

D&O 101 – An Introduction to D&O

Texas State Office of Risk Management

Phil Norton, Ph.D.

May 11, 2017

Management Liability Today

Directors & Officers Liability, and....

- Employment Practices Liability
- Cyber Liability
- Crime / Employee Dishonesty / Social Engineering
- Fiduciary Liability
- Errors and Omissions
- Special Crime (Kidnap & Ransom, Extortion)

A Short History of D&O

- The London Fire
- Edward Lloyd's
 - 1688 coffee shop
- Underwriters
- Lloyd's 1930s
- The St. Paul 1962
- 1970s: Lloyd's, AIG, CNA
- 1980s: M&A mania
- 1990s: Birth of the Class Action "Racket"
- Late 1990s: Private and Not-For-Profit expansion



Defining the Product

What is Directors & Officers Liability Insurance?

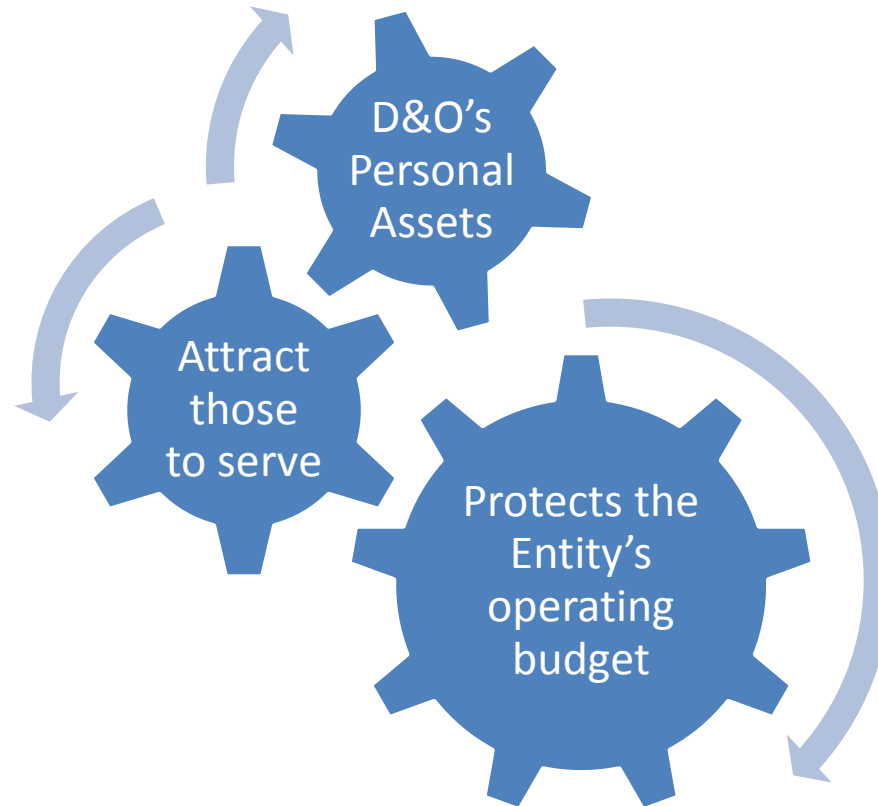
Non-Bodily Injury or Property Damage;

“Loss;”

Resulting in “Claims” against an “Insured;”

Arising from “Wrongful Acts” in their capacity as a director, officers, trustee, or public official of the entity

Why is D&O Insurance Important?



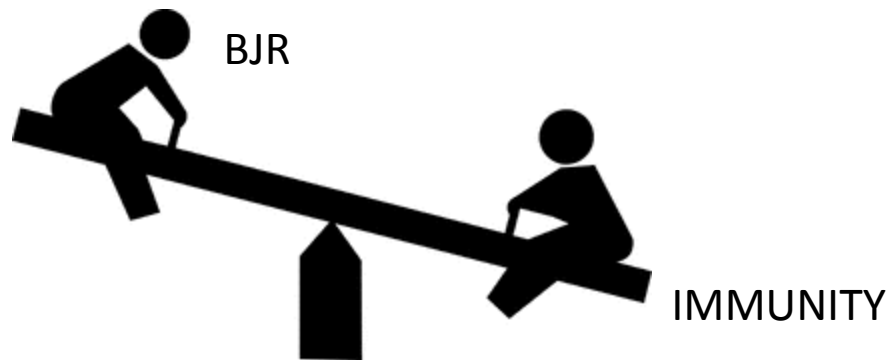
Fundamental Liabilities

Duties of Directors & Officers

- ✓ Loyalty
- ✓ Care
- ✓ Obedience
- ✓ Disclosure

Generally breaching these duties gives rise to liability.

Business Judgment Rule for most – but state agencies have something even better...



D&O Fundamentals

Indemnification is the first line of defense

- Their indemnification may not be sufficient
 - Bankruptcy
- Their indemnification may not be permissible
 - By Statute, or Structure of Settlement, or Judgment
- Insurance is an important last line of defense!

Reasons D&O claims are brought

Major Sources of Liability for Non-Profit or Public Officials

- Donors: failure to use funds as directed, mismanagement of donated funds, misrepresentation, etc.
- Third Parties, Beneficiaries, Stakeholders, the Public at large: Failure to adhere to mission statement or public service purpose for which it was intended to serve, etc.
- Employees: employment related claims such as discrimination, harassment, retaliation, wrongful termination, etc.
- Governmental Agencies: claims alleging violation of law
- Creditors, Bondholders: misrepresentation, mismanagement, failure to use funds as stated



Outlining a D&O Policy

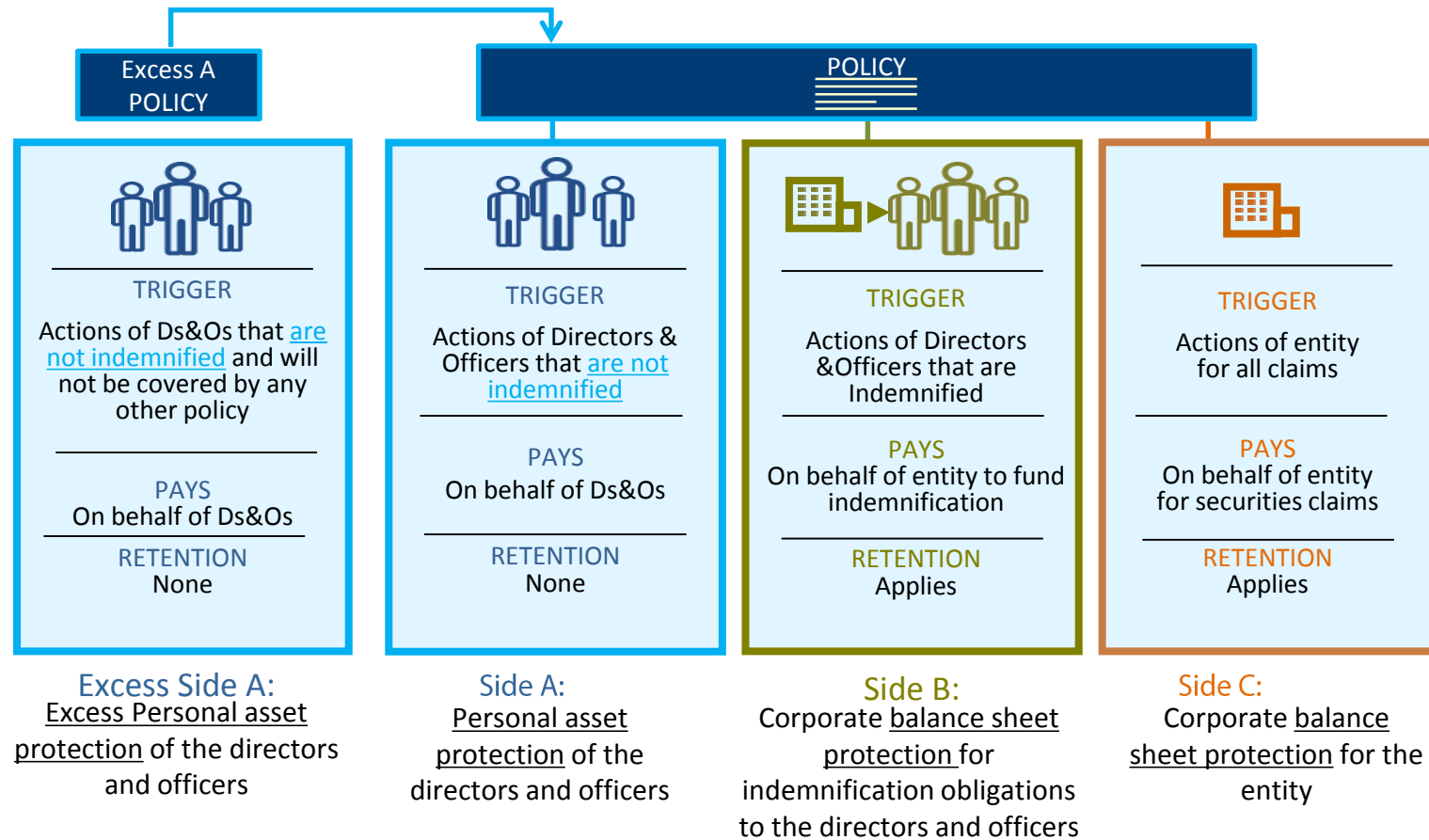
Important Provisions

- Application Forms
- Insuring Agreements
- Covered Persons/Organizations
- Covered Damages
- Coverage Triggers
- Limits, Retentions, Coinsurance
- Defense Provisions
- Exclusions
- Miscellaneous Provisions



D&O Insuring Agreements

Indemnification First, Insurance Second



Some Important Definitions

Claim



- Written Demands
- Civil or criminal suits
- Formal administrative regulatory proceedings
- Other Nuances – tolling agreements, etc.

Wrongful Act



- Any actual or alleged breach of duty, neglect, error, misstatement, misleading statement, omission or act:
 - (1) In his or her capacity as an Insured Person; or
 - (2) Solely by reason of his or her status as such



Some Important Exclusions

- Bodily Injury/Property Damage
- Fraud/Gaining of Profit
- Insured v. Insured
- Breach of Contract
- Other insurance related exclusions, such as
 - ERISA
 - FLSA
 - Environmental

Disclaimer: This is not an exhaustive list. This does not supersede policy language. Please consult your policy for actual language.

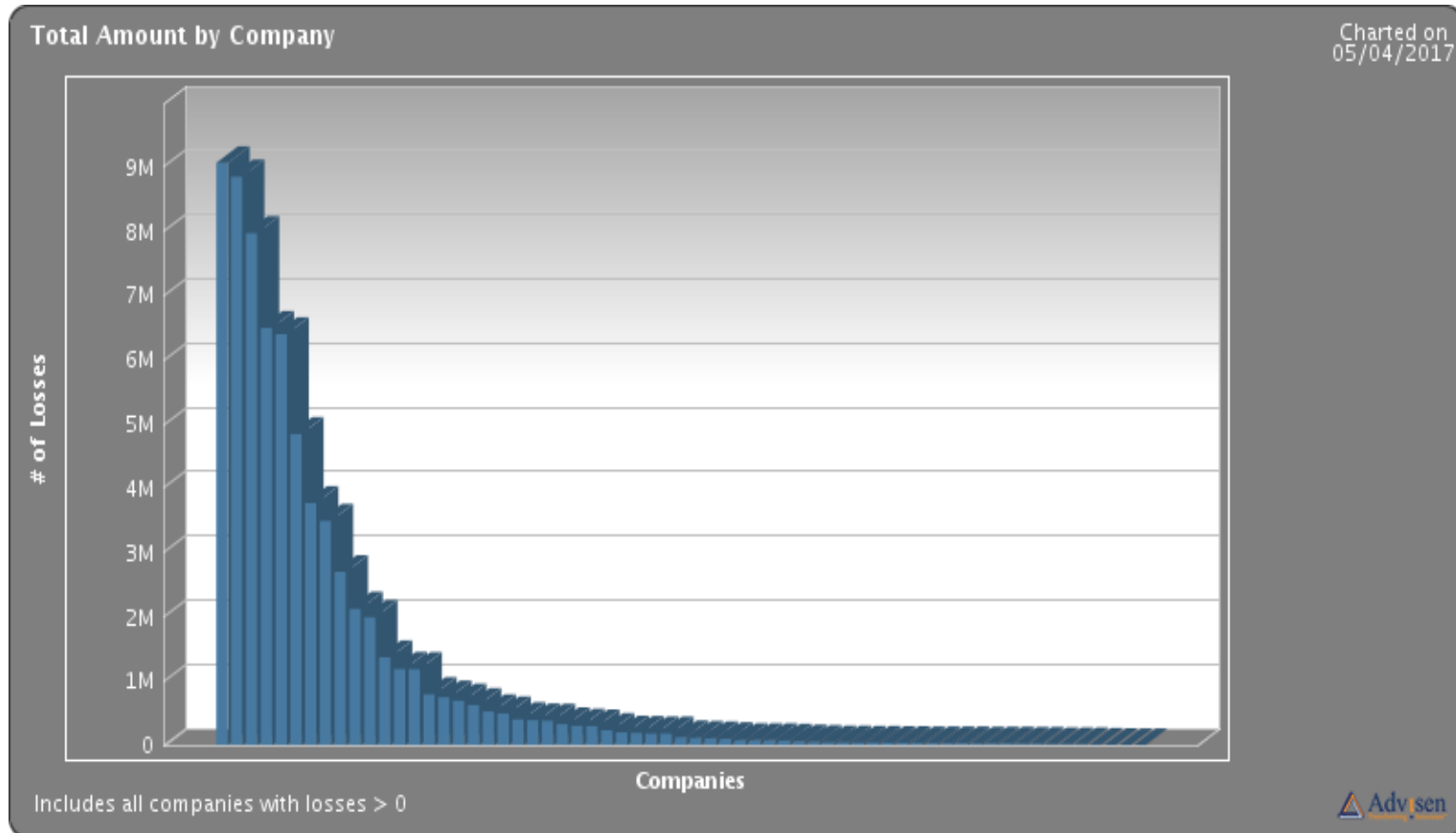


Some Important Conditions

- Notice provisions
- Defense
- Cooperation – providing claim updates, involving carrier in claim process
- Consent to Settlement



D&O Losses for Gov't and Nonprofits



Underwriting - Overview

- Applications and attachments, supplemental information
- Size and Nature of Operations
- Financial Condition
- Other factors
 - Loss History
 - Susceptibility to litigation
 - Applicable industry trends
 - Overall market conditions
 - Any unique exposures or mitigating factors (immunity! AG defense!)
 - Relationship!
 - Group Buying Power

