AMERICAN BANKRUPTCY INSTITUTE

2022 Bankruptcy Battleground West

D&O Insurance and Bankruptcy: Insuring Success

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CONCURRENT SESSION

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BANKRUPTCY
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THE OVERLAP BETWEEN DIRECTORS AND OFFICERS INSURANCE AND INSOLVENCY

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Identifying Policies and Key Dates

GENERAL TYPES OF COVERAGE ARISING IN BANKRUPTCY CASES:

THIRD PARTY POLICIES

- DIRECTORS AND OFFICERS (D&O)—Insurance for "wrongful Acts" committed by company's officer and directors
  - Side A Insured Person Coverage (for the benefit of D&Os; covers amounts incurred by insured D&O which are not indemnified by company)
  - Side B Indemnification Coverage (for the benefit of the company, if company indemnifies D&O, reimbursement available)
  - Side C Entity Coverage (company coverage – if publicly traded, only securities claims covered)

Identifying Policies and Key Dates

GENERAL TYPES OF COVERAGE ARISING IN BANKRUPTCY CASES:

THIRD PARTY POLICIES

- DIRECTORS AND OFFICERS (D&O)—Reporting Requirements
  - Typically written on a "claims made and reported basis," which means that the claim needs to made against insured and reported to carrier during the policy period (or, for purposes of reporting, during any extended reporting period)
  - Notice/prejudice rule followed in some jurisdictions for claims made policies but does not apply to claims made and reported policies
  - Policy may also contain internal time limits for the reporting of claims—e.g., no later than 60 days after the insured has knowledge of the claim.
  - Insured may be able to purchase an extended reporting endorsement. This feature is known as "tail" coverage.

Identifying Policies and Key Dates

GENERAL TYPES OF COVERAGE ARISING IN BANKRUPTCY CASES:

THIRD PARTY POLICIES

- ERRORS AND OMISSIONS (E&O)—Insurance for professional services.
- GENERAL LIABILITY—Insurance for personal, injury, property damage and advertising injury. Typically written on an occurrence basis. Covers losses that occur during the policy period irrespective of when notice is given.

Identifying Policies and Key Dates

GENERAL TYPES OF COVERAGE ARISING IN BANKRUPTCY CASES:

FIRST PARTY POLICIES

- PROPERTY INSURANCE—Insures against physical loss or damage to tangible property
- BUSINESS INTERRUPTION INSURANCE—Insures against loss of business profits due to suspension of business operations

Pre-Bankruptcy Planning

Steps To Take Before a Bankruptcy Filing. Debtor's counsel should:

1. Conduct an insurance audit
2. Consider using a broker who specializes in placing policies for distressed companies
3. Determine whether you need additional coverage. What length tail do you need?
4. Purchase D&O tail prior to bankruptcy filing -- lenders usually permit the purchase in a default situation
5. Obtain policies of client's professionals (lawyers, accountants, brokers) -- identify any claims the client may have against any professionals
6. Consider cybersecurity insurance
7. Consider a "notice of circumstance" letter. Subsequent claims relating to those circumstances will be deemed to have been reported during the policy period in which the notice is given

Pre-Bankruptcy Planning

Key Provisions in a D&O Policy that Need to be Considered in Connection with Pre-Bankruptcy Planning

1. Side A coverage, including Side A excess and side A excess difference in conditions. Side A coverage protects the directors and officers where the company is unable to advance costs on their behalf. An excess Side A policy will provide coverage from losses that are above the limits of the underlying Side A coverage. Side A excess difference in conditions policy covers losses when the D&O carrier for the underlying policy refuses payments under the initial Side A policy.
2. Non-rescindable Side A endorsement. This endorsement protects the company's directors and officers by barring the insurer from seeking to rescind the policy on the basis of fraud, even where the insurer has relied on allegedly fraudulent financial statements attached to, or submitted in connection with, the policy application.
3. Full severability. This provision protects innocent directors and officers where the company's financial statements are found to be fraudulently misstated. Put differently, actual knowledge on the part of one or more officers or directors of fraudulent acts are not imputed to other individuals covered under the D&O policy.
4. Priority of payments. Such a provision can direct that an insurer first pay for loss under Side A and, only when the loss has been fully paid, then reimburse for losses under Side B. Such provisions constitute an enforceable right.

Pre-Bankruptcy Planning

Key Provisions in a D&O Policy that Need to be Considered in Connection with Pre-Bankruptcy Planning

5. Extended reporting or "tail" coverage. While many D&O policies provide for one year of extended reporting or "tail" coverage, claims for breach of fiduciary often have longer statutes of limitation. If management of a company believes that a bankruptcy filing is a possibility, it should consider purchasing such extended reporting coverage.

6. Insured versus insured carve-backs. The standard carve-back for this exclusion – for proceedings filed by a receiver, liquidator or chapter 7 trustee – may not be sufficient. Companies that may enter chapter proceedings should insist on a carve back that includes claims by a debtor in possession, Chapter 11 trustee, creditors, bondholders, and all committees and other bankruptcy constituencies.

7. Conduct exclusions. There are several "conduct exclusions" that are typically found in D&O policies. These include exclusions relating to dishonesty, personal profit/improper gain or advantage and fraud and criminal acts. It is important that these conduct exclusions are worded in such a way that they are triggered only upon a final adjudication as to the prohibited conduct. See, e.g., *St. Paul Mercury Insurance Co. v. Foster*, 268 F.Supp.2d 1035 (C.D. Ill. 2003) (under Illinois law, the personal profit exclusion of a D&O policy required a final adverse adjudication of illegally obtained personal profit). See also, *Federal Insurance Co. v. Cintas Corp.*, 2006 WL 1476206 (S.D. Ohio May 25, 2006)

8. Independent director liability coverage ("IDL"). An IDL policy is written on a Side A basis for the independent directors of a corporation. The need for such a policy arises because when litigation is filed, the CEOs and CFOs use up most of the coverage under the company's D&O policy, thereby exposing the independent directors to potential liability.

Pre-Bankruptcy Planning

Choice of Law

D&O policies typically do not contain choice of law provisions.

Choice of law rules will be governed by the forum state where the action is filed.

In analyzing choice of law issues in the context of insurance coverage litigation, courts have looked to the following tests:

a. Place of contract. Restatement (Second) of Conflicts of Law, § 332; *Wells v. 10-X Mfg. Co.*, 609 F.2d 248, 253 (6th Cir. 1979).

b. Principal location of the risk. *Downey Venture v. LMI Ins. Co.*, 66 Cal.App. 4th 478 (1998).

c. The Restatement's "most significant contacts" test. Restatement (Second) of Conflicts of Law, § 188; *Amica Mut. Ins. Co. v. Fogel*, 656 F.3d 167 (3rd Cir. 2011).

d. Governmental interest. *Frontier Oil Corp. v. RLI Ins. Co.*, 153 Cal.App. 4th 1436, 1454 (2007).

Even where an insurance policy contains a choice of law provision, courts may not enforce that provision if to do so would subvert an important public policy of the forum state. See *Pitzer College v. Indian Harbor Ins. Co.*, 8 Cal. 5th 93 (2019); *Maritz Holdings v. Certain Underwriters at Lloyd's London*, 2020 U. S. Dist. Lexis 222400 (E. D. Mo. Nov. 30, 2020).

Pre-Bankruptcy Planning

Choice of Law

For the chapter 11 trustee or chapter 7 trustee, D&O insurance is often the largest potential recovery for the estate where it brings suits against the debtor's former officers, directors, or advisors.

Choice of law will impact whether claims are potentially covered and how best to plead them. Nevada, for example, has an exculpatory clause that protects directors from liability unless their conduct involved "intentional misconduct, fraud or a knowing violation of the law." NRS 78.138(7)(b)(2).

Different jurisdictions recognize different theories and different claims. They also may recognize different defendants and different exceptions to those defenses.

For example, a fraudulent transfer may also give rise to a breach of fiduciary duty claim—the claim against the recipient of the transfer may not be covered, but the claim against the director or officer that allowed the transfer may be covered.

Are Insurance Policies Property of the Estate?

- UNSETTLED WHETHER PROCEEDS OF D&O POLICY ARE PROPERTY OF THE ESTATE. *IN RE DOWNEY FIN. CORP.*, 428 B.R. 595, 603 (BANKR. D. DEL. 2010).
  - Does the estate have a direct interest in the policy (i.e., first party policies such as casualty, collision, fire insurance where the debtor is the beneficiary) YES, property of the estate
  - Even if debtor is a named insured, is the bankruptcy estate merely a claimant?
  - If property of the estate, proceeds will be subject to the automatic stay and available for the benefit of all creditors

Are Insurance Policies Property of the Estate

> When an insurance policy only provides direct coverage to a debtor, courts generally rule that the proceeds are property of the estate . . . However, when an insurance policy provides exclusive coverage to directors and officers, courts have generally held that the proceeds are not property of the estate."

- *In re MF Global Holdings Ltd.*, 469 B.R. 177, 191 (Bankr. S.D.N.Y. 2012).

Are Insurance Policies Property of the Estate

- Even if not an asset of the Estate, Trustee may have some rights to monitor the policy
  - Even if the policy provides exclusive coverage to D&Os (i.e., not estate property), relief from stay may be necessary to access proceeds even for defense costs. *In re MF Global Holdings Ltd.*, 469 B.R. 177, 191 (Bankr. S.D.N.Y. 2012). 11 U.S.C. 362(a)(3): a bankruptcy filing stays "any act to obtain possession of property of the estate or property from the estate or to exercise control over property of the estate."
  - Insurer often seeks comfort order before providing a defense.
  - Trustee should be entitled to monthly or quarterly reports as to status of available limits. Typically, this is negotiated when insurer seeks comfort order or is sought by the trustee in the context of such motion brought by counsel
  - This is especially important given that these policies are often "burning limits" policies—amounts spent in defense of claims or lawsuits reduces policy limits available for settlement or judgments.

Who Owns the Litigation Claims

- ESTATE VERSUS THIRD PARTY CREDITORS
  - Bankruptcy trustee has exclusive standing to pursue certain claims. *See Smith v. Andersen LLP*, 421 F.3d 989, 1002 (9th Cir. 2005); 11 U.S.C. § 704(1)).
    - Direct v. Derivative Claims: Claims "seeking to redress injuries to the debtor itself."
      - Derivative actions, where a third party sue on behalf of a corporation "belong[] to the corporation, not to the plaintiffs asserting the claim." *Grosset v. Wenaas*, 42 Cal. 4th 1100, 1118 (2008).
      - Action is "derivative" "if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock or property with any severance of distribution among individual holders, or if it seeks to recover assets for the corporation or to prevent the dissipation of its assets." *Jones v. H. F. Ahmanson & Co.*, 1 Cal. 3d 93, 106-07 (1969)
      - [A] direct claim is simply one that reflects an injury that is not incidental to an injury to the corporation as a whole." *Schuster v. Gardner*, 127 Cal. App. 4th 305, 313 (2005).
  - Practice Tip: if claims overlap, trustee may join forces with third party creditors in same action, but the parties need to address any potential conflicts.

Some Relevant Exclusions to Consider

- INSURED V. INSURED: Precludes coverage for claims by companies against their directors and officers. Courts split on whether, in the absence of language in the policy, this exclusion applies to claims by a debtor-in-possession.
- BANKRUPTCY EXCLUSION: Where it is alleged that wrongful action in any way led to bankruptcy filing
- *IN PARI DELICTO*: Broadly defined as the principle that a plaintiff who has participate in wrongdoing may not recover damages resulting from the wrongdoing

The Insured vs. Insured Exclusion

- INSURED V. INSURED—Purpose is to avoid collusion between two insured parties.
  - Check policy to see if action by trustee is exception to application of exclusion.
  - Distinction by courts between claims brought by Chapter 7 or 11 trustees and those brought by debtor in possession:
    - *In re Buckeye Countrymark, Inc.*, 251 B.R. 835, 840-41 (Bankr. S.D. Oh. 2000) (exclusion does not apply to claims brought by Chapter 7 trustee).
    - *In re C.M. Meiers Company, Inc.*, 527 B.R. 388, 404 (Bankr. C.D. Cal. 2015) (exclusion does not apply to claims brought by Chapter 11 trustee).
    - Ninth Circuit has held that debtor-in-possession is the same entity as the pre-bankruptcy entity for purposes of application of this exclusion. See *Biltmore Associates, LLC v. Twin City Fire Insurance Co.*, 572 F.3d 663, 671 (9th Cir. 2009)
    - Cases appear to draw distinction between voluntary assignment of claims by the debtor vis-à-vis appointment of a trustee.

The Bankruptcy Exclusion

- BANKRUPTCY EXCLUSION: Where it is alleged that wrongful action in any way led to bankruptcy filing.
- Sample exclusion:

> IN CONSIDERATION OF THE PREMIUM CHARGED, IT IS AGREED BY THE INSURED AND INSURER THAT THE INSURER SHALL NOT BE LIABLE TO MAKE ANY PAYMENT FOR LOSS IN CONNECTION WITH ANY CLAIM(S) MADE AGAINST ANY INSURED(S):
>
> 1) ALLEGING, ARISING OUT OF, BASED UPON, ATTRIBUTABLE TO, OR IN ANY WAY INVOLVING, DIRECTLY OR INDIRECTLY:
>
> A) ANY WRONGFUL ACT WHICH IS ALLEGED TO HAVE LED TO OR CAUSED, DIRECTLY OR INDIRECTLY, WHOLLY OR IN PART, THE BANKRUPTCY OR INSOLVENCY OF THE COMPANY, OR TO THE COMPANY FILING A PETITION, OR A PETITION BEING FILED AGAINST THE COMPANY, PURSUANT TO THE FEDERAL BANKRUPTCY CODE OR ANY SIMILAR STATE LAW, OR THE COMPANY ASSIGNING ITS ASSETS FOR THE BENEFIT OF ITS CREDITORS…"

The Bankruptcy Exclusion

- ARGUMENTS AGAINST APPLICATION OF BANKRUPTCY EXCLUSION:
  - Ipso Facto Clauses (contract term whereby insolvency of party terminates contract or constitutes material breach) are void.
    - 11 U.S.C. 365(e)(1); *see CMH Liquidating Trust v. National Union Fire Insurance Company of Pittsburgh*, Case No. 2:16 cv-14434, 2019 WL 3296994 (E.D. Mich. July 23, 2019)
  - California Insurance Code § 11580 (many states have similar prohibitions):
    - A policy insuring against losses set forth in subdivision (a) shall not be issued or delivered to any person in this state unless it contains the provisions set forth in subdivision (b). Such policy, whether or not actually containing such provisions, shall be construed as if such provisions were embodied therein.
      . . .
      (b) Such policy shall not be thus issued or delivered to any person in this state unless it contains all the following provisions:
      (1) A provision that the insolvency or bankruptcy of the insured will not release the insurer from the payment of damages for injury sustained or loss occasioned during the life of such policy.
  - There are cases precluding coverage where exclusion goes to "claims arising out of . . . the insolvency or bankruptcy of the Insured or any other person, firm or organization." *Zurich Specialties London Ltd. v. Bickerstaff, Whatley, Ryan & Brurkhalter, Inc.*, 650 F. Supp. 2d 1064 (C.D. Cal. 2009) (no discussion of 11580 or ipso facto clauses)

In Pari Delicto

- *IN PARI DELICTO*: Broadly defined as the principle that a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing.
  - Has been applied to bankruptcy trustees with respect to claims in which the trustee stands in the shoes of the debtor.
    - Fiduciary exception (some jurisdictions)
    - Auditor exception (a few jurisdictions)—may depend on type of claim (negligence v. aiding and abetting)
    - Public policy exception
    - Adverse interest exception/sole actor (exception to the exception)
    - Choice of law important as jurisdictions vary with respect to carve outs on application of exclusion
  - Does not apply to avoidance power claims—i.e., fraudulent transfers, preferences or claims that arise post-petition

Identifying Potential Litigation Claims

- *POTENTIAL LITIGATION CLAIMS AGAINST DIRECTORS AND OFFICERS*
  - *Breach of Fiduciary Duty (Loyalty, Confidentiality and Care)*
  - *Aiding and Abetting Breach of Fiduciary Duty*
  - *Fraud (Intentional Misrepresentation, Negligent Misrepresentation, Concealment, and False Promise)*
  - *Aiding and Abetting Fraud*
  - *Conversion*
  - *Fraudulent Transfer*
  - *Legal Malpractice*

Allocation of Insurance Proceeds

- *Which Litigation Claims Are Covered and How Does That Impact D & O Insurance Coverage?*

- ***Allocation***
  - *The apportionment of the defense costs and settlement/judgment/indemnification amounts that an Insurer pays as between:*
    - *Covered And Uncovered Claims; and/or*
    - *Covered And Uncovered Parties.*

Allocation: Duty to Defend

- *Insurer's Duty v. Right to Payment of Defense Fees and Costs:*
  - *Covered or potentially covered claims:* — *Duty to defend*
  - *Uncovered claims:* — *No duty to defend*
  - *Default Rule for Mixed claims:* — *Insurer has burden of proof to show not a covered claim. Insurer may contract out of default rule through allocation provision based on "relative legal exposure"*
  - *Right to reimbursement must be preserved through reservation of rights*

Hogan v. Midland Nat. Ins. Co., 3 Cal.3d 553, 563 (1970) (if there is a duty to defend one aspect of the case, there is a duty to defend the entire case); but see Endurance American Specialty Co. v. Lance-Kashian & Co., 2011 WL 5417103 (defense costs needed to be allocated because of allocation provision in policy requiring "best efforts").

Buss v. Superior Court 16 Cal.4th 35 (1997) (insurer's right to reimbursement of defense costs incurred for noncovered claims). Pratice tip: insurer seeking reimbursement of defense costs in mixed action has extremely difficult burden of proof.

Allocation: Duty to Indemnify

- ***Larger Settlement Rule vs. Relative Legal Exposure:***
  - *The Larger Settlement Rule (covered and uncovered defendants):*
    - *"Larger Settlement Rule" a D&O insurer must pay the entire settlement unless it can demonstrate that: (1) uninsured defendants were potentially liable for a claim for which the insured directors and officers lacked any responsibility; or (2) the settlement was higher by virtue of the uninsured defendants' potential liability. Nordstrom, Inc. v. Chubb & Sons, Inc., 54 F.3d 1424 (9th Cir. 1995)*
  - *Harbor Ins. Co. v. Continental Bank Corp. (if the same dollars are paid to settle the potential liability of both the covered directors and the uncovered company, those dollars must be allocated to the covered claims against the directors)*
  - *For Mixed Claims: undecided, but probably apply same rule.*

Allocation: Duty to Indemnify

- ***Relative Legal Exposure—Policy Language May Require Allocation***
  - *Sample Allocation Provision:*
    - *If both Loss covered by this Policy and Loss not covered by this Policy are incurred, either because a Claim made against the insured contains both covered and uncovered matters, or because a Claim is made against both the Insured and others not insured under this Policy, the insured and insurer will use their best efforts to determine a fair and appropriate allocation of Loss between that portion of Loss that is covered under the Policy and that portion of Loss that is not covered under this Policy. Additionally, the Insured and the Insurer agree that in determining a fair and appropriate allocation of Loss, the parties will take into account the relative legal and financial exposures of, and relative benefits obtained in connection with the defense and/or settlement of the Claim by the Insured and others.*
  - *See Clifford Chance Ltd. Liab. P'ship v. Indian Harbor Ins. Co.*, 14 Misc.3d 1209(A) (NY Sup. Ct. 2006), *aff'd* 41 A.D.3d 214 (2007)

Preparing for D&O Insurance Litigation

- *Practice Pointers*
  - *Allocation Clauses: Review policy for provisions that might impact allocation analysis.*
  - *Insurer Demands for Allocation: Resist insurer demands to allocate settlements (or judgments) without proof by the insurer that some amount was paid solely for uncovered claims or parties and absent express allocation provision in the policy.*
  - *Subrogation Rights: Be aware of insurer's rights against parties for subrogation of equitable indemnity who contributed to the loss and who may incidentally benefit from the defense or settlement of a claim.*

Outline For ABI Presentation

A. Identification of Pertinent Insurance Policies and Key Dates.

Third Party Policies

1. Directors and Officers ("D&O") Insurance.

a. D&O insurance provides reimbursement to the company for expenses incurred on behalf of the company's directors and officers where those directors and officers are alleged to have committed a "Wrongful Act." Where the policy also provides entity coverage (often referred to as "Side C"), the policy will also cover Securities Claims and potentially other claims that may be asserted against the company.

b. Because this form of insurance is universally written on a "claims made and reported basis", the claim must have been made, and reported to the carrier, within the policy period. The notice-prejudice rule is not applicable to "claims made and reported" policies. *See, e.g., Meadows Constr. Co. LLC v. Westchester Fire Ins. Co.,* 2022 WL 151579 (Mass. App. Ct. January 18, 2022).

c. In addition, the policy may contain internal time limits for the reporting of claims – e.g., no later than 60 days after the insured has knowledge of the claim. These internal time limits are generally enforceable. *See Venoco, Inc. v. Gulf Underwriters Ins. Co.,* 175 Cal.App. 4th 750 (2009).

d. The insured may be able to purchase an extended reporting endorsement which will allow for the reporting of claims after policy expiration. This feature, known as "tail" coverage, provides for a period of time following the policy's termination when the company is entitled to report claims to the insurer arising from conduct that occurred prior to the policy's termination.

2. Errors and Omissions ("E&O") Liability Insurance.

a. This form of insurance provides coverage for professionals such as lawyers and accountants and is typically written on a "claims made and reported" basis.

3. General Liability Insurance.

a. Sometimes called Comprehensive General Liability Insurance ("CGL"), this form of insurance provides coverage for personal injury, property damage and advertising injury. It is typically written on an "occurrence" basis. This means that the loss will be covered if it occurred during the policy period irrespective of when notice is given. Coverage is subject to the notice–prejudice rule, which excuses late notice by a policyholder in the absence of a showing of prejudice to the insurer. *See Campbell v. Allstate Ins. Co.,* 60 Cal. 2d 303 (1963).

<u>First Party Policies</u>

1. Property Insurance.

a. Insures against physical loss or damage to tangible property.

2. Business Interruption Insurance.

a. Insures against loss of business profits due to suspension of business operations due to specified perils.

B. Pre-Bankruptcy Planning.

1. Steps To Take Before a Bankruptcy Filing.

Debtor's Counsel:

– *Conduct* an insurance audit

– *Consider* using a broker who specializes in placing policies for distressed companies

– *Determine* whether you need additional coverage. What size tail do you need?

– *Purchase* D&O tail prior to bankruptcy filing → lenders usually permit the purchase in a default situation

– *Obtain* policies of client's professionals (lawyers, accountants, brokers) → identify any claims the client may have against any professionals

– *Consider* cybersecurity insurance

2. Key Provisions in a D&O Policy That Need To Be Considered in Connection With Pre-Bankruptcy Planning.

a. Side A coverage, including Side A excess and side A excess difference in conditions. Side A coverage protects the directors and officers where the company is unable to advance costs on their behalf. An excess Side A policy will provide coverage from losses that are above the limits of the underlying Side A coverage. Side A excess difference in conditions policy covers losses when the D&O carrier for the underlying policy refuses payments under the initial Side A policy.

b. Non-rescindable Side A endorsement. This endorsement protects the company's directors and officers by barring the insurer from seeking to rescind the policy on the basis of fraud, even where the insurer has relied on allegedly fraudulent financial statements attached to, or submitted in connection with, the policy application.

c. Full severability. This provision protects innocent directors and officers where the company's financial statements are found to be fraudulently misstated. Put differently, actual knowledge on the part of one or more officers or directors of fraudulent acts are not imputed to other individuals covered under the D&O policy.

d. Priority of payments. Such a provision can direct that an insurer first pay for loss under Side A and, only when the loss has been

fully paid, then reimburse for losses under Side B. Such provisions constitute an enforceable right.

e. Extended reporting or "tail" coverage. While many D&O policies provide for one year of extended reporting or "tail" coverage, claims for breach of fiduciary often have longer statutes of limitation. If management of a company believes that a bankruptcy filing is a possibility, it should consider purchasing such extended reporting coverage.

f. Insured versus insured carve-backs. The standard carve-back for this exclusion – for proceedings filed by a receiver, liquidator or chapter 7 trustee – may not be sufficient. Companies that may enter chapter proceedings should insist on a carve back that includes claims by a debtor in possession, chapter 11 trustee, creditors, bondholders, all committees and other bankruptcy constituencies.

g. Conduct exclusions. There are several "conduct exclusions" that are not typically found in D&O policies. These include exclusions relating to dishonesty, personal profit/improper gain or advantage and fraud and criminal acts. It is important that these conduct exclusions are worded in such a way that they are triggered only upon a final adjudication as to the prohibited conduct. *See, e.g., St. Paul Mercury Insurance Co. v. Foster,* 268 F.Supp.2d 1035 (C.D.

Ill. 2003) (under Illinois law, the personal profit exclusion of a D&O policy required a final adverse adjudication of illegally obtained personal profit). *See also, Federal Insurance Co. v. Cintas Corp.,* 2006 WL 1476206 (S.D. Ohio May 25, 2006)

h. Independent director liability coverage ("IDL"). An IDL policy is written on a Side A basis for the independent directors of a corporation. The need for such a policy arises because when litigation is filed, the CEOs and CFOs use up most of the coverage under the company's D&O policy, thereby exposing the independent directors to potential liability.

C. Choice of Law.

1. The vast majority of D&O policies do not have choice of law provisions. This means that a party seeking to file coverage litigation should evaluate the substantive law of the candidate jurisdictions. In this regard, choice of law is governed by the choice of law rules of the forum state where the coverage action is filed.

2. In analyzing choice of law issues in the context of insurance coverage litigation, courts have looked to the following tests:

a. Place of contract. Restatement (Second) of Conflicts of Law, § 332; *Wells v. 10-X Mfg. Co.,* 609 F.2d 248, 253 (6th Cir. 1979).

b. Principal location of the risk. *Downey Venture v. LMI Ins. Co.,* 66 Cal.App. 4th 478 (1998).

c. The Restatement's "most significant contacts" test. Restatement (Second) of Conflicts of Law, § 188; *Amica Mut. Ins. Co. v. Fogel*, 656 F.3d 167 (3rd Cir. 2011).

d. Governmental interest. *Frontier Oil Corp. v. RLI Ins. Co*., 153 Cal.App. 4th 1436, 1454 (2007).

3. Even where an insurance policy contains a choice of law provision, courts may not enforce that provision if to do so would subvert an important public policy of the forum state. *See Pitzer College v. Indian Harbor Ins. Co.,* 8 Cal. 5th 93 (2019); *Maritz Holdings v. Certain Underwriters at Lloyd's London,* 2020 U. S. Dist. Lexis 222400 (E. D. Mo. Nov. 30, 2020).

Faculty

Jeffrey I. Golden is a receiver, bankruptcy trustee and assignee, and a founding partner of Weiland Golden Goodrich LLP in Costa Mesa, Calif. A former shareholder of Buchalter, Nemer, Fields & Younger, he also serves as a expert witness in federal and state criminal and civil matters. Mr. Golden concentrates his practice in the areas of business reorganization and complex receivership and bankruptcy litigation in the state and federal courts. He is available to mediate bankruptcy controversies and other commercial disputes. Mr. Golden is an adjunct professor of bankruptcy law at the University of California, Irvine School of Law and co-editor-in-chief of the *California Bankruptcy Journal*. He also has served as a Ninth Circuit Judicial Conference Lawyer Representative and is a past president of the Orange County Bankruptcy Forum. Since February 2005, Mr. Golden has been listed in *Los Angeles Magazine* as a Super Lawyer, representing the top 5% of the practicing attorneys in Southern California. He has received the OCBF's Judge Peter M. Elliott Award for outstanding ethics, scholarship and contribution, and the CDCBAA's Judge Calvin Ashland "Trustee of the Year" Award. In addition, he was appointed to serve on the California State Bar Client Security Fund Commission, allocating millions of dollars to victims of attorney abuse, and served as its chair. Mr. Golden is a graduate of the Straus Institute for Alternative Dispute Resolution at Pepperdine University School of Law, and he serves on the panel of trained mediators in bankruptcy matters for the U.S. Bankruptcy Court for the Central District of California. He also regularly lectures and writes articles regarding insolvency and commercial law matters. Mr. Golden received his undergraduate degree *cum laude* from the University of California at San Diego – Revelle College in 1984 and his J.D. from the University of Southern California Law School in 1987, after which he clerked for Hon. Peter M. Elliott and Hon. Calvin K. Ashland of the U.S. Bankruptcy Court and the Bankruptcy Appellate Panel, respectively.

Jason B. Komorsky is a partner with BG Law in Woodland Hills, Calif., and has represented Fortune 500 companies and other businesses in commercial litigation, with an emphasis on insurance recovery in both federal and state courts. His insurance experience includes matters relating to general liability, workers' compensation, D&O and E&O, first-party property, and business interruption. Mr. Komorsky has settled and/or litigated matters to judgment involving product-liability coverage, asbestos/silica bodily injury, toxic torts, environmental property damage and corporate malfeasance. He is known for his work with historic comprehensive general liability, umbrella and excess, Bermuda Form and occurrence-based policies, as well as his work seeking coverage from insolvent carriers. For the past six years, Mr. Komorsky has focused his practice on representing trustees in bankruptcy litigation that typically involves D&O, general liability and malpractice insurance coverage. He has represented and/or continues to represent the trustees in adversary proceedings for Anna's Linens, Associated Third Party Administrators, Circuit City, Gabriel Technologies, Cecchi Gori pictures, Pacific Steel Casting Co., Sedgwick and VOIP, among others. Mr. Komorsky is a member of the California State Bar Insurance Law Committee and an update author for the *California Liability Insurance Practice: Claims & Litigation* treatise, a CEB publication. He received his B.A. in 1986 from the University of California, Berkeley and his J.D. in 1991 from the University of California, Hastings College of Law.

Kathy Bazoian Phelps is a partner at Raines Feldman LLP in Los Angeles and has over 30 years of practice in the area of insolvency law, fiduciary representation and fraud litigation. Her practice includes representing federal equity and state court receivers and bankruptcy trustees, as well as serving as a receiver and trustee herself. Ms. Phelps frequently serves as special litigation counsel for fiduciaries and interested parties in fraud-related litigation or cases arising out of receivership and bankruptcy cases and parallel criminal and civil forfeiture proceedings. She is particularly knowledgeable about the administration of Ponzi scheme cases and has litigation experience in claims arising in these types of cases. Ms. Phelps has lectured widely and written on bankruptcy and receivership matters, with a focus on Ponzi schemes. Her book *The Ponzi Book: A Legal Resource for Unraveling Ponzi Schemes*, co-authored with retired Bankruptcy Judge Steven Rhodes, has garnered national and international attention as the authoritative work on Ponzi scheme law. In addition to her roles as lawyer, speaker and author, Ms. Phelps also serves as a mediator and is currently on the mediation and arbitration rosters for the Financial Industry Regulatory Authority, as well as the Bankruptcy Mediation Panel for the Central District of California and the Bankruptcy Mediation Panel for the District of Arizona. She received her B.A. in international relations from Pomona College and her J.D. from University of California, Los Angeles in 1991.

Peter S. Selvin is a partner and chair of Ervin Cohen & Jessup LLP's Insurance Coverage and Recovery Department in Beverly Hills, Calif. He represents policyholders in connection with insurance coverage and recovery efforts, principally in the property and casualty, professional liability, directors of officers, commercial general liability and cyber-insurance areas. His policyholder clients have included publicly traded and privately held companies, as well as individuals. Since 2007, Mr. Selvin has been annually listed in *The Best Lawyers in America*" for both Insurance Law and Commercial Litigation. He has also been listed since 2007 as a *Southern California Super Lawyer* by Law and Politics, Inc. AV-rated by Martindale-Hubbell, Mr. Selvin has written and lectured extensively on insurance coverage and recovery issues, especially in the areas of directors and officers liability insurance and cyber-insurance. He has published numerous articles concerning insurance coverage and recovery in such publications, and with such organizations, as *The D&O Diary*, *Risk & Insurance*, the International Bar Association, the Association of Business Trial Lawyers, *Executive Counsel*, the *Los Angeles Daily Journal* and the American Bar Association. Mr. Selvin has been a panelist for the California Lawyer's annual Cybersecurity Roundtable. He has also given presentations and webinars on insurance coverage topics for organizations such as the Risk Insurance Managers Society (RIMS), Stafford Publications, The Knowledge Group and Litigation Counsel of America. He also is the author of the California Insurance Law Commentary blog. Mr. Selvin received his B.A. with highest honors from the University of California, San Diego, his M.A. in English language and literature from the University of Chicago and his J.D. from the University of California, Los Angeles, School of Law.