

## P-C Trends

### **Aon Hit with \$9+ Million E&O Suit**

*Two big accidents in one year have created coverage issues.*

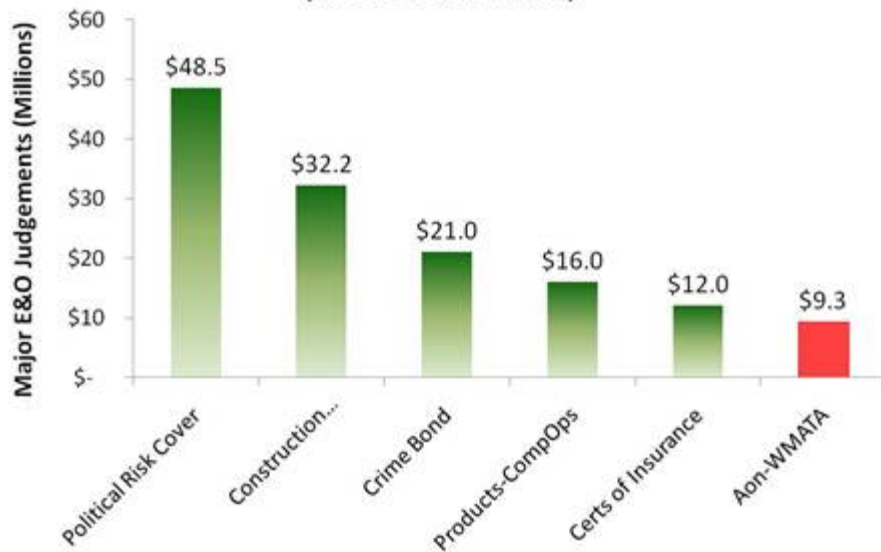
The Washington Area Metropolitan Transit Authority (WMATA) filed suit against its insurance agent/broker asking for at least \$9.3 million of damages, along with pre- and post-judgment interest, attorneys' fees and other costs or expenses. WMATA's agent/broker, Aon Risk Services, Inc. of Maryland, is reported to dispute the claims and says "[Aon] looks forward to defending [itself] in court." If the WMATA allegations and damages claimed are upheld in court, however, the situation will likely reach the top five E&O claims tracked by the Big "I" Professional Liability Committee (PLC). Members should take note of the circumstances and be aware of some key lessons that can be learned from the situation.

On Dec. 23, WMATA filed suit in D.C. Superior Court alleging various acts or omissions resulted in breach of contract, breach of fiduciary duty, breach of its duty to act as loyal insurance advisor/broker, negligence and constructive fraud (essentially fraud, but without establishing intent). In the initial suit, WMATA demanded a jury trial. Aon quickly gave notice of moving the trial to federal court.

Of the approximately \$9.3 million in damages cited, \$9 million are alleged to result from the combination of two major accidents within the WMATA transit system during a single policy year. (Big "I" members may be familiar with "the metro" if they have ever attended the annual national legislative conference in April.) The first accident resulted in depletion of aggregate limits within various excess insurance layers that impacted insurance available in the second accident. WMATA alleges Aon failed to properly see that WMATA either purchase reinstatement of the depleted limits or negotiate and purchase "drop down" coverage from upper layers of coverage. The suit also asks for just over \$250,000 in damages resulting from Aon allegedly not assuring WMATA utilized an accidental death and dismember (AD&D) benefit that would have applied to persons injured in WMATA-related accidents.

As can be seen in the graph below, \$9.3 million along with typical expenses for defense could easily make this case one of the top five E&O claims as tracked by the PLC. Some of the below claims were tracked from public information and others are from knowledge of large claims within the Big "I" Professional Liability Program with Westport Insurance Company. Another aspect of these large claims that go to litigation like this is interest penalties assessed against the defendant if plaintiff allegations are upheld. For example, the second largest claim of \$32.2 million included nearly \$10 million of pre- and post-judgment interest. The WMATA filing specifically asks for pre- and post-judgment interest.

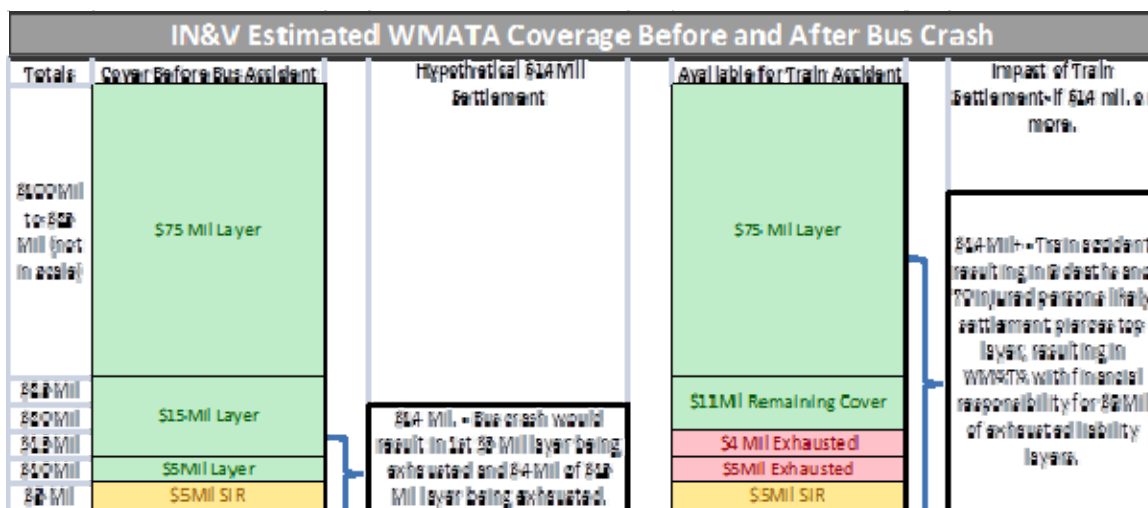
## Big "I" Tracked Major E&O Losses (Assess Your Limits!)



In terms of what Big "I" members can learn from the suit and allegations, next week some of the important risk management lessons that come from this case will be examined in IN&V. One immediate take-away, however, is agents should note the level of damages involved in major E&O claims, particularly when agents are doing complicated commercial insurance programs. "If a member does nothing more from reading about this claim than making a note to call their Big 'I' state association to discuss their policy limits, the agent has taken away a potentially agency-saving lesson," says Brett Nilsson, chairman of the PLC and Utah Big "I" member.

In terms of details of what may have occurred, it is fortuitous when these events come publicly to trial as they bring details available for analysis. A major aspect of the situation as described in the suit is the complex nature of an insurance program needed to place aggregate liability coverage limits of \$95 million. The suit describes the coverage as consisting "of three surplus share layers" (\$5, \$15 and \$75 million) and describes that after an initial \$5 million retention and before the \$5 million coverage layer, the 'second and third layers' limits were subject to payments... equal to the limits of the immediately preceding layer...and either WMATA, the insurer, or both would have to pay an amount equal to the first layer." The language describing how the third layer of excess coverage would payout had the same stipulations.

If we interpret this coverage design correctly (and ignore for the moment the AD&D aspects of the claim), the below is a graphical representation of limits available and retentions before and after a serious September 2008 bus accident. The "after" is very important because in the same policy year in June 2009, WMATA unfortunately also experience a nine-person fatality commuter train accident.



For illustrative purposes, IN&V hypothetically assumes that the WMATA liability for the fatal bus accident resulted in total WMATA losses of about \$14 million. That accident involved one person killed and six injured after an empty bus crashed into an occupied taxi. This hypothetical example may not be the actual WMATA losses and that settlement is not published, but it does appear to be consistent with the \$9 million of damages asked for in the WMATA suit against Aon.

The crux of the suit is WMATA alleges Aon did not make it aware of two options to refurbish the exhausted layers by either repurchasing from existing surplus share providers or negotiating a “drop down” of coverage for higher layers. As you can see in red above, if the bus accident was about \$14 million in damages, it would deplete an aggregate limit on the first layer and \$4 million of limits on the second layer. The subsequent metro rail accident resulting in nine fatalities and some 70 injured others then, if it results in liabilities of more than \$20 million but less than \$100 million, would cause WMATA to fund \$9 million it would not have had to had the first two layers been reinstated or replaced.

Next week IN&V will examine important risk management aspects of this case including analysis of when Aon may have notified its E&O insurance provider of the potential claim (Aon public filings note they purchase commercial insurance). We will examine what agency E&O insurance policies require in that duty of insureds to report claims and potential claims. We will also look at other lessons and at the E&O risk management resources exclusively available to Big “I” members to manage their agency E&O exposure.

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