

D&O Plus: Pillsbury's D&O Policy Advocacy Program

Overview

D&O insurance is one of the most important safeguards a company and its directors and officers have against allegations of wrongdoing by activist investors, aggressive plaintiffs' firms and the SEC. Public and private companies purchase D&O coverage to protect management and outside directors against the ever-changing risks of litigation in a world where their decisions are frequently second-guessed, and it is critical to companies' abilities to attract and retain strong directors and officers.

Yet, despite the importance of D&O coverage as a bulwark against personal and corporate exposure, most people are surprised to learn that the scope of coverage, as reflected in the terms and conditions of the D&O policy, is highly negotiable. No sooner does an insurer issue a revised policy form to exclude more claims than brokers and policyholder counsel have prepared extensive "endorsements" – customized amendments that materially enhance the scope of coverage. Likewise, coverage terms may be tailored to a company's unique circumstances, such as a merger or sale, an IPO, or a liquidation.

The manuscripting of D&O policies is driven by a number of factors. Over the past decade, insurers have sought to minimize their exposure to certain types of claims through denials of coverage and litigation over the meaning of key terms. On issues where policyholders have succeeded in overcoming insurers' defenses, insurers have sought to narrow the scope of coverage afforded in their policies by revising their forms with more restrictive terms and conditions. Not surprisingly, larger companies – especially the ones buying more insurance – have withstood these contractions in coverage terms with greater success.

Paradoxically, notwithstanding the financial meltdown of 2008-2009, the D&O insurance market has remained remarkably "soft." That is, most policyholders have largely retained the ability to purchase D&O coverage at record low rates and with advantageous terms. The keys to success in this arena are market knowledge, up-to-date understanding of the rapidly evolving case law on D&O insurance, and capable advocacy – unique skills that can be found only in the top brokers and coverage counsel.

D&O Policy Advocacy

Pillsbury's D&O Policy Advocacy program provides our clients with those critical skills, deployed to secure significant enhancements to our clients' D&O policies. We work closely with our clients' insurance brokers to place and negotiate improvements to coverage: drafting and negotiating manuscripted policy wordings, advising on coverage towers and Side A structures, modifying policies to address recent case law developments, and, more generally, advocating for state-of-the-art coverage. And, of course, when a claim or potential claim arises, the Pillsbury team is available to advise, and, if necessary, litigate to enforce our clients' coverage rights.

Frequently Asked Questions

Why D&O coverage and not property or E&O coverage, for instance?

In fact, we provide the same service on all forms of coverage, but the zone of potential improvement and the value of the exercise is usually greatest for D&O policies.

How often should this be done?

For some of our clients, this is an annual process, and policy wording enhancements may evolve slowly, yet inexorably, in our clients' favor. Other clients consult us only when they have a particular transaction or exposure they are concerned about.

What does a D&O policy review cost?

The D&O Plus program may be performed on a reasonable, flat-fee basis, with the cost dependent on the complexity of the coverage. Our clients, particularly boards and management, have been unanimous in their opinion that the program provides tremendous value.

Will this offend my broker?

Not the good brokers. The top brokers regularly recommend a "second look" by counsel, and frequently refer their valued clients to Pillsbury. We complement, but do not replace, your broker. Our strong relations with the top brokers and insurers are a key to our success.

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