

Ways to improve your D&O insurance coverage

You can negotiate enhancements to your policy. One place to start is with the definition of 'claim.'

BY STEPHEN J. WEISS AND THOMAS H. BENTZ JR.

ALL OFF-THE-SHELF D&O insurance policies contain a very large number of coverage shortcomings. Many of these shortcomings individually could result in millions of dollars of lost coverage. Fortunately, D&O policies are negotiable.

Although we do not have space in this column to describe how to improve all the shortcomings in a typical D&O policy, we can provide three examples of how changes to a *single* policy definition — that of “claim” — can greatly improve your protection.

“Claim” is a key definition in a D&O policy. Without a claim, there is no coverage. You might expect that so pivotal a term would be standardized. Unfortunately, that is not the case.

Entity Coverage for SEC Investigations. There are dramatic differences among policies as to whether and when an SEC investigation constitutes a claim. Since companies often spend millions of dollars defending an SEC investigation before the SEC ever files a lawsuit, the definition of “claim” in your policy is critical to whether your insurer covers defense costs for an SEC investigation.

For example, some policies define claim to include an “administrative or regulatory proceeding” against the insured company. However, some insurers take the position that an administrative proceeding does not include an SEC investigation. This means that an investigation is not a claim and that the related defense costs are not covered.

Other policies provide broader protection by covering an SEC investigation authorized by a formal order of investi-

gation “but only while [the investigation] is also pending against an Insured Person.” The advantage of this definition is that coverage can attach much earlier than under a definition limited to an “administrative proceeding.” But this definition still falls short. Since the SEC gen-



Stephen J. Weiss (left) is a partner in the law firm of Holland & Knight LLP and is one of the nation’s leading authorities on D&O and employment practices liability insurance.

Thomas H. Bentz Jr., an associate with the firm, has more than seven years of experience in the same areas.

erally does not name individuals in a formal order of investigation, it may be difficult to establish that the SEC investigation is also pending against an insured person. This could leave the company’s defense costs uncovered.

A better alternative is to purchase a policy that defines “claim” to include an SEC investigation commenced by the issuance of a formal investigative order, and does not include a requirement that such investigation also be maintained against an insured person. If your policy does not provide this coverage, it may be possible to negotiate changes.

Criminal Proceedings. Criminal de-

fense costs can be sky-high. Just ask Richard M. Scrusby, former HealthSouth CEO, who ran up bills of more than \$25 million defending against fraud and related charges brought by federal prosecutors, according to media reports. The costs to defend against such proceedings would not be covered by policies that do not include criminal proceedings in the definition of “claim.” Given the government’s increased emphasis on bringing criminal charges against executives, it is more important than ever to negotiate the definition of claim to cover criminal proceedings.

Oral Demands. Some policy forms define “claim” to include both “written and *oral* demands for monetary damages.” The addition of an oral demand to the definition might seem like a desirable expansion of coverage. However, this addition may create coverage problems for the insureds. For example, an officer who receives an oral demand might not recognize it as a claim (because most policies do not treat an oral demand as a claim) and thus may not report it to the insurer in a timely manner. No timely notice, no coverage. Then there is the problem of proof. Trying to establish what a disgruntled stockholder said to the CEO and then determine if it constituted a reportable demand for monetary damages is a difficult task. To avoid these potential coverage issues, we recommend that you ask the insurer to delete oral demands from the definition of “claim.” Insurers typically grant this request.

The preceding discussion may contain more information than you ever wanted to have on the definition of “claim.” However, if you have gotten this far, we trust that you have gained a greater appreciation of the large number of coverage shortcomings that may exist in a D&O policy and an awareness of the enormous dollar consequences small word changes can have on coverage. ■

The authors can be contacted at steve.weiss@hklaw.com and thomas.bentz@hklaw.com.