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# INSIGHTS

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D&O NOTEBOOK | MAY 2019

## High-Value Private Companies: Moving to Public Company Insurance

By Priya Cherian Huskins<sup>1</sup>

Private companies expect their D&O insurance programs to be constructed using the private company version of a D&O insurance contract, not the public version.

However, as some private companies have become more highly valued than many publicly traded companies, insurers are increasingly uncomfortable with providing the private company form of D&O insurance.

That's why we're seeing a rising number of high-value private companies moved off private company-style D&O policies and onto public company-style D&O insurance (i.e. using a public company form of the insurance contract).

### The Background

Private company D&O insurance programs are priced and written for typical private company risks.

In most cases, the potential severity of any particular private company D&O risk is fairly limited compared to public companies, if only because private companies are smaller.

Because of this, private company D&O insurers are usually

willing to provide broader coverage in the private D&O insurance form.

As we see more "unicorns" and "decacorns" come into existence, private company insurers are experiencing more unusual claims, including claims that fall within the expanded coverage grant of private company D&O insurance.

In light of these losses, many insurers in the private company market have concluded that they aren't being adequately compensated for these risks.

One logical response from insurance carriers is to increase the price for private company D&O insurance. In many cases this is happening.

The other logical response is to reduce the scope of potential coverage granted to a private company. Carriers are doing this by moving highly valued private companies to public company-style D&O insurance.

When it's time to move from a private company D&O insurance plan to a public company plan, of course you want to know what you are gaining and losing.

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## Changes in Coverage

The big difference between private and public company D&O insurance is that there is reduced coverage for the corporate entity in the public form.

(See an earlier article as a refresher on the ABCs of private company D&O insurance.)

To be clear, both public and private company forms provide for entity coverage if the corporation is named in a securities claim. The definition of "securities claim" typically includes breach of fiduciary duty suits.

As a practical matter, these are the types of claims for which D&O insurance is being purchased for high-value private companies (and public companies, too).

For example, on the private company form, defense costs coverage may exist for the corporate entity if a regulator decides to take an enforcement interest in a corporation. Another example is corporate entity coverage for antitrust claims. These scenarios are almost entirely excluded from the public company form.

Having said that, exclusions on private company D&O policies have become more abundant in recent years (particularly for higher valued private companies), making the difference between private and public policies narrower.

## Benefits of Moving from Private to Public Company D&O Insurance

In addition to preserving limits for the directors and officers, there are other benefits to moving from private to public company-style D&O insurance. These include the following:

### **ELIMINATE THE INSURED VERSUS INSURED EXCLUSION**

One of the most frustrating parts of the private company form is the insured versus insured exclusion. That exclusion means the insurance carrier will not provide any coverage if one director or officer wants to sue another within the company. Well-brokered public company policies no longer have this exclusion.

As an aside, public company forms retain the exclusion regarding an entity suing the individual director or officer. This exclusion also exists within the private company D&O insurance policy form.

### **CHOICE OF COUNSEL**

Most private company D&O policies are written as "duty to defend" policies. This means that the insurance carrier, not the insured, selects counsel. One benefit of a duty to defend policy is that if one claim is covered, the carrier will defend all the claims. However, a major downside for larger, more sophisticated clients is not being able to select their own counsel.

If a private company is using a public company form, the insured may select qualified counsel and the carrier cannot unreasonably withhold consent. While this is good news, it has to be said that an insurance carrier receiving private company levels of insurance premiums is unlikely to provide full reimbursement of a major law firm's billing rates. By contrast, public companies paying public company premiums typically enjoy full reimbursement for the rates charged by major law firms.

### **BROADER COVERAGE FOR REGULATORY INVESTIGATIONS**

One of the evolutions of the public company form in recent years is that it has softer triggers for coverage when it comes to regulatory investigations. One example is paying for attorney's fees when regulators want to talk to individuals within the company before issuing a subpoena.

### **PREFERRED VERSION OF THE CONDUCT EXCLUSION**

Public company D&O insurance forms that are well brokered tend to have conduct exclusions that are especially hard for insurance carriers to use. This means that the insurance carrier is more likely to pay for the defense and settlement of the entire claim.

For example, many public company forms explicitly forbid a carrier from attempting to avoid paying a claim by bringing a separate suit against the company on the topic of whether certain conduct was bad enough to trigger an exclusion (and in doing so creating a "two-front war"). Instead, the conduct exclusions on public company forms are ideally only triggered upon, for example, a final judgment of wrongdoing.

### **THOUGHTFUL LANGUAGE REGARDING SEVERABILITY**

Could the insurer say it was misled at the time of contract formation and therefore rescind the policy? Public company forms tend to have language that is more protective on this point, thus preserving coverage for directors and officers who had no knowledge that the carrier was being misled.

## POTENTIALLY MORE COVERAGE FOR DIRECTORS AND OFFICERS

This point is worth emphasizing because, in the heat of battle, it's easily forgotten. As frustrating as it can be that D&O insurance is not covering all of the legal bills of a corporate entity, this is actually a good thing for the directors and officers.

While loss of this broad corporate coverage may be unfortunate, there is also another side to this coin. Reducing coverage for the corporate entity means that coverage is preserved for the individual directors and officers.

In a real “dumpster fire” situation involving unusual circumstances, directors and officers will be glad to have limits preserved for their use and not drained away by the corporate entity because there happened to be coverage for the entity on the private company form.

The D&O insurance policy is supposed to cover directors and officers first and foremost. To the extent there is expanded coverage for an entity, such as with private company plans, the coverage available for the directors and officers is reduced.

Due to reduced coverage for the corporate entity, public company D&O insurance sets this balance more clearly in favor of the directors and officers compared to private company insurance.

## Next Steps if You Are Moving to a Public Company Form

You may not have a choice as to whether or not to move to a public company form since carriers might insist on the move.

If you are moving, however, consider the following to help optimize the situation:

- **Are you with the right carrier going forward?** In addition to financial strength and claims paying ability, consider whether your new carrier is one that will stay with you for the long haul—including in the case of an IPO.
- **Do you have any circumstances that might give rise to a claim that would be covered by the private company policy but not your new public company policy?**  
The private company form may allow you to “notice a circumstance,” which means the private company form

would recognize and pay for a covered claim if it were to arise after you moved to the public company form.

Highly valued private companies tend to face many tricky issues when it comes to D&O insurance. Being forced—or proactively deciding—to move to a public company form of D&O insurance is just one of many.

There is no substitute for sophisticated experience when it comes to these types of issues. Look for this quality when choosing a D&O insurance broker to advise you on next steps.



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