

## BANKRUPTCY

### ISSUE

Concern for corporate solvency is at an all-time high. Executives, especially directors of corporations, are trying to weigh their fiduciary obligations to the companies on whose boards they serve against care for their own financial protection. Directors & Officers Liability Insurance (D&O) is more important than ever to ensure the protection of management and the board, so that corporations can retain qualified individuals to help guide them through these turbulent times.

### IMPACT

Anxiety over how D&O policies will respond in bankruptcy is real and growing, because the potential of there being no corporate indemnity available to protect individuals increases the reliance on D&O policies – which ultimately may be a company's only protection.

- Will your D&O policy automatically shift to run-off?
- Do you have built-in protections to ensure that policy proceeds are there for individuals?
- What steps have been taken to “bankruptcy-proof” your D&O program?
- What if one of your insurers is financially unable to provide protection?

The best time to properly address all these issues is at renewal and before the company needs to enforce specific provisions, since this is when one has leverage with insurers in the negotiation process. Management and the board don't need these distractions when they are working to save the company.

### ACTION

To help you select the best course of action and most appropriate D&O coverage should your company face a real risk of insolvency, consider the following points:

- Will the D&O policies automatically shift into run-off upon entering bankruptcy or insolvency? Will they therefore only cover acts or omissions that allegedly occurred prior to bankruptcy? If the answer is yes, correct this, policies should go into run-off upon emergence from bankruptcy.
- As respects the policy's retention and coverage for indemnifiable claims against the individuals, the company's financial condition should affirmatively shift treatment of an otherwise indemnifiable claim to non-indemnifiable.
- D&O policies should contain an order-of-payments provision stipulating that the policy should first cover non-indemnifiable claims against individuals before indemnifiable claims, and only when these have been satisfied should it respond to any corporate entity liability.
- Ensure that there are dedicated Side-A DIC (difference-in-conditions) limits solely for the protection of the personal assets of the directors and officers that will “drop down” to first dollar for non-



indemnifiable claims should the underlying insurance not respond – due to insolvency of underlying insurers, corporate refusal to indemnify or disputes over indemnity.

- Reflect on how the policy's proceeds may be utilized in bankruptcy in light of the fact that in addition to individual executives, the company itself may be covered, directly or indirectly.

Providing as much certainty as possible to management and the board is integral to attracting and retaining directors and officers, particularly during this period of rising challenges and concerns.

## CONTACTS

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