



## LEGAL ALERT

February 13, 2012

### Review of Directors' and Officers' Liability Insurance

On December 1, 2011, we sent the attached memorandum to our clients and friends concerning our recommendation that a review of a company's Directors' and Officers' Liability Insurance Policy ("D&O Policy") should be undertaken annually. No one wants to discover that, after an event has occurred, the coverage afforded by the current D&O Policy is insufficient or non-existent. As we continue to review D&O Policies on behalf of our clients, we see the following trends which we would like to call to your attention:

#### Service on Non-Profit Boards.

Many officers and directors serve on boards of local non-profit organizations. Generally, this board activity is covered under D&O Policies but insurers have become more stringent in imposing formal requirements before coverage can be invoked.

Trend. Among other things, insurers are mandating that service on the non-profit board must be at the specific request of the company (not the granting of a request by the officer or director) or that the company must specify that service on the non-profit is regarded as being within the regular duties of the officer or director of the company.

Recommendation. We recommend that boards of directors specifically review their D&O Policy in this regard and adopt policies and procedures as well as board resolutions which conform to the requirements of the insurer as set forth in the D&O Policy.

#### Electronic Publication of Defamatory Material.

The increasing use and prominence of social media (Facebook, Twitter, YouTube) by both companies and employees has created new hazards in the area of defamation, whether slander (oral) or libel (written). Most standard D&O Policies exclude coverage for libel and slander.

Trend. One of the key elements of defamation is that it must be "published." Social media allows this element to be met easily by the posting of the offending language in an online environment. Employees may use social media to publish comments about another employee, a supervisor or a customer which may not be true and which may damage the reputation of such persons. In this regard, the alleged victim of the defamation most likely will sue the employer as well as the employee posting the alleged defamatory statement.

Bybel Rutledge LLP  
1017 Mumma Road, Lemoyne, PA 17043  
Phone: 717-731-1700  
Fax: 717-731-8205  
Website: [www.bybelrutledge.com](http://www.bybelrutledge.com)

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Recommendation. Insurers that underwrite D&O Policies generally will provide separate cover for electronic publishing of defamatory material and we recommend that companies strongly consider purchasing such coverage.

**Workplace Violence.**

Most D&O Policies or Fidelity Bonds cover injuries caused in connection with larceny, burglary or robbery but some restrict coverage only to those instances where there is use or threat of use of deadly force.

Trend. There appears to be more reported instances of violence occurring in the workplace, whether in the form of employee-on-employee, employee-on-customer or customer-on-employee violence. In all these situations, expect the company to be on the receiving end of a lawsuit by the injured party.

Recommendation.

It is important to determine what type of coverage is available in these situations and whether that coverage is provided under a general liability policy or whether a specific provision in the D&O Policy is required. In any event, we think it important that companies secure such coverage.

These are just a few of the trends we are seeing in the area of D&O Policies. We are available to analyze your D&O Policy (as well as your Fidelity Bond) as well as comparing levels of coverage with financial institutions of a similar asset size and make appropriate recommendations. Please contact any of the attorneys listed below at 717.731.1700 or by email at the following addresses for additional information or assistance.

Nicholas Bybel, Jr. [bybel@bybelrutledge.com](mailto:bybel@bybelrutledge.com)  
G. Philip Rutledge [rutledge@bybelrutledge.com](mailto:rutledge@bybelrutledge.com)  
L. Renee Lieux [lieux@bybelrutledge.com](mailto:lieux@bybelrutledge.com)  
Erik Gerhard [gerhard@bybelrutledge.com](mailto:gerhard@bybelrutledge.com)  
Nicole S. Kaylor [kaylor@bybelrutledge.com](mailto:kaylor@bybelrutledge.com)  
Mark Worley [worley@bybelrutledge.com](mailto:worley@bybelrutledge.com)



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# BYBEL RUTLEDGE LLP

ATTORNEYS AT LAW

1017 Mumma Road, Suite 302  
Lemoyne, PA 17043

Telephone: 717.731.1700  
Fax: 717.731.8205

**Via E-mail**

DATE: December 1, 2011  
TO Clients and Friends  
SUBJECT: Review of D&O Insurance Policy

We consistently have urged our clients and friends to place a review of their Directors and Officers Liability Insurance Policy (“D&O Policy”) on their 12 month calendar of important business issues which should be addressed annually. Given recent trends, we think this more important than ever.

According to a 2010 Survey by Towers Watson, 31% of respondents reported having a D&O Policy claim within the last ten years. This represents a 100% increase from 2008 when only 14% of respondents reported a claim within the same time period. The survey found that a public company has a 35% chance of having a D&O Policy claim in any given year. Lastly and more alarmingly, 54% of respondents said that they had not reviewed their D&O Policy within the last two years!

Neither you nor your directors want to be in a position to discover a lack of sufficient coverage after an event has occurred. Therefore, the Board should be proactive in its understanding of what coverage it has, the limits of the coverage and, most importantly, the exclusions from coverage.

This review should be more than just an administrative function or touching base with the insurance agent. Executive management, along with the relevant Board committee, should be tasked with this review and subsequent presentation of findings and recommendations to the entire Board. We are available to assist in the review of your D&O Policy in context of our experience in reviewing D&O Policies for other financial institutions. For example, we look at the following issues.

## **Coverage**

Does the D&O Policy cover:

- Past, present or future company directors and officers, including advisory or honorary directors and members of advisory boards and committees.

- Activities of non-profit organizations on which a company director or officer serves at the request of the company.
- Punitive and exemplary damages awarded in addition to actual damages as well as multiple damages awarded under statutes which multiply damages.

Does the D&O Policy include a presumption that the articles of incorporation, bylaws and resolutions of the company will be deemed to have been adopted or amended to provide indemnification and advancement of defense expenses to the fullest extent permissible by law?

### **Exclusions from Coverage**

The following generally are excluded from coverage under most D&O Policies and special endorsements or policies will be needed to effect coverage:

- Fines, penalties, costs of investigation or taxes.
- Bodily injury, wrongful death, destruction or personal property,
- Intentional misconduct or dishonesty, fraudulent or criminal acts or omissions or any willful violation of any common or statutory law or regulation but only if there is a binding adjudication in a proceeding adverse to the insured which establishes such conduct.
- Libel, slander or defamation.
- Losses based upon, attributable or arising from the gaining in fact by an insured person of any profit, remuneration or advantage to which he is not legally entitled.
- Pre-judgment and post-judgment interest (per Pennsylvania Amendatory Endorsement)
- Unlawful employee practices (sexual harassment, wrongful termination, discrimination).
- Costs incurred to comply with judicial or administrative agency subpoenas, requests for information, customer complaints or other data which do not result in the institution of a formal proceeding.

### **Side A Coverage**

Do you have excess Side-A coverage which is intended to provide coverage for losses that, for any reason, are not indemnifiable? For Side-A coverage, it is important that the insurer does not have the right to rescind, in whole or in part, the Side-A coverage for any reason.

### **Imputation of Knowledge**

A significant issue with respect to D&O Policies is to guard against the knowledge of one insured person being imputed to all other insured persons. This is important in the context of (1) statements made on the application of insurance so the insurer cannot deny coverage or rescind a policy based on misrepresentations made therein, and (2) knowledge which would give rise to an exclusion from coverage (eg dishonesty of one insured person being imputed to all insured persons).

## **Defense Expenses and Advancement; Choice of Counsel**

Are defense expenses inside or outside the liability limits of the Policy? Although it is preferable to have defense costs outside the limits, we are seeing less coverage being offered for defense costs outside the limits and, when offered, the premium is adjusted accordingly due to the fact that defense costs could be significant.

In any matter which may invoke coverage of the D&O Policy, defense expenses are going to be a significant cost and it is important to know whether the company or the insurer will choose defense counsel and if the insurer will advance defense expenses to the company or an insured individual or plan.

## **Conclusion**

We are available to analyze your D&O Policy (as well as your Fidelity Bond) in context of the foregoing issues and make recommendations for modifications to your coverage. Please contact any of the attorneys listed below at 717.731.1700 or by email at the following addresses for additional information or assistance.

Nicholas Bybel, Jr., [bybel@bybelrutledge.com](mailto:bybel@bybelrutledge.com)  
G. Philip Rutledge, [rutledge@bybelrutledge.com](mailto:rutledge@bybelrutledge.com)  
L. Renee Lieux, [lieux@bybelrutledge.com](mailto:lieux@bybelrutledge.com)  
Erik Gerhard, [gerhard@bybelrutledge.com](mailto:gerhard@bybelrutledge.com)  
Nicole Stezar Kaylor, [kaylor@bybelrutledge.com](mailto:kaylor@bybelrutledge.com)  
Mark A. Worley, [worley@bybelrutledge.com](mailto:worley@bybelrutledge.com)

