Directors & Officers Liability: State of the D&O Market and Recent Trends

Presented by the Professional Indemnity Practice

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As has been the case since late 2011 and has continued through 2013, the overall D&O market has seen some level of pricing and retention pressure, known as hardening. In most cases, insureds are seeing flat or increasing premiums as carriers attempt to restore profitability in the continued low interest rate environment.

Here is a snapshot from four of the larger D&O market segments:

Public Company D&O - Pricing pressure on the first $25,000,000 - $50,000,000 of coverage persists, however a great deal of capacity exists in higher excess layers, allowing for competition to keep overall program pricing in check. As detailed in our In Focus section, Merger & Acquisition (“M&A”) related claims have led many primary carriers to propose higher Securities Retentions, and in many cases, specific M&A retentions. Most publicly traded D&O buyers are enjoying much broader policy terms and conditions than has been available in recent history.

Financial Institutions - With continued fall-out from the 2008 credit crisis, Fi D&O carriers are continuing to push both pricing and retentions to much higher levels through 2013. While the entire sector continues to suffer due to losses, increased regulation and the overall economic environment, carriers that have historically been steady in this space are beginning to take major corrective actions.

Private Company D&O - Similar to public companies, private companies have seen hardening in their D&O programs. Notably, several major private D&O players are exiting large segments of the business and are also attempting to restrict terms and conditions (i.e. Wage and Hour exposure, California exposures, overall limits management). Specifically, carriers are working to reduce coverage available to the private company itself, which has historically enjoyed nearly identical coverage available to directors and officers.

Not-For-Profit D&O - The NFP D&O space, especially the smaller end of the segment, was one of the first portions of the D&O market to experience price and retention pressure. Several key players in the smaller NFP D&O space began raising premiums and retentions within five key segments: Financials, Industries, Energy, Utilities and Retail. Here is a snapshot from four of these key segments:

In Focus: Merger & Acquisition Claims

Most public company D&O buyers who have renewed their coverage this year have heard the term “M&A Retention” more than once. The numbers behind this trend are certainly eye-opening and worth further analysis. Both Cornerstone Research and Advisen have thoroughly investigated M&A trends and the statistics support the reasoning behind recent actions by primary public D&O underwriters:

- Despite the relatively small dip in M&A litigation during 2012 and 2013, we have seen a 1200% increase in M&A related lawsuits since 2002, peaking at 354 in 2010.
- 96% of M&A transactions with a value of $500,000,000 or higher were challenged with an average of 5.4 suits contesting these transactions.
- 65% of M&A transactions with a value of $100,000,000 or higher were challenged.
- Noting that average settlements range between $500,000 and $1,500,000 - 81% of settlements were “disclosure only settlements,” meaning that no monies were paid by defendants outside of disclosure costs, defense costs and plaintiff fees.

Each primary public D&O carrier has their own version of a M&A retention endorsement, which should be carefully reviewed. It is also important to note that most M&A retention pressure has been at the $1,000,000 Securities retention level and under.

Duty to Defend vs. Reimbursement: Private and Non-Profit D&O Policies

Though it may not be widely known, there are distinct differences between each insurer’s private/non-profit company D&O policy. One of the many differences we’d like to focus on is duty to defend versus reimbursement coverage. There are benefits to each approach depending on the type and size of each insured’s organization.

Duty to Defend - The primary benefit of Duty to Defend policies is the availability of pre-determined allocation. The basic premise is that, as long as one allegation is covered and at least one defendant is named on the policy, the entire claim would be defended by the insurance company and their policy. There are obvious benefits to this approach, but the typical and material downside to this type of policy is lack of choice of counsel – most insurance companies will push you to their panel counsel with very little exception.

Reimbursement - The primary benefit to reimbursement policies is choice of counsel and relative freedom to defend a matter. All policies dictate cooperation and participation by the insurance company, but a reimbursement form puts the onus on the insured to choose counsel and defend themselves. The material downside to a reimbursement policy is lack of pre-determined allocation meaning that insureds and insurance companies must negotiate on the allocation of coverage between insureds and loss.

There are positives and negatives to either approach, but it is important to note that many carriers who have historically provided duty to defend with 100% pre-determined allocation are attempting to move away from this coverage in the harder private/non-profit company D&O market.
Our Unique Approach
Clients come first at Wortham, where our business model is based on service rather than sales. Wortham neither owns nor maintains a financial interest in any other entity in the insurance delivery system. Independence eliminates conflicts of interest and allows us to develop liability programs that are tailored to the specific needs of our clients. We are extremely proud of the reputations our 500 insurance professionals have earned throughout the industries we serve, and many of our clients have worked with us for 15 years or more. And, of course, Wortham works only with vendors who maintain the strongest financial ratings and service levels.

Skilled Specialists
Wortham’s Professional Indemnity & Surety Practice operates as an extension of a risk management team. Our practice is headquartered in Houston and supports teams of skilled specialists in each Wortham office: Austin, Dallas, Fort Worth and San Antonio. Maintaining one of the largest practices in the state, our professionals have extensive underwriting backgrounds and collectively offer more than 200 years of experience. All told, our group handles more than $125 million of Professional Indemnity and Surety business annually. Our secret to success is simple: we work to thoroughly understand the business and goals of our clients, and we use our talent and expertise to design highly specialized programs to effectively manage risks.

Wide Range of Experience
Wortham has extensive experience in serving a wide range of clients in every industry across Texas and the United States, from Fortune 100 firms to the smallest not-for-profits. Our specialists are directly involved in serving clients’ Professional Indemnity & Surety coverages, including:

- Directors & Officers Liability for public companies, private companies, partnerships, not-for-profit companies and law firms.
- Professional Indemnity (Errors & Omissions) for lawyers, financial institutions, real estate, medical professionals, architect/engineers, owners/contractors, accountants and other professionals.
- Other Wortham specialties include Employment Practices Liability, Fiduciary Liability, Crime/Fidelity and ERISA Bonds, Kidnap/Ransom & Extortion, Cyber Liability, and Surety Bonds.

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Executive Summary

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