

Managing Costs with D&O Policies

By David M. Siesko

A good D&O policy can help a company manage its securities litigation and defense costs.



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There was a time when director and officer coverage experts thought that the securities reform of the mid 1990s was

going to bring some order and sense to the industry. That, of course, did not happen. The arrival of Sarbanes-Oxley in 2002 added greater pressure on D&O policies and programs—and created new issues. While corporate boards contend with what feels like a never-ending slew of issues, there is one practical area where a robust director and officer policy can help them manage—defending securities litigation and defense costs. It is one simple area that is often overlooked and improperly addressed by Boards. It's an area that can easily spiral out of control—but it doesn't have to.

Defending Securities Litigation and Defense Costs

The defense of director and officer lawsuits is expensive. In a world where insurance carriers are always seeking ways to be efficient, how much they are willing to pay to defend directors and officers is always a point of contention. For example, most carriers have

“approved lists” of defense counsel that they want the insureds to use to defend liability actions against their companies. Usually, these “approved lists” contain general insurance defense firms, quite capable in their own discipline, but rarely positioned to provide an aggressive defense in a high-profile securities litigation.

Expertise is not the only sticking point—cost becomes a major area of debate between the carrier and the insured. Standard defense counsel rates and securities defense lawyers may vary as much as \$500 per hour, depending on geographic region.

Yet, there are a few easy ways that a proactive Board can address these issues, make the claims process more efficient and avoid unnecessary headaches:

Negotiate rates upfront.

Remember that D&O policy terms and conditions on counsel selection are negotiable. The best way to deal with rate issues is to address them head-on at the time you seek quotes from various carriers. Ask the carrier which firms they “prefer” to use for complex securities defense litigation. If you do not see any firms on the carrier list that make you comfortable, then negotiate on two fronts. First, negotiate with the

carrier to have your choice included in your policy. Secondly, negotiate with the firm you are advocating on their rates. A law firm's willingness to work with an insurance carrier on the issue goes a long way to building new relationships for other areas of the firm. However, it is advisable that you be involved in their negotiation. Rarely will securities defense lawyers reduce rates simply because a carrier asks. Client boards need to foster this process

Address counsel selection in the policy.

It is most important to ensure that the selection of counsel issue is addressed specifically in the policy. Despite what you might be told, carriers have great leeway and discretion on this issue, so resolve it at the policy negotiation phase. Addressing this issue up front and clearly in the policy will prevent future headaches for both your board and the insurance carriers claim operation. When you are in the midst of defending a securities matter, defense fees are the last thing you want to dispute with your carrier.

Become familiar with guidelines.

Now that your securities litigation firm of choice has been selected, the

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best avenue is for them to become aware of, and compliant, with an insurance company's litigation management guidelines. For some reason, securities lawyers balk at these types of fee management tools. Yet, they make the process smoother. While securities litigation is complex, a savvy securities defense lawyer will embrace the spirit of the litigation management guidelines, and case management will be much more efficient.

Claim professionals handling director and officer claims are amongst the most technically-minded in the industry. Approached with a rational, cost effective plan, rarely will an experienced claim professional argue about which motions to file or deposition to take. They understand how these cases work, they do it every day.

Involve the carrier's claim professional.

As discussed, embracing the litigation management guidelines is key, but so too is involving the carriers claim professional in the formulation of the defense and—when appropriate—settlement strategy. This all seems very obvious, but rarely do security defense lawyers approach carriers in this manner. Claim professionals need to have working knowledge of the facts of your case and counsel's strategy. Claim department executives expect their claims professionals to be involved in the

strategy and management of the case. The days of a file handler delegating control of a case to defense counsel are over, and well they should be.

The aforementioned steps seem simple enough, but they are often overlooked and they are rarely addressed appropriately during D&O claims. If you include specific defense counsel in your policy terms, encourage the firm to be flexible on rates, embrace the spirit of litigation management and include the carrier in strategy, your board will have one less issue to deal with (fee disputes with your carrier), which is a welcome scenario that allows complete focus on the securities litigation.

David Siesko is the founder of Siesko Partners, and the former chief corporate claims officer at Zurich Financial. Siesko Partners provides advisory services to corporations embroiled in disputes with insurance carriers during all phases of the litigation process. Prior to Zurich, Siesko worked on major claim and legal issues for the American International Group (AIG). An admitted lawyer in New Jersey and Pennsylvania, he represented industrial clients on labor and environmental law early in his career. He is a member of the International Association of Defense Counsel and The Federation of Defense and Corporate Counsel.