

D&O Liability Insurance and Executive Protection: Key Issues Checklist

by Practical Law Commercial Transactions with Geoffrey B. Fehling, Hunton Andrews Kurth LLP, and Evan Bundschuh, GB&A Insurance

Status: **Maintained** | Jurisdiction: **United States**

This document is published by Practical Law and can be found at: content.next.westlaw.com/w-045-0194
Request a free trial and demonstration at: tr.com/practicallaw-home

A Checklist of issues a company should consider when they are evaluating the role directors and officers insurance (D&O insurance) coverage plays in executive protection, assessing the sufficiency of their D&O coverage, understanding how D&O coverage interacts with the company's other coverages, and navigating the D&O underwriting process.

Understand the Role D&O Insurance Plays in Executive Protection

- Keep in mind that directors and officers insurance (D&O insurance) is only one component of an effective executive protection program. Effective executive protection typically centers around three core protections:
 - exculpation;
 - indemnification and advancement; and
 - insurance.
- Recall the various tools companies use to use to protect directors and officers, including:
 - corporate governance documents, including articles of incorporation, bylaws, operating agreements, and similar documents;
 - employment agreements;
 - indemnification agreements; and
 - insurance policies, especially directors and D&O liability policies.
- Be aware that the “Side A” D&O insuring agreement that provides direct coverage for directors and officers only comes into play when the executive protections offered by exculpation and indemnification are unavailable, including when:

- the company is insolvent;
- indemnification is prohibited (for example, derivative claims); or
- the company refuses to honor executives' advancement or indemnification right (for example, due to conflict or other considerations).
- Consult with appropriate risk professionals to review these critical documents to:
 - resolve common pitfalls;
 - minimize unintended gaps; and
 - ensure ongoing access to key documents.

Learn how to Navigate the D&O Insurance Underwriting Process

- Remember that there are hundreds of insurers and countless products providing D&O insurance for individuals. Policy terms vary materially with respect to:
 - insuring agreements and coverage extensions for the benefit of individual insureds;
 - policy limits and sublimits available to protect individual officers and directors;
 - self-insured retentions;
 - defense of claims;

D&O Liability Insurance and Executive Protection: Key Issues Checklist

- definitions;
- exclusions; and
- dispute resolution provisions impacting governing law, mandatory arbitration, and forum selection.
- Make boards and C-suites aware of key coverage issues, including:
 - the purpose of D&O coverage;
 - core “Side ABC” insuring agreements;
 - nature of claims-made policies;
 - concept of defense-within-limits;
 - how multiple law firms representing multiple individual defendants can result in quicker erosion of policy limits;
 - importance of disclosures on applications; and
 - maintaining active communications and fostering relationships with retail insurance brokers, wholesalers, and underwriters.
- Avoid common missteps during the underwriting process, including:
 - failing to disclose prior claims;
 - failing to disclose matters reasonably likely to give rise to a claim in the future;
 - signing a warranty statement or any similar representation when placing a policy, renewing a policy, or requesting increased limits;
 - navigating distressed financials and potential insolvency;
 - discontinuing services, changes in corporate form, or other past or anticipated future operational changes;
 - failing to coordinate insurance policies with any existing contractual arrangements; and
 - retaining inexperienced brokers or failing to perform ongoing policy assessments.

Maximize Executive Protection by Evaluating How D&O Insurance Interacts with Other Types of Insurance

- Do not assess D&O policies in isolation. Insurance policies intended to complement one another may not actually do so in practice based on different

insurers, forms, and endorsements. This can lead to coverage gaps and expose individuals to significant uninsured liability, including:

- exclusion of professional services that are not covered by separate errors and omission (E&O), professional liability, or industry-specific coverages addressing claims based on service relationships with customers (for example, lender liability, private equity activities, healthcare providers, technology services);
 - employment practices liability (EPL) exclusions that eliminate coverage for employment-related claims but are not filled by the company’s EPL coverage, especially where the D&O and EPL coverages are procured through different insurers;
 - cyber exclusions that eliminate coverage for true D&O exposure due to overbreadth or lack of coordination with standalone cyber policies; and
 - bodily injury and property damage exclusions that do not mesh with the coverages provided by commercial general liability policies.
- Review excess policies in addition to primary policies to spot any limitations or notable provisions impacting coverage. Pay particular attention to:
 - “any other source” language (which may exhaust underlying limits);
 - insuring agreements or coverage extensions that are not followed; and
 - impact of sublimits in the primary policy.

Ensure the Company’s D&O Coverage Is Sufficient

- Review the company’s D&O insurance policies. Focus on key policy provisions impacting the availability and extent of coverage, including provisions addressing:
 - whether the insurer has a duty to defend or whether the policyholder has an obligation to defend, subject to a right to be reimbursed by the insurer;
 - the selection of defense counsel;
 - advancement of defense costs where indemnification is wrongfully withheld;
 - presumptive indemnification clauses;

D&O Liability Insurance and Executive Protection: Key Issues Checklist

- allocation of loss, particularly allocation of defense costs;
 - interrelated claims;
 - “prior acts” coverage;
 - specific matter exclusions;
 - separate limits for individuals;
 - erosion of any self-insured retention;
 - severability for applications and exclusions;
 - insurer recoupment, including claims for payment of advanced legal fees and expenses;
 - forum selection;
 - choice of law; and
 - alternative dispute resolution, including mandatory mediation provisions, arbitration provisions, and any cooling-off periods before initiating litigation.
- Pay particular attention to the definition of “Insured” in D&O policies.
 - make sure the definition includes all necessary and intended parties, such as advisory boards; foreign officers and functional equivalents; Chief Information Security Officers (CISOs); in-house counsel; directors serving as independent contractors; and domestic and foreign subsidiaries; and
 - address policy provisions that could limit or bar coverage for individuals based on how the policy defines “insured,” such as the definition of “Wrongful Act” and capacity exclusions.
 - Consider whether the definition of “Loss” includes, among other things:
 - attorneys’ fee awards;
 - pre- and post-judgment interest; and
 - exemplary, punitive, and multiple damages, where insurable.
 - Assess whether the definition of “Claim” appropriately captures common types of demands, for example:
 - requests to mediate or similar alternative dispute resolution vehicles;
 - criminal proceedings;
 - requests to toll or waive statutes of limitations; and
 - requests for injunctive relief.
 - Evaluate whether the policy provides coverage for government investigations and, more specifically, if that coverage is:
 - limited to insured persons;
 - extended to investigations against the company and under what circumstances;
 - delineates between informal requests (for example, interview requests, non-compulsory requests for documents or information) and formal regulatory action; and
 - subject to sublimits.
 - Pay close attention to the policy’s fraudulent and criminal conduct exclusion, especially the “final adjudication” trigger, which can help preserve defense and indemnity coverage for individuals unless and until there is a final, non-appealable adjudication of fraud.
 - Review policy exclusions. Pay particular attention to conditions, carvebacks, and exceptions, especially those that benefit individuals with non-indemnified Side A losses, including exclusions for:
 - professional services;
 - contractual liability;
 - product related failures; and
 - pollution.
 - Understand how D&O policies operate in bankruptcy for the protection of individuals who may be targeted in adversary proceedings and other claims arising out of bankruptcy.
 - Investigate whether the company’s D&O insurance program requires any specific arrangements to ensure continuity of coverage and to avoid gaps in executive protection, such as:
 - local policies protecting boards of foreign subsidiaries;
 - independent director coverage; and
 - retired director coverage.

Consider the Benefits of Dedicated Side A Coverage

- Recognize that two-thirds of the key D&O insuring agreements (Side B reimbursement coverage and Side C entity coverage) protect the company, not

D&O Liability Insurance and Executive Protection: Key Issues Checklist

individual directors and officers. Claims under one or both of those insuring agreements can erode limits that otherwise would have been available to protect individuals from non-indemnified losses (Side A claims).

- Understand that, if claims against the company erode or deplete limits, individuals may be left without adequate protection from personal liability, especially if the company is insolvent or unwilling to advance defense costs or provide indemnification. Consider whether:
 - numerous coverages share policy limits;
 - the company is operating in a high-risk environment;
 - the company is subject to regulatory scrutiny; and
 - if the company’s loss history shows that it has sustained prior litigation and claims activity, subsequent insurance renewals have accounted for the increased risks.
- Consider whether separate, stand-alone “Side A only” coverage is appropriate. Side A coverage provides a dedicated pool of D&O insurance limits that are available exclusively for the benefit of individual insureds when the company does not provide indemnification.
- Evaluate Side A policies with the same critical eye as traditional policies, including whether:
 - there is difference-in-conditions (DIC) coverage;
 - policies with DIC coverage account for any DIC coverage in underlying policies;
 - DIC coverage is with a different insurer or the same insurer;
 - DIC with the same insurer has a Side A match endorsement; and
 - corporate officers and directors understand the implications of each approach.

Know What to Do When a Claim Arises

- Make sure every company employee understands what to do when an incident that may require notice under a D&O policy occurs, including when the company:
 - is served with a lawsuit;
 - receives a demand for money; or
 - gets an email from a regulator asking for documents.
- Recognize that accurate and timely reporting is critical to preserve coverage for the company and its directors and officers in claims-made policies. Key decision makers must be aware of timing requirements and prepared to act quickly.
- Directors and officers should ensure that systems are in place to ask the right questions and take appropriate action to preserve their rights to D&O coverage, including:
 - reviewing the demand to assess whether it qualifies as a claim;
 - understanding the applicable notice obligations, including the difference between a claim and a potential claim and whether a matter should be reported as a notice of circumstances;
 - assessing the issue of “relatedness” and whether new matters implicate earlier policies;
 - identifying the right D&O policies, including all excess policies and any other coverages that may be implicated (for example, E&O, EPLI, Side-A/DIC, and general liability);
 - tracking all insurer communications and responding to reservation of rights letters and similar coverage positions as appropriate; and
 - consulting with outside risk professionals to assist with claim submission, negotiation, and recovery, such as brokers or coverage counsel.

About Practical Law

Practical Law provides legal know-how that gives lawyers a better starting point. Our expert team of attorney editors creates and maintains thousands of up-to-date, practical resources across all major practice areas. We go beyond primary law and traditional legal research to give you the resources needed to practice more efficiently, improve client service and add more value.

If you are not currently a subscriber, we invite you to take a trial of our online services at legalsolutions.com/practical-law. For more information or to schedule training, call 1-800-733-2889 or e-mail referenceattorneys@tr.com.