

COVERAGE FOR CORPORATE GENERAL COUNSEL UNDER DIRECTORS AND OFFICERS LIABILITY INSURANCE POLICIES

Do traditional directors and officers (“D&O”) liability insurance policies afford coverage to corporate general counsel acting in their capacity as attorneys? Recent legal and regulatory actions brought against corporate general counsel arising from stock options backdating scandals have sparked discussion and comment on this issue. Although there is a dearth of legal precedent on the applicability of traditional D&O coverage to claims against corporate general counsel, and coverage terms vary, insurance brokers and industry experts suggest that corporate general counsel examine their policies and take steps to secure appropriate coverage.

D&O liability insurance typically provides coverage to the corporation’s directors and officers “acting in their capacity as such.” When actions naming the general counsel include alleged wrongdoings arising from professional legal services, is the general counsel entitled to coverage under the company’s D&O liability policy? If not, does the corporation maintain lawyers professional liability coverage for its general counsel and in-house legal staff? These important questions require consideration by corporations and their legal departments at this time.

Claims made against a general counsel generally combine allegations of corporate officer wrongdoing and legal malpractice. The typical D&O policy form may, by its terms, restrict coverage for individuals holding multiple roles or may explicitly exclude coverage for professional legal services.

Depending on the terms of the corporation’s particular D&O insurance coverage, several steps (employed independently or in combination) should increase the scope of D&O liability coverage afforded corporate counsel or clarify the coverage terms. Of course, each policy must be considered as a whole in order to fully evaluate the effectiveness of any of the measures discussed below.

- Amending a policy’s definition of “directors and officers” and/or “insured persons” to include the title “general counsel” may extend coverage to the general counsel acting in his/her capacity as an attorney and as a corporate director/officer. This remedy, however, may not expand coverage to non-officer in-house counsel. Amendments to the insured entity’s by-laws should also be considered. By including the title of “general counsel” in the by-laws’ definition of “officers,” listing other in-house counsel as assistant officers, and specifically describing the general counsel’s duties, coverage may be triggered absent any revisions to the policy’s definitions.
- The policy’s coverage restrictions applicable to “wrongful acts” may also present a coverage barrier for corporate general counsel. Most D&O liability policies apply to “any act or omission . . . committed or attempted **solely** in a person’s capacity as director or officer.” Where a corporate general counsel’s actions combine officer and legal counsel functions, coverage conditioned on acts taken “solely” as a director or officer may not be available to the general counsel or may be limited by the insurer.

- In addition to the limitations on coverage arising from the definition of “insured persons” and “wrongful acts,” some policies contain a professional services exclusion. Such an exclusion may also provide grounds to limit or deny coverage for corporate general counsel. Another approach to coverage of corporate general counsel under a D&O liability policy is the addition of employed lawyers professional liability insurance (“ELP”) to a company’s insurance program. An ELP policy affords coverage to corporate general counsel and non-officer in-house counsel, much like a law firm’s malpractice insurance.

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