silicon Valley, Boris has represented many of the leading companies in the technology world, including Google, Facebook, Genentech, Netflix, Salesforce, and Hewlett-Packard. In addition, the individuals he has represented comprise an honor roll of innovators and entrepreneurs, including Marc Andreessen, Carol Bartz, Eric Benhamou, Marc Benioff, Herb Boyer, Sergey Brin, Vint Cerf, John Doerr, Carly Fiorina, John Hennessy, Steve Jobs, Arthur Levinson, Ray Noorda, Larry Page, Ross Perot, Eric Schmidt, Al Shugart, Robert Swanson, and Mark Zuckerberg. Boris has been at Wilson Sonsini Goodrich & Rosati in Palo Alto since 1986. Among other leadership roles, he has served as a member of its board of directors and chair of the firm's Policy Committee.

DANIEL TYUKODY, CO-CHAIR SECURITIES CLASS ACTION PRACTICE GREENBERG TRAURIG, LLP.
Mr. Tyukody focuses his practice on securities litigation and regulatory enforcement, and is one of the few lawyers in the United States who has tried a securities class action to a defense verdict. Dan brings nearly 30 years' experience defending issuers, officers and directors, and underwriters in securities class actions, derivative cases, M&A cases and SEC/DOJ proceedings. He also counsels audit committees and special committees in conducting internal investigations.

A frequent commentator on securities law topics, Dan has been quoted in The New York Times, The Wall Street Journal, The National Law Journal, The Los Angeles Daily Journal, Securities Law 360, Compliance Weekly as well as other publications. He has been named one of the nation's top securities litigators by Chambers USA: America's Leading Lawyers for Business, The Legal 500 U.S., Lawdragon Magazine, Benchmark Litigation and the Los Angeles Daily Journal.

MICHAEL BONGIORNO, CO-CHAIR SECURITIES LITIGATION AND ENFORCEMENT PRACTICE WILMER HALE
Mr. Bongiorno concentrates his practice on securities litigation and enforcement matters. He has served as first-chair lead defense counsel and argued motions to dismiss in dozens of securities class action and derivative suits across the country, as well as appeals affirming dismissals in federal and state courts. His clients have achieved dismissal in the vast majority of such matters. His successful defense in such cases spans a variety of industries and jurisdictions, and he is a recognized leader in securities litigation, particularly in matters against biotech, life science, biomaterials, medical device, and medical product companies, among other industries and areas.



Have securities class action plaintiff law firms changed their behavior following the U.S. Supreme Court's decision in Cyan?

DAN TYUKODY, GREENBERG TRAURIG:
Post-Cyan: Changes in Plaintiff Firms' Behavior and Private Ordering—We are seeing nearly simultaneous filings in state and federal court on '33 Act claims post-Cyan which presents a host of issues, starting with whether the state or federal case should have priority to proceed. (Most would agree that although it is theoretically possible, one should not have two class actions covering identical claims proceeding simultaneously in state and federal court for reasons that include the possibility of inconsistent judgments, undue burden and expense imposed upon defendants, and the conservation and efficient use of judicial resources.) Defendants will usually prefer federal court for various reasons, including that court's greater experience in interpreting the federal securities laws. How to decide which case proceeds first presents an issue.

The principal plaintiff firms are in competition, first as a matter of getting appointed lead plaintiff/lead counsel in either the state or the federal case, and second (once appointed lead counsel in either matter) in deciding which case should go first. In one case pending in Nevada with both state and federal filings, we recently got a Nevada state court to stay its jurisdiction pending the outcome of the federal action; however, counsel for the state court class--Robbins Geller (which had tried unsuccessfully to get itself appointed lead in the federal action)--petitioned the Nevada Supreme Court for a writ of mandamus ordering the trial court to lift the stay, primarily on the basis that the state court action was filed first. That argument rings of the first-to-file "race to the courthouse" that frequently governed the appointment of lead counsel in securities class actions prior to the adoption of the Private Securities Litigation Reform Act of 1995 ("Reform Act" or "PSLRA").

That "race" led to thinly-plead complaints filed on the heels of a stock price drop, and resulting abuses that prompted Congress to adopt the Reform Act, which rejects a first-to-file presumption in favor of one that presumes the lead plaintiff should be the class representative with the greatest financial interest. The Nevada Supreme Court recently asked defendants to respond to the writ petition, and briefing will occur in the first quarter of 2019. While it is unlikely that anyone today would design such a system of concurrent jurisdiction for what are exclusively federal claims, it is the world we are stuck in after Cyan.

BORIS FELDMAN, WILSON SONSINI:
There have been two changes so far. First, plaintiffs have started bringing additional weak Section 11 cases in state courts. These are generally cases that are too weak to be brought in Federal court, where they would be dismissed. Second, plaintiffs have tried to bring Section 11 claims in merger cases where part of the merger consideration was stock pursuant to a registration statement. Again, the weaker cases are showing upin state court.

GREG MARKEL, SEYFARTH SHAW:
Cyan holds state courts have concurrent jurisdiction over 1933 Act Claims.
In 2018, the U.S. Supreme Court held in Cyan, Inc. v. Beaver Cty. Empls. Ret. Fund that state and federal courts each have jurisdiction over claims under the Securities Act of 1933 (the "1933 Act"). 138 S. Ct. 1061 (2018). Importantly, the Supreme Court determined that the 1933 Act bars the removal to federal court of claims brought under the 1933 Act. Id. at 1066. While for many years the reasons for the 1933 Act creating an option for plaintiffs to have their claims heard in state courts has caused study and debate, the reasons remain obscure. Whatever the reason for Congress' choice, the Supreme Court has made clear that Congress created a right to bring 1933 Act cases in state court and that they cannot be removed to Federal Court.

Cyan was decided on March 20, 2018. Through year end 2018, state court filings in California and New York have significantly increased. Section 11 cases have also been filed in Colorado, Texas, Massachusetts and Tennessee state courts. We understand there were approximately40 post Cyan decision, Section 11 claims filed in state courts in 2018. Very few were filed in 2018 before

the decision. The extent of the increase from before the March 20 Cyan decision to after March 20 was dramatic despite the facts that to bring a 1933 Act case there must be investor losses in connection with a public offering of securities (most often with respect to IPOs), the number of such offerings in any given time period is limited, and through much of the post-Cyan period the market did not drop significantly. Looking forward, we expect to continue to see materially more actions filed in state court than was the case prior to the Cyan Supreme Court decision. These filings likely will be most prevalent in California and Delaware and New York. We also are starting to see what could become an important new development: state court cases alleging 1933 Act violations as to securities issued in connection with M&A transactions. This could be a significant problem for public M&A for deals that include the issuance of securities as compensation to sellers. Clearly, between the sale of securities in public offerings and in M&A transactions involving securities being issued, state court 1933 Act filings have and will increase. State Court jurisdiction presents several problems for defendants. Possible parallel proceedings in other states and in Federal Court with attendant higher costs of litigation. Generally motions to dismiss are less likely to succeed in state court. The stay of discovery under the PSLRA may not apply in state court.

MICHAEL BONGIORNO, WILMER HALE:
There is a clear uptick in state court litigation under the 1933 Act, including instances of cases being brought in both state and federal courts. The situation is somewhat similar to past times in which M&A litigation proceeded in both state and federal courts, and defense practitioners are using tools such as motions to stay.

Absent a fix by Congress, some corporations have enacted forum selection bylaws specifying a federal forum for 1933 Act cases. The Delaware Court of Chancery will soon decide whether such bylaws are valid, though the Delaware Supreme Court will have the last word. The key question is whether Delaware corporate law empowers corporations to specify the venue of claims brought under the federal securities laws.

Do you expect the U.S. Congress to take any action that would require 1933 Act claims to be brought exclusively in federal court? In the meantime, what are your thoughts regarding the "Grundfest Provision", and what if any issues might prevent a court from upholding by-laws requiring that 1933 Act claims be filed in federal court?

GREG MARKEL, SEYFARTH:
Corporations and their attorneys have sought ways around the 1933 Act's bar on the removal of 1933 Act claims brought in state court. One widely-discussed approach suggested by Professor Grundfest of Stanford University was to insert so-called Grundfest Provisions in a corporation's charter or by-laws. These company-adopted provisions purported to require any claim under the 1933 Act to be brought in federal court. A typical example states:

Unless the Company consents in writing to the selection of an alternative forum, the federal district courts of the United States of America shall be the exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of 1933. Any person or entity purchasing or otherwise acquiring any interest in any security of the Corporation shall be deemed to have notice of and consented to this provision. However, the enforceability of Grundfest Provisions was recently called into doubt. In December, the Delaware Chancery Court held that such provisions were unenforceable under Delaware law. The court held that a forum-selection clause in a Delaware corporation's charter or by-laws is enforceable when it applies toclaims governing external relationships, such as 1933 Act claims. If upheld by the Delaware Supreme Court, the ruling could increase the number of 1933 Act claims brought in Delaware Chancery Court. Similar rulings might follow in other state courts.

In the Delaware case, a stockholder in Blue Ribbon, Stitch Fix, and Roku sued those companies after they filed registration statements with the SEC and launched initial public offerings. The stockholder sought a declaratory judgment that the companies' Grundfest Provisions were unenforceable. Sciabacucchi v. Salzberg, et al., 2017-0931-JTL, Slip. Op. at 14 (Del. Ch. Dec. 19, 2018).

Vice Chancellor Laster agreed with the plaintiff. The Vice Chancellor held that a corporation's certificate or by-laws could include forum-selection provisions for internal-affairs claims, but not for claims regulating external relationships. The Vice Chancellor noted that the Delaware Chancery Court had previously validated the ability of a corporation to adopt a forum-selection provision for internal-affairs claims. Id. at 23.

Importantly, the Vice Chancellor concluded that 1933 Act claims were not internal-affairs claims. He concluded that a "1933 Act claim is an external claim that falls outside the scope of the corporate contract." Id. at 37. He held that Delaware corporations therefore do not have the power to adopt charter or by-law provisions that mandate a particular forum for 1933 Act claims and such a provision was unenforceable under Delaware law.

Implications: Sciabacucchi has already been noticed for appeal, but it is far from certain that it will be overturned. The Vice Chancellor went to great lengths in his opinion to point out why his ruling was consistent with the rationale of Chief Justice Strine's Delaware Supreme Court decision in Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934 (Del. Ch. 2013).

It is possible, however, that the Supreme Court of Delaware may conclude that the venue provisions in Sciabacucci were in fact enforceable. The final outcome in Delaware is obviously important, first because of the large number of corporations are incorporated in Delaware and also because of Delaware's large but not binding unofficial influence in analysis of corporate litigation in other states. On this last point, however, the decision in Sciabacucci is grounded in statutory analysis of Delaware law, and were the Delaware Supreme Court to follow Vice Chancellor Laster's reasoning and outcome, it might not be persuasive in states where the corporation statutes are not similar on this point to Delaware's.

Despite our sincere admiration for Professor Grundfest, there is another question about his proposal that could raise questions about the enforceability of requiring filings of 33 Act claims in federal court. If Congress does not act, can a corporation properly adopt an enforceable provision in its by-laws or charter that is inconsistent with the 1933 Act's intention of preserving the right of plaintiffs to have their cases heard in state court? It will be interesting to see if this policy question is addressed in the future.

What is reasonably clear is that if Sciabacucci is affirmed, 1933 Act claims in Delaware Chancery Court, California, New York and some other states will continue to increase.

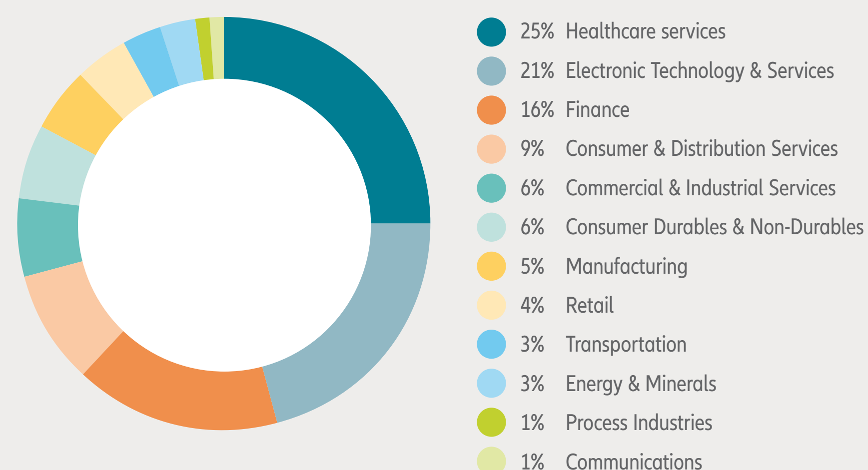
DAN TYUKODY, GREENBERG TRAURIG:
Because a legislative fix seems challenging, it was thought that perhaps "private ordering" could solve the problem with what some have called the "Grundfest proposal", whereby a company would put in its charter documents a provision designating the federal courts of the United States (or the federal court in the company's state of incorporation) as the exclusive venue for '33 Act claims. The Delaware Chancery Court has upheld the use of corporate bylaws to require that suits "relating to the internal affairs of the [Delaware] corporation," such as breach of fiduciary duty claims, be filed exclusively in Delaware, and that principle that was subsequently codified by the Delaware legislature. So, the thought was that a fully disclosed venue restriction requiring a filing in federal court for '33 Act claims might also be enforceable. However, on December 19, 2018, the Delaware Chancery Court granted summary judgment to a plaintiff challenging such provisions, holding they "cannot bind a plaintiff to a particular forum when the claim does not involve rights or relationships that were established by or under Delaware law," and therefore efforts to use corporate charter documents to limit where a plaintiff could sue for '33 Act claims were "ineffective and invalid." While the decision will presumably be appealed to the Delaware Supreme Court, at the moment the idea that private ordering could solve this difficult and rather unfair problem seems very much diminished.

BORIS FELDMAN, WILSON SONSINI:
No. Now that the House has gone Democratic, the prospects for a legislative fix are nil.

Disclosure in re the Grundfest Provision: I am counsel to defendants in the Delaware suit challenging the provision. We believe that the clause is valid and should be upheld. This is a decision that ultimately will go to the Delaware Supreme Court and potentially to the U.S. Supreme Court. Pending definitive resolution, we think that most companies that go public will include such a provision.

GREG MARKEL, SEYFARTH:
Another open question is whether Congress will amend the 1933 Act to (1) permit removal of 1933 Act claims to federal court or (2) require 1933 Act claims to be brought in federal court. In the near term, it seems unlikely that this will be a priority for Congress or that it can garner sufficient support, particularly given recent election results. It is more likely that Congress will act if the plaintiffs' bar files a large number of 1933 Act claims in state court and such filings appear to be an abuse comparable to that which prompted passage of the PSLRA in 1995 (for example if a very large percentage of public M&A Section 11 cases were filed in state courts). For now, though, the defense bar needs to be prepared to defend 1933 Act claims in Delaware Chancery Court, in California and New York, and other state courts.

SECURITIES LITIGATION BY INDUSTRY SEGMENT



Source: NERA Economic Consulting Recent Trends in Securities Class Action Litigation: 2018 Full-Year Review

The decrease in publicly traded companies has been offset by an increase in privately-held companies. As of August 2018, one source estimates that there are over 260 unicorns world-wide (private companies witha valuation over $1 billion), including some private companies with valuations over $10 billion. Uber, for example, raised $10 billion in capital in 2017, but is currently valued at $68 billion by speculators betting on a big payday when it goes public. Are there any unique D&O liability exposures for unicorns distinct from public companies and are there any special challenges in asserting claims and defending claims against such private company unicorns?

MICHAEL BONGIORNO, WILMER HALE:
Private company cases raise unique defense and liability challenges because private companies can often be sued under state blue sky laws. (Public companies are protected by SLUSA from state law claims.) Uber and Theranos, for example, were two unicorns sued in class actions under California securities laws. Blue sky claims are often easier to prove than claims under the federal securities laws, and can be uniquely challenging to defend.

Since Sarbanes Oxley, pure financial misrepresentation claims seem to be less frequent; however, "event driven" 1934 Act shareholder class litigation following on the heels of negative stock price reaction to one or more specific adverse corporate events is on the rise. These lawsuits are often brought by what some refer to as the "newer" securities plaintiffs firms and they often lack a sound basis for supporting allegations of scienter and loss causation. What are your thoughts about defending "event driven" litigation?

BORIS FELDMAN, WILSON SONSINI:
As the Book of Ecclesiastes said, "there is nothing new under the sun." Shareholder class actions traditionally have fallen into three buckets: accounting/restatement cases; missed quarter cases; and general "bad news" cases, what the question calls "event driven" – i.e., product failures, regulatory setbacks, etc. The primary change in litigating the different types has to do, not with their allegations, but rather with the judges deciding the motions to dismiss. Federal district courts have many Democratic appointees. On the whole, they tend to more forgiving of class action complaints than Republican appointees. That probably explains more than any other single factor why the percentage of suits being tossed out has dropped in recent years. As the current Administration begins to focus on district court appointments, the cycle will probably start to reverse.

MICHAEL BONGIORNO, WILMER HALE:
Event driven securities claims are prominent in several sectors, including in particular pharmaceuticals and medical devices. The cases often turn on a close analysis of the timing of adverse events, and when a defendant company became aware of them. For instance, a pharmaceutical company could receive an adverse drug trial result, and the case will revolve around the existence of warning signs. Often, the viability of a complaint will turn on a plaintiffs' ability to create an inference that the company had, or recklessly avoided having, knowledge of the problem at the time of a public disclosure.

DAN TYUKODY, GREENBERG TRAURIG:
One can view the decline in the number of financial restatement cases, and the rise of "event-driven" securities cases as something of a success story, despite the fact that event-driven cases are often expensive nuisances. Arguably, as a result of the reforms enacted as part of both the Sarbanes-Oxley and Dodd-Frank Acts, the roles of independent auditors and audit committees has been strengthened, and the certifications required of individual officers and directors have had a positive effect, as serious financial restatements that ring of fraud appear to be less common. But securities litigation is itself an industry, and like forcing a balloon into a box, the air has to go somewhere. Event-driven cases are kind of an easy target because they arise after an unexpected event has occurred which often (but not always) produces a significant stock drop. These events are as varied as wildfires, allegations of sexual misconduct, cyber breaches, ethics code violations, and a variety of other things "united" by the fact that the conduct complained of is usually more in the nature of alleged corporate mismanagement. Plaintiff's real cause of action in such cases (whatever the merits) is for breach of fiduciary duty against the officers and directors; however, because the business judgment rule makes such cases difficult to bring and maintain, a trend has been to attempt to "bootstrap" a securities claim based upon the "failure" to disclose the alleged mismanagement.

There are many cases holding that such attempts should be rejected, yet district courts vary in terms of their experience with securities cases, and the odd outcome is always a possibility. Moreover, given the liberality with which district courts are encouraged to grant leave to amend, even a very marginal case can result in significant legal fees over successive rounds of motions to dismiss. What can be done to limit such cases is a difficult question. Were courts to utilize the Reform Act's largely ignored provision requiring that a Rule 11 determination be made in every securities class action, and award attorneys' fees in frivolous cases, that would help; but, in fact, courts are temperamentally disinclined to grant such sanctions, and getting a motion to dismiss granted can be hard enough without adding sanctions to the request. Some have suggested early intervention with a mediator where each side shows its cards, but plaintiff lawyers are unlikely to go into such a meeting expecting only to hear how poor their case is, and will view it as a settlement discussion, with the prospect of perhaps settling a weak securities class action for a relatively small amount of money. However, from a defense perspective, such a settlement might not be the best set of facts for the tag-along derivative cases that frequently accompany event-driven securities cases, where a total victory on a motion to dismiss will probably be more persuasive on a motion challenging the adequacy of the derivative case. Thus most companies and their insurers will want to settle both the class and the derivative actions simultaneously, which of course raises the price of settlement.

The latest available data shows the SEC filed significantly fewer standalone enforcement actions at the end of 2017 and first half of 2018 than in prior periods. Has the SEC's enforcement appetite changed under the Trump administration? With its increasing focus upon cryptocurrency, what is the likelihood we will see Congress address the question of whether cryptocurrency is a security and regulated under the securities laws?

MICHAEL BONGIORNO, WILMER HALE:
The SEC enforcement docket no longer appears to be focused on novel theories of liability, or on a "broken windows" approach to enforcement. Instead, cases often present traditional fraud scenarios—insider trading, accounting fraud, instances of clear harm to retail investors. There is little reason to believe this will change during the current administration, through congressional action or otherwise. That said, we have seen an uptick in the second half of this year in overall enforcement activity.

DAN TYUKODY, GREENBERG TRAURIG:
While the first half of 2018 featured significantly fewer standalone enforcement actions than prior years, the second half of 2018 featured much higher enforcement activities across all areas of enforcement, resulting in actions against public companies and their subsidiaries being consistent with the prior five-year average, accounting for 14% of all independent SEC actions. The 71 new actions filed in 2018 were up nearly ten percent from 2017, and about half of them were not broker-dealer related. The Trump administration's overall numbers do not stand out particularly, other than perhaps reflecting a greater focus on broker dealer and investment advisor types of actions, and a lesser focus on Foreign Corrupt Practices Act cases.

Delaware's stricter standard under Trulia for evaluating merger objection settlements may be spreading to state courts which equally disfavor therapeutic-only settlements that economically enrich plaintiff law firms. How does this possible trend affect the defense and settlement of these types of actions? What are some possible solutions that can be explored early in the litigation process?

MICHAEL BONGIORNO, WILMER HALE:
The spread of Trulia has been simultaneously a blessing and a curse. Defendants now have a clear incentive to litigate weak cases through a motion to dismiss and summary judgment, given the unlikelihood that a therapeutic settlement could pass muster in certain jurisdictions. At the same time, strong cases become more challenging to settle, given the potential need for a material monetary payment to be part of the settlement. The question still being answered is whether this dynamic ultimately will remove the incentive to bring weak cases, or if instead plaintiffs' firms will feel the need to cast a broad net in the hope of having some of their cases survive and generate a cash settlement.

DAN TYUKODY, GREENBERG TRAURIG:
Trulia's near total rejection of "disclosure only" settlements in the typical M&A context is taking hold in many jurisdictions besides Delaware. The attempt by the plaintiffs' bar to get around this doctrine by trying to convert traditional breach of fiduciary duty claims into Section 14(a) proxy violation claims has not had a significant effect on the outcome, as most of the run-of-the-mill cases involve negotiated (or non-negotiated) additional disclosures that are not material. Strategically, defendants often are willing to amend in response to the issues raised in a complaint, while denying the materiality of the additional disclosure, and then leave it up to plaintiffs to try to seek a fee. The fact that many of these theoretical fee requests never get filed demonstrates that the principles adopted in Trulia for assessing reasonableness and value in weighing potential settlements have had very positive effects for companies and their shareholders, as well as for the courts themselves as marginal cases simply die on the vine.

BORIS FELDMAN, WILSON SONSINI:
This development is heartening. It shows that judges can figure out a scam and deal with it. These garbage merger suits were a racket for years. Delaware started to shut them down, and now other state courts have followed the Court of Chancery's lead.

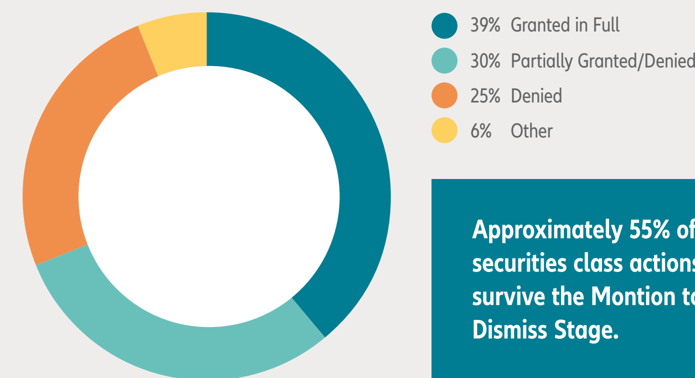
The ball is now in the federal court. The scam-du-jour is to file a weak Section 14 disclosure case in federal court, then to persuade defendants to moot it with meaningless supplemental disclosures. The defendants then pay the plaintiffs' counsel a fee, with no release or judicial approval. This practice needs to stop, but it won't until some federal judges intervene and say no to these mootness payoffs.

President Trump has suggested that the SEC should study doing away with quarterly reporting requirements in favor of a system of semi-annual reports. Do you envision any consequences such a change may have upon shareholder class litigation?

MICHAEL BONGIORNO, WILMER HALE:
Semi-annual reporting could have a multi-faceted effect on securities litigation. It is not difficult to imagine how less frequent financial reporting could yield greater trading volume and volatility around reporting periods, because the market would have fewer occasions per year on which to assimilate new financial information.. Volatility—specifically a stock drop—is in primary driver behind securities class action litigation. Thus, one could reasonably guess that the proposal could increase the opportunities for securities class action filings.

DAN TYUKODY, GREENBERG TRAURIG:
There does not seem to be a strong constituency favoring semi-annual reporting, and if semi-annual reporting is adopted, it may produce more securities class actions, everything else being equal. When a company speaks at least four times a year, there's a compressed time period as only so much can happen in roughly 12 weeks. But in 26 weeks a lot more can happen, and thus the possibility of a market surprise on the heels of bad news would seem to be heightened (as well as forcing harder decisions about Form 8-K disclosures in the middle of a reporting period). Semi-annual reporting also poses potential insider trading issues, as many companies close their trading window four to six weeks before a quarter end; if the that practice were applied to a half-year end reporting period, there would be more time in the middle, where a plaintiff could allege that an insider's trades occurred while in possession of material inside information regarding how the reporting period would end.

MOTIONS TO DISMISS



Approximately 55% of securities class actions survive the Montion to Dismiss Stage.

Source: NERA Economic Consulting Recent Trends in Securities Class Action Litigation: 2018 Full-Year Review

Other than the move of merger objection lawsuits from state to federal court, what are your thoughts as to the causes of the increase in securities litigation in federal court, and can we expect this trend to continue or is it a temporary increase?

BORIS FELDMAN, WILSON SONSINI:
Filing rates ultimately follow market trends. More IPO's inevitably lead to be more Section 11 suits. Surging markets eventually lead to 10b-5 suits when the prices come back to earth. What will change are the subject matters of the companies. In all likelihood, intermediate-term securities suits will focus on AI companies, autonomous vehicles, and alternative currencies

MICHAEL BONGIORNO, WILMER HALE:
It seems clear that there are more firms bringing securities cases and that, as a result, the bar for bringing a case has gotten lower. There is no obvious reason to believe that this trend will abate unless Congress steps in alter the litigation landscape in favor of the defense.

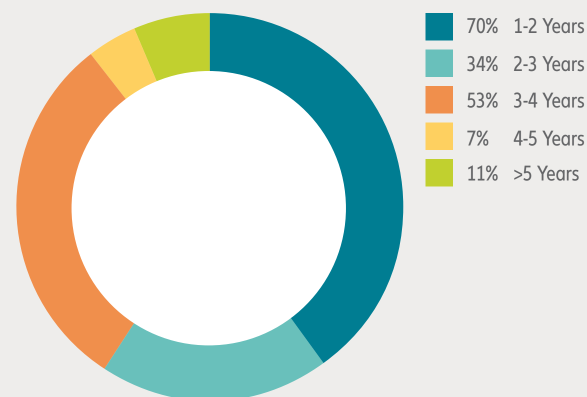
DAN TYUKODY, GREENBERG TRAURIG:
Much of the increase in securities litigation cases (excepting M&A post-Trulia cases) comes from marginal cases of the "event-driven" variety. These are often brought by a subsection of the plaintiffs' bar that does not compete well in landing the more substantial cases, and it is common to see to more established plaintiff firms "take a pass" on these marginal cases. Thus, there is a bi-modal distribution of cases, with quantity often substituting for quality at one end of the spectrum.

In addition, periods of market volatility (such as we are now experiencing), produce their own issues for defendants and opportunities for the plaintiffs' bar. Assets acquired at market highs might later present goodwill accounting issues if asset valuation declines are determined to be other than temporary (which involves a series of judgment calls); stock buy-backs that looked reasonable in one market environment might not be viewed so in another. These cases are rife with opportunities for second-guessing. In addition, while in general cases invoking hot-button issues like data breaches/cybersecurity, and #MeToo-like workplace misconduct issues have not gained traction as securities cases, there have been exceptions, particularly where companies arguably spoke to the relevant issue without (allegedly) telling the full story. Overall, one would not expect that the volume of cases will decrease in the near future. A countervailing trend could present itself if a protracted market fall makes it harder to identify allegedly "fraudulent" outliers, but that is obviously not something to be hoped for.

The cost of defending shareholders securities class actions alleging violations of the 1933 or 1934 Acts has escalated dramatically over the past several years and defense law firms' rates and staffing vary widely. What practical advice can you give to public companies that would assist them in managing litigation costs? Should defense lawyers be engaging plaintiffs' counsel more aggressively prior to the onset of discovery either for the purpose of presenting evidence that would dissuade plaintiffs from proceeding or alternatively to propose resolution at an early stage that makes economic sense for both sides, thereby avoiding unnecessary costs?

CLASS CERTIFICATION MOTIONS TAKE APPROXIMATELY TAKE 3 TO 4 YEARS TO BE HEARD IN 53% OF THE CASES.

Motion to Certify a Share holder Class is Granted in 80% of the Litigation.



Source: NERA Economic Consulting Recent Trends in Securities Class Action Litigation: 2018 Full-Year Review

MICHAEL BONGIORNO, WILMER HALE:
Managing costs starts with hiring the right defense counsel. A firm that is very experienced in handling the particular issues raised by the lawsuit—including sector-specific expertise—will not have a costly learning curve, and will be more efficient and cheaper. Hiring a defense firm that has experience with the plaintiffs' attorneys (and, indeed positive relationships) can also help bring sanity to the discovery process that is invariably the most expensive portion of any case.

BORIS FELDMAN, WILSON SONSINI:
Talking plaintiffs into dropping a suit as non-meritorious is largely a pipe-dream. As one plaintiff's lawyer said to me when I tried to persuade him that his case had no factual basis: "I've made a lot of money on weak cases." Companies and carriers should insist that at the beginning of a case, defense counsel evaluate the facts and assess likely exit opportunities. If the case is not one that has a good shot at dismissal or summary judgment, then it probably makes sense to try to settle it early and get a discount from plaintiffs for doing so.

GREG MARKEL, SEYFARTH:
The question assumes it to be a fact that defense costs have escalated dramatically in securities class actions in recent years. The ultimate question is how can costs of defense be reduced by a partnership of a law firm, insurers and their clients. Most law firms still bill by the hour for securities class actions, although some firms (including ours in appropriate cases) offer flat fees for segments of a case, or based on discovery metrics (e.g., fee per deposition) or provide for large fee discounts with bonus payments for achieving milestones.

Reducing Hours Billed. For hourly billing costs, the key metrics obviously are number of hours and rates per hour. After that, it is just math. The number of hours billed is a function of the number of time keepers times the average of the hours per timekeeper over the life of the case. The next section will focus on ways to reduce the total number of hours billed:

Resolve cases early. A good way to greatly reduce the number of hours billed is, of course, to resolve the case early. This, in turn, can be done in one of two ways – the first would be to have a motion to dismiss granted. About 50% of securities class actions are dismissed on such a basis each year. Practitioners in this area are well aware of the importance of motions to dismiss securities class actions and a substantial effort by counsel is often essential. Nonetheless, by lean staffing, ideally by attorneys experienced in securities litigation, the costs of these motions can be reduced. Motions to dismiss are a key phase of a securities case. Try to have a team experienced in the issues frequently raised on these motions in securities cases. Keep files of briefs written in prior similar cases for reference because some issues are quite commonly raised. Experienced lead counsel generally can assess with fair accuracy the likely merits of various arguments on a motion to dismiss and can consider which arguments are worth making in support of a motion. Focused motions reduce the cost of motions and improve their credibility and likelihood of success. Throwing every argument against the wall will waste time and money.

Generally, in federal securities cases, motions to dismiss are made because discovery is automatically stayed while the motion to dismiss is pending under the PSLRA. If a motion to dismiss is granted (ultimately with prejudice), the savings from never getting to discovery are great. If the motion to dismiss is not successful, the denial of the motion is a natural point to discuss settlement and the delay in discovery which was caused by the motion under the PSLRA may make Plaintiffs more amenable to a reasonable settlement amount.

A second way of resolving a case early is settling early. Serious consideration of settlement before discovery starts is highly recommended. Every case is different and in some cases early settlement may be difficult. However, some cases can and should be settled before discovery begins. Early case evaluation and a thoughtful case plan are quite helpful in evaluating the calculus. It should be standard practice and a requirement to do an early case analysis and case plan.

Whether a mediator would be helpful to achieving a settlement early also varies with the case but a mediator can often be helpful, particularly when there are multiple parties (including insurers) to the mediation.

Whether using a mediator or not, key documents, or expert opinions which may materially affect the settlement value are sometimes useful to provide to plaintiffs' counsel. This is a complex decision and careful consideration must be given to the likelihood of a beneficial effect on settlement versus the value of surprise in the future use and also avoiding waiver of privilege. However, enhancing the likelihood of early settlement will often justify some disclosure. This sometimes includes the work of experts.

Use a Lean Staff. Fewer timekeepers mean fewer hours devoted to internal communication and less redundant work such as having a larger number of people read pleadings and other key documents to stay up to speed. A good way to achieve a lean staff for a securities class action is to carefully develop a case plan with key objectives at each stage of a case and a budget with hours estimated for tasks. The core team members should be specifically identified and they should be not only experienced in securities cases but should also have a substantial percentage of their time available to devote to the matter. Using many attorneys with small amounts of available time is seldom efficient. It forces a larger team to be employed and sometimes there is divided attention of the associates. Too much time is devoted to keeping a large team informed. A smaller team can be supplemented if there are surges in workloads. For example, other associates, contract attorneys or outside agencies can be used for surges in work, such as large document reviews or for types of trial preparation that are fairly mechanical. A smaller team will do better quality, more efficient work than a bloated team.

Another tip to both minimize the size of the team and reduce costs is to carefully prioritize work at any given time. Review and amend the case plan regularly to defer or accelerate work as circumstances change. Good judgment by team leaders on such prioritization is very likely to result in better outcomes, reduced wasted time and lower costs. By reducing the work done at each stage, teams of lawyers can be kept at a minimum. Smaller teams mean less time spent communicating with and educating other team members. This can have a potentially dramatic effect on legal bills.

The amount of potential work which might be done and possibly could be useful in most securities class actions is massive. The leaders of a defense team should prioritize which work must be done and when it is needed. A plan that every witness must be interviewed or deposed, every document reviewed and every possible motion made, is for the vast majority of cases wasteful. Experience and judgment will lead to ways to cut back on work that is not needed or not immediately needed.

Electronic Discovery. Securities class actions will frequently involve voluminous productions. Reducing the cost to collect, load, host, and review the productions will often significantly reduce the overall litigation expense. Obtaining a discount or preferred client rate from electronic discovery vendors should be negotiated. Using vendor document reviewers for first level review is typically less expensive than having outside counsel do the first review of documents, assuming lead/experienced attorneys create a thoughtful document review protocol and is frequently consulted during the vendor review. Use of search terms, data analytics and predictive data analysis through cutting edge technology can reduce the number of documents to review (thereby reducing the cost of electronic discovery).

Hourly rates vary widely depending on the experience and stature of the lawyer, geography, firm policies and economics. As with much of life, the most expensive is not necessarily the best and very often, the most expensive is not what is needed. It is best to hire lead lawyers (not law firms) who can lead a team well, stay actively involved in the case and have experience with, and know what they are doing in, the many phases of securities class actions. Clients should choose a lead lawyer who they believe will be personally engaged in the work and will always be focused on their interests and brings with him or her the ability to try a case. (Although securities class actions are seldom tried, the ability of defense counsel to try a case can provide leverage in settlement.) In choosing that lawyer, have him or her also identify who will be on the team and what their rates are. See if discounts can be negotiated. Get a commitment to use a third year and not a seventh year when a third year is what is needed. If the firm is multi-office, consider and discuss whether in staffing it may be efficient to make use of the substantial differences in rates in different parts of the country to lower costs. An hour of discussion at the start of a case on staffing and billing policies can lead to large savings as the case goes on.

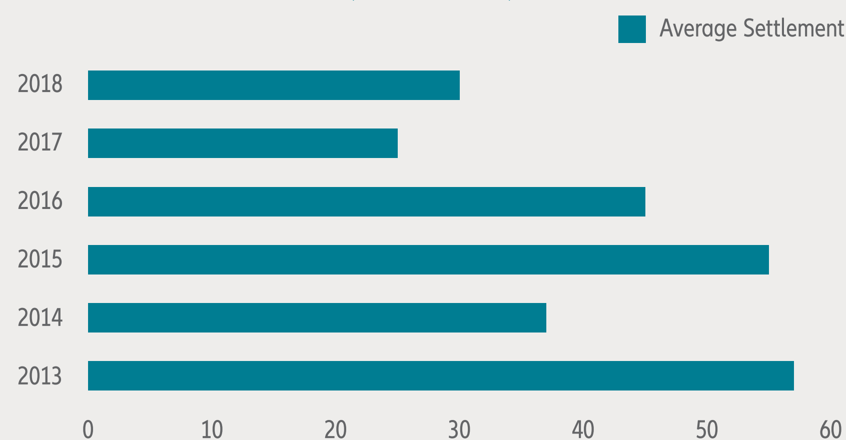
Alternative Fee Agreements. There are an infinite variety of alternative fee arrangements possible. Generally, they are designed to increase the predictability of legal expense and better align incentives of clients and lawyers and insurers by rewarding efficiency. They can work in certain kinds of cases and that includes certain securities class actions. However, the more complex and unpredictable the case, the harder it is to design an arrangement that works for all the parties to the fee arrangement beyond the motion to dismiss stage. It is beyond the scope to give a lengthy description of different alternative models beyond what is mentioned in the first paragraph, but a custom designed fee arrangement for appropriate cases can work well.

MICHAEL BONGIORNO, WILMER HALE:
E-discovery will continue to drive litigation costs. Look back at any large case, and you will find that e-discovery costs drove the budget. We have gone from a world of paper—or paper and email— to a world of text messages, direct messaging, and many other forms of communication. It is costly to collect and process all of this material, and presents fertile ground for logistical errors that can add vast expense or even compromise the substance of a defense. Companies would be well-served at the time of hiring to assess the e-discovery capabilities and experience of defense counsel, and to make a specific plan to manage e-discovery for the duration of the case.

DAN TYUKODY, GREENBERG TRAURIG:
The most effective securities litigation defense strategies are preventative, with risk factor disclosures being a good starting point. In cases involving alleged "omissions" of certain risks that are in fact fairly disclosed in the relevant documents, they are invaluable in getting a case dismissed promptly. Companies should review their risk factor disclosures to confirm whether they are tailored to current circumstances, and the specific event(s) that gives rise to the public statement that precedes the risk factors. In addition, exogenous factors, like the presence or absence of an internal affairs forum selection clause, or Rule 10b5-1 plans for senior executives, can influence a company's litigation profile. And the "tone at the top" matters.

Once in litigation a tremendous amount of energy is appropriately focused at the motion to dismiss stage, and opportunities to settle before that determination have usually been few and far between. Having an "early intervention" where each side lays its cards on the table might result in speedier settlements at lower values, but historically that has not been the practice, and there are institutional reasons (the "lodestar analysis" for plaintiffs' fees among them) why early resolutions are unlikely to become a trend. However, once a case survives a motion to dismiss, it often makes sense to have settlement discussions where experienced counsel evaluate the potential risks and benefits. Rarely is there going to be an arguable "smoking gun" that the other side will not learn about in the course of discovery, and rarely is the alleged "smoking gun" itself in fact a true "smoking gun" when read and understood in context. But just because both sides cannot agree on the facts does not mean that they cannot understand the risks that their analysis and arguments might not prevail. Discovery costs are the largest component of almost any case, and if they can be avoided that is often to the good.

AVERAGE SETTLEMENT ($MILLIONS)



Source: NERA Economic Consulting Recent Trends in Securities Class Action Litigation: 2018 Full-Year Review

What issue or issues do you believe public companies and their D&O insurers are not yet paying close-enough attention to that will affect securities litigation over the next three- to five years?

GREG MARKEL, SEYFARTH:
Section 11 Cases. As noted in an earlier answer, the Supreme Court's Cyan decision on March 20, 2018 means that cases under the 1933 Securities Act filed in state court cannot be removed. This means that plaintiffs in these cases will be able to file cases in state courts they deem more plaintiff friendly than federal court. It is likely that there will be situations where 1933 Act claims based on the same offering are filed in both state and federal courts. In some situations there will be claims filed in more than one state's court. While stay motions may be successful some of the time they will not likely be successful every time in eliminating multiple active forums and the risk (and resulting expense) of multiple cases at this point is real.

It is often the case that getting motions to dismiss granted is more difficult in state court than in federal court. There is also an undecided question as to whether the PSLRA stay of discovery applies to Section 11 claims in state court. Were it not to apply, Plaintiffs could take more early discovery. That discovery will prove to be unnecessary if an early settlement is achieved or a motion to dismiss is granted and is another potential cost factor flowing from Cyan.

There has been a significant increase in Section 11 cases filed in state courts since the Cyan decision and further increases in the number of cases filed is expected. This obviously will not benefit D&O insurers. There also is a real risk that more M&A cases charging 1933 Act claims including Section 11 claims will begin to be filed more often in state courts, making early resolution of these cases more difficult. So far we are aware of 3 such cases. This is another increased risk for D&O insurers.

Cybersecurity and data breach issues will continue to grow in importance and this is an area where we expect to see an increased number of securities cases being brought, particularly on the heels of the first large settlement of a data-breach related securities suit in March 2018. That case involved two significant data breaches disclosed by Yahoo during 2016 and ultimately settled for $80 million. A derivative case on a related issue was settled in early 2019 for $29 million. A related SEC enforcement action was settled in April 2018 for $35 million and has the distinction of being the first data breach-related enforcement action that the SEC has settled. The SEC's continued focus on cybersecurity disclosure issues, the settlement of the Yahoo securities litigation and related enforcement action, and the filing of several more data breach-related securities suits in the past several months and the ever-increasing sophistication of hackers strongly suggest that there is more litigation in store going forward and directors and officers will be among the defendants in some cases.

Privacy issues are another area where we expect there to be increased securities litigation in the coming years. This past year the European Union's updated General Data Protection Regulation (GDPR) went into effect and the state of California enacted privacy legislation. Securities class actions brought against Facebook and Nielsen Holdings related to costs associated with GDPR compliance, and, for Facebook, related to its release of user data to Cambridge Analytica, underscore that privacy issues could lead to significant D&O liability exposure.

Increasing attention to issues of sexual harassment in recent years, particularly following the outpouring of support for the #MeToo movement, has resulted in efforts to hold management and boards accountable for the behavior of corporate wrongdoers and/or for allowing the continuation of an "old boys club" culture. A number of lawsuits were brought against management in 2018, including, for example, against CBS, National Beverage Corp., and Wynn Resorts. Many suits have focused on sexual misconduct by an employee and, more recently, on allegations of disparate treatment and toxic cultures as well. This is another area of potential risk.

DAN TYUKODY, GREENBERG TRAURIG:
If asset prices continue to decline, one might expect to see future cases challenging goodwill accounting and stock buyback cases, for the reasons discussed above. In addition, there may be increased challenges to categories of statements—such as a company's compliance with its code of ethics, or its analysis of the impact of climate-change—that are the subject of judgment and involve a value-laden analyses, as attempts to chip away at the business judgment rule take the form of securities class actions.

A CANADIAN SECURITIES CLASS ACTION LITIGATOR'S PERSPECTIVE

Linda Fuerst Senior Partner Litigation Group at Norton Rose Fulbright LLP -Canada.

Ms. Fuerst's litigation practice covers a broad range of commercial and professional liability matters, with a particular focus on securities litigation, including class proceedings and regulatory issues. She has litigated civil, criminal and regulatory matters and has appeared before all levels of court in Ontario, the Supreme Court of British Columbia, the Supreme Court of Nova Scotia and the Nova Scotia Court of Appeal, and represented clients in connection with investigations and proceedings by the Ontario, Alberta and Nova Scotia securities commissions, IIROC, the MFDA and the Competition Bureau. Ms. Fuerst has also directed internal investigations into matters including possible insider trading and backdating of stock options. Ms. Fuerst began her legal career clerking for the Chief Justice of the High Court of Ontario. She practised criminal law and served as a part-time assistant crown attorney before joining the Enforcement Branch of the Ontario Securities Commission as senior investigation counsel. Following a rotation at the US Securities and Exchange Commission in Washington, DC, she joined a well-known litigation practice in Toronto where she practised from 1994 to 2015 and subsequently joined Norton Rose Fulbright Canada LLP.

We are hearing that the frequency of securities class actions in Canada is decreasing yet severity is increasing. What are the drivers of this trend?

Most securities class actions commenced in Canada allege a statutory cause of action for secondary market misrepresentation. That cause of action, which has been in existence for approximately 16 years, does not require plaintiffs to prove that they relied upon the alleged misrepresentations, but does oblige them to obtain leave of the court to bring the claim. There was an initial flurry of securities class actions after the enactment of that statutory cause of action. However, it took several years for those early cases to work their way through the system, and for our higher courts to provide guidance concerning important issues such as the standard for granting leave. Our courts have now confirmed that the leave test, which requires a representative plaintiff to demonstrate that there is a reasonable possibility of the action being resolved in favour of the plaintiff at trial, is more than a "speed bump." It requires the plaintiff to demonstrate there is a "reasonable or realistic chance that [the plaintiff] will succeed" , by offering "both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim." It appears that this interpretation of the leave test is serving its intended purpose, which is to discourage plaintiffs from bringing frivolous "strike" suits.

The threat of a significant adverse costs award against an unsuccessful representative plaintiff that fails to satisfy the leave test or the test for certification may be another factor at play. Unlike in the United States, in Canada we have a "loser pays" system whereby ordinarily the losing party in litigation must pay a portion of the winning party's legal expenses. Securities class actions are expensive to prosecute and defend. In several recent Ontario cases, costs awards against the unsuccessful representative plaintiff in on a motion for leave and to certify a securities class action have been in the hundreds of thousands of dollars. In Yip v. HSBC Holdings, the defendant corporation was awarded over $1 million following its successful motion to stay or dismiss the action on jurisdictional grounds in advance of certification.

It is likely that the performance of the markets also has some effect on the number of securities class actions that are commenced. Often there is an uptick in litigation of this nature after an economic correction. When an issuer's share price suffers a significant decline, class counsel look for deficiencies in the issuer's public disclosures to blame on the decline. The markets have done fairly well over the past several years. The absence of such market instability has been good news for public companies from that perspective.

One final circumstance to consider is the fact that the Ontario Securities Commission and now the Alberta Securities Commission are prepared to settle securities regulatory proceedings on a no contest basis in certain circumstances, including where significant compensation has been paid to investors and the matter was self-reported. The fact that a securities regulator has already been able to extract significant investor compensation in such a settlement may provide less incentive for the plaintiffs' class action bar to do so via a securities class action.

That settlement amounts are trending higher suggests that class counsel are exercising greater care in the cases that they are prepared to bring, selecting those with a greater chance of success and attracting a higher damages award or settlement value. Typically class counsel's compensation is a percentage of the monetary recovery that they achieve for the class.

Are there any trends that you've seen with respect to choice of jurisdiction for commencing securities class actions within Canada? If so, can you attribute this to any specific factor(s)?

Most securities class actions continue to be brought in Ontario, primarily because many of the defendant companies are located in Ontario and their shares trade on the TSX. However, in recent years there has been an increase in the number of such actions brought in Quebec, presumably due to the ease with which plaintiffs can get cases certified in that jurisdiction. Quebec is known as a very friendly jurisdiction for plaintiffs in class actions.

We're finding that in situations where we have a Canadian class action there is usually a companion action south of the border in the U.S. What considerations to you have to keep in mind as defence counsel in one jurisdiction when your strategies may impact the litigation in another jurisdiction? Are there any particular stages of the litigation where you would consider this to be most critical?

At all stages of the litigation it is vitally important to carefully coordinate defence strategy in cross border class actions involving similar allegations in different jurisdictions, given substantive and procedural differences affecting the defence of those claims in both countries.

Substantive differences in the causes of action, or in how the claims have been pleaded in each jurisdiction, increases the risk that a defendant may inadvertently advance a position in one case that is inconsistent with the position that it takes in the other, to the benefit of the plaintiffs in one or both of the actions. A careful analysis and comparison of the substantive elements

of claims in all jurisdictions at the outset is necessary in order for defence counsel to collaborate in devising a strategy to minimize that risk to the greatest degree possible. Evaluating at early stage which claim creates the greatest economic exposure for the client is an important part of that analysis.

The impact of procedural differences between the jurisdictions must also be evaluated, as that can affect how quickly one action will likely proceed in comparison to the others, and when the defendant may first be required to file evidence and expose its witnesses to cross-examination. These differences include, for example, the fact that unlike in the United States, in Canada it is extremely difficult to strike a claim at an early stage of the case. In Canada, unlike the United States, there are no discoveries in a class action until after certification. Understanding these distinctions may permit defence counsel to attempt to speed up or slow down one of the class actions to avoid, for example, the defendant's witnesses being exposed to oral examination in one jurisdiction significantly before discoveries in the other jurisdiction.

While consideration of these factors and close collaboration of defence counsel across the affected jurisdictions is necessary at all stages of the litigation, it is of vital importance that they are carefully addressed before evidence is filed in any motion in any jurisdiction, defence witnesses are examined in any of cases, or a motion is filed in which a particular defence position is advanced that could impact the defence in other jurisdictions . It is an important consideration when experts are retained and briefed, particularly if the same expert may give evidence in both cases. It is also a necessary consideration if an attempt is to be made to settle one or both of the cases, as a settlement of one has the potential to either raise or lower expectations in the other.

Would you say that plaintiffs' counsel in Canada are adopting a "wait and see" approach to the motion to dismiss in the U.S. before aggressively moving forward with the Canadian action, or are they for the most part driving their own claims separately without consideration of what is happening in the U.S. action?

This appears to depend upon the identity of plaintiffs' counsel and the nature of the case. I am aware of several securities class actions that continued in Canada notwithstanding that a parallel class action was dismissed at a pleadings motion in the US. However, it is not uncommon for Canadian class counsel to sit back and wait to see how preliminary motions are decided in the US before filing evidence in support of a motion for leave and to certify a parallel claim in Canada. The fact that a companion class action in the US is certified or survives a motion to dismiss will certainly be used by Canadian class counsel as leverage in any settlement negotiation, or alternatively, may result in tweaks to the allegations made in the Canadian actions.

The term "event driven" litigation is often tossed around to describe situations where a stock price drops in response to a specific event and shareholder litigation ensues. We are hearing more often that since Sarbanes Oxley, pure financial misrepresentation claims are less frequent in the U.S. but that event-driven litigation is increasing in frequency. Can you comment on what we are seeing in Canada with respect to event-driven litigation?

Class actions resulting from events other than a restatement of financial results , such as a mining company's failure to disclose a negative assay result, a pharmaceutical company's failure to disclose a significant increase in competition for its core products, or the discovery of fraudulent practices within a financial services company, are becoming more common. However, regardless of the type of event serving as the catalyst for the lawsuit, it is incumbent on the plaintiff to demonstrate that the alleged misstatement was material, meaning that it would reasonably be expected to have a significant effect on the market price or value of the company's securities. There is no 'bright line" test for materiality, which is to be determined objectively from the perspective of what a reasonable investor would consider important in deciding whether to invest and at what price, and involves a contextual and fact-specific inquiry.

We haven't yet seen any data breach event-driven securities class actions in Canada. With the Yahoo, Paypal, Quidian and Equifax class actions south of the border, do you see this type of securities class action on the horizon in Canada or do you think there is anything about our privacy laws (and mandatory breach notification requirements coming this year) that you think will prevent us from seeing this sort of litigation with any significant frequency?

I expect that we will see a Canadian securities class action arising out of a cyber incident. The likely targets are companies in a business relating to information security, or in the financial payments or services space where robust protection of client information is key to the company's business, the breach is significant, and there is a significant drop in share price following disclosure of the breach. Mandatory reporting obligations are unlikely to change the risk of such actions. There are also reporting obligations in the US, which were alleged to have been breached in, for example, the Yahoo example. Assuming that Canadian companies comply with their statutory disclosure obligations, the greater risk may arise from overly optimistic statements in public disclosure documents concerning vulnerability to cyber incidents and cyber breach preparedness, or the failure to promptly disclose the full extent and severity of a cyber incident when it occurs.

What would you consider the "top 3" most significant Canadian secondary market liability cases in 2017-2018 and why?

In Paniccia v MDC Partners Inc., on a motion for leave to bring a statutory secondary market claim, the Ontario Superior Court resolved the thorny issue of whether a company's receipt of a securities regulatory enforcement summons is a material event that must be disclosed. Justice Perell ruled that in general, it was not, as "[a]n investigation is not a conclusion about a fact." Further, under securities law, the existence of an investigation is confidential and ought not to be disclosed absent the consent of the regulator. Premature disclosure of an investigation may in fact be harmful and adversely affect share price. A reasonable investor would expect the company to respond to the subpoena, cooperate with the investigator, and conduct an internal investigation and then determine whether there was a material fact to correct or a material change to report to its investors. This is welcome news for companies in the early stages of a securities regulatory investigation.

The result in Wong v Pretium is less helpful to defendants. In that case, Justice Belobaba provided guidance concerning the assessment of materiality. He granted leave to the representative plaintiff to bring a statutory secondary market misrepresentation claim against Pretium, a mineral exploration company, in respect of its decision not to disclose preliminary mineral sampling results that it viewed as unreliable even though Pretium was proven to be correct about the sampling. Further testing later proved the preliminary sample to be inaccurate.

The Court emphasized that the materiality standard is focused on information that a reasonable investor objectively would consider important in making an investment decision, not information that the issuer subjectively believed or did not believe to be true. The Court reasoned that the findings of an expert mining consulting firm going to the heart of Pretium's business model was information that was important to investors in deciding whether to invest and at what price. Although Pretium had every right to qualify such information with its own opinions regarding the accuracy of the testing and the true mineral content of the mine in its disclosure, failing to disclose the information was potentially a misrepresentation. A motion for leave to appeal the decision was denied.

Finally, in HSBC v Yip, the Ontario Court of Appeal clarified the meaning of "responsible issuer" in the statutory cause of action for secondary market misrepresentation, which permits claims against a reporting issuer or a "responsible issuer", which is defined as a company with a "real and substantial connection" to Ontario. The Court upheld a lower court ruling that HSBC Holdings, a holding company of an international banking conglomerate whose office was in the UK and whose shares traded on a foreign exchange but not on a Canadian exchange, was not a responsible issuer. It rejected the plaintiff's suggestion that the Ontario Legislature intended that Ontario would become the universal, "default" jurisdiction for issuer around the world whose securities were purchased by residents in Ontario.

As defence counsel, what would you say are your main "pain points" with regard to the current class action process in Canada?

A major pain point is the fact that unlike in the US, it is virtually impossible to succeed in getting a class action dismissed at an early stage of the case unless defence evidence is filed. Even if the defendant company appears to have a good defence, there is significant risk in bringing a motion for summary judgement or opposing the motion by the plaintiff for leave to bring a statutory claim for secondary market misrepresentation, as it exposes defence witnesses to cross-examination early in the case.

The lack of a coordinated case management regime for managing and consolidating multiple class actions relating to the same matter in different provinces is another pain point. This increases defence costs and also the possibility of inconsistent decisions in different jurisdictions.

Switching gears slightly, we have seen with the McDonald v. Home Capital Group Inc. case that there are strategic considerations that need to be kept in mind when there is a purported class action proceeding in parallel with an OSC enforcement action relating to the same issues. Can you comment on this, briefly?

The existence of a regulatory proceeding against the defendant company significantly complicates the defence of a parallel class action.

Where it is practicable to do so, it is usually preferable to try to settle the class action first, as that can and typically is accomplished without any admission of wrongdoing that could be used against the defendant company in the securities regulatory proceeding. However, securities regulators generally want to press ahead with any enforcement proceeding quickly in the public interest, making it difficult to successfully resolve the civil matter first. Further, it will be exceptionally difficult to settle the class action for a reasonable amount if a securities enforcement proceeding is pending.

"No contest" settlements with the Ontario and Alberta Securities Commissions are now available, but only in exceptional circumstances where the company has self-reported wrongdoing to the regulator and paid significant compensation to investors. In circumstances where a no contest settlement is not an option, the regulator will require admissions in any settlement agreement to resolve the regulatory proceeding , which could and likely would be used against the company in a related class action.

The only other option is to try to settle both in tandem, which is what occurred in the Home Capital matter. However, attempting to settle two such related matters together can be significantly more complex than simply settling one.

What is the state of litigation funding in Canada, how does it work, with what frequency is it being used, and are Canadian courts commenting on it?

It is becoming more common for the costs of class actions to be funded by a third party litigation funder. Typically a third party funder enters into an agreement with the representative plaintiff pursuant to which it agrees to fund the costs of the litigation, including the cost of third party experts and potentially also some or all of class counsel's fees, in exchange for a percentage of the recovery in a settlement or judgement at the end of trial.

In Canada, such arrangements must generally be approved by the court. The court must be satisfied that such agreements are not champertous or illegal, and are a fair and reasonable arrangement that facilitates access to justice while protecting the interests of the defendants. In the class action context, such arrangements may be justified as a matter of expediency.

To date several of these arrangements have been approved. In some cases the approving court also required the funder to post security for a portion of the anticipated defence costs, to ensure that if the defendant ultimately succeeds in the action it will be able to enforce any costs award in its favour.

In deciding whether to approve such an arrangement, the courts will consider factors including the need for third party funding, the amount of compensation to be paid to the funder and whether there is a cap on it, and whether the funding agreement interferes with the lawyer-client relationship, including retention by the plaintiffs of autonomy, control and carriage of the litigation. Avoiding overcompensation of the funder is the "penultimate-predominant factor", because over-compensation moves the funder into the role of a champertor.

CYBER BREACH SOME PRACTICAL INSIGHTS & ADVICE

Next, two prominent Data Breach attorneys who are experts at navigating the legal responsibilities demystify the process. They also provide some practical advice to companies that are facing a breach. Mullen Coughlin and Lewis Brisbois Bisgaard & Smith are pre-approved by Allianz and provide pre-and post-breach services to our customers.

Jim Prendergast Founding Partner Mullen Coughlin.

Jim Prendergast is a founding partner of Mullen Coughlin. Mr. Prendergast's practice is focused on representing clients who have experienced a data compromise and clients with data privacy issues. Mr. Prendergast has represented clients with high profile, national exposure data compromises. Mr. Prendergast uses the legal skills and talents he developed over the past twenty-five years as a prosecutor and trial attorney to assist his clients. Mr. Prendergast has represented many clients who have suffered an exposure of credit card data as a result of criminal hacking or unintentional exposure. Mr. Prendergast has also represented numerous colleges and universities, which have been the victims of cyber attacks and other data events. He provides counsel to his clients from day one of the compromise until compliance is accomplished. Mr. Prendergast works on a daily basis with federal and state regulators, federal and local law enforcement officials, issuing and acquiring banks and the credit card industry. In addition, Mr. Prendergast assists clients with HIPAA compromise and compliance issues, preparation of incident response plans and other data privacy consulting issues. Mr. Prendergast is also a frequent speaker on data privacy and data security matters.

Sean Hoar, Chair Data Privacy & Cybersecurity Practice Lewis Brisbois Bisgaard & Smith, LLP

Sean Hoar, CISSP, GISP, CIPP/US, has extensive experience managing responses to digital crises and effectively marshalling resources to contain and remediate information security incidents. He served as the lead cyber attorney for the U.S. Attorney's Office in Oregon where he was the point of contact for the FBI, Secret Service, and Homeland Security in system intrusions and other digital crime emergencies. He now manages responses to data breaches and counsels businesses on best practices in data privacy and information security. He also facilitates incident response planning, table top exercises, and risk assessments.

As a veteran security and privacy attorney and an accomplished litigator prosecuting cybercrime, identity theft, Internet fraud, and other matters for the U.S. Department of Justice, Sean managed compliance with the Fourth Amendment, the Stored Communications Act, and other constitutional and regulatory frameworks for federal law enforcement. He trained federal investigators and prosecutors about the acquisition and use of digital evidence, and he trained foreign officials, on behalf of the U.S. Department of State, about anti-terrorism and cybercrime awareness. He taught courses in cybercrime and privacy law and serves as the executive director of the Financial Crimes & Digital Evidence Foundation. A frequent author and speaker on privacy and security matters, Sean has received numerous accolades from the FBI, the Secret Service, the IRS, and the DEA throughout his career.

As referenced above, Sean holds the Certified Information Systems Security Professional (CISSP), the Global Information Security Professional (GISP), and the Certified Information Privacy Professional/United States (CIPP/US) credentials. These are often required to perform certain types of information security system audits.

What are some of the types of data breach events is your law firm involved with and are you seeing any trends in frequency or severity?

JIM PRENDERGAST, MULLEN COUGHLIN:
We assist clients in responding to all types of data events, including inadvertent loss or disclosure by employees, credit card scraping malware, and stolen laptops. However, email compromises and ransomware events make up the majority of the data events that our clients face. These two categories in particular are rapidly growing in frequency and complexity in recent months.

Often in ransomware matters a forensic investigator was able to determine that the unauthorized actor did not access our clients' sensitive information during the encryption of the client's network. However, due to several factors including the unavailability of detailed log information and the newer variants of ransomware, this conclusion is less probable then even a few months ago. Additionally, the ransom amounts demanded by the unauthorized actors have been increasing significantly in recent months.

Email compromise cases have also become more complex. Forensic investigators at the forefront of their fields developed tools to determine with precision which files, if any, were accessed by an unauthorized actor. Unfortunately, recent changes in the computer industry have made these tools less effective in some cases.

SEAN HOAR, LEWIS BRISBOIS BISGAARD & SMITH:
In part due to the size and location of our national breach response team (20 attorneys distributed through each time zone), we see all types of data security incidents. A few major trends include executive email account compromises for the purpose of stealing sensitive data or redirecting wire transfers, encryption attacks for both extortion and to mask evidence of the previous compromise of systems, and attacks on eCommerce sites to steal payment card information.

What should a company do when it first realizes there's been a data breach event or it suspects there may have been an event?

JIM PRENDERGAST, MULLEN COUGHLIN:
When a company first suspects that a data event may have occurred, they should contact their insurance broker or carrier and Privacy Counsel / Breach Coach immediately. Some data events, such as a ransomware attack, have a much greater immediate impact on a business or organization than others. Immediate steps to be taken after such events include preserving forensic evidence to allow for a full forensic analysis of an event, and communications with third parties regarding the event.

SEAN HOAR, LEWIS BRISBOIS BISGAARD & SMITH:
As soon as a company realizes there has been a data breach event, it should preserve all evidence of the incident and immediately call its cyber insurance broker or carrier. The second call should be to outside counsel (often referred to as a "breach coach").

What information should a Company provide to a Breach Coach to optimize the services you provide?

JIM PRENDERGAST, MULLEN COUGHLIN:
A Privacy Counsel / Breach Coach is interested in as much information as is available at the time.

It is helpful to know what the client has learned through their own investigation, however short, before the call. These details may include how and when the client learned that they experienced a data event, what, if anything, has been done so far internally to try to respond to the event, and what the client's immediate needs are.

It is also helpful to have an understanding of our client's business. To determine what notification obligations may exist as facts become known, a Privacy Counsel / Breach Coach will consider what data may have been impacted, whether that data may be protected by the states of residence of the individuals associated with that data, what state or federal regulators may require notification, and what notifications may be required by contractual relationships that the client might have with third parties.

We also want to know if law enforcement was contacted and if any third parties are aware of the compromise.

SEAN HOAR, LEWIS BRISBOIS BISGAARD & SMITH:
If possible, the company should be prepared to provide the breach coach the following information: When the incident was detected; How the incident was detected; When the incident occurred, and if information and/or the system was accessible to malicious actors over a period of time, the dates during which the information and/or system was accessible (the "window of vulnerability"); What steps were taken by the company upon detection of the incident to respond to the incident; If sensitive data may have been accessed or acquired without authorization, the type of data that may have been accessed or acquired (i.e. Social Security numbers, driver's license numbers, payment card or financial account information, protected health information, etc.);

If sensitive data may have been accessed or acquired without authorization, the location of the data prior to the access, and whether it was secured by any technical measures (i.e. passwords, encryption, etc.);

(a) If indicators of compromise have been identified (i.e. malicious IP addresses, malware, phishing messages, etc.), a summary of those indicators;

(b) If possible, the type of operating systems of the affected devices or systems;

(c) If possible, the number of affected devices (laptops, work stations, servers, etc.); and

(d) Any other information the company believes to be relevant to the incident.

Breach Coaching Explained

JIM PRENDERGAST, MULLEN COUGHLIN:
Privacy Counsel/a Breach Coach will engage a forensic investigation firm under privilege on the client's behalf. This is done for two main reasons. First, an experienced forensic investigator knows what to look for and where to look for it to best determine what happened and what data may have been accessible to an unauthorized party. Secondly, it allows the investigation to be conducted under attorney/client privilege to best protect the client's legal interests.

Privacy Counsel/a Breach Coach will provide legal counsel to the client regarding any notification obligations to individuals, regulators and third parties as a result of a data event. A breach coach will draft legally complaint notifications to these potential audiences, if necessary, at the conclusion of the investigation. We will also provide advice and guidance on internal and external communications regarding the event.

Privacy Counsel/a Breach Coach will also assist in responding to any inquiries by state or federal regulators regarding the data event to best protect the client's legal interests.

SEAN HOAR, LEWIS BRISBOIS BISGAARD & SMITH:
The breach coach will be the project manager for the response to the incident. If it appears that the company would benefit from a digital forensics investigation, the breach coach will facilitate an introduction to a digital forensics firm and a "scoping" call with that firm for the purpose of determining the scope of the proposed investigation and the estimated cost of the project. The digital forensics firm will then provide the breach coach with a statement of work to be reviewed for reasonableness in scope and pricing. The breach coach will then work with claims counsel for the cyber insurance carrier to review and approve the statement of work. Once the statement of work is approved, the breach coach will then work with the insured to review and execute the statement of work and initiate the digital forensics investigation. The beach coach will facilitate the digital forensics investigation, coordinating conference calls with digital forensics investigators and the insured so that everyone is updated about progress on the matter.

If the incident involves a ransomware attack, the breach coach will not only facilitate the digital forensics investigation, but will provide guidance on negotiating with the attacker - if the insured needs access to mission critical information and otherwise believes that payment of a ransom to the attacker is necessary.

If the investigation reveals that sensitive personal data was acquired without authorization, the breach coach will assess any consumer or regulatory notification obligations. If such obligations exist, the breach coach will draft both consumer and regulatory notification letters for review and approval by the insured. If a relatively large volume of consumer notification letters must be mailed, the breach coach may recommend that a consumer

remediation firm be engaged to assist with mailing the letters. The breach coach will then facilitate the preparation of a statement of work from a consumer remediation firm, and will work with claims counsel for the cyber insurance carrier to review and approve the statement of work. Once the statement of work is approved, the breach coach will then work with the insured to review and execute the statement of work and initiate the notification process.
If sensitive information like Social Security numbers was acquired without authorization, the breach coach may recommend that remediation services be provided to affected consumers, like credit monitoring. The breach coach will then facilitate the preparation of a statement of work from a consumer remediation firm, and will work with claims counsel for the cyber insurance carrier to review and approve the statement of work. Once the statement of work is approved, the breach coach will then work with the insured to review and execute the statement of work and initiate the delivery of services. These services may involve mailing the notification letters, provision of credit monitoring, staffing of a call center. The breach coach will remain available to assist with any consumer complaints or regulatory inquiries.

Describe the process and timeline from when a data breach incident is first reported to your law firm through conclusion of your engagement. What should the Insured expect?

JIM PRENDERGAST, MULLEN COUGHLIN:
The process and timeline for responding to each data event is unique. For example, if a small business accidentally emailed a file containing protected data to the wrong party, Privacy Counsel / a Breach Coach may be able to provide immediate assistance in providing legal counsel regarding the notification obligations that exist based on the specific facts of the event. In other cases, such as an email compromise, a thorough forensic investigation is required to determine what the unauthorized actor may have accessed and whether notification obligations are triggered as a result. An experienced Privacy Counsel / Breach Coach will provide a client with reasonable expectations for the process and timeline from the beginning of their engagement through completion.

SEAN HOAR, LEWIS BRISBOIS BISGAARD & SMITH:
As soon as the insured is available for an initial call, the breach coach will facilitate an initial "assessment" call to determine the nature and scope of the incident. During this call the breach coach will outline a strategy for assisting the company recover from the data security incident. If the strategy involves engaging a digital forensics firm to assist with an investigation, a scoping call with the digital forensics firm will be scheduled to occur immediately. The resulting statement of work should be approved and executed shortly thereafter so that the digital forensics investigation can be initiated immediately. Depending upon the nature and scope of the incident, regular calls are then facilitated by the breach coach with the digital forensics firm and the insured. These calls may be daily or less frequent, based on the urgency of the matter. If sensitive information is determined to have been acquired without authorization, notification to consumers and regulators should occur no later than 30 days from the date the incident was detected. If regulators must be notified, regulatory inquiries may occur months after the incident, but if the company promptly responded to the incident, promptly notified consumers, and provided appropriate remediation services, the company will be well positioned to address any regulatory inquiries.

What are some common mistakes made by companies when they suspect or realize there's been a data breach?

JIM PRENDERGAST, MULLEN COUGHLIN:
From the perspective of a Privacy Counsel / Breach Coach, the common mistakes that are made upon discovery of a data event result from a desire to move rapidly and to do the right thing. Often, clients may make preliminary notifications to employees or impacted individuals about the event in an effort to be transparent. However, such notifications before understanding the nature, cause, and scope of an event can lead to unanswerable questions and greater confusion.

Other clients who are impacted by ransomware attempt to reach out to the attacker on their own to try to negotiate the ransom or obtain the necessary decryption keys on their own. This often leads to higher or additional ransom demands or significant issues with the decryption of the impacted files. We recommend that only an experienced forensic firm conduct these negotiations on a client's behalf.

Finally, the largest mistake that is made is delay. Often a business or entity that has experienced a data event may not turn to the experts for days or weeks after discovering the event. This delay can result in lost evidence that would have been useful for a forensic investigation, and potentially increased scrutiny but regulators or other third parties.

SEAN HOAR, LEWIS BRISBOIS BISGAARD & SMITH:
One of the worst mistakes is to delay notification of the cyber insurance broker or carrier. Cyber insurance brokers and carriers should be notified immediately upon detection of an incident so that the cyber insurance policy and the resources provided under the policy can respond on behalf of the insured. Another mistake is to fail to preserve evidence of the incident. This often occurs when the company directs either internal or third party information technology personnel to investigate the matter, and because they are not forensics professionals, they inadvertently destroy evidence that would otherwise be helpful to the company. Another mistake is to make external disclosures about the incident before sufficient information is known about the nature and scope of the matter. This often results in inaccurate information being provided to the public, and results in the consumption of scarce personnel resources dealing with unnecessary media and regulatory scrutiny.

CRISIS MANAGEMENT
STRAIGHT TALK FROM EXPERTS

A central component of any data breach is handling the crisis a company may face to its reputation as it navigates through a breach. One of Allianz' pre-approved experts in this field is Fleishman Hillard ("FH") is a global, full-service communications firm with more than 85 offices in 30 countries. FH's crisis counselors around the world guide clients through challenges every day. FH use our crisis management approach, or A.R.C.™ (Assess, Resolve, Control) methodology. Our tools help clients protect their reputation in the face of crisis. They have been proven after helping over 150 different organizations through breach response and privacy-related issues — across 42 countries

Adam Montgomery, Senior Vice President Fleishman Hillard,

Mr. Montgomery is a certified crisis communications counselor with a focus in government relations and issues management. Adam assists clients manage and plan for situations with sensitive issues, such as data and security breaches. Adam develops data breach response plans and provides assistance on how to reduce data breach risk and limit negative coverage in traditional and social media.

Scott Radcliffe, Senior Vice President Fleishman Hillard

Mr. Radcliffe is a senior leader in the privacy and cyber risk practice. In this role, he has worked with top executives at several Fortune 500 companies to set strategic-level positioning and corporate level cybersecurity communications.

Describe the types of services your firm provides to companies in the context of a data breach crisis and practical examples of how your firm mitigates the potential for financial loss.

We protect client reputations by helping them exceed stakeholder expectations. We do this in three ways: (1) Planning and preparation which includes assessments, setting up monitoring, breach response communications plan development, training and drills; (2) Incident response involving team support, crisis management counsel, message development, notification planning and writing, media relations counsel and support, content publishing and hosting, and advocate mobilization; and (3) Reputation recovery which contains after-action communications, reports and plan adjustments, reputation repair plan, monitoring and response, stakeholder relations, ongoing customer security and recovery communications and litigations communications.

Is there a 'best practice" protocol that companies should follow immediately upon discovery of a data breach and while the breach investigation is proceeding?

When approaching a data incident through a communications lens a few of the best practices to consider are: demonstrate accountability/action, be transparent, stay out of the weeds, tier and tightly sequence communications, message consistently across audiences, prioritize client responses, and track sentiment and emerging themes.
It is important to define a guiding strategy, grounded in your own mission and values that you would like customers and stakeholders to take-away from this issue now and in the future. This strategy should be shaped by the answers to these questions: (1) What happened; (2) Who knows the complete situation; (3) What type of information may have been compromised; (4) What is the intent of the activity; (5) How many people were affected; (6) Were any employees impacted/involved; (7) Is it ongoing (8) How long has this been happening; and (9)Is the company required to report this situation.

What are some common mistakes companies can avoid concerning crisis management?

The biggest mistake companies make is not having a plan or being unprepared to respond to a breach or cyberattack. The following common mistakes are made without a plan: Engaging the wrong teams without objectives, timelines or the ability to work together; Sharing conflicting, inaccurate, and incomplete information with leadership without clear guidance on what decisions need to be made; Establishing the communication strategy based on one of two assumptions: that the breach will become public or no one will ever find out; Rushing to communicate externally without accurate or helpful information; Making communications decisions based on assumption of the types and value of data you do and don't control; and Communicating to affected group quicker than you can respond to inquiries or too slow to prevent more damage.

EMPLOYMENT PRACTICES LITIGATION

A Defense Litigator's Tour of the Landscape

Wendy J. Mellk, Principal,
Jackson Lewis, P.C.

Ms. Mellk's litigation practice includes the defense of employers in single and multi-plaintiff actions before state and federal courts, the American Arbitration Association and administrative agencies such as the Equal Employment Opportunity Commission and the New York State Division of Human Rights on claims of discrimination (gender, race, age, religion, national origin, sexual orientation), sexual harassment, breach of contract, retaliation, violation of whistleblower protections and wage/hour laws, and wrongful discharge and related tort claims (invasion of privacy, defamation, interference with business relations, misrepresentation, and fraud). She also has handled appeals before the Second Circuit Court of Appeals and the New York State Appellate Division.

She has represented numerous clients in national collective actions under the FLSA for overtime compensation and has experience in all aspects of class action cases, including developing litigation strategy, overseeing class-wide discovery, preparing potential exposure analyses, opposing class certification, interviewing witnesses, defending and taking depositions and retaining experts.

Have you observed any significant rulings that expand/restrict employer/employee rights in the workplace?

Yes, with respect to the expansion of Title VII to cover sexual harassment discrimination. In Hively v. Ivy Tech Community College (7th Cir.) and Zarda v. Altitude Express (2nd Cir.), the courts both held that Title VII's prohibition on sex discrimination encompasses discrimination on the basis of sexual orientation. There is a split in authority, as the 11th Circuit in Jameka Evans v. Georgia Regional Hospital, No. 15-15234 (11th Cir. March 10, 2017) found sexual orientation is not protected by Title VII. This split in authority sets the issue up for Supreme Court review. Interestingly, the Equal Employment Opportunity Commission (EEOC) continues to support the expansion of Title VII to cover sexual orientation discrimination, but the Department of Justice (DOJ) holds a contrary position.

Have you seen case law expansion of protections for medical marijuana users?

Yes. In Barbuto v. Advantage Sales & Marketing, LLC, SJC -12226 (July 17, 2017), the court ruled that medical marijuana users are allowed to assert claims under Massachusetts' disability discrimination law. In reviving Barbuto's discrimination claims, the Massachusetts Supreme Judicial Court expressly rejected the employer's argument that, because marijuana is illegal under federal law, requiring an employer to accommodate medical marijuana use is per se unreasonable. Instead, the Court held that, at a minimum, Defendant Advantage Sales & Marketing owed Barbuto an obligation to engage in an interactive dialogue concerning her ongoing medicinal marijuana use before terminating her employment.

Also, in Noffsinger v. SSC Niantic Operating Co., LLC, Docket No. 3:16-cv-01938 (D. Conn., Aug. 8, 2017), the court ruled that federal law does not preempt the Connecticut medical marijuana statute's prohibition on employers' firing or refusing to hire qualified medical marijuana patients, even if they test positive on an employment-related drug test. This is a case of first impression that may have potentially sweeping implications for state law and the federal Controlled Substances Act.

Finally, the court in Callaghan v. Darlington Fabrics Corp., et al., No. PC-2014-5680 (R.I. Super. Ct., May 23, 2017) ruled that employers cannot refuse to hire a medical marijuana cardholder, even if the individual admittedly would not pass the employer's pre-employment drug test required of all applicants. The court granted summary judgment to the plaintiff-applicant.

In 2017 and 2018, have you seen any significant rulings that overturn prior case law?

Yes. In Desrosiers v. Perry Ellis Menswear, LLC. (NY Court of Appeals, 2017), the New York State Court of Appeals held that notice of a class action settlement must be distributed to all members of the putative class, even when the settlement comes before a class has been certified. This ruling creates significant challenges for the settlement of putative class actions.

Another ruling is the court's decision in Severson v. Heartland Woodcraft, Inc., No. 15-3754 (7th Cir. Sept. 20, 2017). On September 20, 2017, the U.S. Court of Appeals for the Seventh Circuit issued a significant opinion for employers. In Severson, the plaintiff requested an additional 2-3 months of leave following the expiration of his Family Medical Leave Act (FMLA) entitlement to recover from surgery, but his employer denied his request. The Seventh Circuit upheld a grant of summary judgment to the employer, holding that "[t]he ADA is an antidiscrimination statute, not a medical-leave entitlement."

In an unpublished decision on October 17, 2017, the court in Golden v. Indianapolis Housing Agency, No. 17-1359 reaffirmed, reiterating that "[a]n employee who needs long-term medical leave…is not a 'qualified individual' under the ADA." Recently, the U.S. Supreme Court declined review, establishing a rule that leave of more than a few weeks in duration falls outside an employers' reasonable accommodation obligations under the Americans with Disabilities Act (ADA).

In Alvarado v. Dart Container Corporation of California (California Supreme Court, March 5, 2018), the court ruled that when calculating overtime in pay periods in which an employee earns a flat rate bonus, employers must divide the total compensation earned in a pay period by only the non-overtime hours worked by an employee.

The United States Supreme Court in Somers v. Digital Realty Trust (United States Supreme Court, February 21, 2018) held that Dodd-Frank's anti-retaliation provision does not extend to an individual, like Plaintiff Somers, who had not reported a violation of the securities laws to the Securities and Exchange Commission (SEC). Facially, the impact seems to be a victory for employers because the ruling makes it more difficult for whistleblowers who do not complaint to the SEC to bring a claim under Dodd Frank. However, there are several potentially concerning implications. The impact may be limited because there are other federal, state, and local statutes, as well as case law, which define whistleblowers to include employees who have made internal complaints. Indeed, the Sarbanes-Oxley Act's anti-retaliation provisions protect individuals who report to the SEC, another federal agency, and to a supervisor (i.e., internal complaint). There is the potential that employees who report misconduct internally may also go to the SEC, so whistleblowers can receive the more expansive benefits and protections available under Dodd-Frank, or they could bypass complaining internally altogether. If whistleblowers bypass internal compliance programs to complain to the SEC, it could undermine the benefits of self-policing and, in addition, lead to an increase in SEC related investigations and attendant costs.

Lastly, the Supreme Court resolved a split in the Circuits and issued its decision in the Epic Systems Corp. v. Lewis; Ernst & Young LLP v. Morris; and NLRB v. Murphy Oil USA Inc., and a decision expected before end of 2017-18 term. The Supreme Court affirmed that arbitration agreements with individual employees that bar pursuing work-related claims on a collective or class basis are enforceable. This decision is of great significance for employers as they can now reliably depend on the enforceability of class action waivers in an arbitration agreement.

What types of employment lawsuits are you currently seeing with greater frequency?

We continue to see EEOC "bread and butter claims", as well as an uptick in pregnancy discrimination claims. We have seen an increase in demand letters relating to sexual harassment/#MeToo claims but find that many employers are looking to resolve these claims at the pre-litigation stage. Wage hour litigation continues to be a significant exposure for employers.

There has also been an increase in website accessibility claims. These claims arise in lawsuits under Title III of the ADA concerning websites that are not accessible to vision impaired users. Title III requires a place of public accommodation to make "reasonable modifications" to its business policies and procedures to accommodate customers with disabilities. Courts are split on whether Title III only applies to businesses that have a brick-and-mortar presence or whether all websites must be compliant. 814 federal lawsuits alleging inaccessible websites filed in 2017, including a number of putative class actions. Industries particularly at risk include retail and hospitality, including restaurants.

Another trend is that almost 50% of all EEOC charges contain a retaliation element. Most, if not all, statutes providing workplace protections (as well as other laws) contain prohibitions against retaliation. It can be more difficult to obtain summary judgment on retaliation claims due to issues of intent and temporal proximity. In many courts, if an adverse action occurs within three months of protected activity, summary judgment can be difficult even in the absence of evidence of any retaliatory animus.

Provide your thoughts on some of the largest EPL jury verdicts in the past year and what factors drove the results?

In July 2018, a jury in Los Angeles, California awarded approximately $31.1 million to a 54 year old former dental supply company employee who alleged age and gender discrimination claims and who had worked for the company for 36 years. At the conclusion of the trial, the jury awarded $5282 in economic loss; $3 million for emotional distress damages and $28 million in punitive damages.

A Suffolk County, Massachusetts jury in Mary 2018 awarded a Haitian–American nurse an unprecedented $28.2 million in total damages on her claim of retaliation against Brigham & Women's Hospital, her former employer. At the same time, the jury rejected the nurse's claim of race discrimination. The verdict consisted of $450,000 in economic damages, $2.75 million in emotional distress damages, and $25 million in punitive damages.

A jury in the U.S. District for the Northern District of Illinois awarded a male grocery store butcher $2.4 million in compensatory and punitive damages on his claim of sexual harassment against a small grocery store located in the south side of Chicago. The lower court ultimately reduced the award to $477,500, because of Title VII's statutory damage caps and the excessiveness of the award. The U.S. Court of Appeals for the Seventh Circuit has affirmed the award. (Smith v. Rosebud Farm, Inc., No. 17-2626, 2018 U.S. App. LEXIS 21481 (7th Cir. Aug. 2, 2018).

A Fresno, California jury awarded nearly $8 million to former Chipotle employee Jeanette Ortiz on her claim of wrongful discharge in May 2018. The jury found Chipotle fired Ortiz in retaliation for her filing a worker's compensation claim of carpal tunnel syndrome. It also found Chipotle falsely accused Ortiz of stealing money to disguise the unlawful motive. Faced with the possibility of additional punitive damages on top of the initial trial verdict, the fast-food giant settled with Ortiz after trial for an undisclosed sum.

A California jury awarded a former drug addiction counselor more than $4.5 million in damages finding that her former employer had violated the ADA. The Plaintiff, Della Hill, was diagnosed with major depressive disorder while on protected medical leave for a broken arm. Her medical leave was set to expire on March 23, 2015, but prior to its expiration, she submitted additional medical information to her employer on her diagnosis and requested additional leave. Instead of granting the request, her employer, the Asian American Drug Abuse Program (AADAP), terminated her on March 31, 2015, for failing to return from medical leave. After determining that AADAP had failed to reasonably accommodate her disability, the jury awarded Hill $1.9 million in damages (approximately $550,000 in economic damages, and $1,350,000 in non-economic damages). The jury also determined that AADAP had acted with malice, oppression, and/or fraud, which allowed the jury to award another $2.6 million in punitive damages. (Hill v. Asian American Drug Abuse Program, Inc., No. BC582516 (Cal. Sup. Ct. Jan. 19, 2018).

What trends have you observed at the EEOC/state administrative level during fiscal year 2018?

In fiscal year 2018, there was a 12 % increase in sexual harassment charges filed with the EEOC, and a 23% increase in reasonable cause findings on sexual harassment charges. Monetary awards recovered for victims of sexual harassment rose 22% to $70 million.

Retaliation claims were the most commonly filed charge in 2018. We anticipate that retaliation will maintain its status as the most frequently filed charge, as it is an "add on" to all of the other statutory charges.

The EEOC filed 184 merit lawsuits alleging discrimination in fiscal year 2017, holding another 242 on its docket for 2018. In 2018, the EEOC filed 197 merits lawsuits. Overall, there was a 50% increase in sexual harassment lawsuits filed by EEOC (41 in 2018). The EEOC was successful in 90.8% of the suit outcomes in 2017. For comparison, in 2016, the EEOC only filed 86 merit lawsuits.

Finally, while federal wage and hour lawsuits have slowed somewhat recently, they have increased 60% since 2007 and continue to be a source of exposure and concern for employers. Lawsuits brought under the ADA have more than doubled in the past decade and continue to climb. Similarly troubling, FMLA lawsuits have tripled in the past five years.

Have you noticed a significant up-tick in EEOC Charges, demand letters, litigation, etc. in the aftermath of the momentum surrounding #MeToo and "Time's Up"?

Yes, there appears to be an increase in demand letters. According to Acting Chair of the EEOC, Victoria Lipnic's comments on March 13, 2018, "[p]eople may not yet be going to the EEOC — and in fact we have not seen a huge surge in charges being filed with the EEOC — but what I'm hearing is, particularly from insurance carriers… they're seeing a lot more demand letters".

There has also been significant uptick in requests for EEO training, in particular, C-Suite training on sexual harassment. The uptick in training also can be associated with the mandatory training requirements implemented by the State. While supervisory training has been mandatory in California for some time, New York recently passed legislation requiring all employers to provide harassment training to employees. There are a number of other States that also require training.

Also, notably, in March 2018, Congress increased the EEOC's budget by $16M, which will be used to combat workplace harassment.

Do you expect any end in sight for the #MeToo and "Time's Up" litigation movements?

We expect these movements to sensitize employers, employees, and juries to "Me Too" related issues. In particular, we are finding that millennial employees are less tolerant of potentially harassing behavior, and thus, it would not be surprising to see a longer term impact in terms of claims increase as well as findings in favor of claimants. However, for the most part, employers seem to be responding to the movement by increasing training, ensuring robust reporting mechanisms and corporate commitment in an attempt to place themselves in a more defensible position.

Any issues with time barred causes of action due to statutes of limitations?

We have not seen any issues concerning time barred causes of action, although we do expect to see an increase in arguments concerning "continuing violations", which will allow for an extension of the limitations period. What we have seen is an extension of the trend of more and more claims being asserted under state and local anti-discrimination laws, which tend to have longer limitations periods and often times are more expansive in protections and available damages. For example, under the New York City Human Rights Laws, the standard to establish sexual

harassment is lower than under Title VII; the limitations period is three years with no administrative prerequisite, and the available damages are more extensive, including unlimited compensatory and punitive damages and attorney fees (as compared to the capped damages under Title VII).

Have you observed a significant increase in private settlements?

Most claims are settled privately. We have noticed that employers who have received sexual harassment related demand letters over the past six months want to resolve claims as quickly as possible. We have seen less appetite for litigation when it comes to these issues.

Have any unintended consequences occurred as a result of the "#MeToo" movement?

A number of jurisdictions have passed or have pending laws that prohibit non-disclosure provisions in settlement agreements. These non-disclosure provisions may make cases more difficult to settle, as confidentiality is important to most employers in case resolution. Without confidentiality, an incentive for resolution disappears, and cases may be harder to resolve. It does appear that non-disclosure prohibition legislation does have exceptions, i.e., agreements will be valid if non-disclosure is at the consent of the claimant. Thus, it is important that settlement agreements in those jurisdictions (i.e., New York) have appropriate and specific consent language.

There has also been a trend towards legislation prohibiting agreements mandating arbitration of sexual harassment claims.

In addition, under the 2017 Tax Cuts and Jobs Act, payments related to sexual harassment or sexual abuse are not deductible if there is a non-disclosure agreement.

Can you compare the Trump Administration to the Obama Administration, specifically regarding National Labor and Relations Board (NLRB), Department of Labor (DOL), and EEOC?

Overall, under the Obama administration, agencies focused on a number of core issues designed to expand the definition of employer (the theory of the fissured workplace). For example, there were a number of initiatives to expand the definition of joint employers (i.e., the franchisor/franchisee relationship) and restrict the classification of individuals as independent contractors (and converting these individuals into employees). We have seen a withdraw of these initiatives under the Trump administration and a return to the more traditional definitions of employer and employee.

Trump nominated Janet Dhillon to chair EEOC. Dhillon served as general counsel for J.C. Penney Company Inc., US Airways Group, and Burlington Stores, and chaired the Retail Litigation Center, an industry group which has clashed with the EEOC in court. Trump also nominated Daniel Gade who lost his right leg while serving in Iraq. This nomination has drawn attention to the argument that disability benefits make wounded veterans dependent on the government. Both nominations remain pending. In December 2017, the President also nominated Obama-appointee Chai Feldblum to be reappointed as a Commissioner, for a term expiring in 2023, an announcement subsequently criticized by many conservative Republicans. Sharon Gustafson has been nominated to fill the General Counsel role. Interestingly, Gustafson represented Peggy Young in the ground-breaking case Young v. UPS, in which the U.S. Supreme Court found that employers had to accommodate pregnancy and related conditions if it made accommodations in other circumstances.

Management-side labor and employment lawyer, John Ring was confirmed to fillthe vacant seat on the five-member NLRB. Ring replaces former-Board Chairman Philip Miscimarra, a Republican, and restore a 3-2 Republican majority to the Board. Miscimarra's term ended on December 16, 2017.

Are there any significant decisions rendered by the NLRB, DOL, and EEOC that are possibly subject to reversal under the current administration?

The DOL announced the withdrawal of two Wage and Hour Administrator's Interpretations (AIs) on joint employment and independent contractors. The DOL's actions reverse the Obama administration's attempts to expand the definition of employer and employee to a more traditional view of employment relationships.

The DOL is expected to undertake new rulemaking at some point with regard to overtime pay. The Obama Administration's overtime pay rule (which would have more than doubled the required salary level from $23,660 to $47,476 for a full-year worker to qualify for the Fair Labor Standards Act white collar exemptions) was invalidated by a federal court. If new rulemaking is entertained, the DOL is expected to set a new salary level for the white collar exemptions in the low-$30,000 range.

The National Labor Relations Board has vacated its decision in Hy-Brand Industrial Contractors, Ltd., 365 NLRB No. 156 (Feb. 26, 2018), and restored the Board's union-friendly joint employer test set forth in Browning-Ferris Industries, 362 NLRB No. 186 (2015), which Hy-Brand overruled. The vacated decision came after the Board's Inspector General released a report stating that Member William Emanuel should have recused himself from participating in the Hy-Brand decision. Emanuel's former law firm represented one of the joint employers involved in the Browning-Ferris decision.

In Janus v. AFSCME Council 31, No. 16-1466, the Supreme Court held that public sector employees who are non-members of a union cannot be legally required to pay agency or "fair share" fees as a condition of employment. Unions that represent public sector employees anticipate that a significant number of non-members will cease paying agency fees to the union that represents them. For example, the Service Employees International Union, one of the largest unions in the country, months ago laid off employees at its national headquarters in anticipation of the Court's decision. Other unions likely will follow the SEIU's cost-cutting lead. We also expect that unions' budgets for legislative lobbying will decrease.

Finally, the EEOC abandoned the expanded EEO1 reporting requirements that would have required employers to provide pay data on EEO-1 forms.

Are there new standards that will be implemented by the current administration regarding workplace rules?

The DOL returned to the issuing opinion letters in response to employers' queries rather than using the more general, less frequent and broad "administrator interpretations" that were issued by the Obama administration. Secretary Alexander Acosta said in the DOL statement: "[r]einstating opinion letters will benefit employees and employers as they provide a means by which both can develop a clearer understanding of the Fair Labor Standards Act and other statutes. A return to opinion letters presents an opportunity to have a dialogue with DOL and have questions answered and issues raised at the DOL."

The EEOC proposed harassment enforcement guidance in 2017 still remains in "proposed" format, and it is unclear when it will be adopted. The guidance covers all categories of harassment (age, sex, LGBT discrimination, religion, age, national origin, disability and genetic information); defines what constitutes harassment; reviews when a basis for employer liability exists; and offers suggestions for preventive practices. The EEOC identifies "five core principles" that it believes are necessary for preventing and addressing harassment, including 1) committed leadership; 2) demonstrated accountability; 3) strong, comprehensive policies; 4) trusted and accessible complaint procedures; and 5) regular, interactive training tailored specifically to the audience and the organization. Although the 2017 proposed guidance does not have the force of law, employers should expect the EEOC's investigators to rely on it when investigating employers who allegedly violate harassment laws. This signals that enforcing the laws governing workplace harassment continues to be one of the EEOC's top priorities, which is especially relevant given the national #MeToo discussion.

Is there a general, significant difference between the current and prior administration?

In general, there seems to be a return to the more traditional positions taken by administrative agencies rather than any attempt to push the envelope on novel employee friendly issues. In addition, agencies are restricted from passing new regulation due to President Trump's January 2017 Executive Order requiring agencies to slash two regulations for each new regulation.

Are there additional responsibilities employers have in the workplace, given any recent case law or types of lawsuits that have been filed recently, specifically with respect to sexual harassment and assault claims?

Employers should maintain robust policies prohibiting all forms of harassment based on any protected class, including sex, and ensuring such policies are compliant with federal and applicable state law. Employers should also establish and communicate a clear reporting mechanism, which requires employees to report workplace harassment and provides multiple avenues to bring such complaints. Investigation of all allegations of harassment quickly and thoroughly and taking prompt remedial action when necessary is also critical.

Harassment complaints should be routed to Human Resources and/or the appropriate individual(s) at the organization based upon the allegations and individuals raising the issue or accused of improper conduct; Complaints must be investigated and properly handled and should not be ignored or denied before investigating the substance.

Employees who make such complaints must be protected from retaliation of any kind, and the company must take corrective action based on the findings of the investigation. Action must be taken to ensure that conduct stops and does not recur. Consistency is key. Also key are establishing and communicating a strong policy prohibiting retaliation and holding managers accounting for upholding it, training all employees on discrimination, harassment, reporting, and retaliation, and responding to complainants.

In the context of #MeToo, is there advice employers should take when dealing with employees who file?

As set forth above, take all claims seriously and investigate. Decide whether it is appropriate to separate claimant from alleged harasser during an investigation. Communicate with the claimant. Think about a crisis response plan in advance, and remember that these claims can go public and viral. Moreover, be very aware the potential for retaliation and ensure that Human Resources is involved in any subsequent discussions with the claimant about performance or discipline, and take extra steps to ensure the decisions related thereto are based on legitimate and documented, non-retaliatory reasons[1].

We extend our sincere thanks to all of the contributors to this edition of the Financial Lines Claims Briefing. Please direct any questions to; James Ilardi, Allianz Global Corporate & Specialty North America Head of Financial Lines Claims at **james.ilardi@agcs.allianz.com.**

[1] *The content of this publication reflects the opinions and observations of the author and should not be construed as legal advice.*

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