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?

- Protects the Entity’s operating budget
- Attract those to serve
- D&O’s Personal Assets
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…
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

**Excess Side A:**
- **TRIGGER:** Actions of Ds&Os that are not indemnified and will not be covered by any other policy
- **PAYS:** On behalf of Ds&Os
- **RETENTION:** None

Excess Personal asset protection of the directors and officers

**Side A:**
- **TRIGGER:** Actions of Directors & Officers that are not indemnified
- **PAYS:** On behalf of Ds&Os
- **RETENTION:** None

Personal asset protection of the directors and officers

**Side C:**
- **TRIGGER:** Actions of entity for all claims
- **PAYS:** On behalf of entity for securities claims
- **RETENTION:** Applies

Corporate balance sheet protection for the entity

**Side B:**
- **TRIGGER:** Actions of Directors & Officers that are Indemnified
- **PAYS:** On behalf of entity to fund indemnification
- **RETENTION:** Applies

Corporate balance sheet protection for indemnification obligations to the directors and officers
### 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