PUBLIC DIRECTORS & OFFICERS INSURANCE

D&O OVERVIEW

WHAT IT COVERS:

Fiduciary Insurance protects plan sponsors (employers) and plan fiduciaries (executives and employees designated to manage benefit plans) from claims that they have violated requirements laid out under ERISA. These claims allege mismanagement of plan assets or failure to follow ERISA rules when controlling or managing plan assets and paying plan benefits.

Fiduciary liability policies cover the cost of defending sponsors and fiduciaries and indemnify them for monetary liabilities that result from a legal settlement or adverse judgment.

BASIC COMPONENTS:

The D&O Liability policy is broken down into three basic coverage sections:

INSURING CLAUSE A

This section of the policy is for claims made against individual Directors, Officers, and Employees of the Company. This coverage provision is for non-indemnifiable loss only. These are claims where the Company cannot legally or financially indemnify its individuals. This could occur during bankruptcy (financially unable) or for a derivative suit (legally unable). It offers personal asset protection to individuals.

INSURING CLAUSE B

This section of the policy is for claims made against individual Directors, Officers, and Employees of the Company, where the Company can and will indemnify. It offers balance sheet protection to the entity.

INSURING CLAUSE C

This section of the policy is for claims made against the Company directly. It also offers balance sheet protection to the entity. The coverage provision is commonly for Securities Claims only.

IMPORTANCE OF SEPARATE DIC A-SIDE D&O POLICY:

About 15 years ago, companies began purchasing a separate policy and separate limits only for the protection of the individual Directors and Officers of the company. This shift in purchasing coincided with the rise of shareholder derivative demands being settled in a stand-alone manner without being consolidated with a securities class action (SCA).

The fear was that a SCA could be settled first and potentially use the entire tower of insurance; leaving the individuals without the proper protection to settle a derivative demand action. Due to the nature of a derivative action, in most cases, the company cannot indemnify a settlement, so without insurance, the individuals would be personally liable.

This policy provides excess ("follow form") A-Side coverage on exhaustion of underlying insurance, but also drops down as primary in many scenarios:

- Insolvency of underlying carrier(s)
- Rescission of underlying policy(ies)
- Wrongful refusal to indemnify (improper denial of coverage)
- Denial of coverage where DIC A-Side policy provides broader coverage
- Company refuses to answer indemnification requests
- Broader coverage with limited exclusions

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KEY EXCLUSIONS:

Conduct/Fraud Exclusions

An insurance carrier can deny a claim alleging deliberate or criminal fraud by an individual. However, as this is a common accusation, most carriers limit the ability to apply this exclusion to the point at which the Finding of Fraud has arrived at its final adjudication (there are no other Courts to appeal to).

Insured vs. Entity Exclusion

This exclusion prevents the company from bringing a suit against an individual director or officer.
There are numerous carve-backs to the exclusion that should be attained, including:

- Derivative suits
- Employees for Securities Claims
- Cross claims for indemnity
- Employment claims
- Bankruptcy trustee/Creditors Committee
- Former directors and officers (gone at least 3 years)
- Foreign jurisdiction claims
- Whistleblower claims

Other Noteworthy Exclusions

With recent changes to the insurance marketplace, it is also important to understand how these standard exclusions can be amended or deleted to the benefit of an individual company's specific risk profile:

- Pollution Exclusion
- ERISA Exclusion
- Bodily Injury/Property Damage Exclusion
- Pending & Prior Litigation Exclusion
- Compensation & Labor Exclusion
- Known Wrongful Acts Exclusion

D&O OVERVIEW

COMMON TYPES OF CLAIMS

Like others afforded trust, Directors & Officers of Public Companies are held to standards and expectations. In their case the duties are owed to the shareholders and the "market" where shares of their company are bought and sold. They are expected to show Care, Loyalty, and Honesty when making Disclosures. When those duties are breach several types of lawsuits may follow:

Government initiated suit – for example by the SEC and or DOJ:
Government agencies, such as the SEC and DOJ can bring investigations and enforcement actions. For example, the SEC based on Whistleblower allegations and the DOJ for investigations for violations of the FCPA or Antitrust laws. In addition to any resulting fines and penalties, the costs to defend D&Os in these investigations alone can be significant.

Securityholder suits:
Shareholders and investors can assert fraudulent inducement to purchase shares based on alleged misrepresentations made in financial reporting.

Derivative Actions:
Shareholders bring an action against the D&Os on behalf of the company itself. Usually, such cases involve allegations of failed corporate governance and mismanagement. These often follow, the filing of Shareholder "stock drop" cases.

Bankruptcy:
Trustees and creditors can file claims in an effort to recoup losses asserting breaches of fiduciary duties or negligent management of the company's assets.

To learn more about D&O Coverage, contact our team:
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