



Personal Limit

Explore the benefits of directors' and officers' insurance coverage

by Pamela V. Rothenberg

Recruiting and retaining talented officers and directors is a tremendous challenge—especially in today's post-Enron environment, where qualified candidates are concerned about personal liability for wrongful acts committed by the company, other board members or officers.

Obtaining directors' and officers' liability insurance ("D&O") can mitigate this concern. D&O insurance policies protect both the company and its officers and directors against liabilities arising from wrongful acts committed by the company or individuals.

Board members and senior officers should ensure their company maintains adequate, comprehensive D&O coverage. This is especially important for independent directors who could be tainted by bad acts committed by non-independent board members or senior officers. Independent directors should consider requiring their own separate, non-rescindable D&O policies.

To assess D&O coverage, the following terms are key:

- **Coverage:** Policies typically have separate insuring agreements for directors and officers and the company. Both sides require coverage.
- **Limits:** Policies have an overall limit of liability coverage. Keep in mind policy limits can be exhausted by defense costs, which can be millions of dollars.

- **Exclusions:** Policies typically exclude fraud, dishonesty, personal benefit and criminal acts. Many impute bad acts by one person to others in the company, sometimes denying coverage to innocent board members or employees. These must be scrutinized carefully.

- **Premium:** Large publicly traded companies should expect to pay

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hundreds of thousands of dollars annually for coverage because of potential securities claims.

- **Retention:** The insured must cover this deductible or dollar amount before the insurer pays certain claims.
- **Policy period:** D&O policies generally run for a one-year term.

When purchasing D&O insurance, real estate companies should be concerned with two main issues having a major impact if a claim is made:

Protection for misrepresentations in application. Many policies permit insurers to rescind all or parts of coverage for material misrepresentations or fraudulent statements in the application. Obtain an endorsement to limit the insurer's ability to deny coverage to directors and officers who were unaware of these bad acts.

Severability of fraudulent or criminal conduct. Fraudulent or criminal conduct by one director or senior officer should not be imputed to others, especially with respect to securities claims. Only facts pertaining to and knowledge possessed by a past, present or future chairman of the board or president, chief executive, operating or financial officer should be imputed to the company. This critical endorsement is the main benefit.

Given our litigious society and ever-present threats of personal liability, officers and directors should protect themselves and their companies by purchasing comprehensive D&O coverage. To be safe, have policies independently reviewed by professional advisers unrelated to the insurer or its agent. □

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