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Focus on D&O Insurance

Coverage Tips: Insured Versus Insured Exclusions

Virtually all D&O insurance policies contain an Insured versus Insured ("I v. I") exclusion. A typical I v. I exclusion provides that the policy does not cover loss resulting from any claim made against any insured . . . "brought or maintained by or on behalf of any Insured or Company in any capacity." It is well accepted that I v. I exclusions are intended to exclude coverage for collusive suits, such as those brought by the company against its own directors or officers to recover losses resulting from poor business decisions. In certain situations, however, a court may find that an I v. I exclusion bars coverage for a claim that most policyholders would have assumed was covered. The following are examples of how an I v. I exclusion may unexpectedly result in a coverage gap:

(1) Where a shareholder suit is brought against insured directors and officers by numerous plaintiffs, one or more of whom qualifies as an insured person, a court may find that the I v. I exclusion bars coverage for the entire suit. In other words, a court may find that the I v. I exclusion bars coverage for claims brought by noninsureds if they are brought in the same suit as claims by insured persons. To avoid this situation, policyholders should request a policy amendment stating that the I v. I exclusion does not apply to claims brought by noninsured persons or entities, even if brought in the same suit as claims by insured persons or entities, or similar wording.

> a court may find that the I v. I exclusion bars coverage for claims brought by noninsureds if they are brought in the same suit as claims by insured persons

(2) A common exception to the I v. I exclusion is a claim brought in any bankruptcy proceeding by the examiner, trustee, receiver, liquidator, rehabilitator or similar official of the company. A court may find that the bankruptcy exception does not, however, apply to claims brought by examiners, trustees, receivers, liquidators, rehabilitators or similar officials of companies whose insolvencies are not governed by the U.S. Bankruptcy Code, including insurance companies, banks and other deposit institutions, and other financial institutions that are regulated by federal and state government. Policyholders in these industries should make sure that their "bankruptcy exception" extends to any type of insolvency proceeding, and not solely to insolvency proceedings governed by the U.S. Bankruptcy Code.

(3) The Dodd-Frank Act provides new incentive for whistleblowers who may qualify as insured persons. A court may find that, where the whistleblower is an insured person, the I v. I exclusion bars coverage for the whistleblower claim. To avoid this potential coverage gap, policyholders should request an exception to the I v. I exclusion for whistleblower actions. To the extent a policyholder already has such an exception in its policy, it should make sure that the exception is broad enough to apply to all types of whistleblower actions, and not only those brought under Sarbanes-Oxley.

> ***Upcoming Topic***
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> **The Importance of Maintenance of Underlying Insurance and Exhaustion Clauses in Excess Policies**

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Additional questions or comments concerning the bulletin or its contents may be directed to the Chair of the firm's Insurance Law Practice, **Kevin J. Kuhn** (312-609-7652).