

Give Notice on Your D&O Claim . . . Yesterday

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A ballgame isn't over till it's over. All too often, an insurance company will treat a D&O Claim as if it began before it began. You need to be ready for that possibility.

Most D&O policies contain some form of an "interrelated wrongful acts" provision that can effectively render timely notice requirements retroactive. What this means for Policyholders is that you may have to give notice of a claim before it is made if it is related to claims that were previously made. While policy language varies, one typical provision states, "[C]laims based upon or arising out of the same act, error or omission or related acts, errors or omissions shall be deemed to be a single claim . . . all such claims shall be deemed to be first made as of the date that the earliest of such Claims was first made." *Paradigm Inc. Co. v. P&C Ins. Sys.*, 747 S. 2d 1040, 1042 (Fla. Dist. Ct. App. 2000).

When a claim is asserted against your company, it may be natural to assume that only the claims listed in a demand letter or complaint will be those that proceed in litigation. However, it is common for a claimant to amend its claims and assert a new claim based upon the same set of facts that were originally alleged. If the amended claims include claims against your company's directors or officers or allegations that now trigger your D&O coverage, you may run into a coverage roadblock if you did not notify your D&O insurance company of the original statement of claim. That is, the insurance company may take the position that you were required to give notice of a claim before that claim was actually made.

How can you protect your company from the potentially punishing application of the "interrelated wrongful acts" provision in a Directors and Officers insurance policy?

Help Your Broker Spread a Wide Net When Reporting the Claim

When your company receives a claim, complaint or other demand, your immediate reflex may be to send a copy of that document to your broker so that "the appropriate" insurance companies may be notified. Perhaps you direct your broker to notify "all appropriate insurance companies" and leave the decision on whom to notify entirely to your broker without providing the broker with all the necessary information.

It is essential to provide all the information that may help your broker determine which policies are triggered and *may* be triggered. That means sharing with your broker all of the information you have about the claim, including factual information about the claims, your company's defenses and

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the general background facts that may not be contained in the demand. If you do not provide all pertinent and potentially pertinent information to your broker, your broker may not realize that insurance policies other than the "obvious" ones may be triggered.

Indeed, it is those facts that may or may not be known or raised by the claimant at the initial pleading or demand stage that may cause the claimant to amend its demand to add additional claims. If those newly asserted claims trigger coverage under your D&O insurance policies but you have not placed your D&O insurance company on notice of the initial demand — as opposed to the amended demand — you may be surprised to receive a denial from your insurance company on the basis that you failed to give timely notice.

Frank discussions with your trusted professionals about those "silent facts" can help you to avoid the pitfall of inadvertently failing to put all appropriate insurance companies on notice — not just those that may be the obvious choices based on the original demand or statement of claim.

Playing Games with the Policy Period

By projecting the start of a claim against your directors and officers back to the start of a prior and allegedly "related" claim, an insurance company may feel empowered not only to assert that the policyholder failed to provide timely notice but also that the claim occurred outside the policy period.

A typical notice provision requires notice "of any Claim as soon as practicable after the Company's general counsel, risk manager, chief executive officer or chief financial officer (or equivalent positions) first becomes aware of such Claim, but in no event later than sixty (60) days after the end of the Policy Period."

In the insuring agreement, the insurance company typically agrees to pay the loss for a "wrongful act" that takes place during the policy period. A wrongful act may be defined as "any actual or alleged error, omission, misleading statement, misstatement, neglect, breach of duty or act negligently committed or attempted" by any Director or Officer while acting in their capacity.

Consider the scenario in which you receive a demand from a claimant but decide not to give notice to your D&O insurance company because the demand does not clearly assert a claim against your Directors and Officers or a claim under the terms and conditions of the policy. What happens if the claimants amend their initial demand a year or two later to allege new claims based upon the facts contained within the original demand?

Even if the newly asserted claims fall within the policy period, if they arise out of the same set of facts as initially alleged, then the new claims, as one interrelated wrongful acts provision phrases it, may "be deemed to constitute a single Claim and shall be deemed to have been made at the earliest of the following times regardless of whether such date is before or during the Policy Period: (a) the time at which the earliest Claim involving the same Wrongful Act or Interrelated Wrongful Act is first made; or (b) the time at which the Claim involving the same Wrongful Act or Interrelated Wrongful Act is first made."

If you become aware of a claim against your Directors and Officers after the end of the policy period, your insurance company may deny coverage because the claim was not reported during the policy period.



Even if you provide notice on a current policy promptly after becoming aware of a claim newly filed against your Directors and Officers, the insurance company may deem the claim to have occurred prior to the policy period, when the alleged “interrelated wrongful act” first occurred.

Further Steps to Avoid Late Notice Defenses

In addition to providing your broker with all relevant information when you receive notice of a claim, you can take further steps to avoid “interrelated wrongful acts” coverage defenses. All of them involve understanding the claim against you as broadly as possible and casting the notice net as widely as possible. They include:

1. **Have a candid discussion with your trusted counsel** about the claims asserted, your company’s defenses, and claims that could be asserted based upon the facts as you know them to be. This can help you understand the potential amendments to the stated claims and understand whether your Directors and Officers have potential liability down the road.
2. **Communicate with your insurance broker** — not only about the claim in question but about the scope of all your insurance policies. Be sure that you understand the notice requirements in all of your insurance policies, particularly those policies that you may not initially consider to be triggered by a claim.
3. **Consult with trusted coverage counsel on the policy provisions regarding claims, notice and interrelated wrongful acts.** Understanding these provisions, including how courts have interpreted them, will assist you in evaluating the insurance coverage available for the claims asserted.
4. **When in doubt . . . notify.** Policyholders may be reluctant to notify insurance companies whose policies are not obviously triggered by a claim. Factors motivating that reluctance to notify often include a belief that policy premiums will increase because of notice of a claim. However, generally, notice only with no monies spent will not affect premium and on balance, even if the insurance company increases the policy premiums at renewal because of notice of a claim, generally that increase is small relative to the coverage that may be lost if notice is not given.
5. **Don’t keep your professionals in silos;** let them talk to each other to fully protect your interests. Your broker, defense counsel and coverage counsel should talk to one another to ensure all appropriate steps are taken.

Read the Claim, Read the Policy

Policyholders often fail to read their insurance policies until there is a loss. However, the interrelated wrongful acts provision in many D&O insurance policies, combined with the notice requirements in those policies, highlights the importance of understanding the constraints your insurance policies may place on coverage if you decide not to provide notice of a claim. One way to avoid inadvertently forfeiting coverage is by understanding the claims that are asserted — and those that could be asserted, as well as the notice and insuring agreement provisions in your insurance policies. ▲

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