EXECUTIVE RISK SOLUTIONS

JULY 2025

Quarterly Update

Table of Contents

+ *SEC Restricts Authority to Initiate Formal Investigations*

In 2009, the Securities and Exchange Commission (SEC) delegated authority to issue formal orders of investigation to the Director of the Division of Enforcement at the SEC. This shift in authority followed the 2008 financial crisis and came in the wake of the Bernie Madoff Ponzi scheme. Originally scheduled to last one year, this delegation of authority was subsequently extended.

In early 2025, SEC enforcement staff were advised that the Commission itself would now have to approve all formal orders of investigation, which are required to issue subpoenas for testimony or document production. The final rule eliminating the delegation of authority became effective in March 2025 without any notice or comment period.

According to the SEC, the change "is intended to increase effectiveness by more closely aligning the Commission's use of its investigative resources with Commission priorities." SEC staff will still be able to conduct informal investigations and request the voluntary production of documents.

"We are returning to how the Division operated for most of its existence, ensuring the Commission has the utmost insight into the cases we bring throughout the process," an SEC spokesperson said in a written statement. By removing the delegated authority, the Commission appears to believe it will get earlier insight into the investigations being conducted and an early ability to assess the merits of issuing a formal order of investigation.

Following the rule change, SEC enforcement staff will be required to prepare a memo that recommends the issuance of a formal order, and others at the SEC (including the Commissioners) will have an opportunity to provide feedback on the recommendation. It remains to be seen how much of an impact this will have on the timing and pursuit of proposed investigations.

+ *Fourth Circuit Finds Bump-up Exclusion Bars Coverage for Merger Claims*

Ten years after the merger of Willis and Towers Watson, coverage litigation regarding the settlement paid to shareholders who challenged the terms of the deal has finally concluded. In the end, after two trips to the Fourth Circuit Court of Appeals, indemnity coverage for the $90 million paid in settlement was found to be excluded. Specifically, the bump-up exclusion in Towers Watson's D&O policy was held to bar indemnity coverage because the overall result of the settlement was that shareholders were paid additional money. "After giving all the words in the bump-up exclusion their reasonable and ordinary meaning, the Court concludes that the settlements 'represent' amounts that 'effectively increased' the consideration for the merger, such that the bump-up exclusion unambiguously applies to the settlements." And, to add insult to injury, coverage for the portion of the settlement that went toward the shareholders' attorney fees was also found to fall outside the coverage afforded by the D&O policies at issue. "The district court rightly observed that regardless of how the additional consideration was distributed once paid to the beneficiaries, it nevertheless constitutes in toto an increase in the consideration paid for the merger." *Towers Watson & Co. v. National Union Fire Insurance Co.*, 138 F.4th 786 (4th Cir. 2025).

+ *Short-Seller Report Deemed Insufficient to Prove Loss Causation*

In another recent opinion issued by the Fourth Circuit Court of Appeals, shareholders seeking to rely on a short-seller report to prove loss causation were unsuccessful. After the federal district court in Maryland dismissed all claims brought by shareholders, the appellate court affirmed the ruling.

Shareholders of technology company IonQ, Inc. originally brought suit in May 2022 after the issuance of an online report from Scorpion Capital LLC which caused IonQ stock to fall in price. The report alleged IonQ's business was a brazen hoax and that statements about their technology were untrue. However, the report disclaimed the accuracy of its conclusions and disclosed that Scorpion Capital held a short position in IonQ stock, meaning it would benefit financially from the stock decreasing in price.

Nevertheless, shareholders attempted to use the report as their primary piece of evidence. Causes of action under Section 10(b), Rule 10(b)(5), Section 14(a), Rule 14a-9 and Section 20(a) were asserted by shareholders, alleging they were misled about IonQ's technology, capabilities and business prospects.

"To plead loss causation, a plaintiff must plausibly and with sufficient specificity allege that (1) the exposure of the defendant's misrepresentation or omission, i.e., the revelation of new facts suggesting the defendant perpetrated a fraud on the market, and (2) such exposure resulted in the decline of the defendant's share price." In adopting the Ninth Circuit's rationale, the Fourth Circuit held that "it is not enough to plead that some allegation of fraud hit the market if it is implausible to believe that said allegation revealed any new truth to the market." While they declined to adopt a categorical ban on using short-seller reports to plead loss causation, one can only hope two Circuit courts rejecting this approach will dissuade similar claims being filed based on such flimsy evidence. *Defeo v. IonQ, Inc.*, 134 F.4th 153, (4th Cir. 2025).

+ *Remedial Work Found to Violate Voluntary Payments Clause*

Voluntary payments clauses are included in nearly all liability policies as a way to prevent policyholders from impairing the rights of an insurer obligated to defend a claim. A case out of New York from earlier in the year involving an errors and omissions (E&O) liability policy provides an example of how they can be perilous to coverage.

The policyholder in this case (Tindall Corp.) designed and manufactured precast concrete for large construction projects. They were hired by a general contractor to design, manufacture, deliver and install precast concrete members of a water treatment plant. Shortly after work began, an inspector identified issues with the concrete products installed at the site. An engineering firm was hired to determine the extent of the problems and whether a remedy existed to correct the issues. The parties agreed upon a remedy and implemented the plan.

Subsequently, after all work was complete, the policyholder submitted a notice of circumstances which could give rise to a claim under its E&O policy. In response, the E&O insurer denied coverage for costs incurred by the engineering firm to find a remedy and additional costs by the policyholder in completing the project.

To support its denial of coverage, the insurer alleged that (1) the remedies applied were improvements beyond the original scope of work, (2) notice was untimely and (3) the policyholder admitted liability in violation of the voluntary payments provision in the policy. The court rejected the insurer's position that the remedies applied to correct issues with the manufactured concrete were upgrades. "Berkley's interpretation of the term 'improve' would necessarily exclude coverage for any correction of services, which is the heart of its liability coverage...Berkley's interpretation would render the policy worthless." However, it went on to find the policyholder violated the voluntary payments provision. "The undisputed evidence shows that as early as September 2019 Tindall acknowledged to PWD that it had supplied non-compliant double-tee beams. From September 2019 through December 2019 Tindall repeatedly made admissions of liability and proposed remedies for its non-compliance with the project specifications. It was not until April 13, 2020 that Tindall notified Berkley of a possible claim under the Policy. At that time, Tindall's liability for the alleged professional errors and its plan for remediating the non-compliant products was presented to Berkley as a *fait accompli*."

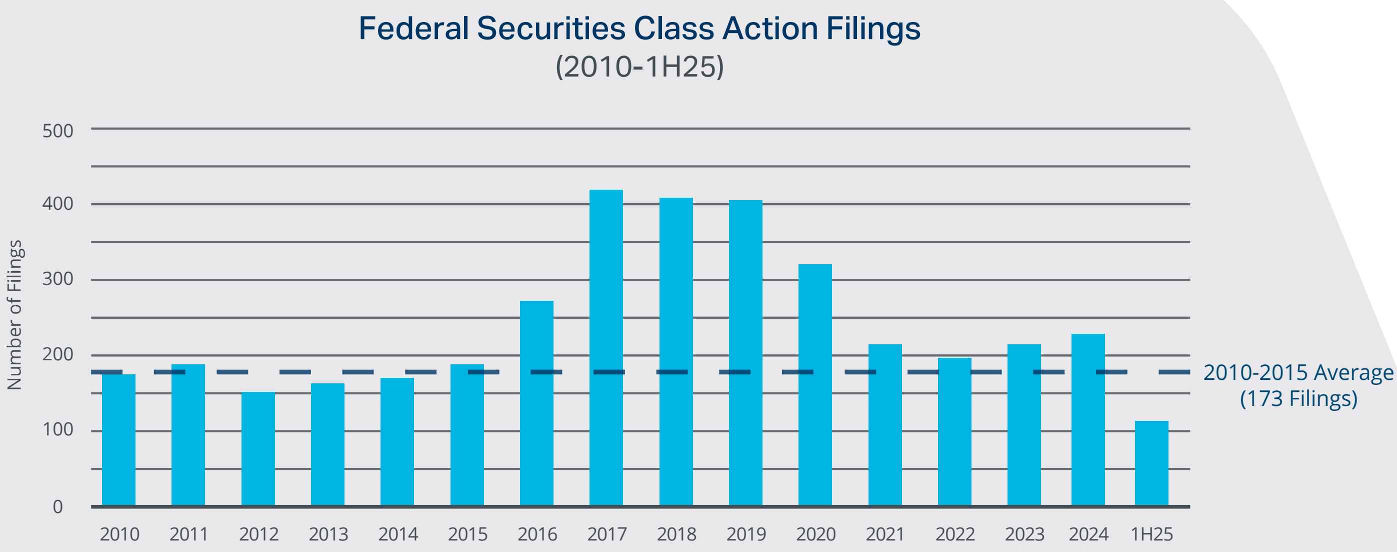
Remedial Work Found to Violate Voluntary Payments Clause, continued

As such, the policyholder's admission of liability without the consent of the insurer acted to bar coverage. "[T]he policy provision was clear in that Tindall was barred from voluntarily making any payments or assuming or admitting liability without the prior consent of Berkley."

Our goal in highlighting this case is to remind policyholders of their obligation and to ensure the prompt discussion of claims or potential claims before situations like this occur. In this case, the insured could have avoided this denial of coverage by submitting notice earlier and working with the insurer on how to remedy the defects, rather than doing so on its own. *Tindall Corp. v. Berkley Assurance Co.*, 2025 WL 677028 (W.D.N.Y February 21, 2025).

D&O Filings

+ As we have previously reported, D&O Federal Securities Class Action Claims increased in 2024 for the second time in as many years, representing a 2022 to 2024 increase of 13%.
+ In 1Q 2025, D&O claim activity increased noticeably, with 67 total Federal Securities Class Action Claims being filed.
+ Filings did slow down in 2Q 2025, bringing the 1H 2025 total to 111, which would equate to a full-year total of 222.
  — Although this would represent no year-over-year change, it would still be 28% higher than the 2010-2015 average of 173 claims per year.



D&O Pricing and Outlook

+ Although D&O litigation remains elevated over historical levels, overall market conditions remain favorable.
  — The downward pressure we saw on pricing (and, in certain instances, retentions) over the last year and a half has slowed down, but capital remains plentiful and competitive.
+ The current pricing environment continues to be a story of “supply and demand.” New capacity has entered the market (more supply) during a period where IPOs and de-SPAC transactions have declined sharply (less demand). This combination of events has created more competition for business.
+ Carriers do remain cautious regarding companies with near-term capital needs or a high likelihood of M&A.
+ Some carriers are struggling to build critical mass, and a handful have exited the market. Partnering with strong and stable D&O capital providers should remain an important consideration.

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