

ANDERSON KILL POLICYHOLDER ADVISOR

The Policyholder Law Firm



D&O Insurance for Cryptocurrency Litigation

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The year 2017 was an exhilarating year for cryptocurrencies. Bitcoin, Ether and others surged to record highs. There are many factors that have led to these price increases, one of which is the initial coin offering phenomenon, through which promoters have raised hundreds of millions of dollars in capital through the sale of cryptocurrency “tokens.”

Unsurprisingly, federal and state regulators have paid close attention to ICOs. They have issued stern public warnings and commenced several regulatory enforcement actions. Recent statements from Securities and Exchange Commission and Commodity Futures Trade Commission officials suggest that enforcement activity is likely to increase in 2018, and that “significant resources” will be brought to bear on the market, according to SEC Chairman Jay Clayton. In addition to regulatory activity, securities class action lawsuits have been filed in connection with several offerings.

Given the expense that this litigation can entail, what insurance coverage if any might be available to defray this? One place to look is directors and officers liability insurance. These policies typically cover claims made against an entity’s directors and officers under what is known as “Side A” (reimbursing directors’ and officers’ non-indemnifiable defense and indemnity costs) and “Side B” (reimbursing the entity for amounts paid to defend and indemnify directors and officers), and claims against the corporate entity itself under “Side C” (covering the entities’ own defense and indemnity costs).

What constitutes a “claim” under a D&O policy is a threshold coverage consideration. This may differ depending on whether the insured at issue is a corporate director or officer or the entity itself. For example, a policy may define a claim against a director or officer as “a written demand for monetary damages or non-monetary relief.” Similarly, with respect to private company policyholders, a claim may

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be defined as “a written demand for monetary, nonmonetary or injunctive relief.” With respect to coverage for a public company, the definition of “claim” may require allegations of “a violation of any federal, state, local or foreign regulation, rule or statute regulating securities.”

The broad definitions of “claim” applicable to directors and officers and private companies under many D&O policies may readily trigger coverage for claims by investors against directors and officers and private companies involving an ICO as well as regulatory investigations involving individual directors and officers and the company. Even where a formal regulation, rule or statute is not alleged to have been violated, depending on the policy language, policyholders can argue that the definition of “claim” extends to claims alleging violations of the common law. See *Verizon Communs., Inc. v. Ill. Nat’l Ins. Co.*, No. N14C-06-048 WCC CCLD, 2017 Del. Super. LEXIS 250, at *26 (Del. Super. Ct. Mar. 2, 2017).

Regulatory investigations of public companies involving cryptocurrencies may also trigger D&O coverage if the policy’s definition of “securities claim” includes regulatory investigations and proceedings. The scope of coverage for such investigations depends on whether the policy covers both “formal or informal administrative or regulatory proceeding[s] or inquir[ies],”

or limits coverage to more formal proceedings instituted against the company. Compare *MBIA Inc. v. Federal Ins. Co.*, 652 F. 3d 152, 155 (2d Cir. 2011) with *Office Depot, Inc. v. Nat’l Union Fire Ins. Co.*, 453 Fed. Appx. 871, 875 (11th Cir. 2011).

Another issue may be who is included in the policy’s definition of an “insured.” Many ICOs list formal and informal advisors in their marketing. They may be added as defendants to civil litigation regardless of the ultimate merits of such claims. Because these positions may not fall squarely within the definition of “insured” under the policy, anyone considering such an advisory role may wish to consider the availability of D&O insurance for potential litigation risk involved in an ICO.

Finally, some policies may include exclusions related to electronic data and cyber losses. D&O policies are written on company-specific manuscripted forms. Reviewing coverage before a loss to determine if a policy will apply to an ICO-related claim is a prudent course of action for an enterprise considering such an offering.

Cryptocurrencies have created great wealth for some, as well as litigation for others. We expect litigation and enforcement activity to increase in 2018. It is always worth asking if your insurance policies will cover a loss. This is true with respect to any lawsuit, and just as true when cryptocurrency is at issue. ▲

About Anderson Kill

Anderson Kill practices law in the areas of Insurance Recovery, Commercial Litigation, Environmental Law, Estates, Trusts and Tax Services, Corporate and Securities, Antitrust, Banking and Lending, Bankruptcy and Restructuring, Real Estate and Construction, Foreign Investment Recovery, Public Law, Government Affairs, Employment and Labor Law, Captive Insurance, Intellectual Property, Corporate Tax, Hospitality, and Health Reform. Recognized nationwide by Chambers USA, and best-known for its work in insurance recovery, the firm represents policyholders only in insurance coverage disputes — with no ties to insurance companies and has no conflicts of interest. Clients include Fortune 1000 companies, small and medium-sized businesses, governmental entities, and nonprofits as well as personal estates. The firm has offices in New York, NY, Stamford, CT, Newark, NJ, Philadelphia, PA, Washington, D.C., and Los Angeles, CA.

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