

The Current State of Side A Insurance Coverage

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RISKS FACING D&O's TODAY

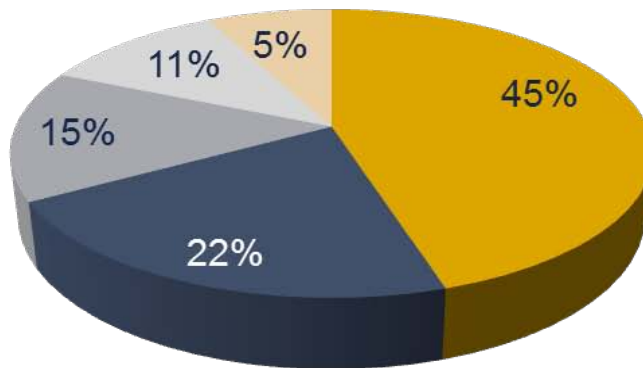
DIRECTORS AND OFFICERS TODAY FACE INCREASED RISKS



THE BIG PICTURE OF D&O LITIGATION FOR 2012

- The total number of new claims are down in all categories, but still higher than all previous years prior to 2011 (the peak)
- **Regulatory claims** are now the largest category
 - Financial firms and their directors and officers continued to be the most “popular” defendants → at 28% of these suits.
- Derivative actions (15%) now **exceed** traditional Securities Class Actions (11%).

D&O Suits by Type:



- Regulatory
- Breach of Fiduciary Duty
- Derivative
- Securities Class Actions
- Other

ALL D&O SETTLEMENT DATA

In 2012, the average settlement for all D&O suits was **\$21.2M** (up from \$16.4M the prior year) and the average securities class action settlement was **\$51.8M** (compared to \$34.9M in 2011).

- The average settlement amount for “mega-claims” (settlements of \$100M+) declined by more than 27%
 - Mega-claims were only 40% of total settlement dollars in 2012- compared to the past 5 years when mega-claims were roughly 71% of settlement dollars
- Defense firms explain this as a matter of easy cases settle early (“Pilgrims”) or are dismissed, while tougher cases, seeking more \$\$\$ don’t settle and that is what we are now left with... **leading to concerns about settlements in 2013 and beyond.**

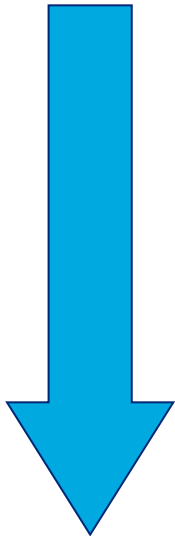
While securities class action suits continue to represent an increasingly smaller percentage of D&O suits filed, they remain **the most significant source of large losses.**

From: Advisen’s D&O Claims Trends: 2012 Wrap Up

HOW SIDE A INSURANCE PROTECTS

D&O INSURANCE IS THE LAST LINE OF DEFENSE

First line
of defense



Last line
of defense

Statutory Protection



Corporate By-laws



Corporate Indemnification Agreements



Traditional D&O Insurance



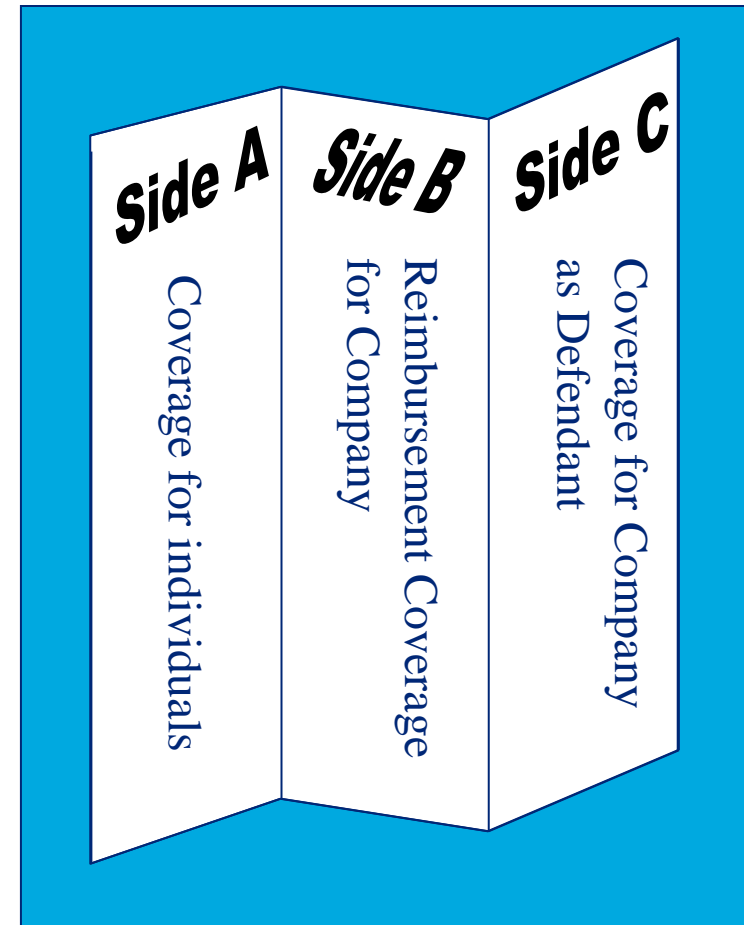
Dedicated Side A D&O Insurance

D&O INSURANCE HAS THREE (3) SEPARATE INSURING AGREEMENTS

- **Side A: Individual Coverage**
 - Covers directors and officers when they are not indemnified
- **Side B: Corporate Reimbursement**
 - Covers the company to the extent it indemnifies a director or officer
- **Side C: Entity Coverage**
 - Covers claims made against the company (this coverage is generally limited to securities claims in public company policies)

■ *Additional Coverages*

- *For private companies, additional coverages like Employment Practices Liability, Fiduciary(ERISA) Liability, Crime/Bond, E&O, and Privacy/Cyber may be included*

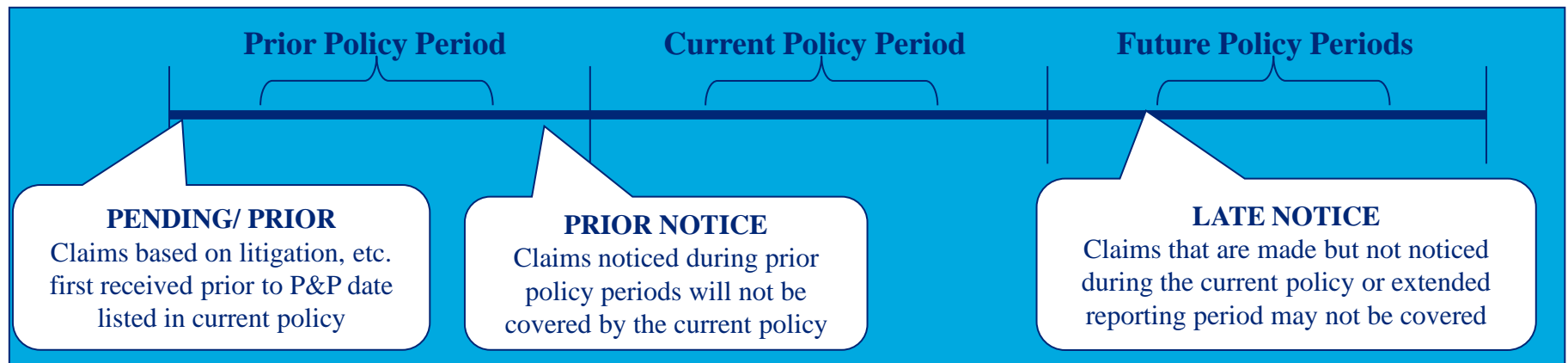


D&O INSURANCE FILLS MANY GAPS

- A D&O policy can respond even if the company is **bankrupt**
- Most D&O policies guarantee advancement of defense costs
 - Today, **PRESUMPTIVE INDEMNIFICATION** is less of an issue
- A D&O policy can protect against **derivative** losses
- A D&O policy minimizes the risk of a **change in control** affecting a director or officer's protection
- A D&O policy can be converted to **runoff/tail** in the event of an acquisition or other change in control

D&O INSURANCE DOES NOT FILL ALL GAPS

- Most traditional D&O policies limit coverage in certain areas. For example:
 - Claims (i.e., Bodily Injury or ERISA claims) intended to be covered under other policies
 - Claims by the Organization (entity) against Insured Person
 - Claims for deliberate and proven fraud
 - Claims noticed to past policies / related to pending or prior proceedings / late notice



- Definition of Claim much narrower (internal or SEC investigations)
- D&O policies can also limit choice of defense counsel and/or how a claim is defended
- D&O pricing can be volatile

SIDE A ISSUES

HOW MUCH COVERAGE DO YOU NEED?

- Balance cost against risk
- Need enough to attract and retain directors and officers
- Consider median and average claims *and* defense costs
- How much Side A coverage should you purchase vs. traditional ABC coverage
- For public companies, the “typical” settlement value of a securities class action claim equals the drop in market capitalization impacting outside investors, multiplied by a percent (could range 2-20+%)
 - ***THIS DOES NOT INCLUDE DEFENSE COSTS, OPT-OUT CLAIMS, DERIVATIVE CLAIMS AND/OR AND ERISA TAG-ALONG CLAIMS***



TYPES OF DEDICATED LIMIT POLICIES

- There are several types of dedicated limit policies:
 - **Side A only**– only protects individual directors and officers
 - **Side A (Excess and DIC)** – sits excess traditional D&O coverage and drops down when broader
 - **Independent directors liability / outside directors liability policies (IDL)** - only protects independent or outside directors; and
 - **Individual policies** – protects an individual for all boards he or she serves on

- These policies only protect against non-indemnifiable claims (i.e., claims that the company is unable to/refuses to indemnify the director or officer for)

BASIC SIDE A TERMS TO LOOK FOR

- As broad or broader than primary policy
 - Look at definition of Claim and Wrongful Act
- No inconsistent requirements or definitions
 - Notice
 - Exclusions
 - Related Claims
 - Arbitration Requirements
- Non-Rescindable Coverage
- Drop Down Triggers
 - What happens if the company fails to indemnify?
- No ERISA, Failure to Maintain, Pollution, I vs. I Exclusions

OTHER CONSIDERATIONS FOR SIDE A COVERAGE

- Large Side A limits from a single insurer
 - Pros and Cons
- Using same insurer for Side A and Primary policies
 - Pros and Cons
- Cost vs. Coverage provided
- Does Side A make sense for non-profits and/or private companies?
- Does Side A (Management Liability Insurance) make sense for law firms?

CONCLUSION AND QUESTIONS

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