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## CASES OF INTEREST

### *Securities Class Action and Derivative Suit Containing Different Allegations Both Afforded Covered*

As an addendum to the cases highlighted in our April 2024 Newsletter regarding inter-related claims and coverage litigation before the U.S. District Court for Maryland warrants its own case summary. In *U.S. District Court for Maryland v. ...*, the court found coverage for Maryland warrants its own case summary. In *U.S. District Court for Maryland v. ...*, the court found coverage for Maryland warrants its own case summary. In *U.S. District Court for Maryland v. ...*, the court found coverage for Maryland warrants its own case summary.

Notice of the securities class actions was provided under the insured's 2016-2017 D&O program, while the derivative claims and SEC investigation were noticed under the 2017-2018 D&O program. The primary insurer in the 2017-2018 program took the position that all of the above matters involved the same Wrongful Acts or Interrelated Wrongful Acts, meaning coverage was not available under the 2017-2018 D&O program. This latter program also included ... class actions and derivative demands (all of which predated the 2017-2018 policy period), along with a Prior

While this Court recognizes that the class ... governmental investigations to be useful evidence ... focus on overlapping, but not identical, time periods, ... YfYbhi dUfhYgZ ... YfYbhi hYcfYg cZ JUV mcb X YfYbhi YjXYbWZ UbX gY X YfYbhi fY JZ hY i fh fY JX cb hY gUa Y fYUgcb b hc bX hY GdYW W U hcb UbX DfJcf Bch W Yi W gJcbg bUdd W V Y

Here, a Single Claims provision in the policies ended up being what preserved coverage under an entire separate program of insurance. Challenging insurers to justify denials and even forcing them to litigate the issue when policyholders, as these cases indicate. A thorough discussion with an insured's broker and counsel is always a good idea when assessing which policies a *UmiU c fX W j YfU Y Zc f U dUfh W Uf W gY*" *Endurance American Insurance Co. v. Under Armour, Inc.*, 2024 WL 1640565 (D. Md. April 15, 2024).





After two former employees were sued for misappropriation of trade secrets and breach of non-compete agreements, they demanded [b]X[ ]a b] W[h]c[b] Z[ ]ca` h[ ]Y` Z[ ]fa Yf` Ya d`cnYf` gi ]b[` h[ ]Ya " 5g` nci` a ][ \h[ ]Yl dYVW h[ ]Yf` XYa UbXg` k YfY` refused, and they were forced to litigate the dispute. The Delaware Court of Chancery looked to the former employer, Unisys, Inc.'s Articles of Incorporation UbX` 6mUk g` h[ ]c` XYhYfa ]bY` k \Yh[ ]Yf` ]bX[ ]a b] W[h]c[b] was warranted. Unisys asserted the former Ya d`cnYg`k YfY` bchX]fYVtcf`cf`c` Wfg`Ybh]hYX`h[ ]c` ]bX[ ]a b] W[h]c[b]"

Noting that Delaware policy supports the approach cZ fYgc`j ]b[` Ua V][ i ]m]b` ZUj cf` cZ ]bX[ ]a b] W[h]c[b] and advancement, the court found the refusal by Unisys to be in derogation of contractual obligations set forth in their governing documents. "Under Delaware law, the 'by reason of the fact' standard, or h[ ]Y`c` V]U` WdUW]mghUbXUfXZ` ]g` ]bhYfdYhYX` VfcUX`m UbX ]b ZUj cf`cZ]bX[ ]a b] W[h]c[b UbXUXj UbW[ ]a Ybh`h[ ]Y` inquiry is not focused on when the individual seeking advancement allegedly misused the information; rather, the court looks to when and in what capacity h[ ]Ymcf][ ]bU`mUW[i ]fYX` ]h`

employees  
 Based on the evidence presented, the court agreed the claims being asserted against the former employees were by reason of their service at Unisys subsidiaries. The court concluded the opinion by reminding the parties that no Delaware corporation Gilbser, et. t a. v. t UnisysCcorporatio ,( )fj-7.1804 and that when one does, it has broad powers and Yl ]V][ ]m]h[ ]c` hU]cf` UXj UbW[ ]a Ybh`h[ ]c` ]h[ ]g`bYXXg`" K \Yb` a corporation mandates advancement to the full Yl h[ ]Ybh`cZ k \Uh ]g` dYfa ]gg]V`Y` i bXYf` h[ ]Y` g]h[ ]i h[ ]z` ]h` a i ght h[ ]Y`U` h[ ]YbXUbh`= V][ ]h[ ]c]bg`h[ ]Uh` cA` Z` h[ ]Uh` XYV]k ]cb"



## Derivative Cases Involving Parallel Suits or SEC Actions More Likely to Include Monetary Settlement

Cornerstone Research recently issued a study analyzing the settlements of shareholder derivative cases that involved conduct also being challenged in a federal securities class action. The authors note that 47% of securities class action settlements between 2019 and 2023 were accompanied by parallel shareholder derivative actions. They noted a 36% premium for cases with an accompanying derivative suit. Of the 110 parallel derivative settlements, only 26% included a monetary component. "Overall, derivative settlements with a monetary component are associated with higher securities class action

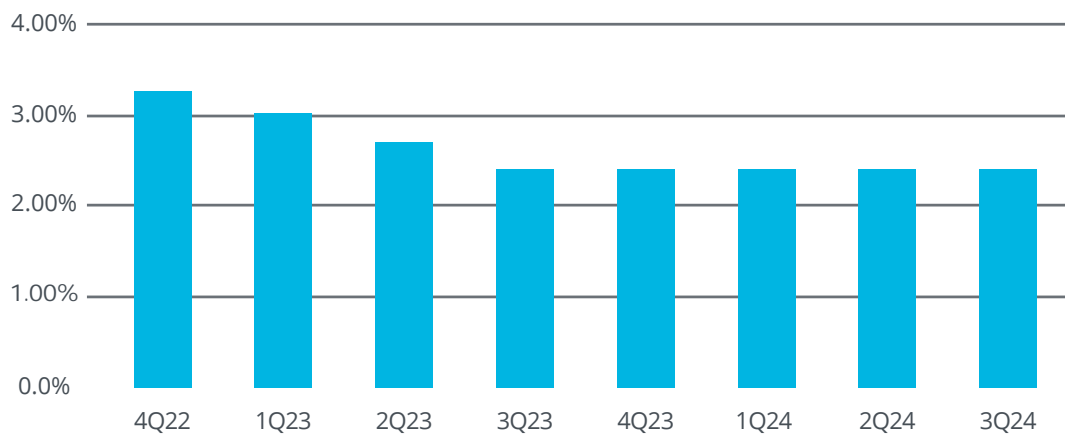
settlements, consistent with the view that the monetary settlements correlate with the size of the *W/gY`cf`h\Y`ghfYb[ h`cZ`h\Y`i bXYf`n]b[ `U`Y[ Uh]cbg`*. Similarly, derivative settlements with a monetary component were found more likely to be associated with an SEC action or criminal charges against the *XYZYbXUbbg`cf`fY`UhYX`dUfh]Yg`" H\YgY` bX]b[ g`UfY` \UfX`mU`gi fdf]gY`Zcf`dfUW]h]cbYfg`]b`h`g` Y`X`"K ]h` Ub`Yj Yf![ fck ]b[ `g]UV`Y`cZ`d`U]bh] g` fa g`cc\_]b[ `hc`* make a name for themselves, follow-on derivative suits appears to now be the norm.

## Professional Services Exclusion Bars D&O Coverage in Anti-Trust Litigation

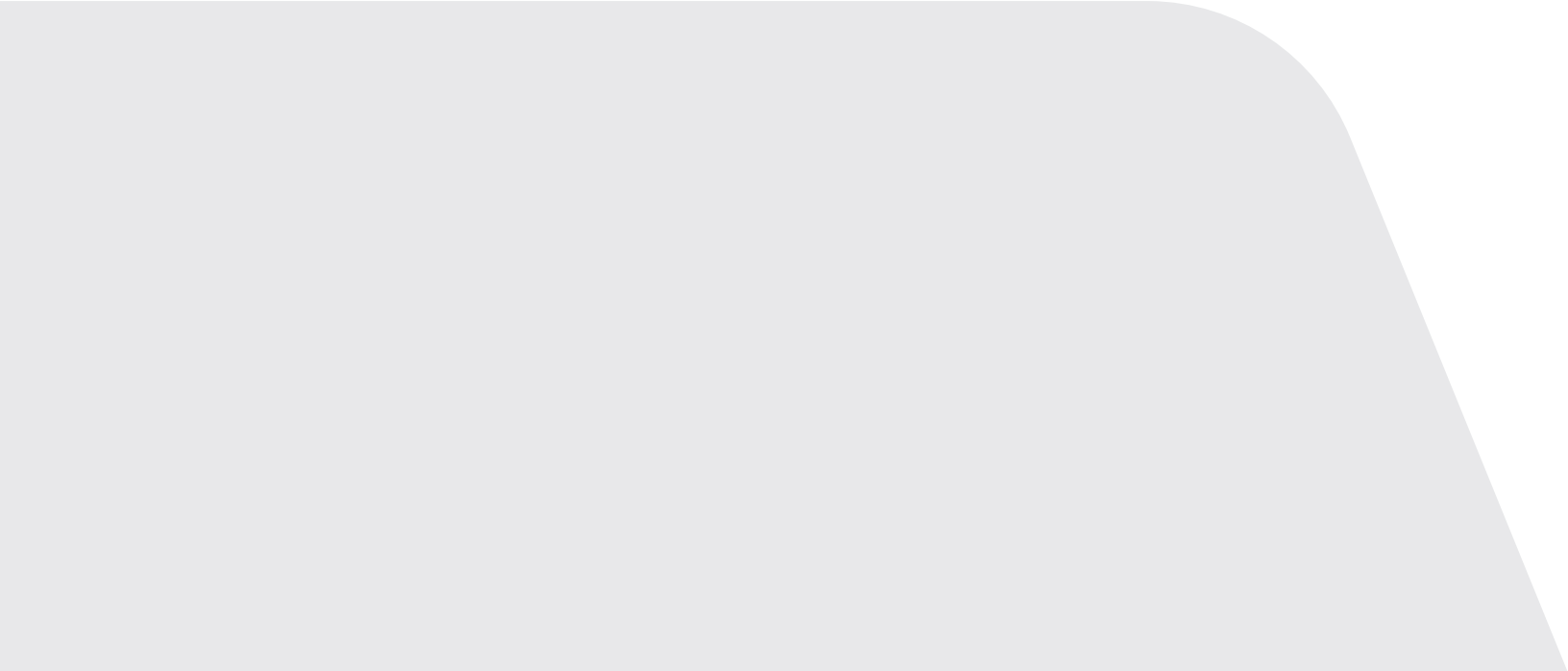
5`dfcdYfmi a UbU[Ya Ybhi`fa`ZUM]b[`Ubh]!Hfi ghi` ]h[ Uh]cb` `YX`Vmih\Y`8YdUfha Ybh`cZ`k`gh]W`k`]`bchi` VY`U`cfXYX`W`j`YfU[ `Y`i bXYf` ]hg`8/ C` ]bgi fUbW`Vm` fYUgcb`cZU`DfcZYgg]cbU`GYfj ]Wg`YI W`g]cb`"K ]bXgcf` Property Management was named as a defendant for its use of RealPage software in setting lease prices. The D&O program included a primary policy and two YI Wgg`dc`]W]g`h`Uh`Zc`ck`Zcfa`za`YUb]b[ `H\YmiUXcdh` the terms of the primary policy unless otherwise noted. The primary policy contained a Professional GYfj ]Wg`YI W`g]cb` h`Uh`fYa`cj`YX`W`j`YfU[ `Y`cb` account of any claim based upon, arising from, or in consequence of performing or the failure to perform any professional service.

H\Y`df]a`Ufmidc`]W]U`gc`gdYW] YX`h\Y`bgi`fYX`fYHU]bYX` H\Y`f][`h`hc`gY`YVh`XYZYbgY`W`i`bgY`zh`YfYVmiU`fa`]b[` the insurer did not possess a duty to defend. In rejecting Windsor's arguments, the court noted they hinge on the assumption that the primary policy encompassed a duty to defend, such that a 'potential coverage' standard applied despite clear language to the contrary. Relying on both the Professional GYfj ]Wg`YI W`g]cb`UbX`h\Y`Xi`hmtc`XYZYbX` `Ub[ `i`U[ `Y` in the policy, the court agreed with the insurers H\Uh`bc`W`j`YfU[ `Y`k`Ug`U`cfXYX`i`bXYf`h\Y`df]a`Ufmi`cf`YI`Wgg`dc`]W]g`" *Argonaut Insurance Co. v. GID Investment Advisers Corp.*, 2024 WL 4069028 (D. Mass. September 5, 2024).





## D&O Filings

- + As we have previously reported, D&O Federal Securities Class Action Claims decreased noticeably from 2019-2022.
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## About IMA

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