

'Circumstance Reporting' Can Preserve D&O Coverage

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Many directors and officers liability policies are written on a “claims made and reported” basis. This means that the policy covers only claims that are asserted against the insured *and reported to the insurer* while the policy is in effect, or within a short grace period provided after the policy expires. The requirement that claims be reported while the policy is in effect can create practical and legal difficulties.

This is particularly true when events that might end up resulting in a claim happen near the end of a policy period. For instance, the insureds can be placed in a difficult situation when they receive communications that expressly or implicitly threaten to assert a claim, but the communications do not rise to the level of an actual “claim” as defined by the policy. If these communications are not reported to the insurer before the policy period expires and a claim is later asserted based upon the same events after a new policy goes into effect, coverage problems can arise. The successor carrier might deny coverage by contending that the claim was “made” during the prior policy period, or contend that the insured’s knowledge of the circumstances giving rise to the claim triggers a policy exclusion in the successor policy. The prior insurer, in turn, might assert that there is no coverage because the claim was not reported while its policy was in effect. Both insurer’s positions could ultimately lack merit, but the costs of litigating that issue could be substantial and have the practical effect of depriving the insured of coverage necessary to defend the claim.

Most directors and officers liability policies fortunately contain “circumstance reporting” provisions. These provisions allow the insured to report potential claims, or circumstances that may result in claims, even if no actual claim has been asserted. If done properly and in compliance with the applicable policy language, reporting the circumstances or the potential claim allows the insured to seek coverage for a claim that is later asserted based upon those circumstances, under the policy that was in effect when the circumstance report was made.

In effect, the allowable period for reporting claims under the policy is extended as to any claims that result from the circumstances reported to the insurer. Determining whether to make a circumstance report can be a difficult decision that requires careful consideration of the facts and policy language involved. It is important that this evaluation occur promptly so that all available options can be considered.

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