

## **Corporate Counsel Insurance: Important Coverage for Exposed Lawyers**

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It is now widely recognized that the liability exposures for companies and their directors and officers are continuing to increase in a variety of areas. Unfortunately, this heightened liability exposure now also extends to in-house corporate counsel, who advise management on critical legal issues and who to a large extent can influence, if not control, conduct of the company and its directors and officers. In the wake of numerous highly-publicized recent corporate debacles, courts, legislators and regulators are imposing more rigorous standards on these in-house advisors, resulting in more claims against in-house counsel and unprecedented liability exposure from a wide variety of potential claimants. For example, in-house counsel usually are heavily involved in many aspects of a company's compliance with the Sarbanes-Oxley Act, and are now required to report "up the ladder" any evidence of material violation of securities laws or breach of fiduciary duty. Failure to properly discharge these responsibilities can create new and potentially dangerous personal liability concerns for counsel.

Claims activity arising out of the Enron collapse demonstrates the reality of these potential exposures. Shareholder lawsuits named as defendants several of Enron's in-house counsel and the bankruptcy examiner concluded there was sufficient evidence to support claims against in-house counsel on behalf of the Debtor. The causes of action against the in-house counsel included malpractice and breach of fiduciary duty, and alleged the counsel negotiated and documented improper transactions without investigating or properly advising directors or shareholders of the true nature of the transactions.

In response to these developments, more companies are now examining the extent and appropriate form of financial protection for their in-house counsel. Typically, this analysis reveals that the in-house counsel has very little if any reliable financial protection. Most companies provide in their bylaws or certificates of incorporation mandatory indemnification only for their directors and officers, not other employees. As a result, non-officer employees (including in-house counsel) are at the mercy of the company's directors to decide whether and to what extent indemnification will be available if a claim is made against the employee. Even if mandatory indemnification exists, there would be no protection if the company becomes insolvent or files bankruptcy.

Similarly, most directors and officers liability insurance policies ("D&O Policy") afford limited if any coverage for non-officer employees. If the coverage exists at all, it is usually only for Securities Claims or only when the employee is a co-defendant with a director or officer. Also, an issue may arise whether the counsel's alleged wrongdoing was committed as an employee or in some other uninsured capacity.

A company that recognizes this deficiency in its risk management program generally has two potential insurance options. First, the company may be able to purchase an endorsement to its D&O Policy that extends coverage under that policy to its in-house counsel. Second, the

company can purchase a separate professional liability insurance policy specifically designed for in-house counsel. Such a policy would be subject to its own separate limit of liability and would cover both the in-house counsel for non-indemnifiable claims and the company to the extent it indemnifies the in-house counsel.

A separate professional liability insurance policy for in-house counsel affords to the Insureds a number of advantages over a D&O Policy which is endorsed to include in-house counsel as Insureds. The following summarizes many of those advantages:

1. Specifically Tailored Policy. A professional liability insurance policy for corporate counsel contemplates and addresses many of the unique issues that may arise in professional liability claims against in-house counsel. As a result, the Insureds under that type of policy have less risk of coverage surprises or uncertainties than under an endorsed D&O Policy.
2. Preserve D&O Coverage. If in-house counsel are added as Insureds to the D&O Policy, any payment under that policy of losses incurred by in-house counsel will reduce the remaining available limit of liability for claims against directors and officers. Since the D&O Policy is primarily designed and purchased to provide quality and predictable insurance coverage for directors and officers, the expansion of coverage to include in-house counsel as additional Insureds may ultimately harm the directors and officers. Conversely, if coverage under the D&O Policy is eroded or exhausted by losses incurred by the directors and officers, the in-house counsel who are additional Insureds under that policy will lose much if not all of their insurance coverage. A separate professional liability policy with a separate limit of liability protects against this type of potentially dangerous erosion of the D&O Policy's limit of liability.
3. Claims by Company. A standard D&O Policy excludes from coverage any defense costs, settlement, judgment or other loss incurred in a claim by or on behalf of the company against an Insured. One of the purposes for this standard exclusion is to dissuade companies from asserting claims against their directors and officers. Although a professional liability insurance policy for corporate counsel similarly is not intended to encourage claims by the company against its in-house counsel, at least the AIG Corporate Counsel Premier<sup>SM</sup> professional liability policy form affords defense costs coverage for such claims. This approach protects the in-house counsel defendant by providing a defense, without creating a financial incentive for the company to sue its in-house counsel.
4. Covered Claims. Unlike a standard D&O Policy, the AIG Corporate Counsel Premier professional liability insurance policy covers not only demands, suits or proceedings for monetary damages or other relief, but also ethics and licensure proceedings against the in-house counsel concerning the eligibility or license of the counsel to practice law or compliance with Section 307 of the Sarbanes-Oxley Act of 2002. Legal expenses incurred by counsel in such proceedings may not be indemnifiable by the company, and thus insurance coverage for those legal

expenses can be critically important to the in-house counsel. A standard D&O Policy, even if endorsed to include in-house counsel as Insureds, does not provide this coverage.

5. Insured Persons. The AIG Corporate Counsel Premier professional liability insurance policy includes as Insureds not only past, present and future in-house counsel, but also paralegals, clerical staff and other employees of the company who support the counsel in the performance of legal services. Also, “contract” attorneys who perform services for the company under a written agreement with an employment contractor or agency are covered. A standard D&O Policy which is endorsed to include in-house counsel as additional Insureds typically does not include coverage for these types of employees or contract attorneys. This expansion of coverage under the professional liability policy is not only important for the employees and contract attorneys, but also for the company to the extent the company indemnifies those employees or contract attorneys, since the professional liability policy insures the company to the extent it indemnifies an Insured Person for covered Loss.
6. Moonlighting. A D&O Policy which is endorsed to include in-house counsel as additional Insureds typically covers the in-house counsel only for claims made against the counsel in his or her capacity as counsel for the company. However, the AIG Corporate Counsel Premier professional liability insurance policy also affords coverage for moonlighting, pro bono and other legal services unrelated to the company if those services are rendered while the counsel is an employee of the company. In-house counsel frequently render these types of “external” legal services without realizing they may otherwise have little if any financial protection against claims arising out of those services. As a result, this expansive coverage can be highly valuable to counsel.
7. Officer Capacity. Even if the in-house counsel is designated an officer of the company, and therefore an Insured under the D&O Policy, some D&O insurers may contend that legal services performed by that officer are not performed in his or her insured capacity as an officer. For example, some insurers may contend that a person who holds the title “Vice President and General Counsel” is not insured under the D&O Policy for legal services rendered as general counsel (which may not be considered an officer capacity), but is insured only for services rendered as vice president. A professional liability insurance policy for corporate counsel eliminates this potential gap in coverage by expressly insuring legal services rendered as an employee, including as general counsel.
8. Duty to Defend. The AIG Corporate Counsel Premier professional liability insurance policy imposes upon the insurer the duty to defend any claim under the policy. D&O Policies typically require the Insureds to defend the claim, and the insurer is simply required to pay reasonable, necessary and covered defense costs. By requiring the insurer to defend the claim, the Corporate Counsel Premier policy allows the Insureds to rely on AIG and its vast claims experience to defend

the claim. In addition, there is less risk that coverage disputes will arise regarding the amount or nature of the defense costs, or the need to allocate defense costs between covered and non-covered matters.

9. Personal Injury Coverage. The AIG Corporate Counsel Premier professional liability insurance policy expressly covers claims for false arrest or imprisonment, malicious prosecution, defamation, violation of the right to privacy, and wrongful entry or eviction. Many of these types of claims are excluded under some D&O insurance policies. Because the rendering of legal services frequently can give rise to these types of claims, express coverage for these claims in a professional liability policy can be quite valuable.

For these reasons, among others, the AIG Corporate Counsel Premier professional liability insurance policy can provide important and unique financial protection for companies, their in-house counsel and other employees involved in rendering legal services.