



# ANATOMY OF A D&O CLAIM

## Session #IN300

COORDINATOR/SPEAKER:

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MODERATOR/SPEAKER:

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SPEAKER:

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# OUTLINE

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- Introduction of Panel
- Opening Remarks
- Limitations of D&O Coverage
- What Happens When the Corporation's Directors are Served With a Suit?
- What Happens When Your Insurer Receives Your Claim?
  - Initial Response From the Insurer
  - Detailed Response From the Insurer

# OUTLINE

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- Resolution of Issues Through Negotiation or Arbitration
- Settlement Issues
- Summary
- Additional Question and Answers
- Final Message

# LIMITATIONS OF COVERAGE

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- Three General Types of Exclusions
  - 1) Conduct Exclusions
  - 2) Other Insurance May Preclude Coverage
  - 3) Claimant Exclusions
- Pending and Prior Litigation
- No Coverage for Certain Parties Including the Corporation

# NOTIFYING YOUR CARRIER

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- Giving Timely Notice to Your Insurer
- Who Should Give Notice?
  - 1) Insured
  - 2) Broker
- What Needs to be Included?

## NOTICE OF CLAIM (1)

Comment: If the policy is not near expiration, it is wise to obtain information from the client on:

- Whether directors and officers were named as defendants
- What counsel has been chosen to defend them and whether that counsel is defending others (such as the corporation itself) as well.

This information should be in the notice of claim letter.

If the policy is about to expire, it is more important for the notice to be given than for all information to be included at the same time.

If defense counsel has not been chosen or defense arrangements are not known to the Risk Manager, advise them to obtain this information as soon as possible so you can send it to the carrier.

Re: (Name of lawsuit)  
Insured:  
Policy No.:  
Expiration Date:

Dear (Insurance Company):

Under provisions of the above policy, a claim has been made against directors and officers. Attached is a copy of the Summons and Complaint naming as defendants \_\_\_\_\_ (names of directors/officers/employee/agents)\* and ABC Corporation (if that is named).

The law firm of \_\_\_\_\_ has been retained to represent \_\_\_\_\_. For your information, this firm also will represent ABC Corporation (if a different firm is employed by the corporation, state that as well).

According to policy provisions, we request permission to incur costs, expenses, and charges in connection with the defense of this matter.

Please acknowledge receipt of this letter promptly and confirm insurer consent to incurring costs and expenses.

Sincerely,

## NOTICE OF CLAIM (2)

Comment: If the insured does not know of the defense arrangements, the claim go to the carrier, with the defense information sent later.

**Re:** (Name of lawsuit)  
**Insured:**  
**Policy No.:**  
**Expiration Date:**

Dear (Insurance Company):

Under provisions of the above policy, this letter is notice of the attached Summons and Complaint. Named as defendants are \_\_\_\_\_ (names of directors/officers/employees/agents) and ABC Corporation.

We do not yet know the defense arrangements; as soon as we do, we will inform you of them and formally ask for your consent to incur these costs.

Sincerely,



### NOTICE OF CIRCUMSTANCE (INCIDENT, OCCURRENCE) (3)

Comment: Policies often contain a provision stating if an insured becomes aware of "any circumstances which may reasonably be expected to give rise to a claim" (or similar language), notice should be given of those "circumstances" to protect the insured's rights. Some policies refer to "occurrences" or "wrongful acts." The insured should be responsible for describing the specific "circumstances," "wrongful act," or "occurrence."

This notice is frequently essential when the insured is switching carriers (otherwise coverage might be excluded under the new policy and unavailable under the current).

Re:       **Insured:**  
          **Policy No.:**  
          **Expiration Date:**

Dear (Insurance Company)

This notice is given to you under (insert policy's notice of "circumstances" clause, title and section) on behalf of ABC Corporation and its directors and officers. The following ("circumstances," "wrongful act," "occurrence") may give rise to a claim.

Brief description by the insured.

Sincerely,

## RESPONSE FROM CARRIER ON COVERAGE (4)

**Comment:** Carriers generally respond with a reservation of rights letter. These are often lengthy and cite many exclusions in the policy. Sometimes they are less specific but characterize the complaint in a certain way, stating the alleged legal liabilities do not fall into this line of coverage. In any case, a response to this letter protects your client's rights under the policy.

In all cases, the letter should go to the client, preceded by a phone call.

Specific issues the client wants to address can be incorporated into your letter, or the client or client's lawyer can draft a response.

If the insurer issues a letter of denial, send it to the insured immediately, as with any other claim.

**Re:** (Name of lawsuit)  
**Insured:**  
**Policy No.:**  
**Matter:**  
**Your File No.:**

Dear (Insurance Company)

Our client received your \_\_\_\_\_ letter reserving your rights under the policy. Please be advised that the insured reserves all their rights under the policy pertaining to the above matter and does not necessarily agree with your statement in that letter. Our client also disagrees with your interpretation of coverage for \_\_\_\_\_ (whether punitive damages are recoverable, characterization of the nature of the lawsuit, applicability of a particular endorsement, etc.).

Sincerely,

# FIVE KEY ELEMENTS TO YOUR INSURER'S RESPONSE

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- 1) Declination of Coverage With Respect to Certain Matters
- 2) Reservation of Rights
- 3) Defense Counsel Issues
- 4) Allocation of Defense Costs and Expenses
- 5) Request for Further Information

# DECLINATION OF COVERAGE FOR CERTAIN MATTERS

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- Portion of Loss Not Covered Such as Fines, Penalties, Punitive and Multiplied Damages
- Allegations Where a Specific Exclusion Applies
- Claims Where a D&O is Not Acting In His/Her Capacity as Such for the Corporation
- Prior and Pending Litigation
- Claims Against the Corporation

# RESERVATION OF RIGHTS

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- Areas of a Complaint Where an Exclusion May Apply
- Issues of Capacity In Which the Defendants Were Acting
- Areas of Possible Misrepresentation or Disclosure of Required Information In the Application

# DEFENSE COUNSEL ISSUES

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- Should Single or Multiple Counsel be Used?
- Should the Corporation Use Its Existing Outside Counsel or Hire New Counsel Specifically to Handle this Suit?
- Deciding Factors
  - 1) Expertise to handle special litigation
  - 2) Potential for conflict of interest or disqualification
  - 3) Was the existing firm transactional counsel
  - 4) New firm may bring an objectivity valuable in decision making

# ALLOCATION

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- Why is it Necessary?
- Who Carries the Burden of Proof?
- What Factors are Considered?
- What Methods are Used?

# SETTLEMENT ISSUES

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- Claim Cannot be Settled Without the Consent of the Carrier Without Impacting Coverage
- It is Possible to Obtain Consent to Settle Before Resolving Coverage Issues
  - 1) Negative Features
  - 2) Positive Features
- Courts Have to Approve Settlement in Class Action and Derivative Suits



# RISK MANAGER'S ROLE

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- Prior to a Claim
  - 1) Whenever possible, educate management on the scope of their D&O coverage
  - 2) Tell them what to expect when a claim is filed
  - 3) Get to know not only your underwriters, but also the claims people
  
- During a Claim
  - 1) Keep the lines of communication open
  - 2) Stay involved and informed

# BROKER'S ROLE

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- Educate Your Client on the Coverage
- Discuss the Limitations of Coverage
- Explain the Allocation Process
- Know Management at All Levels
  - 1) Risk Manager
  - 2) General Counsel
  - 3) CEO & CFO
- Assist Client in Providing Prompt Notice to the Carrier
- Be a Facilitator and Mediator

# **BROKER'S ROLE**

## ***(continued)***

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- Keep the Underwriters Involved
- **KEEP THE LINES OF COMMUNICATION OPEN**

# SUMMARY

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- D&O Claims are Very Complex
- Mutual Goal of Reaching a Successful Outcome
- Lines of Communication Must Stay Open
- Develop a Partnership