

# Maximizing Protection & Recovery Under Your D&O Insurance

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# Agenda

- The Essentials: What Does D&O Insurance Cover?
- Strategies For Placement
- Claim Strategy: Reporting, Disputes & Recovery
- Current Trends and Issues in D&O
- In-House Insights & Takeaways
- Questions and Answers

# THE ESSENTIALS: WHAT DOES D&O INSURANCE COVER?

- D&O insurance protects against
  - “Loss” arising from
  - “Claims” alleging
  - “Wrongful Acts” by specified
  - “Insureds”
- Claims-Made Coverage
  - D&O policies are triggered when a Claim is made in the policy period
  - Claims-made v. claims-made and reported
- D&O coverage should reflect the real-world decisions your board is making—and the personal liability they face in doing so

# Types of Claims Covered

- Generally, D&O policies will cover Claims for “Wrongful Acts” such as:
  - Securities claims
  - Mismanagement claims
  - Restatement claims
  - Breach of fiduciary duty claims
  - Negligent supervision claims
  - Creditor Claims

# What is a “Claim”?

- How is a “Claim” defined?
  - Written demand
  - Civil or criminal proceeding
  - Administrative or regulatory proceeding
  - Arbitration or mediation proceeding

## Broader Definitions

- A written request to toll or waive the statute of limitations
- Pre-claim inquiry
- Subpoena

# “Wrongful Act” Defined

- “Wrongful Act” means:
  - any actual or alleged error, omission, misleading statement, misstatement, neglect, breach of duty or act allegedly committed or attempted by: any of the Directors and Officers, while acting in their capacity as such, or any matter claimed against any Director and Officer solely by reason of his or her serving in such capacity
- “Wrongful Act” can also mean:
  - any error, misstatement, misleading statement, act, omission, neglect or breach of duty actually or allegedly committed or attempted by any of the Insured Persons, individually or otherwise, in their capacity as such, or in an Outside Position

# Definition of “Loss”

- Specific to policy:
  - Restitution?
  - Disgorgement?
  - Taxes, Fines, and Penalties?
  - Punitive Damages?
- Typically does not include:
  - Certain types of non-monetary relief
  - “Uninsurable” amounts that the insured becomes “legally” obligated to pay

# Who is Insured?

- Directors (or members of the board of trustees)
- Officers (senior management)
- Former directors and officers
- FAQ → Does this include:
  - Subsidiaries (existing and newly acquired)?
  - In house counsel?
  - Audit committee?

# D&O Insuring Agreements

- Side A (Personal Protection)
  - Covers directors and officers for claims where the company refuses to or is financially unable to pay for indemnification (e.g., bankruptcy)
  - Essential for recruitment of high-level individuals
- Side B (Corporate Reimbursement)
  - Reimburses company for indemnification of its directors and officers
  - Subject to self-insured retention/deductible
- Side C (Entity Coverage)
  - Extends coverage to claims against entity itself
  - Public Companies v. Private Companies

# Types of Loss Covered

- Generally will cover legal fees:
  - Reasonable and necessary
  - Reasonably related to covered claims
- Also provide indemnification for:
  - Settlement payments for covered claims
  - Judgments when insured is found liable
- Investigation Costs
- Subpoena Costs

# STRATEGIES FOR PLACEMENT

# Smart Strategy for D&O Placement

- Coordinate early between Legal, Risk, Finance, and the Board
- Understand the company's risk profile
- Know your claims history and how it's framed to underwriters
- Work with an experienced insurance broker who adds values
- Purchasing D&O Insurance is not just a pricing decision
  - When faced with reductions in coverage, assess reporting of potential claims / notice of circumstances

# Misrepresentations in Applications

- Prior knowledge of claim may bar coverage
  - *Huntington Nat'l Bank v. AIG Specialty Ins. Co.*, No. 2:20-CV-00256, 2024 WL 3226117 (S.D. Ohio June 27, 2024)
  - *Infinity Q Cap. Mgmt., LLC v. Travelers Cas. & Sur. Co.*, No. N21C-07-158 EMD CCLD, 2022 WL 3902803, at \*13 (Del. Super. Ct. Aug. 15, 2022)
- Material misrepresentations may allow insurer to rescind the policy
  - *Clear Blue Specialty Ins. Co. v. Ozy Media, Inc.*, 626 F. Supp. 3d 1121 (N.D. Cal. 2022)
  - *Soni v. Certain Underwriters at Lloyd's, London Subscribing to Policy Numbers AP016692016/0014 & YL050600c/011*, 2022 WL 11044708 (C.D. Cal. Sept. 19, 2022).

# Handling Potential Claims

- Understand how policies treat potential claims and potential circumstances that can result in a claim, e.g.,
  - If during the Policy Period or the Extended Reporting Period, if exercised, the Insureds become aware of circumstances that could give rise to a Claim against the Insureds and give written notice of such circumstances to the Insurer during the Policy Period or the Extended Reporting Period, if exercised, then any Claims subsequently arising from such circumstances shall be considered to have been made during the Policy Period
  - The Insureds shall include within any notice of Claim or circumstance a description of the Claim or circumstances, the nature of the alleged Wrongful Act, the nature of the alleged or potential damage, the names of actual or potential claimants, and the manner in which the Insureds first became aware of the Claim or circumstances
- Timely written notice of claim to insurer is key

# Policyholder Checklist for Renewal

- Check the key terms of coverage
  - Check definitions of Wrongful Act, Claim, Loss, and Insured
  - Look for Notice provision that is tied to Risk Manager or General Counsel's knowledge
  - Limit preamble of all exclusions
  - Make sure Personal Conduct Exclusions tied to final adjudication
  - Narrow any prior claim exclusion, retroactive date / prior acts exclusion, or related claim provision
  - Non-imputation and severability for exclusions and application (protect innocent insureds)
  - Application, Warranties, & Non-Rescindable Provisions
  - Consider adding a mandatory mediation clause
  - Evaluate option of an extended Reporting period
  - Make sure your excess policies allow you to fill any gaps due to settlements with insurers lower in the tower

# Policyholder Checklist for Renewal

- Think about the emerging or routine claims in your industry and ask for affirmative coverage for such claims
- Ask your broker what enhancements they recommend
- Have an insurance coverage lawyer review the policy for gaps or unfavorable terms

# **CLAIM STRATEGY: REPORTING, DISPUTES, & RECOVERY**

# Notice and D&O Coverage

- **Many variations of disputed issues regarding notice**
  - Prior Claim / Prior Knowledge
  - Late Notice
  - Insufficient Notice
- **Strategies to avoid traps**
  - Know how “Claim” is defined in your policy
  - Understand what pre-policy claims or facts were already disclosed and impact of prior claims
  - Recognize importance of notice of circumstances or potential claims
  - Be clear on reporting requirements
  - Don’t omit excess carriers – report up the tower

# Insurers' Defense Obligations

- Insurers have a duty to reimburse defense costs
  - Some policies require “advancement”
  - Some policies require “consent”
  - Some policies have an allocation provision
- Policy may include a “duty to defend”
  - Broader than duty to indemnify
  - Insurer assumes cost and potentially control of defense

# How are Policies Interpreted?

- Coverage is construed broadly while exclusions are construed narrowly
- Insurers bear the burden of proving applicability of exclusions
- Ambiguity is resolved in favor of coverage
- Courts may consider reasonable expectations of policyholders

# Which Law Applies?

- Insurance is state-law specific
- Policies may have choice of law provision
- Different state laws are more or less favorable to policyholders

# Resolving Disputed Coverage Issues

- Present a compelling coverage argument
  - Case law
  - Representations during underwriting
  - Regulatory filings / alternative forms
  - Marketing Materials
- Use mediation strategically
- Bring business relationships / premium dollars to the table

# RECENT TRENDS IN D&O INSURANCE

# D&O Insurance and the Second Trump Administration

- Regulatory & Enforcement Shifts
  - Rollback of ESG, DEI, and climate-related enforcement
  - Reduced SEC/DOJ activity
  - Shift in DOJ cooperation standards & whistleblower incentives
- Increased Risk of Private Suits
- New risks for whistleblower protection, DEI litigation, executive orders

# “Related Claims” Exclusions and Provisions

- Policies routinely exclude coverage for claims “related” to claims” prior to policy period
- Some courts have taken a broad view, holding that the standard is whether there is a “meaningful linkage” between the allegations in subsequent and prior claims
  - *In re Alexion Pharms., Inc. Ins. Appeals*, No. 154, 2024, 2025 WL 383805 (Del. Feb. 4, 2025) - holding that a settlement for stockholder claims must draw from same pool of coverage as a separate settlement with regulators)
  - *First Solar, Inc. v. Nat’l Union First Ins. Co.*, 274 A.3d 1006, 1007 (Del. 2022) – ruling that a securities class action and an opt-out case constitute related Claims, such that the opt-out case is excluded from insurance coverage under later-issued policies
- Coverage may also be barred when suits allege allegations of wrongful acts that predate the policy period
  - *Public Risk Mgmt. of Fla. v. Munich Reinsurance Am., Inc.*, 2022 WL 2338572 (11th Cir. June 29, 2022) – no coverage for defense and settlement costs paid where lawsuit included allegations of related series of wrongful acts that predated the relevant coverage period
  - *Henry v. Maxum Indem. Co.*, 2022 WL 16758298 (E.D. La. Nov. 8, 2022) – finding no coverage because lawsuits were based on the same or related wrongful acts as lawsuit made before the policy’s inception

# D&O Insurance and Cybersecurity

- Lawsuits against directors and officers relating to cyber incidents have become more common
- Updated SEC disclosure rules require broader disclosures for (1) cybersecurity incident reporting; (2) cybersecurity risk management and strategy; and (3) cybersecurity governance
  - The enhanced disclosures may provide plaintiffs lawyers with information for filing shareholder derivative lawsuits and other securities disputes
  - Failure to meet the disclosure requirements may also create disputes with the SEC or shareholders
- Availability of cyber-coverage will depend in large part on exclusions, such as cyber or confidential information exclusions
- Policyholders should carefully review their D&O policies to determine whether they cover claims or enforcement actions for inadequate disclosures

# D&O Insurance and A.I.

- Companies may face exposure for the use of predictive AI in operations
  - *Est. of Lokken v. UnitedHealth Grp., Inc.*, 2025 WL 491148 (D. Minn. Feb. 13, 2025) (surviving motion to dismiss)
  - *Barrows v. Humana, Inc.*, No. 3:23-cv-654-CHB (W.D. Ken. 2024) (class action complaint alleging use of faulty AI model)
- Companies may also face shareholder claims for misstatements about their use of AI and its capabilities
  - *Agostino v. Innodata Inc. et al*, No. 2:2024cv0097 (D.N.J. 2024) (investor suit alleging overstatement of AI capabilities)
  - *Nunez v. Skyworks Solutions Inc.*, No. 8:25-cv-00411 (C.D. Cal. 2025) (shareholders securities claim alleging overselling of AI capabilities)
- D&O Coverage Considerations:
  - Does the definition of “Wrongful Act” cover AI-related decision-making?
  - Are AI-specific exclusions creeping into the policy?
  - Is there any gap between cyber, tech E&O, and D&O policies?
  - Are board and officer disclosures about AI use adequately vetted?

# DEI and D&O Policies

- Anti-DEI agenda could generate claims against company leadership through direct federal actions and shareholder actions, both of which are typically covered by D&O policies
  - One executive order directs the D.O.J. to submit an enforcement plan within 120 to identify “the most egregious and discriminatory DEI practitioners” in certain sectors
  - State attorneys general (e.g., TX, FL) already targeting ESG and DEI
  - This may lead to investigations and litigations against identified private firms
- Private actions have already been brought against company executives and directors
  - *McCollum v. Target Corporation et al.*, No. 2:25-cv-00021 (M.D. Fla. 2025) (alleging Target misled investors about risks of DEI and ESG initiatives)
- Currently, it is not typical for D&O Policies to exclude coverage for DEI-related claims. But an upswell in litigation may affect premiums or lead to new exclusions

# IN-HOUSE INSIGHTS & TAKEAWAYS

# Key Takeaways

- D&O protection is broader than you think
- Watch the definitions—especially claim and loss
- Insurers reward companies that demonstrate thoughtful governance and risk oversight
- Start early with renewals and advocate for enhancements
- When a claim hits, take control of notice, defense, and messaging

# Questions?



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