Seminar on Reinsurance

June 5–6, 2023

Westin Philadelphia

Philadelphia, PA
D&O Liability
What just happened / Where is it going
Concurrent Session, June 6
8:30 – 9:45 AM ET
Antitrust Notice

- The Casualty Actuarial Society is committed to adhering strictly to the letter and spirit of the antitrust laws. Seminars conducted under the auspices of the CAS are designed solely to provide a forum for the expression of various points of view on topics described in the programs or agendas for such meetings.

- Under no circumstances shall CAS seminars be used as a means for competing companies or firms to reach any understanding – expressed or implied – that restricts competition or in any way impairs the ability of members to exercise independent business judgment regarding matters affecting competition.

- It is the responsibility of all seminar participants to be aware of antitrust regulations, to prevent any written or verbal discussions that appear to violate these laws, and to adhere in every respect to the CAS antitrust compliance policy.
Meet the Speakers

Marc Berner
SVP, FI, Allied World Ins Co

Marc Berner is SVP and Head of the U.S. Financial Institutions Division at Allied World where he has responsibility for all aspects of underwriting executive liability lines for financial services firms brokered in the U.S.

Marc has more than 24 years of insurance industry experience as an underwriter and broker. Prior to joining Allied World in 2016, he was Department Head for the Financial Institutions Practice at Hartford Financial Products.

Marc holds a BA in Political Science from Binghamton University and a JD from Albany Law School where he was Associate Editor of the Albany Law Review.

Rick Ramotar, FCAS
VP, QBE Re

Rick is a VP and Senior Actuary at QBE Re with expertise in Professional Lines insurance pricing.

Rick has more than 20 years of actuarial experience dealing with a variety of lines of businesses. Rick has held prior roles at Swiss Re, Hiscox, the PMI Group, Aon, Trans Re, and Farmers.

Rick holds a BS in Statistics from UC Santa Barbara.

Brian Sabia, ARe, ASLI, RPLU
EVP CUO, TOA Re

Brian is a EVP and Chief Underwriting Officer at Toa Reinsurance Company of America.

Brian has over 20 years of experience in Professional lines underwriting, from positions within PartnerRe, Berkshire Hathaway, and Executive Risk.

Brian holds a MBA in Finance from Sacred Heart University and a BA in Economics from the University of Connecticut

Lon Chang, FCAS
VP, Ascot Group

Lon holds a BS in Finance from New York University.

Lon is the head of US Pricing at Ascot Group. He has 13 years of actuarial experience and has been with Ascot since Dec 2018.

Lon will be your Moderator for this session.
D&O Rating Index from 2002

- Qtrly Index
- Last 2 Yrs are broken down by Qtr

- Mix of different types of D&O
  - Public
    - Primary
    - Excess
  - FI
    - Primary
    - Excess
  - Side A
  - Private
  - Not for Profit

From AON Quarterly D&O Pricing Index Report, Fourth Quarter 2022
Quarterly Year-Over-Year Change

Q1-2012 Through Q4-2022

From AON Quarterly D&O Pricing Index Report, Fourth Quarter 2022
What Happened

• 2018 rates increased and kept going thru 2021

• Why?
  • Rates had been low for a long time
  • Concerns about profitability
  • Social Inflation
  • Increasing Security Class Action Claims
  • New Events i.e. Sexual Harassment
  • Outside of D&O, there were large casualty and property losses

• D&O had large exposures – limits up to $50m
Fear is good for rates

• Exit market – didn’t happen this time
• Reduce / Tighten capacity
  • Non-renew riskier business
  • Tighten terms and condition
  • Increase deductibles
  • Reduce Capacity deployment
  • Max limits: $50m → $15m → $5m

Hard markets occur when capacity reduces, leading to increasing rate as insureds pay more to entice insurers to offer cover
2022… Rate reversal

- Higher rates attracted more capacity
  - Existing companies had increased budgets
  - New entrants – a lot of new start-up capacity came online
- Special Purpose Acquisition Corporations (SPACs)
  - High rate / low limit risks – disappeared from the market
- Companies had high budget targets
  - Existing were aggressive defending books to hit targets
- 2022 Delaware law passed to allow captives to cover D&O but impact so far unknown
Where are we now

• “Rates have fallen but are still above target rating levels”

• Rates are only half of the story
  • SCA claims – frequency & severity
  • Prior Year development including potential pipeline claims
  • Banking Crisis II
  • SPACs / deSPACs and runoff
  • Regulatory / Political Environment / Increasingly Aggressive SEC
  • ESG
  • Cryptocurrency / Opioids
  • Reinsurance
Recent Financials Make D&O Look Good…

Calendar year loss ratios for largest D&O writers

<table>
<thead>
<tr>
<th>Premium Rank</th>
<th>Loss Ratio Rank</th>
<th>Group</th>
<th>2022</th>
<th>Three-Year Average 2020–2022</th>
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<tr>
<td>6</td>
<td>1</td>
<td>Fairfax Financial Holdings Limited</td>
<td>54</td>
<td>52</td>
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<tr>
<td>7</td>
<td>2</td>
<td>W. R. Berkley Corp.</td>
<td>54</td>
<td>71</td>
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<tr>
<td>1</td>
<td>3</td>
<td>AXA XL</td>
<td>62</td>
<td>62</td>
</tr>
<tr>
<td>2</td>
<td>4</td>
<td>Chubb Limited</td>
<td>63</td>
<td>64</td>
</tr>
<tr>
<td>3</td>
<td>5</td>
<td>Berkshire Hathaway</td>
<td>63</td>
<td>66</td>
</tr>
<tr>
<td>10</td>
<td>6</td>
<td>Sompo Group</td>
<td>65</td>
<td>67</td>
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<tr>
<td>8</td>
<td>7</td>
<td>CNA Financial Corp.</td>
<td>67</td>
<td>63</td>
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<td>9</td>
<td>8</td>
<td>Zurich North America</td>
<td>68</td>
<td>64</td>
</tr>
<tr>
<td>5</td>
<td>9</td>
<td>Tokio Marine U.S.</td>
<td>70</td>
<td>67</td>
</tr>
<tr>
<td>4</td>
<td>10</td>
<td>American International Group, Inc.</td>
<td>116</td>
<td>83</td>
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</table>

Source: Fitch Ratings Mar 23, 2023 Special Report, "U.S. Directors and Officers Liability Market Update"  
Fitch analysis uses data from S&P Global Market Intelligence
But Industry Forecasts are Bearish

“My gut tells me that the new competitors jumping into public D&O and excess liability are going to get burned, a lot of them are going to get burned, and this is more of a short-term phenomenon on rate being below prospective loss ratio trend.”

-Carl Lindner, co-CEO American Financial Group

“We are one of the very few lead markets in large account public D&O where primary rates have remained relatively flat year over year. In contrast, high excess public company D&O saw rate declines greater than 20 percent.”

-Peter Zaffino, CEO AIG

“One example [of our risk discipline] is the reduction of our public commercial D&O business where we found pricing insufficient for the risks we see in this line.”

-Vince Tizzio, CEO Axis
Security Class Action Claims

Figure 1. Federal Filings and Number of Companies Listed in the United States
January 1996–December 2022

NERA Recent Trends in Securities Class Action Litigation: 2022
Full-Year Review

*NERA Recent Trends in Securities Class Action Litigation: 2022
Full-Year Review
Federal Filings By Type

- Crypto Unregistered Securities Filings
- Merger-Objection Filings
- Other Filings
- Rule 10b-5 Filings
- Rule 10b-5 and Section 11 and/or 12 Filings
- Section 11 or 12 Filings

*NERA Recent Trends in Securities Class Action Litigation: 2022 Full-Year Review*
Average Settlement Value

*NERA Recent Trends in Securities Class Action Litigation: 2022
Full-Year Review
## Average Settlement Value

**Table 1. Top 2022 Securities Class Action Settlements**

<table>
<thead>
<tr>
<th>Ranking</th>
<th>Defendant</th>
<th>Filing Date</th>
<th>Settlement Date</th>
<th>Total Settlement Value ($Million)</th>
<th>Plaintiffs' Attorneys' Fees and Expenses Value ($Million)</th>
<th>Circuit</th>
<th>Economic Sector</th>
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</thead>
<tbody>
<tr>
<td>1</td>
<td>Twitter, Inc.</td>
<td>16 Sept 16</td>
<td>11 Nov 22</td>
<td>$809.5</td>
<td>$185.7</td>
<td>9th</td>
<td>Technology Services</td>
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<tr>
<td>2</td>
<td>Teva Pharmaceutical Industries Ltd.</td>
<td>6 Nov 16</td>
<td>2 Jun 22</td>
<td>$420.0</td>
<td>$109.3</td>
<td>2nd</td>
<td>Health Technology</td>
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<tr>
<td>3</td>
<td>Luckin Coffee Inc.</td>
<td>13 Feb 20</td>
<td>22 Jul 22</td>
<td>$175.0</td>
<td>$31.3</td>
<td>2nd</td>
<td>Consumer Non-Durables</td>
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<tr>
<td>4</td>
<td>BlackBerry Ltd.</td>
<td>4 Oct 13</td>
<td>29 Sept 22</td>
<td>$165.0</td>
<td>$59.5</td>
<td>2nd</td>
<td>Technology Services</td>
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<tr>
<td>5</td>
<td>Granite Construction Inc.</td>
<td>13 Aug 19</td>
<td>24 Feb 22</td>
<td>$129.0</td>
<td>$21.7</td>
<td>9th</td>
<td>Industrial Services</td>
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<td>6</td>
<td>Endo International plc.</td>
<td>14 Nov 17</td>
<td>23 Feb 22</td>
<td>$113.4</td>
<td>$20.9</td>
<td>3rd</td>
<td>Health Technology</td>
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<tr>
<td>7</td>
<td>Walgreens Co.</td>
<td>10 Apr 15</td>
<td>7 Oct 22</td>
<td>$105.0</td>
<td>$31.1</td>
<td>7th</td>
<td>Retail Trade</td>
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<tr>
<td>8</td>
<td>Novo Nordisk A/S</td>
<td>11 Jan 17</td>
<td>27 Jun 22</td>
<td>$100.0</td>
<td>$31.7</td>
<td>3rd</td>
<td>Health Technology</td>
</tr>
<tr>
<td>9</td>
<td>Stamps.com, Inc.</td>
<td>13 Mar 19</td>
<td>24 Jan 22</td>
<td>$100.0</td>
<td>$17.3</td>
<td>9th</td>
<td>Commercial Services</td>
</tr>
<tr>
<td>10</td>
<td>Mattel, Inc.</td>
<td>24 Dec 19</td>
<td>2 May 22</td>
<td>$98.0</td>
<td>$14.8</td>
<td>9th</td>
<td>Consumer Durables</td>
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<td><strong>Total</strong></td>
<td></td>
<td></td>
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<td><strong>$2,214.9</strong></td>
<td><strong>$523.4</strong></td>
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</tr>
</tbody>
</table>

*NERA Recent Trends in Securities Class Action Litigation: 2022
Full-Year Review*
Banking Sector Under Stress
March Madness

A TIMELINE OF THE CRISIS

March 04
- Silvergate Exchange Network was discontinued

March 08
- Silvergate Bank was announced to shut down
- Silicon Valley Bank disclosed a loss of $1.8 billion
- Credit Suisse delayed its annual report

March 11
- Stablecoin USDC dropped to US$0.878874

March 10
- Federal Deposit Insurance Corporation stepped in and took over SVB

March 09
- SVB's shares dropped 60%

March 12
- The New York-based Signature Bank was closed at the order of state officials

March 13
- Many US bank stocks took a major hit while USDC was moving back towards its $1 peg

March 14
- Credit Suisse's stocks plummeted by 24% by the end of the day due to a panicked sell-off

March 19
- UBS agreed to take over Credit Suisse for more than $3 billion

March 17
- SVB filed for Chapter 11 Bankruptcy

Source: Bitget Academy
April 21
Moody’s downgrades 11 regional banks due to higher interest rates

April 24
First Republic releases alarming Q1 earnings and is “pursuing strategic options,” triggering steep stock declines

April 24
Federal Reserve says it failed to take forceful action on SVB in its postmortem

May 1
First Republic is sold to JP Morgan. Second largest bank failure in US history

May 3
PacWest announces intention to sell itself. PacWest and other regional banks have steep stock declines

May 4
First Horizon and TD Bank call off proposed merger

June
Gloom??
Banks – Under Stress

- Bank and banking failure have been in the news a lot this year
  - Silvergate, SVB, Signature Bank, Credit Suisse, First Republic

- Some early failure tied to crypto but a big driver is higher interest rates and changes in the economy
  - Fed is being proactive

- While some banks are going under, the drivers are different from what happened 10 years ago

- What does this mean for Financial D&O?
  - Rates / Claims

- What role has the media played? Does it even matter?
  - Traditional media, Twitter, Peter Thiel
  - Western Alliance denying it was exploring a potential sale

- Bank officials who served as Fed officials. Does this matter?
  - Greg Becker, CEO SVB + SF Fed board member
Cyber related D&O claims

• D&O claims as a result of Cyber incidence or failure to disclose

• Failing to meet business plan due to impact of Cyber events

• Claims related to cyber related penalties
  • Loss of reputation
  • Losses due to fines
  • Restriction of future business
  • Restatement of results
Emerging issues and trends for Private D&O

- EPLI exposures remain at the forefront for underwriters
  - Diversity and Inclusion policies and actions are important underwriting concerns
  - #MeToo, Higher retentions and separate retentions for California risks.
  - Covid-19 layoffs causing rise in discrimination, harassment and ADA claims

- Bankruptcy/Insolvency
  - While initially increasing in the wake of Covid-19, bankruptcies declined toward the end of ’20 government stimulus (around 25 in ’21- and ’22) before increasing to levels seen at the start of Covid pandemic (71 in March of ’23 vs Covid high of 74 in July of ’20)
  - Interest rate increases/inflation, labor force and supply chain issues contribute to economic uncertainty
  - Trends indicating that private companies are becoming a bigger slice of corporate bankruptcy pie (60% in 1H’22 vs 40% from ’05-’21)
  - Less access to capital markets than public companies

- Merger and Acquisition risk
  - Complex SPAC litigation results in multiple policies being tapped to contribute to losses; i.e., private company run-off, public company go forward, and SPAC D&O

- Emerging Industries (cannabis, crypto, AI)

- Increase in Regulatory vigilance
SPAC/deSPAC

- Impact on rate from disappearance of SPACs
- Distribution/winddown
- Recent tax confusion
- Post-merger bankruptcies
- SPAC-SPAC mergers
SPACs / de-SPACs

• SPAC
  • A special purpose acquisition company, also known as a "blank check company", is a shell corporation listed on a stock exchange with the purpose of acquiring a private company, thus making it public without going through the traditional initial public offering process. (Wikipedia)

• De-SPAC transaction
  • When a SPAC identifies a potential match, they'll begin the acquisition process through a formal letter of intent, which is followed by a due diligence phase and the execution of a merger agreement. (Donnelly Financial)
SPAC/deSPAC Basics

• Special Purpose Acquisition Vehicle (SPAC): vehicle for taking a company public, alternative to IPO, often referred to as “blank check company” i.e. a shell company with no physical assets

• SPAC (blank check company) raises money in an IPO to be merged with private company, usually 2-year deadline for SPAC to invest. Combination referred to as de-SPAC transaction

• SPAC sponsors granted significant consideration, usually 20% of the SPAC’s equity in the merged company

• SPAC IPO investors have the choice of redeeming shares or investing in the now public company. Private Capital in form of Private Investment in Public Equity (PIPE) can be raised to supplement company’s capitalization.
  • Redemptions have increased and PIPE financing have dried up

• SPACs have been in existence for decades but increased exponentially in 2020-21 with 248 in 2020 and 613 in 2021, 2022 has slowed 65 (through May). Average of 20 per year from (2009-19)

• 92 de-SPACs closed in 2020, 213 in 2021 and 16 in thru March of ‘22; over 350 SPACs looking for partners. Many have returned capital to investors
Why are SPACs Important

- Massive increase in SPACs in 2021 but has come back to earth due to economy and heightened regulation
- Viewed as an easier and cheaper alternative to IPO Process
- Wasn’t as heavily regulated
- Was a fringe vehicle but its use exploded in 2020
SPAC Liquidation and Follow-on Issues

- SPACs are liquidating now that suitable merger partners cannot be found within the SPAC lifespan (typically 2 yrs)

- Market conditions have not been favorable to IPOs and SPACs since 1H 2021

- Many SPACs wound down at the end of 2022 to avoid a 1% federal buyback levy—IRS released clarification on Dec 27, 2022 that the levy will not apply to SPAC liquidations

- SPAC sponsors have attempted to keep break-up fees and other (limited) sources of revenue instead of returning to shareholders

Src: Wall Street Journal 2022
Goodwill Write-downs and Bankruptcies

• Recent SPAC mergers targeted smaller, more speculative companies

• 2022 Fed tightening made financing for speculative companies difficult with no relief in sight

• Write-downs occurring now as goodwill created in the merger evaporate

• Boxed, Virgin Orbit, and Pear Therapeutics are latest SPAC deals to go bankrupt

• Arrival, after going public via a SPAC in 2021, is attempting to raise money by merging with another SPAC in 2023 to avoid bankruptcy

Src: Wall Street Journal 2022
The Fall Out


• Claims differ from traditional core SCA suits because in addition to being brought against the surviving public company, also brought against the SPAC, and its sponsor and principals. **Multiple Insurance policies in play**

• SEC Vigilance:
  • Proposed rule changes that **may add significant D&O exposure**; i.e., (1) required disclosures; (2) private company subject to liability under Section 11 of the Securities Act of 1933; (3) elimination of safe harbor for forward looking statements under the PLSRA
  • Enforcement Division activity for misleading statements

• **Industry is prepared** by making rate adjustments for these exposures. Though new market entrants and other factors have caused recent rate deterioration; e.g., Primary pricing for de-SPAC companies typically exceeded $200k/mil from mid ‘20 to Q1’22. Primary pricing, while still historically strong, is closer to $100K/mil on average.

• To Be Continued…
ESG

- What are E, S, G?
- ESG lawsuits – not doing what you said
- Anti-ESG lawsuits
- Anti-ESG investing bills
- FL vs Disney
ESG claims

• Environmental, social, and governance (ESG)
  • Set of standards for a company’s behavior used by socially conscious investors to screen potential investments. Environmental criteria consider how a company safeguards the environment, including corporate policies addressing climate change, for example. Social criteria examine how it manages relationships with employees, suppliers, customers, and the communities where it operates. Governance deals with a company’s leadership, executive pay, audits, internal controls and shareholder rights. (Investopedia)

• Evolving area
• Is this a severity or frequency issue?
• What’s the biggest concern? E, S, or G?
Sustainability proposals are popular...

Sustainability Proposals
Filings are trending down this year compared with 2022, but more are expected to surface.

- Environmental
- Social
- Sustainability Governance

Note: Proposals filed by March 20 for U.S. public companies with annual general meetings in the first six months of the year.
Source: Sustainable Investments Institute
...but anti-ESG measures are growing

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<thead>
<tr>
<th>State</th>
<th>Bill</th>
<th>Status</th>
<th>Type (i.e., Investment Restriction Targeted)</th>
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<td>S.B. 13</td>
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<td>Oklahoma</td>
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<td>Passed House, Read in Senate 05/22</td>
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<td>South Dakota</td>
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<td>Introduce 2/22</td>
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*Florida Governor Rick Scott announced in July 2022 that he plans to propose an anti-ESG bill in the 2023 legislative session that we would classify as a No Social Investment Bill.*

Src: Reuters 2022
Environmental

• This has been around in different forms for a while
  • Climate change lawsuit
  • Pollution

• Now, it’s more on the forefront
  • Greater disclosure brings greater scrutiny
    • Did you do what you said?
  • Carbon credits
  • Dueling science

• SEC is coming out with guidance
Societal

• Hard to define
  • Not everyone agrees… hot button issues – politics / abortion / etc.

• Hard to measure
  • Not all goals are quantifiable
  • Societal norms change

• Once you put it to paper, it opens the door to claims
  • Not doing what you said
  • Actions hurting corporate results and thus stockholders

• Corporate duty
  • Stockholders
  • Workers
  • Society
Governmental

- SEC has gotten much more active
  - Empowered / Aggressive
  - Increased fines
  - Increasing reach to target companies’ clients and vendors
  - Going after companies around disclosure
  - Crypto regulation is far from settled
    - Coinbase claims SEC’s review of IPO rules out SEC’s ability to say operations are unlawful
    - Lawyer defending ex-OpenSea worker for frontrunning listings claims NFTs are not securities and are not technically insider trading

- Will the tax man cometh?
Other ESG Questions

• Regulatory approach may lead to more ESG claims in state than federal courts—see current energy sector Environmental D&O suits

• Is there a time limit for ESG claims? Can this turn into D&O’s reviver statute?

• Can net-zero be measured?

• How do companies balance ESG without running into antitrust issues?