



Casualty Actuarial Society

2009 CAS Spring Meeting

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 - OakBridge is an insurance intermediary specializing in management liability insurance placements for public and private companies, as well as private equity and venture capital funds and other alternative investment vehicles.
- 1995 to 2005: President, Genesis Professional Liability Managers, Inc. (a Berkshire Hathaway company)
- Previously, Partner, Ross, Dixon & Bell, Washington, D.C.
- Professional Liability Underwriting Society (PLUS): President (2004), Board Member (1999-2005), Foundation Board Member (current)
- Co-Chair, PLUS D&O Symposium, 2007 through 2009
- Author, *The D&O Diary* (Internet weblog)

Subprime-Related Shareholder Litigation

Subprime-Related Securities Class Actions

180 Total, including 101 in 2008

2007: 40 SCAs

2008: 101 SCAs

2009: 38 SCAs

21 Auction Rate Securities Investor Actions

Shareholders' Derivative Lawsuits: 27

ERISA Lawsuits: 21

Source: The D&O Diary , as of April 17, 2009

The Evolving Litigation Wave: Defendants

- 2007:
 - Mortgage loan originators, home builders
 - Investment Banks
- 2008:
 - Bond insurers, mortgage guarantee insurers
 - Student lenders, commercial lenders, commercial construction
 - Broker-Dealers
 - Securities Issuers (asset backed securities; preferred or subordinated securities)
 - Foreign domiciled financial institutions
- 2009:
 - *More* Securities Issuers
 - Toxic Assets on the Balance Sheet

The Evolving Wave: Gatekeeper Claims

- Securities Underwriters
- Rating Agencies
- Accounting Firms
 - New Century Financial Corp. Trustee’s Claims Against KPMG
 - Securities Class Action Litigation: New Century, Countrywide

“Subprime?": No, Credit Crisis Related

Student Lending:

SLM Corporation (Sallie Mae)

First Marblehead Corp.

Corporate Debt:

iStar Financial

Construction Project Financing:

Perini Corp.

Credit Cards:

American Express

2008 Securities Lawsuits: Non-U.S. Defendants

- 34 of the 2008 SCAs vs. Non-U.S. Defendants (15%)
- 17 different Countries
- Countries Most Frequently Targeted:
 - Canada (7)
 - China (5)
 - Switzerland (4)
 - U.K. (3)
- Of the 34 SCAs, 13 were subprime/credit crisis-related

2009: Non-U.S. Activity Continues

- First Quarter 2009
 - 13 out of 58 Securities Class Actions vs. foreign-domiciled companies (22%)
 - Many of the 13 involved the same companies
 - E.g., five of the 13 are against U.K. companies, but only two U.K. companies named (RBS and Barclays)

Fall 2008: “Inflection Point”

- “New Wave” Credit Crisis Lawsuits:
 - Exposure to Credit Crisis Casualties
 - E.g., Constellation Energy; Reserve Fund
 - Wrong Way Bets on Currencies, Commodities
 - E.g., Sadia, S.A.; Britannia Bulk
 - Non-Financial Companies with Toxic Assets on Balance Sheet
 - NextWave Wireless, Perrigo Company

The “Dead Bank” Litigation

- 25 Bank Failures in 2008
 - Most since 1994 (last failed bank era)
 - 8 already sued in SCAs (even though only 11 public cos.)
- 2009: Already 25 Bank Failures (as of 4/20/09)
 - National Bank of Commerce, Berkley IL: Failure due to exposure to Fannie Mae, Freddie Mac
- Failed Banks = Failed Bank Litigation

Early Returns

Most cases only in earliest stages

Dismissal Motions:

- **Countrywide, New Century** survived motions to dismiss
- **Standard Pacific, NovaStar, Radian SCAs** dismissed with prejudice
 - Is it time to ask whether these cases are faring poorly?

Settlements:

- Merrill Lynch: \$550 mm total (SCA: \$475 mm; ERISA: \$75 mm)
- Other settlements more modest (Luminent: \$8 mm; WSB Financial \$4.65 mm)

ERISA Cases:

- Motions to Dismiss: Granted in Huntington Bankshares (S.D. Oh.), denied in NovaStar ERISA action (W.D. Mo.)

How Far Along Are We?

First Lawsuit of Current Wave: February 2007 (New Century Financial)

Compare to Cadwalader Litigation:

- Initial complaint filed in October 2007
- Counsel in Commercial Mortgage Securitization
- Transaction Took Place in 1997

Possible Future Directions?

1. Additional Disclosure or Suitability Actions against Financial Sector
2. Disclosure Actions Outside the Financial Sector
3. Actions Against the Rating Agencies
4. Actions Against the Investment Banks for Securitization Errors
5. Lawsuits Involving Other Kinds of Credit Exposures: Credit Cards, Auto Loans, Commercial Mortgages, Student Loans
6. Lawsuits involving other Securities and Instruments: e.g., Credit Default Swaps, Subordinated or Preferred Securities, etc.



Credit Crisis Litigation: Who Will Pay for All This?

- Different Lines of Insurance Potentially Triggered
 - D & O Liability Insurance
 - Fiduciary Liability Insurance
 - Investment Management E & O
 - Bankers' Professional Liability Insurance
- Complication #1: Large Bank's Insurance Structures
- Complication #2: Bankruptcy
- Complication #3: Simultaneous Civil Litigation, Criminal Investigations, Regulator Action

THE D&O DIARY

A PERIODIC JOURNAL CONTAINING ITEMS OF INTEREST FROM THE WORLD OF DIRECTORS & OFFICERS LIABILITY, WITH OCCASIONAL COMMENTARY

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More About Life Sciences Companies and Securities Litigation

Posted on April 16, 2009 by **Kevin LaCroix**



In prior posts (most recently [here](#)), I discussed the fact that while litigation against the financial sector has predominated recent securities lawsuit filings, plaintiffs' attorneys also have targeted other sectors, including in particular the life sciences sector. An April 2009 memorandum by **David Kotler** of the **Dechert** law firm entitled "Dechert Survey of Securities Fraud Class

Actions Brought Against Life Sciences Companies" ([here](#)) takes a closer look at the 2008 life sciences securities lawsuits and analyzes the allegations on which the claims are based.

The memo notes that the 23 securities lawsuits filed against life sciences companies in 2008 is about the same number as the 25 life sciences securities lawsuits filed in 2007. However, the report also notes that the 2008 life sciences securities lawsuit filings represented only 10% of all securities lawsuit filings during the year, compared to 14% in 2007. The report attributes this slight drop to the fact that securities lawsuits in the financial sector "skyrocketed" in 2008.

The memo reports that, similarly to prior years, half of the life sciences companies sued in 2008 were very small, with market capitalizations below \$250 million. However, by contrast to 2007, when nearly half of the life sciences companies sued had market capitalizations greater than \$10 billion, on 2008 "only 13% of total actions were brought against the largest companies."

With respect to the allegations raised in the new lawsuits, the memo notes that in 2008, the majority of claims "pertained to accounting improprieties and/or misstated or misleading financial results and forecasts, by comparison to the 2007 filings, where industry-specific issues such as product safety,

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