D&O and Financial Institution Liability

We work with our insurance clients as both coverage counsel and monitoring counsel on a wide array of D&O and Financial Institution matters. Our attorneys have substantial expertise concerning the underlying issues in these matters, including assessing legal exposures that directors and officers of private and public companies face, determining damages in securities cases, and evaluating exposures faced by private equity firms and hedge funds. We also have expertise on the coverage issues raised by such matters, including related claims, the I v I exclusion, the definition of Securities Claims, and what constitutes covered Loss. We regularly advise clients on coverage and exposure, participate in mediations, and litigate coverage issues.

Representative recent matters include the following:

- **UBS Financial Services Incorporated of Puerto Rico, et. al v. XL Specialty Insurance Company**, 289 F. Supp. 3d 335 (D.P.R. 2018), aff'd, No. 18- 1148, __ F.3d __ (1st Cir. Jul. 3, 2019). UBS sought coverage for lawsuits, regulatory investigations, and hundreds of arbitrations alleging mismanagement of its closed-end mutual funds following the collapse of the Puerto Rican bond market. After briefing by Wiley Rein, the trial court granted summary judgment to the insurers, agreeing that a specific litigation exclusion bars coverage. The court agreed that UBS could not splice the matters at issue into thousands of separate claims to escape the exclusion. On appeal, the First Circuit affirmed our client’s trial court victory in all respects.

- **Jayhawk Private Equity Fund II LP v. Liberty Ins. Underwriters, Inc.**, No. 17-cv-5523 (C.D. Cal. June 7, 2018). The insured, a postsecondary education and e-services learning provider in China, faced securities fraud suits alleging that it issued false statements about its financial health and internal controls from February 14, 2011 to April 2, 2012. The insurers denied coverage based on a prior acts exclusion barring coverage for claims arising out of wrongful acts committed before December 1, 2011. After motion to dismiss briefing by Wiley Rein, the court held that the prior acts exclusion applied because the securities action alleged misrepresentations both before and after December 1, 2011.

- **First Horizon Nat’l Corp. v. Houston Cas. Co.**, No. 15-cv-2235-SHL-dkv, 2017 WL 2954716 (W.D. Tenn. June 23, 2017), aff’d, 742 Fed. App’x 905(6th Cir. 2018). The insured mortgage lender sought coverage for a $212.5 million settlement with the U.S. Department of Justice for an alleged violation of the False Claims Act. On the eve of trial, Wiley Rein won summary judgment for our client. The court held that the policyholder’s “non-specific,” “boiler-plate” notice of potential claim was insufficient as a matter of law to trigger coverage under the $75 million tower of insurance. After briefing and argument by Wiley Rein, the U.S. Court of Appeals for the Sixth Circuit unanimously affirmed, concluding that the insurers “correctly and persuasively” argued that the policyholder’s notice of a potential claim was not a notice of an actual claim that might trigger coverage.

- **Starr Indemnity & Liability Company, et al v. Lumber Liquidators Holdings, Inc., et al.**, Civil Action No. 4:16- cv-114 (E.D. Va.). Wiley Rein represented a tower of insurers in connection with an interpleader action seeking a discharge from liability under $35 million in directors and officers liability policies. The underlying claims against Lumber Liquidators and its directors, officers, and employees consisted of numerous securities fraud and derivative lawsuits as well as investigations by the U.S Department of Justice and the U.S. Securities and Exchange Commission stemming from allegedly illegal sourcing initiatives for its wood
products and allegedly excessive levels of formaldehyde in its laminate products. The alleged exposure greatly exceeded the $35 million in policy proceeds, and the insurers sought to protect against collateral claims alleging liability in excess of their limits of liability. The court ultimately granted the insurers’ motion for summary judgment and discharged them from further liability.

- ARCP-Related Litigation. Wiley Rein represents a primary insurer in connection with a number of matters arising from the disclosure of an accounting scandal at American Realty Capital Properties (ARCP) that also impacted two affiliated entities, AR Capital LLC and RCS Capital LLC. Wiley Rein represented the carrier in coverage litigation brought by AR Capital alleging that the carrier improperly denied coverage for the litigation under the primary D&O policy issued to AR Capital, and that it failed to properly exhaust the policy issued to ARCP. The matter was resolved in a confidential settlement in January 2017. Wiley Rein represented the carrier in connection with the settlement of similar underlying claims brought against RCS as well as additional claims arising from RCS’s Chapter 11 bankruptcy.