

# WHAT EVERY LAWYER (AND EVERY DIRECTOR AND OFFICER) SHOULD KNOW ABOUT DIRECTORS AND OFFICERS LIABILITY INSURANCE

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# TOPICS

- I. Typical Structure of D&O Coverage
- II. What's Covered
- III. "Top 10" Questions to Ask
- IV. What Is "Side A"
- V. Current Marketplace Conditions

# STRUCTURE OF D&O COVERAGE

- Claims Made Coverage
- Insured Retains Right to Defend and Settle Claim
  - Subject to Insurer Consent

# STRUCTURE OF D&O COVERAGE

## Three Types of Coverage/Insuring Agreements

1. Side A
2. Side B
3. Side C / Entity Coverage
  - Private = Always
  - Public = Usually

# STRUCTURE OF D&O COVERAGE

## Side A

Covers claims against individual directors and officers that are not indemnified by their company

- Statutory Prohibition
- Insolvency

Typically no retention

## STRUCTURE OF D&O COVERAGE



### Side B

Provides reimbursement to company for amounts it is required to indemnify directors and officers as a result of a claim

- Most coverage is paid under Side B
- Retention typically applies

## STRUCTURE OF D&O COVERAGE



### Side C / Entity

Coverage when the company itself is a defendant in a claim

- Private = all claims
- Public = securities claims only

## WHAT'S COVERED



- Claims for a “Wrongful Act”
  - Any actual or alleged act, error, omission, misstatement, misleading statement or breach of duty by an insured in their capacity as such

## WHAT'S COVERED



- Exclusions are Key to Coverage
  - Express Exclusions
  - Definitions
  - Conditions

## 10 QUESTIONS THAT SHOULD BE ASKED REGARDING D&O COVERAGE

10. Who is the insurer?
9. What are the policy limits?
8. When can the policy be cancelled?
7. Does the policy cover punitive damages?
6. What other forms of coverage are included in the policy?
5. Does the policy include "Entity" coverage?
4. What do the personal conduct exclusions look like?
3. Does the policy include a severability provision for the exclusions?
2. Does the policy contain a securities claims exclusion?
1. Does the policy contain an application statement severability provision?

## 10. WHO IS THE INSURER?

- A.M. Best
  - Claims Paying Ability
    - A++ to F
  - Financial Size Category
    - I to XV
      - XV is Largest

## 9. WHAT ARE THE POLICY LIMITS?



- How Do The Limits Compare To Your Benchmarks?
  - Revenues/Sales
  - Industry

## 8. WHEN CAN THE POLICY BE CANCELLED?



- Insurer's Perspective
  - Any Time for Any Reason With 60 Days Notice
- Insured's Perspective
  - Only For Nonpayment of Premium



## 7. DOES THE POLICY COVER PUNITIVE DAMAGES?

- Most Favorable Venue Wording?

## 6. WHAT OTHER FORMS OF COVERAGE ARE INCLUDED IN THE POLICY?

- Usual Suspects
  - Employment Practices Liability
  - Fiduciary Liability
- Are The Limits Shared or Separate?



## 5. DOES THE POLICY INCLUDE ENTITY COVERAGE?

- Yes
  - You Are Almost Certainly Sharing Limits
  - Is There An “Order for Payments” Provision?
- No
  - How Do The Allocation Provisions Work?
    - Preset Allocation
    - “Relative Legal Exposures”

## 4. WHAT DO THE POLICY'S PERSONAL CONDUCT EXCLUSIONS LOOK LIKE?

- Personal Conduct Exclusions
  - “In Fact” Exclusions
    - Two Kicks at the Cat
  - “Final Adjudication” Exclusions
    - Need Finding/Judgment in Underlying Claim



### 3. DOES THE POLICY INCLUDE A SEVERABILITY PROVISION FOR THE EXCLUSIONS?

- Minimum = Severability of Personal Conduct Exclusions
- Preferable = All Exclusions



### 2. DOES THE POLICY CONTAIN A SECURITIES CLAIMS EXCLUSION?

- Publicly Traded Company = Never
- Non-Public = ???

# 1. DOES THE POLICY CONTAIN AN APPLICATION STATEMENT SEVERABILITY PROVISION?

- Two Approaches
  1. Death Penalty – Policy Rescission
  2. Near Death Experience – Claim Exclusion
    - Non-Rescindable Policy

# APPLICATION SEVERABILITY

- Policy Rescission Subject to Full Severability (The “Gold Standard”)
  - The Insureds agree that in the event that any such statements and representations are untrue, this Policy will not afford any coverage with respect to any of the following Insureds:
    - Any natural person Insured who knew as of the effective date the facts that were not truthfully disclosed and knew that such facts were not truthfully disclosed in the Application;
    - Any Insured that is an organization, if any Executive Officer of the Insured knew as of the effective date the facts that were not truthfully disclosed.

# APPLICATION SEVERABILITY

- Policy Rescission Subject to Middle Ground Severability
  - That in the event the Application contains misrepresentations made with the actual intent to deceive, or contains misrepresentations which materially affect either the acceptance of the risk or the hazard assumed by the Insurer, the facts pertaining to and knowledge possessed by any Director, Officer or the Company (other than knowledge possessed by the person(s) executing the Application) shall not be imputed to any other Director or Officer.

# APPLICATION SEVERABILITY

- Policy Rescission With No Severability
  - This policy shall be void in its entirety and of no effect whatsoever if the Application contains misrepresentations which materially affect the acceptance of the risk or the hazard assumed by the Insurer and such misrepresentations were known to be untrue on the inception date by any Insured.
  - Majority rule if no severability provision.

## APPLICATION SEVERABILITY

### Claims Exclusion (Non-Rescindable)

- Same General Concepts as Policy Rescission
  - Policy Remains in Force but Coverage for Claim is Excluded

## WHAT IS SIDE A?

- Separate Tower
- Side A Excess
- Side A Excess with DIC

## WHAT IS SIDE A?


### Questions to Ask to Determine How Well Your “A” - Side Risk is Covered

1. How do the other coverage limits stack up?
2. Does the primary coverage have an “Order of Payments” provision?
3. What rescindability provisions apply to primary side A?
4. Are Derivative Action Costs indemnifiable?
5. What does our balance sheet look line?

## CURRENT MARKETPLACE CONDITIONS

### “Soft”

- Buyers market for both price and conditions
- Time to negotiate



**Questions?**

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