

D&O Insurers face increasing levels of opt-out litigation



As further evidence of the extraordinarily challenging securities class action litigation landscape facing Directors & Officers Liability insurers and driving the current firming rate environment facing buyers, a new report notes that opt-out rates in securities class action settlements have more than doubled over the last four years. *Opt-Out Cases in Securities Class Action Settlements: 2014-2018 Update*, released by Cornerstone Research in conjunction with Latham & Watkins, LLP, also confirms that class settlements greater than \$20 million were over 10 times more likely to have opt-outs than settlements of less than \$20 million.

As most people active in the D&O arena know, securities class action filings have increased significantly in recent years and continue to be filed at near-record rates. Most such actions end in a dismissal or settlement and class members have the ability to opt out of settlements in order to try to achieve greater recovery outside the class by filing their own action.

Opt out litigants may also be motivated to bring separate actions by the prospect of reaching a quicker resolution, or to attempt to have the case heard in a more friendly venue. However, doing so comes with no guarantee of success and with notable cost burdens that aren't able to be shared, as would be the case in a class action.

The Cornerstone report indicates that between 1996 and 2014, opt out plaintiffs received an additional 13% over other class plaintiffs, while in 6 cases that opt out premium was in excess of 20%.

Recent court rulings on tolling the statute of repose were expected to make it harder for claimants to opt out of settlements but may have had the unintended effect of resulting in more pre-emptive opt-outs by large claimants such as pension funds and other institutional investors who can afford the legal expense of pursuing their own case outside of the class.

As we have noted in previous editions of the Business Bulletin, the decrease in the number of public companies and the increasing number of securities class action filings has caused the likelihood of a claim to rise sharply in recent years which, unsurprisingly, is driving the challenging marketplace conditions buyers are facing today. Increasing opt-outs will only add to the volume of claims and costs faced by insurers in this space.