"D&O Insurance Today"

Wednesday, April 10, 2013

Course Materials

Audio Archive

As the questions mount regarding director and officer liability, companies - as well as those covered - are taking a second look at their D&O insurance policies. With D&O carriers sometimes looking to amend policies - and more lawsuits naming directors and officers being filed - the playing field for D&O insurance is becoming increasingly complicated. Join these experts:

- **Tom Bentz**, Partner, Holland & Knight LLP
- **Peter Critchell**, Assistant Vice President - Directors & Officers, AIG Property Casualty
- **Heather Fox**, General Counsel, ARC Excess & Surplus
- **Thomas McCormack**, US Claims Officer - Directors & Officers, AIG Property Casualty

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Broc Romanek, *Editor, TheCorporateCounsel.net*: Welcome to today's webcast, "D&O Insurance Today." It's been quite a few years since we've had a D&O insurance program, so I'm excited to get up to speed. Here's a link to the Course Materials.

Let me go ahead and introduce our panel. Tom Bentz is a Partner of Holland & Knight. I want to thank Tom for putting our panel together and leading the show here, as well as putting together the course materials for today. Peter Critchell is an Assistant Vice President of D&O for AIG Property Casualty. Heather Fox is the Chief Brokerage Officer for ARC Excess & Surplus. And Tom McCormack is U.S. Claims Officer for D&O for AIG Property Casualty. Tom, take it away.

Typical Claims Against Directors and Officers

Tom Bentz, *Partner, Holland & Knight LLP*: Thank you very much, Broc. I'm happy to do this update on directors' and officers' liability insurance. We're going to do this as a group, so I'm going to let the gentlemen from AIG start off by giving us a little bit of what they're seeing with respect to the risks that directors and officers are facing today.

Tom McCormack, *U.S. Claims Officer - Directors & Officers, AIG Property Casualty*: There are a group of litigations that you typically see in a D&O claim. One piece could be securities litigation - violation of the securities laws, violations of Section 10(b), Rule 10b-5, or Section 11 for IPO claims - things like that. Typically, the allegations in those complaints are that the directors did not adequately disclose the risks to

the market in a timely fashion, and because of that, the stock dropped and stockholders lost a lot of money.

Another group of litigations that we see all the time are merger and acquisition litigations. Typically, whenever there's a takeover, friendly or unfriendly, it results in litigation. I don't know if you've seen any of the recent statistics, but if you were to go back 10 years, probably fewer than 30% of mergers resulted in litigation. This past year, in 2012, for large mergers, 95% of all deals resulted in litigation. Even the rate of litigation for smaller deals was much higher - I would say about 90% of those mergers resulted in litigation. In those litigations, you typically see a claim that there was some breach of fiduciary duties by the directors and officers of the company, that they didn't adequately look at the deal before they approved it, that they favored one group over another group in terms of finding a merger partner, or things like that.

Lately, there have been more and more SEC investigations related to both types of litigation. The SEC has become much more involved and has made much more of a name for itself recently. If you look at insider trading, for example, during the past two years, the SEC has taken 70 cases to trial, and it has won 70 cases. They've gotten a lot of publicity out of that. And they get a lot of settlements as a result of having won all those trials.

SEC investigations are typically very expensive to handle and result in high number of documents that need to be preserved. Dealing with the SEC and its requirements disrupt the company's activities on a daily basis. That has certainly disrupted the lives of many corporations recently.

Some other types of litigation are bankruptcy, not so much in the large companies, but in smaller and midsized companies. During the past couple of years, there have been many companies that have gone into bankruptcy. They all result in litigation, brought by a litigation trustee, for example. Those litigations typically are very expensive to handle and very expensive to resolve. You're at a disadvantage because the litigation trustee has all the documents that the company originally had.

Bentz: Tom, have you noticed any trends with respect to the costs to resolve or to defend these suits in the last several years?

McCormack: The costs have gone up tremendously. For example, in the merger and acquisition area, typically in the past almost all of that litigation was filed in Delaware. But now it may be filed not only in Delaware, but also in the state court where a company has its principal place of business. It may also be filed in federal court. That's all driven by plaintiffs' attorneys looking to get a piece of the pie. So you're defending on multiple fronts, and in multiple jurisdictions, all of which leads to higher prices.

In addition, securities litigation has tended to spread out a little bit. The length of time to resolve cases has gone up slightly over the past couple of years As everyone knows, the longer litigation goes on, the more cost is involved in it.

You also have different fronts that you have to defend. You may be defending against a securities lawsuit at the same time that you may be defending against an SEC investigation. The Department of Justice may have gotten involved, and maybe there is criminal litigation that needs to be defended.

Peter Critchell, *Assistant Vice President - Directors & Officers, AIG Property Casualty*: I wanted to address what Tom just said about the spreading out of the fronts and different forums. The transactional cases are now getting filed in a multiplicity of forums. Then the plaintiffs (and even Delaware, which is trying to get all cases involving Delaware law into Delaware) will be fighting with other jurisdictions and other courts as to where it gets litigated.

I think this connects somewhat broadly to a trend on costs that has two sides. At Cornerstone, one of our friends does a yearly analysis of securities cases, which are certainly a major portion of the very expensive D&O exposure. Over the last few years, the number of filings of securities claims has gone down, and that trend continued last year. However, last year, the settlement amounts were double the amount of the year before. In other words, the median amounts paid to settle securities cases, which was around $5 million in

2011, was around $10 million in 2012. So there's something strange going on - fewer filings, but bigger settlement numbers.

I think it connects to the fact that there are fewer securities cases, which are - along with employment class actions and certain others - a big source of money for the plaintiffs' bar. So there are fewer of those cases to go around. There are various reasons for that, including the PSLRA, various trends in legislation, and the fact that there are fewer firms doing this kind of litigation.

But there's less to go around. The pie has gotten smaller. The plaintiffs' lawyers at every level - but certainly below the top-tier firms - are looking for more things to do. So you'll see plaintiffs' firms in the M&A transactional cases attacking deals that you didn't used to see doing that work.

You'll see them doing shareholder derivative cases. Shareholder derivative cases would in the past have been quickly settled, because typically they will accompany a securities fraud suit. Those folks don't want to litigate, they don't want to do discovery - they just want to get paid off quickly. Now you're seeing them holding on longer. You're seeing those cases being more difficult to settle, for a variety of reasons.

So in the securities area, that pie is changing somewhat, at least in regard to the volume of cases - the inventory. And you're seeing a lot of attempts to creatively find new areas for litigation.

I'm not sure we're seeing the new big thing on the horizon yet. The credit crisis was certainly a bump. LIBOR is going to create some issues. Beyond that, it's a little unclear. The one thing I think you can count on is that the plaintiffs' bar is very assiduous, very diligent and very creative.

Maybe going overseas is a trend. I'm handling some of those cases, and we are seeing more of that kind of litigation. That's a slow process, longer term.

It is interesting to see how costs, which have always been big, are not moderating in terms of settlement or litigation. So this is an ongoing battle for us.

McCormack: To follow up on one thing that Peter said, typically there have been trends in the D&O marketplace resulting from plaintiffs' firms coming up with a new theory. The tech bust in early 2000 led to the accounting scandals of Enron, WorldCom, Global Crossing, etc. You had IPO laddering cases that resulted in a tremendous amount of litigation. And you had a group of stock option backdating cases.

In the last 10 years or so, there have been pockets that led to a tremendous amount of litigation, including the credit crisis of 2008. No one sitting here today can predict what the next wave of litigation will be. But based on historical data, there will be a new wave in the future.

Trends in D&O Policy Pricing, Terms and Conditions

Bentz: Heather, maybe you can talk a little bit from your perspective how this change in the D&O market, and what we see as litigation trends, has affected the D&O policyholder in terms of pricing, terms and conditions.

Heather Fox, *Chief Brokerage Officer, ARC Excess & Surplus, LLC*: Sure. I'll start with public companies, because a lot of the focus of the conversation has been on securities class actions.

In the public market, we are currently seeing some rate increases over the prior year where we also experienced rate increases. Prior to that, we had eight years of rate decreases.

The rate increases are mainly confined to the primary policy. We see anywhere from flat to 5 -7% rate increases in the primary. The reasons for that are attributable to what Tom was talking about - M&A cases tend to hit only the primary, because they are mainly defense cost cases. So the primary markets are feeling the pain of those cases, more so than the excess markets.

Then, in the excess markets, you'll see a little bit of a rate increase. The excess markets don't have the M&A exposure, and their rates as a result have been somewhat flat to up a couple of points.

In contrast, the private company and nonprofit space has been more difficult. There is the bankruptcy exposure that we just heard about. The other difference on a private company and nonprofit policy form is that you have full entity coverage, not just coverage for securities claims. Those books of business have seen a lot of entity claims over the years. Couple that with the fact that the private and the nonprofit space was a particularly competitive marketplace - it was seen by the insurance markets as a lucrative area where they could make a lot of money.

So the space got very competitive over the last 10 years. The competition drove the prices down dramatically while losses were mounting.

Over the last 18 months to two years, we've seen some pretty dramatic rate increases there, which could be as high as 25%. Of course, there are often smaller premiums in the private and nonprofit space as compared with the public company space. But, especially in the bigger markets, the leaders in the space, who have very large books of business, have communicated to us that they have to re-underwrite their books of business.

Some markets are doing better than others. We have seen some carriers trying to distinguish rate increases based on industry class and exposures, and they have really diced up their books to figure out where they're losing money. We have also seen other markets where they are just looking for rate increases across the board on their books of business.

Of course, it's the job of the broker to make sure that the carriers aren't trying to blanketly look for a 25% increase on everybody's business.

On the coverage side, in terms of a trend in the private and nonprofit space, the carriers are looking to pull back on entity coverage. They're trying to attach more exclusions and trying to provide a more narrow entity coverage, because that is where they have seen the losses.

Bentz: Are there any trends that you can talk about and maybe share with us as far as the terms and conditions on both the public and private sides? I know you just mentioned some pulling back in the private market. What about on the public side?

Fox: On the public side, coupled with the rate increases that I was just talking about, the carriers are looking to get higher retentions - higher deductibles. It seems to me that oftentimes the carriers are happier getting the higher deductible than trading dollars on a rate increase.

Where they can't get a higher retention because of competitive pressures, they may try to put a higher retention just on the M&A exposure. Sometimes you can get them to limit the higher retention just to that exposure and then moderate your rate increase.

The biggest coverage concern for your clients - whether private, nonprofit or public - is the issue of coverage for investigations. When does the policy start kicking in for investigative coverage?

For the most part, you can get informal investigative coverage for insured persons in the public company space. In the private and nonprofit company space, the underwriters are not as anxious to offer that coverage. Those books of business are not performing that well to begin with, so they're more leery of expanding the coverage.

AIG and a few other markets have introduced products that provide entity investigative coverage for public companies as a separate purchase. Because entity investigations are a high-severity exposure, the pricing on these products is very expensive. As a result, the product has not seen much traction.

Every time you sit down with a client, that's the coverage they're looking for. Towers Perrin, I believe, had a survey of what concerns most directors and officers. One of the biggest concerns was regulatory exposure. So I would say that's probably the biggest coverage concern that I see.

Bentz: Peter, from the underwriting perspective, or at least from AIG's perspective, what are you seeing,

as far as trends in terms and conditions?

Critchell: Being on the claims side, I'm not actually best positioned to speak to that. But I was just going to say, in response to what Heather was talking about, that from our perspective it is somewhat less than ideal that more people have not sought investigative coverage. Clearly companies do want this investigative coverage. As you can see, for instance, in the Chinese reverse merger cases, the SEC is very invigorated. And the SEC can be very difficult to deal with. So offering a broader coverage for investigations seems to meet a need.

From our perspective, these investigations are very, very expensive. And in particular - and I think that our new policy is more clear on trying to distinguish this - investigations are very expensive in terms of the initial discovery, which although you're providing it just to the SEC, is a situation in which you can almost guarantee that a securities fraud lawsuit is going to follow, if it hasn't been filed already. That is then a parallel exposure with separate, but related discovery issues.

And you get into all kinds of complications. Heather and I have been through a few of these, where you're trying to sort out - what is it that's covered with respect to the investigation? What is covered with respect to the litigation? When did that happen? The new policy form was intended to at least make these kinds of issues very clear.

I don't know if Tom can speak to other underwriting innovations.

McCormack: A couple of years ago, we didn't really see that many companies taking Side A coverage. Now that has become much more prevalent in the public space, where on top of the traditional D&O insurance, there is a layer or multiple layers of Side A coverage strictly for the individual directors, primarily outside directors who want to make sure that they are covered for sitting on the board. That has caught on much more than it had in the past.

Maybe in the future, this investigation policy will catch on, if there are a few more large public investigations by the SEC that get a lot of press.

Fox: I'll disagree with that just a little bit, Tom. I think the desire is there from clients. I think they all see the SEC exposure and are very concerned about it. But at the price point right now, most clients are not thinking they want to lay out those kinds of premium dollars. The price point right now is not making sense to them. They'd rather wait and hope they don't have an investigation, and if they do, use those premium dollars they didn't pay to fund the cost of the investigation.

If the price point comes down, I think you would have a lot more people interested in the product.

McCormack: That's the essence of the free market, Heather - that supply and demand will meet somewhere.

Fox: Yes, that's right.

How D&O Insurance Fits In With Other Protections

Bentz: That might be a good point for us to jump off and get a little bit more into the meat and bones of the actual policies themselves. One of the things I find in my practice advising directors and officers about insurance is that there's generally a fairly big misunderstanding on how D&O insurance fits into the general scheme of their protection.

Specifically, you start off with the fact that there is statutory protection for directors and officers. Of course, there are many issues there. It's different depending what state you're in. Those statutory protections can be changed. And for the most part, those protections are permitted, but not mandatory.

What comes up next - and I think this ties into the investigation coverage - is what happens if you have bylaws that say the company is going to indemnify directors and officers to the greatest extent permitted by law?

What we've seen - and, again, this is in my practice - is that kind of provision is not typically enough to protect the directors and officers. One obvious reason is, if the company doesn't have the funds to indemnify, it doesn't matter what you're entitled to. You can't get it.

Beyond that, there are a lot of other limitations to the bylaws that can and should be addressed. One thing that we've noticed is that a lot of companies haven't looked at their bylaws since the day they filed their corporate documents. Or they haven't looked at them for 10 or 20 years. And they have not kept up with the legal developments in the last several years that have impacted the ability of bylaws to protect the directors and officers.

D&O insurance has a very specific place in protecting the directors and officers. But it's not necessarily the first place you go to find that protection.

When you get to talking about D&O insurance, I think it's really important to remember that D&O insurance policies vary tremendously from insurer to insurer. There's a lack of uniformity in terms and conditions. There's a lack of uniformity in scope of coverage. Even a single insurer may have four or five different policies, each of which will provide very different coverage for their directors and officers.

One of the things that we wanted to do today was drill down a little bit about - who should be covered by this policy? And who shouldn't?

Heather, do you want to start off with that topic?

Who Should and Shouldn't Be Covered

Fox: Most of the policies are going to cover - in the boilerplate - duly elected directors and officers. Many will also cover employees. And that's a point where the director and officers should reflect. Although the primary purpose of the D&O policy is to protect directors and officers, how does the company want to insure its employees?

Is there an indemnity obligation? Whether or not there's an indemnity obligation, do you want coverage for employees under your D&O policy?

Many companies decide that they want to cover employees the same way they cover directors and officers. Others try and limit the coverage for employees to employment practices cases, because that's an entity exposure.

Oftentimes, I will see people want to insure the employees on a co-defendant basis. So they'll say, to the extent that a director or officer is named in the case, they would like their employees protected as well. Assuming there are no conflicts, there will only be one law firm representing all defendants. Companies don't want the D&O carrier to be able to allocate and only cover the costs of defending the director or officer, and to deduct from what they're going to reimburse the company for the cost of defending the employee. So companies will cover employees as co-defendants to get full coverage. That's the way most companies will want to see their coverage react, and the way most carriers will offer the coverage.

With respect to the General Counsel, while it's nice to see the name in the policy, it really isn't necessary. I know a lot of carriers do name the general counsel explicitly. But if you're an officer already, you're automatically covered by the policy.

A lot of times people like to see the titles Risk Manager and Director of H.R. as named insureds. I think that's a little bit of marketing. It's not necessary if they hold the title of director, officer or employee.

Additionally, you want to think about the types of employees you have. Do you have temporary employees? Do you use independent contractors? Do you have volunteers? Those people should be explicitly endorsed if you want to see coverage for them.

Again, you want to line up your indemnity obligation. If you have an indemnity obligation for independent

contractors, you should make sure that the insurance contract spells that out. Those are the types of things you want to think about when you're deciding who is an insured person under your policy.

Of course, in terms of entity exposure, you want to have the parent corporation named on the Declarations Page. Most D&O policies are going to provide automatic coverage for subsidiaries of the parent corporation in right within the terms of the policy. "Subsidiary" will be a defined term in the policy.

If you have joint ventures, other entities or affiliates that are not direct subsidiaries or true subsidiaries, you want to think those through with your broker or your adviser and make sure that you're affording explicit coverage to the entities to the extent that you want them insured. So, if you have a 30% interest in a joint venture, you want to make sure that your policy responds to the extent of your 30% interest. You don't want to ensure the entire joint venture.

Those are just some of the things to think about when you think about who's going to be insured under your policy.

Bentz: And I think part of that is really balancing, how far do you want to stretch your coverage versus how much do you really want to use the policy to protect your individual directors and officers?

Fox: That's right.

What Constitutes A Claim

Bentz: What constitutes a claim is one of the other key definitions in the policy. Peter, would you like to talk a little bit about what constitutes a claim under the policy?

Critchell: Absolutely. Again, as you said, the policy language does vary. I would center in on the key point here, which is - to be a claim, there has to be an allegation of a wrongful act. That's what a D&O policy covers. And that means that some things that might look like a claim sometimes aren't.

In general - again, depending on the specific policy language - a written demand is necessary for a "claim" to exist. The claim can demand monetary or non-monetary relief. Again, with variations, civil and administrative proceedings are covered, and investigations are covered. We've talked about that a little bit.

There are complications in terms of when the coverage triggers for, in particular, the entity versus individuals. As a general matter, these policies (and our policies at AIG) have been careful to cover individuals fairly early on, in an informal stage, and the entities only when a proceeding is filed. The new Executive Edge form varies that. But in general, the policy will have a fair amount of specificity as to what is or isn't covered.

Criminal actions constitute a claim, depending on the policy. I've already talked about investigations.

Employment actions are a special category worth mentioning. We often have issues with insureds where a discrimination claim is filed as a lawsuit, but the precursor to that is the required filing of a charge with the Equal Employment Opportunity Commission. That charge is a fairly simple, abbreviated form that says, "I've been discriminated against by so-and-so or at such-and-such an office." The EEOC will consider the charge. It can decide to bring the lawsuit itself. Or it can decide not to and issue what is called a "right to sue" letter, or notice to the putative plaintiff, who then goes and files in court.

We have repeatedly had issues with the receiving notice of the filing of the claim. The policy may be triggered only when a suit is filed. But, in fact, an EEOC charge is a claim. It is a written demand for relief in connection with a wrongful act - in this case, discrimination. The golden rule here is, when you get something in that looks like it says somebody did something wrong and you have notice of it, provide notice to your insurer.

In terms of a wrongful act, there are some things that come over the transom that might look like a claim, but aren't, at least from the insurer's perspective. An example would be demand letters to the board, which are typically a precursor to a shareholder derivative suit raising issues with respect to some situation

or another. Often that situation may become a securities fraud lawsuit or a large lawsuit of some other type. But it is basically a demand to the board to investigate and see what went wrong.

Typically, a shareholder sends these demand letters. In Delaware, and I think in other states, there is a specific statute that allows for this.

The insurers - AIG, at least - will take the position that such a demand letter is not a claim because it is not alleging a wrongful act. It's asking the board, as a corporate internal matter, to look at a situation and determine if there is a claim, and whether the board would like to litigate that claim derivatively on behalf of itself. There are different viewpoints about that, and we get into discussions with policyholders on that issue.

Another example - bankruptcy cases tend to spill out fraudulent conveyance or preference transfer claims. Especially when it's called a fraudulent conveyance, one would think there is a wrongful act involved. Certain of the bankruptcy codes that cover conveyances and preferences, where there has just been money going out of a corporation, don't, in fact, ground in tort. In other words, they really ground in the interests of the bankruptcy process in marshalling assets.

We sometimes have discussions with policyholders about whether that is really a claim. There hasn't been a wrongful act - just some money went out of the corporation. The person may have received it absolutely innocently, and there is no real claim that something wrong was done. Rather, there's a claim that the money should comes back.

So it's occasionally a metaphysical question - what is a claim? I would underline the point that, if you get something in writing that hints that somebody did something wrong, send it in. Even if it's not actually a claim at this point, but it looks like it will become one, we treat it as a notice of circumstances that could lead to a claim. That means that as of that date, if it becomes a claim, you will have been deemed to have given notice, which is a trigger under the policy.

Bentz: From my perspective, this is probably one of the most important points you could take away from this program. Whether it's a small matter or a big matter, whether you think it's going to have legs or not, you need to report when you get something in, because it's better to get this wrong than not report it and then have no coverage.

Policy Exclusions

Bentz: That actually will tie into our next topic here, which covers the types of things that are excluded from a claims-made D&O policy. Tom, you're up for this one.

McCormack: I'll start right there. Exclusions typically start with things that happened before the policy and things that happen after the policy. So if a claim is made during one policy period and is not reported to the current insurance carrier, and then it becomes a full-blown lawsuit in the next policy year, with a different carrier, there is the issue of when that claim was made.

If the claim was made in the prior policy period, the current carrier will say it was made before the policy and there's no coverage, because all D&O policies are claims-made policies. The old carrier will say, it was made during their policy period, but it wasn't reported until a later policy period, and you have the duty of reporting the claim as soon as you receive it, and therefore there's no coverage.

Also, for claims that are made, for example, after an insured goes into bankruptcy or after there's a change in control, typically I would advise all companies - especially public companies - to get what's known as a discovery or run-off period to cover claims that are made after the end of the policy period that cover acts that occurred prior to the situation that resulted in the change of control. I think that's very important.

So those are some of the main exclusions. You can go into fraud or things like that, but you need to look at the language of the policy as to how that is treated. Typically, you would want to make sure that fraud

or illegal profit is only excluded after a final adjudication, rather than after some other type of language that sometimes is found in D&O insurance policies.

Another typical exclusion is bodily injury. That's not what a D&O insurance policy is there to cover. There are other types of insurance that cover those exposures. Pollution is another type of exposure that would be better covered under a different type of policy.

Another big exclusion that appears in almost all D&O policies, and is particularly relevant in the private and non-profit space, is an "insured versus insured" exclusion. D&O insurance is not really designed to handle internal disputes between two different 50% owners of a company as to what should be done with it. Typically, that would be one insured suing another insured. That's another exposure that's typically excluded under the D&O policy.

Those are the main areas of exclusions in a typical D&O policy.

Improving A D&O Policy

Bentz: Heather, maybe you can talk a little bit about how you work with a policy and make some improvements to it? I know we started off earlier saying there were a lot of different carriers and a lot of different language that's available out there. What's the best time to negotiate changes? And what do you need to negotiate?

Fox: On renewal, you're always going to want to review your policy. You're going to want to look at it carefully and look at it fresh every year. You're going to want to do that with a broker or some adviser who knows the market well and knows the changes that are available in the marketplace.

You should come up with a wish list every year, even if it has request on it from the prior year that previously the carrier said no to. Then you're going to want to sit with your adviser, your broker, and prioritize. What are the important things you want to get done this year on your renewal? Which ones may have premium attributed to them? Come up with a priority list of what you want to accomplish with the carrier that year.

You want to negotiate, but you're also balancing trying not to get a rate increase. A lot of times, the strategy is to get your renewal pricing. You send the carrier your wish list and you get your renewal pricing, and then maybe push harder on the coverage issues after you know where the pricing lands.

Sometimes the underwriters may come back and say if you really want that coverage, they want an increase. But oftentimes you're really just tweaking the policy and there's not a direct premium attributed with it. You can negotiate that separately and not have impact on pricing.

Of course, there are other things that come up in a corporate life that may make you want to look at your policy again. Particularly if you're about to have an IPO, the coverage is going to change. You're on a private company form before you IPO, but when you IPO, you're going to a public form. You're going to want to renegotiate the policy. And make sure you put a tail in place on the private company policy. That's certainly a time when you would not look simply at renewal.

You would also want to look at your coverage if you're contemplating filing bankruptcy. Sit with an adviser and make sure that the policy is in a good position. It really already should be in a good position, if you had a good adviser before you got into financial distress. Another time that people review their policies is before or during significant M&A activity.

When you're looking at your policy today, you're probably not contemplating a transaction and you're not contemplating bankruptcy. But your policy should already contemplate those things so that if you come upon those things in your corporate life, your policy already adequately addresses those issues.

A word of caution - a lot of times people spend a ton of time looking at and negotiating their primary policy, and the excess policy doesn't get as much review. It's critical that the excess policies be reviewed.

Those policies should be what are called "true follow" form policies, meaning they don't have additional restrictions that don't exist in the primary. They should literally say, "Me, too. I follow everything the primary does."

Of course, in the insurance world, nothing's quite that simple. So you want to review those excess policies and delete anything that's adding terms that don't exist in the primary. What can happen is, if you have a claim, you may be getting coverage under your primary, but when you exhaust that primary and you get to the excess, the excess carrier may say, "This policy has this additional term, and I'm not covering this claim."

That has happened. There has been litigation in that area. So you want to make sure that your policy is true follow form.

One other thing you want to look at that's very important with excess policies is what's referred to in the industry as "shaving of limits." A shaving of limits provision basically says that, to the extent that an insured contributes towards exhaustion of an underlying policy - so if you have a primary policy and there's a coverage issue on it, and the carrier says, "I will pay $8 million of my $10 million limit, but I want the insured to contribute another $2 million" - you need language in your excess policy to allow the insured to make that $2 million contribution.

Otherwise, the language in your excess policy is going to say, "We don't attach. The primary is not exhausted, since the primary carrier only paid $8 million, so you can't access the excess limit." So you want to have a broadly-worded shaving of limits provision that allows an insured and other entities - including other insurance carriers, because sometimes you may have a policy that could drop down and fill in on that uninsured loss in the primary - to fill in any contribution towards exhaustion of the primary.

Critchell: It's important to have enough excess. In cases where you have less of a tower than you need, from my perspective, it stunts the whole process of handling the claims to resolution at a primary level when the company itself is facing an exposure on a claim that otherwise really ought to have been settled within the tower. That can cut both ways. But it's important to consider the amount of the excess.

And it's super-important to consider who those excess insurers are. Obviously, their financial viability is important. But also, in connection with what Heather is saying, you want to consider their general flexibility in dealing with claims. Sometimes claims are resolved in deals that involve the whole tower or parts of the tower. There are a lot of excess insurers out there who are extremely rigid about drop-down or about doing any kind of creative way to resolve a case. And you really want good excess insurers, as well as the primary insurer.

Fox: That's an excellent point, Peter. Your broker should be able to tell you who are the carriers that are difficult and who are the carriers that come to the table.

Tips On Handling Claims

Bentz: To follow up on that - and I think this will be our last point, because we're running out of time - I'd like some of your tips on how policyholders can handle a claim if they have one. I think that, more often than not, the insureds mistakenly look at the insurance company as the enemy. And I think you get a lot more mileage if you look at them as a partner.

They insurer can be helpful in being able to draw on their experience as to what an average settlement is in this kind of case. They may have worked with a particular law firm before or know a particular moderator or arbitrator really well. You can get a lot of information from them if you work with them.

If anybody else has points, I'll give everybody an opportunity here, and then we will wrap up.

Fox: I agree with that, Tom. I can tell you, just having dealt with the gentlemen on the phone from AIG, they know the plaintiffs' lawyers well and can tell you how they typically behave. They can tell you whether they're serious players or not. They know a lot about the different jurisdictions. They really can be

very helpful in settling claims.

From my perspective, going back to the earlier point about late notice, the first thing to do is report the case. I spent a lot of time fighting to try and get bills paid where the company is responsible for paying their lawyers, but the carrier says the company didn't notice the claim right away, so they are not paying for the first six months. So report the claim right away.

To Tom's point, get your insurers onboard right away with the strategy of the case, because they can be helpful. And you want to make sure you keep them updated throughout the life of the case, so that when it comes time to settle, they know the case, they're there with you, they're willing to offer their money - which you have paid for, of course, as the insured - and they are ready, willing and able to help you settle the case. If you keep them updated, that should happen.

If you come to them after you have not updated them for a year and tell them you're ready to settle and you just need $5 million, of course, that's going to be a problem. So keep them updated.

Seeking the consent of the insurer prior to putting any offer on the table is another area where insureds can get into difficulty. If a settlement offer goes out, there's language in every policy that says that's problematic. You have to seek the carrier's consent before you do that.

I'll open it up to the AIG folks.

McCormack: I would just add, before I turn it over to Peter, that when you're buying a D&O insurance policy, what you're really buying is the expertise of the insurance carrier and the people that handle your claims. You want people who are experienced, who have relationships with the premier law firms in the country, who know the plaintiffs' bar and can have a dialogue directly with plaintiffs, to give you insight into each and every one of the principal players in this area. You want people who have relationships with mediators, who have mediated before them time and time again and have developed relationships over time. Those carriers can actually bring insight into how to resolve a matter, and how to get it done as expeditiously and as cost-effectively as possible.

That's what you're really buying. We have some of the most experienced people in the industry, and the person to my left here is probably one of the most experienced people in the industry in terms of having gone to many mediations over the years.

Critchell: Thank you very much, Tom. I'm going to harp on the same point, as to the experience that we bring. I can honestly say that's true of all of the claims adjusters here at my level.

I worked in a large white-shoe law firm for a number of years, and I walked around thinking that partners were gods. Now having done this for a number of years, I am more experienced than virtually any partner at a big law firm in New York, or anywhere, in one specific thing, and that is, for settlements and mediations, how do you get to the best, lowest number the quickest?

Beyond that, these guys are the experts. We do nothing but defer to law firm partners in terms of their understanding of the legal issues. But in terms of settlement, I think we have more experience, volume and otherwise.

This really goes to an interesting point, which is - lawsuits can be viewed in two ways. In America, they tend to be understood in the business community as being about money. In Europe and elsewhere, it's more of a moral question - they are viewed as an affront to one's dignity and pride and a challenge to corporate reputation. That can be true in the U.S., and it often is. And that is the most interfering element you can have in getting an efficient resolution.

But in most large cases, the business folks can be made to understand that this is about money, it's too big to be fought to the death, we're going to settle, and the only question is when, how, and under what circumstances. When that is focused on, the insurance company offers you something interesting. Because its sole incentives are customer relationships and customer service, and not spending more of its money

than it has to, it really offers a neutral perspective.

Defense firms are very good at what they do. They're very powered up by fighting. They're willing to settle, but their incentives are to continue litigating from a financial standpoint. And their incentive from an ego standpoint is, they want to win.

The insurance company often can give you a very valuable, independent, outside perspective. I'm not saying insurance companies never weigh in favor of trying to do something sooner. And some insurance companies go the other way. They just sit there and never want to act.

But I can say, speaking for us, that we look for the right opportunity to get the best number. And that's really in the policyholder's interest.

Bentz: I want to say thank you to everybody, Heather and Tom and Peter, and, of course, to Broc, as well, for letting us do this program.

Romanek: Thanks very much, Tom, for putting this program together. It really was fabulous - I learned a lot. Thanks also to Peter, Heather and Tom. Thank you very much.