Directors’ and officers’ insurance

Scope of coverage

1 What is the scope of D&O coverage?

As in other states, Directors and Officers (D &O) insurance coverage in Florida indemnifies for legal damages and provides for defense cost payments to corporations’ and other organizations’ directors and officers in the event of lawsuits or claims by third parties during the policy period. While, most often, coverage relates to the directors and officers of a corporation, insurance coverage may be purchased for directors of other types of entities as well. Florida’s statutes explicitly authorize condominium associations[1] and cooperatives[2] to provide D&O insurance for their directors and officers.

While policy provisions vary, D & O insurance policies cover liability arising out of the discretionary acts of high level executives and members of boards of directors, rather than the more ministerial actions of employees with limited authority. Examples of situations which may trigger coverage under a D&O policy include but are not limited to:

- Shareholder or derivative lawsuits over company or stock performance;
- Investor or creditor lawsuits regarding mismanagement of fiduciary obligations;
- Misrepresentation in organization prospectuses;
- Decisions exceeding the scope of officers’ authority;
- Pollution and environmental issues;
- Employment-related and human resource liability; and
- Cyber liability.

The different coverages afforded by a D &O insurance policy are described, in short hand fashion, by the “sides” to the policy. Side A sets forth terms of direct coverage to directors and officers when the corporation or other organization (hereinafter “organization”) is not legally obligated or is otherwise unable to indemnify them. Side B reimburses the organization itself for defense costs and indemnity that organization provides to its directors and officers. Side C—also known as “entity coverage”— indemnifies the organization for direct liability arising from violation of federal and state securities laws or other similar claims. If included, Side D provides coverage for security derivative demand investigation costs.

D&O policies may provide for reimbursement of defense costs expended by directors and officers, as opposed to the insurer directly providing a defense. Among exclusions to D&O policies are (a) fraud[3]; (b) criminal activity; (c) acting for personal profit; (d) prior (late) claim notice; (e) bodily injury or property damage; (f) pending and prior litigation and (g) “insured vs. insured” claims.

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[1] Fla. Stat. Section 718.11

[2] Fla. Stat. Section 719.104

[3] Typically, to be effective as an exclusion from a D&O policy, fraud must be established by final adjudication by a court.

Today, D & O insurance typically is claims-made, rather than occurrence-based. In short, in order to be covered, a claim must be reported between a D&O policy's effective commencement date and end date of coverage

Litigation

2 What issues are commonly litigated in the context of D&O policies?

Among likely subjects for coverage litigation under D&O policies are: (a) whether there was a failure to disclose material facts existing at the time of the respective policy's placement, thereby giving rise to a possible rescission cause of action; (b) whether, according to the policy's specific provision for reporting of claims, the claims were not timely reported; and (c) whether appropriate allocation—whether for indemnity or reimbursement of defense costs – have been effected between covered and uncovered claims.

In Florida, the most frequently litigated issue is the viability of the "insured vs. insured" exclusion. Established to avoid collusion among the insureds, the "insured vs insured" exclusion prohibits, under most circumstances, one insured from receiving indemnification and reimbursement of defense costs for a claim or proceeding involving another insured. *Durant v. Jones* 189 S. 3rd 993 (Fla. 1st DCA 2016) is instructive in emphasizing that the exclusion means what it says. In that case, the exclusion was held to bar coverage in the instance in which a corporate director sued the corporation's president for overvaluing the corporation's shares of stock prior to the director's stock repurchase. Since the director had never been an appointed officer or employee of the corporation, a narrow exception to the exclusion for the corporation's employees was found not to apply. However, in *Rigby v. Underwriters at Lloyd's, London* 907 So.2nd 1187 (Fla. 3rd DCA 2005), an insurer was not allowed to exclude a lawsuit from D&O policy coverage under the "insured vs. insured" exclusion , where a bankruptcy trustee sued one of the defunct corporation's officers. Even though the trustee was named as an insured in an endorsement to the corporation's last issued D&O policy, the court held that the exclusion was not on point as the trustee was not acting in the capacity of either a director or officer in bringing the lawsuit.