



A New D&O Insurance Landscape for Public Companies – *Indemnity Plus*

Not since the introduction of Entity coverage for Securities related Claims has the public D&O coverage landscape been as dramatically altered as it has by the recent introduction of a suite of coverage enhancements geared toward individual Directors and Officers (as opposed to the corporate entity itself). The policy changes made by leading primary D&O insurers are ushering in a new era in which these insurers have expanded the four corners of their policies to demonstrate their commitment to protecting individual Directors/Officers, and the companies which indemnify them. Many of the new primary coverage enhancements were previously available only via Side A Difference In Conditions (“DIC”) Excess policies.

What’s behind this leap forward?

While the specific coverage enhancements vary from insurer to insurer, they are generally driven by the carriers’ recognition of, and response to, the following:

- **The continuing evolution of the Claim process in which “Claims” are increasingly preceded by pre - “Claim” inquiries of individual Ds/Os regarding regulatory matters.** For investigations, the current standard for triggering a “Claim” under the D&O policy is the service of a subpoena upon an “Insured Person”.
- **The increased exposure of Ds/Os to claims by third parties alleging malfeasance for the company’s business practices.** BP’s Gulf of Mexico catastrophe serves as a good example.
- **An increased tension between Ds/Os and/or the company with respect to their perspectives as fiduciaries of the company, particularly if a company refuses or fails to indemnify the Ds/Os.** Companies with activist shareholders, such as Carl Icahn, who gain Board seats may exemplify that type of tension.
- **A need to update policy language to better align underwriting “intent” with claim “practices”.** While some of the alignment is administrative, some of it is philosophical. Certain carriers have claim paying practices which exceed underwriting intent; while others lag.
- **A soft and overcrowded market for D&O insurance.** What better way to lead than to offer significantly broader coverage and force others to follow?

What are the changes and their benefits?

Unlike “Entity” coverage, this latest leap forward in expanding the boundaries of the primary D&O policy is neither focused on one particular issue nor does it have a descriptive moniker. Since the policy enhancements are focused on providing individual Ds/Os with broader, more certain coverage; we are labeling this latest expansion “Indemnity Plus”. More importantly, exactly what type of changes are carriers now willing to make to their policies and what are the potential benefits to policyholders?

- **Removal of the exclusion for one Insured Person suing another Insured Person (aka Iv.I Exclusion).** Some carriers will extend the coverage even further and limit their overall Insured versus Insured Exclusion to Organization vs. Organization and Organization vs. Current Insured Persons.

Potential Benefits: In addition to the obvious benefit of D&O insurance now being available for scenarios such as a former founding CEO suing current Board members for diluting/diminishing the value of his shares; Boards may now decide to more boldly fight takeover bids driven by activist shareholders with Board presence.

- **Expansion of coverage for defense costs related to informal inquiries, including regulatory investigations, by a broad range of enforcement bodies (both domestic and foreign) of individual Ds/Os.**

Potential Benefits: These costs can easily run from \$1-5M plus, and were never previously covered by D&O policy language. Under the “old” D&O coverage, the policy’s Claim provision isn’t triggered until the serving of a subpoena against individual Ds/Os for SEC investigations or, for other investigating authorities, until a D/O is identified in writing. While some may argue that these costs fall within the policy’s self-insured retention, the counter argument is that these costs incurred during the informal phase will help erode/satisfy the retention sooner and faster so that costs associated with any ensuing formal investigation, proceeding or litigation will be using “insurance dollars”.

- **Removal of the Pollution Exclusion.**

Potential Benefits: While carriers have clearly stated that they will not cover clean up costs, they certainly intend to cover Securities related and Side A claims arising directly or indirectly from pollution related events. Additionally, some carriers have also explicitly stated that they intend to cover consequential damage losses brought by third parties alleging lack of Board oversight. On a related note, carriers are also providing more favorable carvebacks to exclusions for Bodily Injury, Personal Injury and Property Damage.

- **The automatic advancement of defense costs if the company fails or refuses to indemnify a D/O for any matter (insurable under a D&O policy), including the informal inquiries noted above.**

Potential Benefits: One of the provisions within D&O policies of which very few individual Ds/Os are aware is that of presumptive indemnification (D&O insurance requires the company to indemnify individuals to the fullest extent permissible by law). Now, if a company fails or refuses to provide such indemnification, the company's D&O insurance would respond and fund the non-indemnified D/O's defense with no retention applying.

- **Addition of coverage for costs incurred by companies in evaluating whether to prosecute a derivative demand, before it reaches the "Claim" stage.** In particular, this can include defense costs for special committees in seeking dismissal of an actual derivative demand.

Potential Benefits: Although sub-limited, a carrier's acknowledgement of coverage for fees incurred in investigating a derivative demand were not previously available in the market. Derivative demand costs can readily run from \$1-3M. A carrier's recognition of coverage for derivative demand costs will also serve to erode/satisfy the self-insured retention sooner and faster making insurance funds available sooner to fund any ensuing litigation.

- **A suite of Executive Enhancements available in the base form that were otherwise available only if the "deal was right" and your broker asked for them.** In furtherance of the individual D/O centric emphasis of the new changes, the coverage enhancements also include; Personal Reputation Expenses, Asset Protection Costs, SOX 304 Costs, Extradition Costs, Manslaughter Act Defense Costs, and E-Discovery Consulting Services.

What's the impact on insurance budgets?

In the interest of space and attention spans, we will refrain from continuing to list the remainder of the policy changes and potential benefits to policyholders. Hopefully, the changes and benefits noted illustrate the significant policy expansion brought by Indemnity Plus. Not unlike Entity coverage when it was first introduced, carriers expect to receive some measure of premium above and beyond what they charge under their standard forms. When first introduced by Chartis in May of this year, the suggested retail price was 15-25% above the standard. As other carriers brought forth similar innovations, the price started to decline. At this point in time, a policyholder might expect to pay 10% more for the full suite of Indemnity Plus coverages. If shopping on an a la carte basis, many of the coverages can be secured for no additional premium. It is important to note that although "Indemnity Plus" policies/endorsements do provide broader coverage for most areas, they may also contain more restrictive terms in others. The bottom line, careful review of old and new policy forms and endorsements is critical.

In the beginning, the insurance market created Directors' & Officers' Liability with Sides A and B to protect individual Directors/Officers. As Securities related litigation became more prevalent and increasingly targeted corporate entities in addition to Ds/Os, the market responded by adding coverage (Side C) expressly for the Corporate Entity when named in Securities related litigation. Today, with an increased focus by Ds/Os on their increasing individual liability, the D&O insurance market is responding yet again by providing them with broader, more specific and dependable protection as we enter the era of Indemnity Plus.



Rich Leavitt Principal, WGA, ExecutiveRisk Practice Leader
William Gallagher Associates 617.646.0283 rleavitt@wgains.com

** This memorandum and any attachments hereto are neither meant to be an exhaustive analysis of the coverage afforded under any Policy, nor is it meant to represent a legal opinion on an Insured's rights under the Policy. This memorandum and supporting documentation will serve to summarize certain legal issues, litigation trends and the potential impact of the same on D&O coverage. The insured should not use this summary as a basis for determining how to pursue certain rights under the Policy or as a representation of the extent of coverage. The Insured should read and reference the Policy for a complete understanding of the coverage afforded by the Policy. The author and his/her employer disclaim any liability, loss, or risk the insured relies on as a consequence, directly or indirectly, of the use and application of any of the contents of this information.*