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RT ProExec INSIGHTS

THE TOP TEN D&O STORIES OF 2014

This year was an eventful one in the world of directors' and officers' liability. Many of the changes during 2014 have important implications for 2015 – and possibly for years to come. The list of the Top Ten D&O Stories of 2014 is discussed below with an eye toward future possibilities.

1. FEE-SHIFTING BYLAWS EMERGE AS A POSSIBLE LITIGATION REFORM TOOL

For years, defense advocates have sought to try to curb abusive ligation through reform legislation and other means. However, an interesting new initiative has recently emerged – the attempt to achieve litigation reform through amendments to corporate bylaws.

The possibility of litigation reform through bylaw revision received a substantial boost in May 2014, when the Delaware Supreme Court in the ATP Tours, Inc. v. Deutscher Tennis Bund case upheld the facial validity of a bylaw provision shifting attorneys' fees and costs to unsuccessful plaintiffs in intra-corporate litigation. This development quickly caught the eye of litigation reform advocates, as the adoption of fee-shifting bylaws seemed to offer a way for companies to reduce the costs of and possibly curb burdensome litigation. At the same time, however, shareholder advocates became concerned that these types of bylaws could deter even meritorious litigation.

The controversy that quickly followed over fee-shifting bylaws seemed headed for a swift resolution when the Delaware General Assembly quickly moved to enact on a measure that would have limited the Supreme Court's ruling to non-stock corporations (meaning that it wouldn't apply to Delaware stock corporations). However, the legislature tabled the measure and it will not be acted upon until early 2015.

While the proposed legislation remains pending, institutional investors are mounting a concerted effort in support of legislative action in Delaware "to curtail

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the spread of so-called ‘fee-shifting’ bylaws,” while business groups are conducting a campaign opposing the legislation.

Despite the current uncertainty in Delaware surrounding the issue, a number of companies have gone ahead and adopted some version of a fee-shifting bylaw. Alibaba, one of 2014’s highest profile IPOs, was among several companies that completed offerings during the year and that had adopted fee-shifting bylaws. These developments have triggered calls for the SEC to take action with regard to fee-shifting bylaws.

At the same time, while the debate in Delaware over fee-shifting bylaws has continued, there have been developments in other states suggesting that regardless of what the Delaware legislature ultimately does, the debate over fee-shifting bylaws will go on. Among other things, the Oklahoma legislature has adopted a provision mandating the shifting of fees in derivative suits. The Oklahoma provision specifically applies to derivative suits “instituted by a shareholder” where there is a “final judgment.” In those circumstances, the court “shall require the non-prevailing party or parties to pay the prevailing party or parties the reasonable expenses, including attorney fees...incurred as a result of such action.”

We will closely monitor developments in both the Delaware legislature and in other states as well as any action the SEC may take as it pertains to fee-shifting bylaws.

2. CYBER SECURITY EMERGES AS D&O LIABILITY CONCERN

In a year that began with unfolding news of the massive Target data breach and ended with the malicious cyber intrusion at Sony Corporation, cyber security emerged as one of 2014’s overall top stories. It also became clear during 2014 that — along with the reputational risks and operational integrity issues—cyber security also increasingly represents a potential liability exposure for corporate directors and officers, as highlighted by two sets of lawsuits filed this year.

First, in January 2014, shareholders filed two derivative lawsuits in the United States District Court for the District of Minnesota against certain officers and directors of Target Corp. The two complaints alleged that the defendants were aware of how important the security of private customer information is to customers and to the company, as well the risks that a data breach could present. The complaints allege that the company “failed to take reasonable steps to maintain its customers’ personal and financial information,” and specifically with respect to the possibility of a data breach that the defendants failed “to implement any internal controls at Target designed to detect and prevent such a data breach.”

Second, a shareholder for Wyndham Worldwide Corporation initiated a derivative lawsuit against certain directors and officers of the company, as well as against the company itself as a nominal defendant, related to the three data breaches the company and its operating units sustained during the period of April 2008 to January 2010. The plaintiff alleges that “in violation of their express promise to do so, and contrary to reasonable expectations,” the company and its subsidiaries “failed to take reasonable steps to maintain their customers’ personal and financial information in a secure manner.”

While plaintiffs' lawyers were quick to file these D&O lawsuits, it is not clear that this type of litigation will prove to be successful. In an October 20, 2014 opinion, District of New Jersey Judge Stanley Chesler, applying Delaware law, granted the defendants' motion to dismiss the complaint in the Wyndham Worldwide case. Judge Chesler found that the Wyndham board's refusal to pursue the plaintiff's litigation demand was a good-faith exercise of business judgment, made after a reasonable investigation.

It remains to be seen whether the plaintiffs' lawyers will succeed in exploiting the continuing wave of data breaches as a source of D&O liability. However, it is clear that company boards and senior management will continue to face scrutiny for cyber security issues. SEC Commissioner Luis Aguilar underscored these concerns in a June 2014 speech in which he stressed that "ensuring the adequacy of a company's cybersecurity measures needs to be a part of a board of director's risk oversight responsibilities." He added the warning that "boards that choose to ignore or minimize the importance of cybersecurity oversight responsibility do so at their own peril."

3. U.S. SUPREME COURT SIDESTEPS POTENTIALLY TRANSFORMATIVE SECURITIES LITIGATION ISSUES, BUT ONE MORE POTENTIALLY SIGNIFICANT CASE REMAINS ON ITS DOCKET

For several months earlier this year, all eyes were on the U.S. Supreme Court as we awaited the outcome of the Halliburton case, which potentially could have been a game changer in the world of securities class action litigation. After the Supreme Court released its Halliburton decision, attention shifted to the Omnicare case.

In March 2014, the U.S. Supreme Court agreed to take up the Indiana State District Council of Laborers v. Omnicare case, to determine whether or not it is sufficient to survive a dismissal motion for a plaintiff in a Section 11 case to allege that a statement of opinion was objectively false, or whether the plaintiff must also allege that the statement was subjectively false – that is, that the defendant did not believe the opinion at the time the statement was made.

The Supreme Court's consideration of the Omnicare case will resolve a split in the circuits between those (such as the Second and Ninth Circuits) holding that in a Section 11 case allegations of knowledge of falsity are required; and those (such as the Sixth Circuit, in the Omnicare case) holding that allegations of knowledge of falsity are not required. The case is potentially important because the absence of allegations of knowledge of falsity is a frequent basis for dismissals of Section 11 suits in the Second and Ninth Circuits, where the vast preponderance of securities suits are filed. As it is, the current split would allow cases to go forward in the Sixth Circuit that would not have survived in the Second and Ninth Circuits. The D&O Discourse blog commented that "Omnicare likely will have the greatest practical impact of any Supreme Court securities decision since the Court's 2007 decision in Tellabs." The Court is expected to issue its decision in the case before the end of the current term in June 2015.

4. LARGEST EVER SHAREHOLDER DERIVATIVE SUIT SETTLEMENT REACHED

Until recently, derivative lawsuit settlements rarely involved a significant cash component. The settlements instead usually consisted of an agreement for the company concerned to adopt corporate governance reforms and the payment of the plaintiffs' attorneys' fees. One of the more noteworthy recent developments in the world

of corporate and securities litigation has been the emergence of derivative lawsuit settlements involving a significant cash component.

On November 19, 2014, Activision, which is the maker of the popular videogames "Call of Duty" and "Worlds of Warcraft," announced the $275 million settlement of the shareholder derivative lawsuit that had been filed in Delaware Chancery Court. The lawsuit had been filed in connection with the transaction announced in July 2013 whereby Activision and an entity controlled by Activision's two senior officers acquired over 50% of Activision's outstanding shares from Vivendi S.A., its controlling stockholder, for approximately $8 billion in cash.

In its press release, Activision said that the $275 million settlement amount was to be paid to Activision itself by "multiple insurance companies, along with various defendants." According to the November 19, 2014 Reuters article by Tom Hals, the Activision settlement is "the largest of a shareholder derivative lawsuit," exceeding 2013's $139 million News Corp. settlement.

Shortly after the Activision settlement was announced, news of another massive derivative lawsuit settlement emerged. According to Liz Hoffman's December 1, 2014 Wall Street Journal article, Freeport-McMoRan is nearing a settlement of more than $130 million to resolve a 2013 shareholder derivative lawsuit filed in connection with the company's purchase of two oil-and-gas companies. The settlement would resolve allegations by Freeport's shareholders that the company overpaid when it bought McMoRan Exploration and Plains Exploration & Production companies for a combined $9 billion. The shareholders had alleged that the Freeport board had conflicts of interest while negotiating the company's purchase of the companies.

The Journal article reports that under the proposed settlement agreement, much of the more than $130 million to be paid in the settlement would be paid to the Freeport shareholders in the form of a special dividend. The total amount of the dividend is likely to exceed $100 million. According to the Journal article, "most of the cost of the settlement would be paid for using a special type of insurance policy that covers directors and executives, according to some of the people. Freeport would pay the rest."

These recent settlements underscore the fact that shareholder derivative litigation has become a significant severity risk for companies and their directors and officers – and for their D&O insurers. The News Corp. settlement was funded entirely by D&O insurers and the Activision and Freeport McMoRan settlements are to be funded at least, in part, by D&O insurance.

The rise of jumbo shareholder derivative lawsuit settlements has a number of implications. Among other things, it is a topic that will have to be considered as D&O insurance buyers consider how much insurance they will need to ensure that their interests are adequately protected.

5. IPO'S SURGE, IPO-RELATED LITIGATION EMERGES

2014 was a very strong year for IPOs globally, but in the U.S., where there were more IPOs this year than any year since 2000, this was an "exceptional" year, according to a report from accounting and consulting firm EY. According to the report, there were 288 IPOs completed in the U.S. during 2014 (through December 4, 2014, and inclusive of deals then expected to close by year's end), which represents an increase of 27% over 2013. The U.S.

IPOs raised around $95 billion, which, according to the report represents "new high." By way of contrast, the 2013 U.S. IPOs raised about $62 billion.

The surge in IPO activity in the U.S. is, according to recent academic research, due at least in part to the so-called "IPO on-ramp procedures" in the Jumpstart Our Business Start-Ups (JOBS) Act, enacted in 2012. The JOBS Act's IPO on-ramp procedures are designed to ease the process of going public for "emerging growth companies" (EGCs), which the Act defines as companies with annual revenues less than $1 billion. Under these provisions, EGCs may submit their draft registration statements to the SEC confidentially and only need to disclose their intention to list their shares 21 days before they start investor roadshows. The EGCs can also release just two years of audited financial statements, rather than the standard three, and need only disclose the compensation of the top three executives rather than the standard five.

A concern worth noting it is that an increase in IPO activity will almost certainly translate into an increase in IPO-related securities litigation. Indeed, of the 170 new securities class action lawsuits filed during 2014, 17 of them (10%) involved IPO companies. Twelve of these IPO-related securities suits were filed in the year's second half, suggesting that the IPO-related securities litigation picked up as the year progressed. Given the lag time between the date of an IPO and the date of a securities suit filing, and given the increase in IPO activity in 2013 and 2014, we should expect to see IPO-related securities litigation continue to increase in 2015.

6. MANY BANKS PROSPER BUT PROBLEM INSTITUTIONS REMAIN AND FAILED BANK LAWSUITS CONTINUE TO ACCUMULATE

According to reports from the FDIC, banking institutions in this country continue to improve and are performing better than during the same period a year ago. However, even six years after the height of the financial crisis a significant number of problem institutions remain.

According to the FDIC's latest Quarterly Banking Profile, the agency still rates 329 banks as "problem institutions." (A "problem institution" is a bank that the FDIC ranks as a 4 or a 5 on its 1-to-5 scale of financial stability. The agency does not release the names of the banks its regards as problem institutions.) On a positive front, the number of problem institutions has declined. The number of problem banks is now 63 percent below the post-crisis high of 888 at the end of the first quarter of 2011.

Consideration should be given to the fact that the number of overall banks have declined. As recently as the end of 2007, there were 8,534 institutions reporting to the FDIC. At the end of the third quarter 2014, the number of reporting institutions was down to 6,589, a drop of over 22%. The percentage of problem banks remains surprisingly high given that we are now six full years past the peak of the financial crisis.

As of the latest report on the agency's website, the agency has filed a total of 104 failed bank lawsuits during the current bank failure wave, with 20 suits filed in 2014 alone. The agency's website notes that it has authorized lawsuits in connection with 148 failed banks, suggesting that there are more lawsuits yet to be filed beyond the 104 filed to date. As the bank closures continue to come in, the period during which the FDIC will be filing new failed bank lawsuits extends further into the future.

According to the FDIC, of the 104 lawsuits it has filed, 33 have fully settled and one resulted in a favorable jury verdict. These numbers imply a significant number of pending and as yet unresolved lawsuits that will continue to work their way through the system. There are a number of important implications from this continuing litigation.

First, it seems likely that we will continue to see significant judicial decision-making on issues relating to the liabilities of directors and officers. The failed bank litigation has already led to a number of significant D&O decisions. For example, in July 2014, in connection with a failed bank case pending in Georgia, the Georgia Supreme Court issued a landmark decision discussing the protections available under Georgia law to corporate directors and officers under the Business Judgment Rule.

Second, in connection with insurance coverage litigation that has arisen in conjunction with the FDIC failed bank litigation, we will see further judicial decisions interpreting key D&O insurance policy provisions. For example, there have been a number of interesting decisions addressing the question of whether or not the insured vs. insured exclusion found in most D&O insurance policies precludes coverage for claims brought by the FDIC in its capacity as receiver of a failed bank. So far, the cases have reached differing conclusion on this question, although several recent decisions have held that the exclusion does not preclude coverage.

Third, the pending litigation will continue to weigh on the D&O insurance carriers that are active in providing insurance to commercial banks. The ongoing litigation continues to produce adverse development in these carriers' prior underwriting year results and undermine their current calendar year results.

7. SEC AWARDS LARGEST EVER WHISTLEBLOWER BOUNTY UNDER THE DODD-FRANK WHISTLEBLOWER PROGRAM

According to the latest annual SEC whistleblower program report, there were 3,620 whistleblower reports during the 2014 fiscal year (which ended on September 30, 2014). That represents an increase of 11.8% over the 2013 fiscal year. Overall, there have been a total of 10,193 whistleblower reports since the program commenced at the end of the 2011 fiscal year.

Most significantly, and in what is by far the largest whistleblower bounty award yet under the Dodd-Frank's whistleblower provisions, on September 22, 2014 the SEC announced an award of between $30 and $35 million to a whistleblower who provided original information that led to a successful SEC enforcement action.

One particularly interesting feature of this award is that the whistleblower is a foreign resident. According to the SEC's press release, this is the fourth whistleblower award to a resident of a foreign country, which the agency says "demonstrates the program's international reach." The whistleblower office head is quoted as saying that "whistleblowers from all over the world should feel similarly incentivized to come forward with credible information about potential violations of the U.S. securities laws."

8. BIG CORPORATE SCANDALS MAKE A COMEBACK

While the emergence of financial scandals may be nothing new, a striking number of corporate scandals came to light during 2014. Among the higher profile scandals is that involving Petroleo Brasileiro, S.A. (“Petrobras”). The massive corruption and money laundering investigation of Petrobras and its employees and executives by Brazilian officials has been widely reported in the global financial press. For example, a November 14, 2014 Wall Street Journal article entitled “Petrobras Scandal Widens, Earnings Delayed”, reported that Brazilian federal police had arrested 18 Petrobras employees who allegedly “were part of a bribery and money-laundering scheme that has siphoned hundreds of millions of dollars from the state-owned oil firm into the pockets of employees, contractors and politicians.”

The Petrobras scandal emerged shortly after another high-profile scandal involving another prominent non-U.S. company came to light. When Tesco PLC announced on September 22, 2014 that its previously forecast first-half profit had been overstated by £250 ($408.8 million), the news of the accounting irregularities was “serious,” as Tesco plc’s CEO of less than a month’s standing at the time put it. As bad as the initial announcement was, the news soon grew worse. On October 1, 2014, the company announced that the U.K.’s financial watchdog, the Financial Conduct Authority (FCA), has “commenced a full investigation” of the accounting irregularities at the company. The situation grew bleaker still on October 23, 2014, when the company announced that the amount of the overstatement was actually £263 million pounds ($422 million), rather than the previously announced £250, and that the company’s Board Chair, Richard Broadbent, would be stepping down.

Both the Petrobras and Tesco scandals resulted in the filing of securities class action lawsuits in the U.S., as did the October 2014 disclosure of accounting issues at real estate investment trust American Realty Capital Properties. With respect to the securities lawsuit filings against the company, on October 29, 2014, American Realty issued a press release in which it disclosed the existence of an accounting error and subsequent cover-up relating to its financial statements for the two quarters of 2014. The press release stated that the “error was identified but intentionally not corrected,” and that other adjusted funds from operations and financial statement errors “were intentionally made,” resulting in an overstatement of adjusted funds from operations and understatement of net loss for first three and six months of the year.

According to a December 19, 2014 Wall Street Journal article, American Realty’s former Chief Accounting office, whom the company sacked following its disclosure of the accounting issues, has alleged in a defamation lawsuit that she filed against the company’s CEO that the CEO “ordered subordinates to manipulate financial results at his firm.”

General Motors also experienced a massive scandal over the faulty ignition switches installed in its vehicles, and while that was a scandal of a different sort, it did also result in a securities class action lawsuit.

These scandals underscore the treacherousness of the landscape in which D&O insurers must operate. It doesn’t take many of these kinds of problems to make D&O underwriters skittish.

9. ENVIRONMENTAL ISSUES RE-EMERGE AS A D&O LIABILITY CONCERN

During the financial crisis, many issues and concerns that previously loomed large moved further down the agenda. Environmental liability issues are among these concerns.

In recent months, there have been a number of lawsuits filed based on alleged misrepresentations of the defendant company's environmental compliance. As the derivative lawsuit filed in May 2014 against the board of Duke Energy highlights, environmental issues apparently are becoming an area of increasing focus for plaintiffs' lawyers.

In addition, it does seem as if the plaintiffs are getting some traction in securities suits based on environmental compliance disclosures. For example, on August 7, 2014, the securities suit filed against Exide Technologies and certain of its directors and officers based on the defendants' allegedly misleading statements about the company's compliance with environmental regulations became the latest environmental disclosure securities suits to overcome the initial pleading hurdles.

The survival of the environmental disclosure securities suit against Exide comes closely after the Second Circuit's recent ruling in the JinkoSolar securities suit, in which the appellate court reversed the lower court dismissal of the suit and concluded that the plaintiffs' allegations concerning the alleged deficiencies of the defendant company's environmental compliance disclosures were sufficient.

These cases underscore the fact that reporting companies' environmental compliance disclosures are facing increasing scrutiny, making the quality of the environmental disclosures increasingly important.

In addition to these issues involving traditional environmental liability concerns, there may be reason to be concerned that D&O liability issues could arise from alarms over global climate change. In a series of letters sent to board members of various major energy companies and to a number of participants in the directors and officers liability insurance industry, three environmental groups contend that climate change denial by energy industry representatives presents a risk of personal liability to the individual energy company board members. The letters also contend that "the threat of future civil or criminal litigation could have major implications for D&O liability insurance coverage." The letters were sent in late May by three environmental organizations – Greenpeace International, the World Wildlife Fund International and the Center for International Environmental Law – to board members at 32 energy companies and to 44 participants in the D&O insurance industry.

10. U.S. LAWSUIT FILINGS IN THE WAKE OF OVERSEAS REGULATORY INVESTIGATIONS GREW DURING THE YEAR

The lawsuits investors filed in U.S. courts related to the Petrobras scandal are interesting on many levels. Among other things, the Petrobras lawsuits are representative of the growing phenomenon of U.S. securities litigation following the disclosure of a bribery or corruption investigation. Another securities suit filed about the same time, involving Cobalt International Energy also followed after the announcement of a bribery investigation, as did the lawsuit filed in December 2014 against Sanofi, the lawsuit filed in August 2014 against Key Energy Services, and the lawsuit filed in March 2014 against Hyperdynamics Corporation.

While as a general matter there is nothing new about the filing of these kinds of follow-on securities lawsuits, there is one aspect of the Petrobras lawsuit filings that is particularly interesting and that may represent an emerging securities litigation filing trend. That is, the Petrobras lawsuits involve U.S. securities suit filings against a non-U.S. company based on disclosure surrounding a regulatory investigation outside the U.S.

In the past, the U.S. has been the most active country, particularly with respect to bribery investigations. However, several countries have recently become more active in enforcing their own anti-bribery laws, including, among others, China, Canada, and Brazil. These investigations have not only led to an increase in anti-corruption enforcement actions, but also in many cases have led to follow-on civil litigation as well.

There were a number of these kinds of follow-on civil actions filed in the U.S during 2014. For example, in addition to the Petrobras lawsuit, in January 2014, Nu Skin Enterprises was hit with a securities class action lawsuit following news of an alleged investigation in China of the company's allegedly fraudulent sales practices. Similarly, in June 2014, China Mobile Games and Entertainment Group was hit with a securities class action lawsuit following the news of an anti-bribery investigation in China involving company officials.

These cases all involve investigations in the respective companies' home countries. However, for many companies, their most significant regulatory risk may be outside of their home country, and as the $489 million fine that GlaxoSmithKline paid to Chinese regulators earlier in September 2014 demonstrates, the foreign country regulatory exposures are very substantial. Further complicating matters is that regulatory investigations increasingly involve cross-border collaboration and cooperation of multiple countries' regulatory and enforcement authorities. The Libor interest rate manipulation and the foreign currency manipulation investigations both involved significant cross-border collaboration, as has the many trade sanctions violations investigations.

As overseas regulatory activity continues to increase, the incidence of follow-on civil lawsuit filings is likely to continue to grow as well. An interesting related question is whether the increase in regulatory activity will lead to increased civil lawsuit filings in courts outside of the United States. The inaccessibility of U.S. courts to investors who purchased their shares of non-U.S. companies on non-U.S. exchanges (as a result of the U.S. Supreme Court's Morrison decisions) may cause these investors to seek to pursue remedies in their own countries, or to seek legal reform to reduce procedural barriers to pursuing these kinds of claims.

These developments raise important issues about the liability exposures of the potentially affected companies as well as for their directors and officers. The liability exposures include not only the potential regulatory and enforcement risk but also the possibility of follow-on civil actions, brought by shareholders or others. The "others" that might bring claims include supervisory board members in those jurisdictions with the dual-board structure.

These issues in turn have important D&O insurance implications. The issues also present a particularly difficult challenge for D&O insurance underwriters involved in underwriting companies outside the U.S. as they must attempt to understand and anticipate these kinds of actions from regulators and how they may affect the companies under consideration.

CONCLUSION

There is always a lot going on in the world of D&O liability insurance and 2014 was no exception in that regard. But what is interesting is how so many of 2014's key developments foreshadow coming events in 2015 and beyond. For example, the Delaware legislature's ongoing consideration of fee-shifting by law legislation and the U.S. Supreme Court's review of the Omnicare case, among many other pending issues, will only be resolved as 2015 unfolds.

For that reason, we will have to wait to see the implications of many of 2014's key events. The one thing that seems certain is that 2015 will be an eventful year.

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