Aon's Litigation Risk Insurance Solutions

Using Insurance Capital To Ring-Fence Litigation-Related Risks



Managing Litigation Risk to Unlock Growth

The risk of significant or catastrophic loss from pending litigation can erode shareholder value, force reserve requirements that can negatively impact cash flow, or prevent a merger or acquisition from closing.

On the plaintiff side, even after succeeding in winning a significant judgment in court or arbitration, businesses must protect against the risk that the judgment will be partially or completely reversed on appeal, or that the awarded damages will be reduced.

Litigation risk insurance is a strategic tool to help protect businesses from the risks of catastrophic judgments and preserve the benefits of favorable judgments. As the pioneer in litigation risk insurance, Aon's team of former litigators and financial markets professionals delivers unmatched experience to help our clients manage the downside and capitalize on the upside of litigation risks to improve outcomes and drive growth.



Aon's Litigation Risk Insurance Solutions Include:

- Defense-side **adverse judgment insurance**, which helps businesses ring-fence litigation-related risks, enabling them to move forward with M&A deals, financings, or other transactions, and permitting them to otherwise operate unimpeded by the specter of a potential future catastrophic judgment; and
- Plaintiff-side **judgment preservation insurance**, which allows businesses that win significant judgments at trial, on summary judgment, or in arbitration to "lock in" some or all of a damage award pending appeal, thereby reaping immediate benefits from judgments that otherwise might take years to become final, and which may ultimately be overturned.

In addition to our core litigation risk solutions, Aon offers bespoke solutions to address our clients' most complex financial risks. Whatever your challenge, our team of former practicing litigation, M&A, and tax attorneys and seasoned deal professionals bring the depth and breadth of experience necessary to address litigation- and deal-related financial uncertainty and unlock greater opportunities.

Adverse Judgment Insurance



Improving Outcomes for Mergers and Acquisitions

When a target in a transaction faces litigation-related risk, it can be difficult to allocate that risk. A buyer may be unwilling to assume a potentially long-term, open-ended loss exposure due to the inherently unpredictable and slow-moving nature of litigation, while a seller may not want to escrow a significant portion of the purchase price.

Defense-side adverse judgment insurance brings predictability to deals that otherwise may be difficult to close. By using this insurance solution, sellers can avoid an otherwise substantial escrow requirement, and buyers can ring-fence the risk of damages from an adverse judgment.

Managing Complex Financial Risks

Even outside of the transaction context, Aon can help businesses transfer the risk of ongoing litigation to an insurance policy, freeing up capital from reserves, improving balance sheet health, and otherwise addressing some of the many problems that can be caused by litigation and that can hamper businesses' operations and capital management.

How It Works

Aon's adverse judgment insurance solutions offer coverage for final judgments in ongoing litigation, but not defense costs or settlement (though the insurance can help facilitate settlements), and do not require the insurance markets to take control of the litigation.

Adverse judgment insurance requires a significant amount of diligence and is most suitable for:

1. Litigation where the evidentiary record and the parties' legal arguments are fairly well developed; and

2. Early stage litigation where the relevant facts are in the possession of the insured and/or issues of law predominate over issues of fact.

The insurance carriers that write such coverage also require the provision of reliable information that will allow them to ascertain both potential liability and the likely worst-case damage scenario if liability is found, with the likely worst-case damage scenario typically serving as the attachment point for coverage.

CASE STUDIES

Adverse Judgment Insurance

Insuring Seller Against $600 Million Class Action Suit With Well-Developed Record, Enabling Merger To Proceed

A private equity firm was in negotiations to acquire a private company that was a defendant in a $600 million class action litigation that was nearing trial. The target company believed that it would avoid liability at trial, and that even if it were found liable, damages would not exceed $90 million, and mock jury results supported those beliefs.

Nevertheless, plaintiffs were being represented by a top law firm, and the trial court had previously dismissed the case only for that dismissal to be reversed on appeal, leading to the perceived risk that the trial judge might favor plaintiffs in order to avoid further reversal.

The buyer did not want to assume any litigation risk, even if that risk was remote, and demanded a $600 million escrow from the target company. Rather than escrowing $600 million until the end of the case, which could very well take years to wind its way through the appellate process no matter the outcome at trial, the company sought to ring-fence the risk with insurance.

Aon worked closely with the target company and its counsel to present their defense case to insurers in a favorable light, and to help insurers get comfortable with the risks. Aon ultimately succeeded in structuring and placing $520 million of adverse judgment insurance above a $100 million retention, allowing the target company to proceed with the transaction.

Insuring Buyer Against Early-Stage Patent Infringement Lawsuit, Enabling Acquisition To Proceed

A buyer was acquiring a privately held company in a $20 million roll-up transaction. During negotiations, the target company was sued for patent infringement by the buyer's chief competitor. The buyer believed that the lawsuit was an attempt to scare the target company into selling to the competitor rather than the buyer.

Even though the buyer believed that the litigation was meritless and wanted to close the transaction, it was unwilling to do so without an escrow indemnity from the target company's shareholders. The target company's shareholders, in turn, did not want to put up an indemnity because they believed that the lawsuit was baseless, and were prepared to scuttle the acquisition and defend the case.

As the case was at its inception, with only a complaint and responsive pleadings having been filed, Aon worked with the buyer to prepare an analysis of the likely range of potential royalty and lost profit damages if patent infringement were found, which allowed insurers to propose a retention that would protect both the buyer from catastrophic loss and the insurers from providing coverage within a likely range of damages. Aon ultimately succeeded in placing an adverse judgment insurance policy, enabling the acquisition to proceed.

Insuring Company Against the Risk That an Adverse Trial Judgment Will Be Affirmed on Appeal

A small private equity-owned company lost a $20 million+ compensatory and punitive damage judgment following a trial seemingly rife with errors. Though the judgment was being appealed, it was impeding the company's owner from selling the company and compromising the company's cash position because it was forced to bond its appeal, and because its lenders had severely restricted its borrowing ability.

Although the trial court arguably had committed several reversible errors, the company was alleged to have engaged in questionable behavior in connection with the litigation, which had insurers questioning whether the appellate court would, in fact, reverse the trial court.

Aon worked with defense counsel to help insurers handicap potential risks and structured an appellate-focused adverse judgment insurance policy that capped the company's exposure if the appellate court affirmed the trial court's judgment, thus allowing the company to recoup some of its cash collateral, reopen its lines of credit so that it could make an acquisition, and market itself without a catastrophic litigation hanging over it.

Judgment Preservation Insurance

Helping Businesses Reap Immediate Benefits from Favorable Judgments

When a business wins a significant judgment at trial, on summary judgment, or in arbitration, there is the risk that such judgment will be partially or completely reversed on appeal, or that the awarded damages will be reduced.

In addition, appellate proceedings often take years to fully resolve, leaving even those businesses that ultimately succeed on appeal waiting an inordinate amount of time to collect on their award and recognize the associated P&L on their balance sheets. As a result, businesses often settle cases in which they have prevailed for less than the amount of a judgment in order to immediately capture at least a portion of the judgment amount, and to avoid the possibility of reversal on appeal.

Even when a judgment is paid out to a prevailing plaintiff pending appeal, that business may be unable to freely use the funds it receives given the possibility that the judgment may ultimately be reversed, requiring some or all of those funds to be repaid.

Aon's judgment preservation insurance solutions allow businesses that win significant judgments at trial, on summary judgment, or in arbitration to effectively "lock in" some or all of a damage award pending appeal and reap immediate benefits from judgments that otherwise might take years to become final, and that may ultimately be overturned.

How It Works

Like adverse judgment insurance, judgment preservation insurance does not cover litigation costs or settlement, does not entail the insurance markets taking over the appeal, and requires significant diligence before coverage can be bound.

Unlike adverse judgment insurance, the nature of appellate litigation means that the record on appeal is typically fixed and finite, and the parties' legal arguments are often clear very early on, sometimes even before the opening appellate brief is filed. Accordingly, judgment preservation insurance is typically more straightforward to place because appeals tend to lend themselves to the type of underwriting that insurance markets must undertake in order to both provide coverage and determine an appropriate attachment point.

By ring-fencing appellate risk, judgment preservation insurance allows companies to realize immediate benefits from lower court judgments that are subject to potential reversal or damage award reduction on appeal.

CASE STUDIES

Judgment Preservation Insurance

Insuring Company Against Possibility That Confirmed Arbitration Award Will Be Vacated on Appeal, Enabling Extraordinary Dividend To Be Paid

A public company obtained a $600+ million award in a commercial arbitration, which then was confirmed in a U.S. federal district court. Because post-judgment interest was running at a high rate, the losing party offered to make a payment in full satisfaction of the judgment so long as it was permitted to appeal the confirmation of the arbitration award and, if successful on appeal, initiate a separate proceeding to recover the funds it had paid pursuant to the satisfaction agreement.

The company accepted this offer, and subsequently found itself sitting on a significant amount of cash that it was constrained to deploy given the possibility that the district court confirmation order could be reversed on appeal. The possibility of appellate reversal, in turn, led to the possibility of the company being ordered to repay some or all of the satisfaction agreement payment in a subsequent recovery proceeding. Moreover, the possibility that a post-appeal recovery proceeding could take the form of another arbitration, likely to be followed by additional district court confirmation/vacatur proceedings and appellate challenges no matter which side prevailed in the arbitration or before the district court, meant that the company could very well find itself unable to utilize the proceeds from the original arbitration for several years.

Aon worked with the client and its counsel to address insurer concerns about the arguments that the client's adversary had pursued before both the district court and the appellate court, including arguments to reverse confirmation on public policy grounds. Just as importantly, Aon worked with the client and its counsel to game out for insurers all of the complex procedural pathways that the litigation could take if the district court judgment were, in fact, reversed.

Aon ultimately succeeded in placing a $500 million+ judgment preservation policy protecting against both the possibility of the district court confirmation order being reversed on appeal and the possibility that the company would be forced to return funds in a subsequent recovery proceeding, thereby enabling the company to disburse funds to its shareholders in the form of an extraordinary dividend.

Insuring Against the Risk of Reversal on Appeal

A private equity firm's portfolio company obtained dismissal of a plaintiff's claims and won an approximately $90 million compensatory damage judgment on its counterclaims. Nearly 10 years had passed since the plaintiff had initiated the litigation, and its appeal would take another one to two years. The client expended a great deal of time and money in defending against the plaintiff's claims and prosecuting its counterclaims, and needed finality because both the upside and downside litigation exposure had been retained by the private equity firm post-sale of the portfolio company.

Aon structured a judgment preservation insurance policy that capped the client's exposure if the appellate court were to overturn the judgment, thus allowing the client to have finality on both the decade-long ordeal and the sale of the portfolio company.



The Aon Advantage

Aon's team delivers a boutique service experience from seasoned former practicing litigation, M&A, and tax attorneys and deal professionals.

We offer a broad range of best-in-class insurance solutions and have cultivated relationships with more than two dozen trusted insurance markets that provide coverage on all manner of complex litigation-related risks. This means that Aon is uniquely positioned to structure and place substantial insurance programs of up to $1 billion on any given litigation.

We also understand that the timing and sensitivity of M&A deals and other transactions are paramount to their success and we work closely with your defense or appellate attorneys, your deal team, and our insurance providers to advise on and execute solutions that seek to limit your litigation risks and improve your deal outcomes, bringing a passion for developing tailored solutions to our complex risks that is unparalleled in this industry.

When working with Aon, our clients are confident that their investments are secure, that they are protected from risks, and that certainty for their positions is realized.

$43.1B limits placed globally by Aon for transaction liability in 2020



$1.78B limits placed for litigation-related risks



Global litigation, tax, and M&A solutions with strong coordination across regions



Claims Advocacy delivered by dedicated claims teams



Unique service model designed for 24/7 support



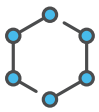
40+ former practicing litigation, tax, and M&A lawyers



Only firm with a team of **dedicated specialist advisors** placing litigation risk



Access to **20+** A-rated or better insurance carriers collectively capable of providing per-risk limits of more than **$750M**



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If you are interested in obtaining coverage, contact your Aon broker.
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About Aon

Aon plc (NYSE:AON) is a leading global professional services firm providing a broad range of risk, retirement and health solutions. Our 50,000 colleagues in 120 countries empower results for clients by using proprietary data and analytics to deliver insights that reduce volatility and improve performance.

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