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D&O Insurance Coverage: "The Rest of the Story"

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D&O Insurance Coverage: The Rest of the Story

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"Forewarned, forearmed; to be prepared is half the victory."

Miguel de Cervantes, *The Ingenious Gentleman Don Quixote of la Mancha* (circa 1615)

Introduction

Most bankruptcy professionals[1] know some of the basics about directors and officers ("D&O") insurance policies in the bankruptcy and insolvency context. Many bankruptcy professionals know about the insured-versus-insured exclusion. And some know that—assuming that the chapter 11 debtor is an insured—the D&Os must obtain stay relief before the D&O insurer can start paying for the cost of defense. But many bankruptcy professionals do not know much beyond that. These materials do not attempt to cover everything that bankruptcy professionals should know about D&O policies.[2] Instead, they cover a handful of topics and—in doing so—

*These materials provide a general summary of certain legal issues. They are not intended to be—and should not be relied upon—as legal advice.

[1] Throughout these materials, the term "bankruptcy professionals" is used to refer to attorneys, turnaround advisors, investment bankers, and other professionals.

[2] Although a comprehensive treatment of D&O policies is beyond the scope of these materials, such materials are easily accessible on the Internet. *See* Kevin LaCroix, *The Nuts and Bolts of D&O Ins.*, THE D&O DIARY, https://www.dandodiary.com/nuts-and-bolts/ (covering relevant topics in a series of nuts-and-bolts articles). The D&O Diary is an outstanding blog and covers cutting-edge D&O coverage issues. But it also contains nuts-and-bolts articles that should give those without much exposure to D&O insurance coverage a much better understanding of the issues.

attempt to convince bankruptcy professionals that it is important that they develop a working understanding of basic D&O insurance issues and analyze coverage on the front of a restructuring, so they can best position their clients—whether they are representing a D&O, a debtor in possession, the board of directors, an unsecured creditors' committee, or one of the other parties that are often affected by D&O coverage—with respect to D&O coverage.

Report Claims Timely.

It is incumbent that D&Os timely report their claims to the D&O insurer consistent with the terms of the policy. As background, as many bankruptcy professionals are aware, the vast majority of D&O policies are claims-made policies. In contrast to an "occurrence" policy that "provides coverage for acts done during the policy," a "claims-made" policy "provides coverage for claims brought against the insured during the life of the policy."[3] But few bankruptcy professionals are aware that there are two types of claims-made policies: (a) pure claims-made policies, which require the insured to "report the claim as soon as practicable" and (b) "claims-made-and-reported" policies, which contain the foregoing requirement as well as the "additional requirement that the claim be reported to the insurer within the policy period or within a specific number of days thereafter."[4] Some states have adopted the notice-prejudice rule, which restricts

[3] *See Ashland Hosp. Corp. v. RLI Ins. Co.*, Civ. Action No. 13-143-DLB-EBA, 2015 WL 1223675, n.1 (E.D. Ky. Mar. 17, 2015) (interpretation of D&O insurance policy); *see also* 13 COUCH ON INS. § 186:13 (3d ed. Dec. 2017 update) ("The 'claims made' requirement is, in essence, no different than a provision that the policy will not cover claims asserted against the insured by the insured's own employees. Just as notice of a claim by an employee would not be within the coverage, no matter how promptly given, a claim made after the policy period terminates would not be covered, even if notice of the claim were given as 'promptly' as one hour after the insured became aware of it (assuming no contrary statute or policy factor.")))

[4] *See Prodigy v. Agricultural Excess & Surplus Ins. Co.*, 288 S.W.3d 374, 379-80 (Tex. 2009) (D&O insurance policy); *see also Ashland Hosp.*, 2015 WL 1223675 at n.3 ("Courts often conflate the two types of policies, but the nomenclature is not particularly significant. What is significant is that some claims-made policies do not require notice within a time certain, while others do.")

insurers from denying coverage for late notice unless they were prejudiced by such notice.[5, 6] When applying the notice-prejudice rule in connection with a "claims-made-and-reported" policy, many courts will not require that the insurer be prejudiced to deny the claim based on the failure to report it timely.[7, 8] A trap for the unwary is to assume that the rule about prompt notice is relaxed if the D&O policy is renewed.[9]

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[5] New York has a notice-prejudice statute. *See*, *e.g.*, N.Y. Ins. Law § 3420(a)(5) ("A provision that failure to give any notice required to be given by such policy within the time prescribed therein shall not invalidate any claim made by the insured, injured person, or any other claimant, unless the failure to provide timely notice has prejudiced the insurer . . .")

[6] In other states, courts have recognized the notice-prejudice rule. *See Zahoruiko v. Federal Ins. Co.*, Civ. Action No. 3:15-cv-474 (VLB), 2017 WL 776645, *6 (D. Conn. Feb. 28, 2017) ("Connecticut requires two conditions to be satisfied before an insured's duties can be discharged pursuant to a notice provision of the policy: (1) an unexcused, unreasonable delay in notification by the insured; and (2) resulting material prejudice to the insurer."); *Ashland Hosp.*, 2015 WL 1223675 at n.1 (no coverage as a result of late notice without requiring insurer to prove prejudice and collecting authorities so ruling); *Templo Fuente De Vida Corp. v. National Union Fire Ins. Co. of Pitts., P.A.*, 224 N.J. 189, 129 A.3d 1069, 1077 (N.J. 2016) (recognizing that the N.J. Supreme Court had first recognized the notice-prejudice rule in 1968); *Craft v. Philadelphia Indem. Ins. Co.*, 343 P.3d 951, 955 (Colo. 2015).

[7] New York's notice-prejudice statute carves out "claims-made policies." *See* N.Y. Ins. Law § 3420(a)(5) ("With respect to a claims-made policy, however, the policy may provide that the claim shall be made during the policy period, any renewal thereof, or any extended reporting period . . .") For purposes of such statute, the term "claims-made policy" is defined in regulations promulgated by the Superintendent of the New York Insurance Department. *See* N.Y. Ins. Law § 3420(a)(5); N.Y.C.R.R. § 73.1(a) (defining "claims-made policy"). Such regulations subject such claims-made policies to an extensive set of rules. *See*, *e.g.*, N.Y.C.R.R. § 73.3 (section entitled "Terms and conditions of claims-made policies"). Such rules are pared back some—as set forth in section 73.2(d)(2)—if the policy meets one of the alternative requirements set forth in section 73.2(d)(1). *See* N.Y.C.R.R. § 73.1(d).

[8] *See*, *e.g.*, *US HF Cellular Commc'ns, LLC v. Scottsdale Ins. Co.*, Case No. 2:17-CV-261, 2018 WL 2938388, *10 (S.D. Ohio June 12, 2018) (applying California law—which recognizes the notice-prejudice rule—and denying D&O coverage with claims-made-and-reported policy based on late notice).

[9] *Compare id.* (denying coverage under D&O policy notwithstanding renewal); *GS2 Eng'g & Envtl. Consultants, Inc. v. Zurich Am. Ins. Co.*, 956 F. Supp. 2d 686 (D.S.C. 2013) (denying coverage under D&O policy notwithstanding renewal) *with Cast Steel Products, Inc. v. Admiral Ins. Co.*, 348 F.3d 1298, 1304 (11th Cir. 2003) (construing a claims-made professional liability policy and allowing reported claim in next policy period because of concerns it would otherwise

Avoidance Actions May Be Insurable.

The conventional wisdom among bankruptcy professionals is that avoidance actions are uninsurable. While there is some support for the conventional wisdom,[10] courts have started to rule otherwise[11] particularly in connection with settlements.[12]

Courts that rule that avoidance actions are uninsurable reason that such actions seek restitution. The most prominent restitution-is-uninsurable decision is *Bank of the West v. The Superior Court of Contra Costa County*, 833 P.2d 545 (Ca. 1992). In that decision, the California Supreme Court stated in *dicta*[13] that the complaint in the underlying litigation "did not seek

"precipitate a trap"); *St. Paul Fire and Marine Ins. Co. v. Town of Gurley*, No. 5:14-cv-00613-AKK, 2015 WL 5286915, *16 (N.D. Ala. Sep. 8, 2015) (concluding that claim was timely because "renewal of insurance coverage is view[ed] by the ordinary man as being seamless continuation of coverage provided in the original insurance agreement").

[10] *See, e.g., Stanley v. U.S. Bank Nat'l Assoc.* (*In re TransTexas Gas Corp*.), 597 F.3d 298, 310 (5th Cir. 2010) (holding that the "return of funds due to a fraudulent transfer is in the nature of restitution" and uninsurable as a matter of law).

[11] *See Greater Cmty. Bancshares, Inc. v. Federal Ins. Co.,* No. 4:14-CV-0266-HLM, 2015 WL 10714012, *9 (N.D. Ga. Feb. 9, 2015) (fraudulent transfer claims not necessarily uninsurable under Georgia law); *Federal Ins. Co. v. Continental Cas. Co.*, No. 2:05-cv-305, 2006 WL 3386625, *24 (W.D. Pa. Nov. 22, 2006) (fraudulent transfer and preference claims not uninsurable as a matter of law under Pennsylvania law).

[12] *See Burks v. XL Specialty Ins. Co.*, 534 S.W.3d 458, 467-70 (Tex. Ct. App. 2015) *vacated but not withdrawn*, 534 S.W.3d 470 (Tex. Ct. App. Jan. 2016) (vacated based on settlement but clarifying that earlier decision "is **not** withdrawn") (emphasis in original); *see also U.S. Bank Nat'l Ass'n v. Indian Harbor Ins. Co.*, 68 F. Supp. 3d 1044, 1053 (D. Minn. 2014) (coverage exists for policy containing a final adjudication provision for payment of alleged settlement restitution reasoning that "parties may contract to require that the payment is actually—and not just allegedly—restitution"); *but see Philadelphia Indem. Ins. Co. v. Sabal Ins. Grp., Inc.*, Case No. 16-62168-Civ-Cooke/Torres, 2017 WL 4310700, **4-6 (S.D. Fla. Sep. 28, 2017) (rejecting the reasoning of *U.S. Bank*).

[13] As an alternative basis for its ruling against coverage, the California Supreme Court found that the "claims did not occur in the course of the Bank's advertising activities within the meaning of the CGL policy." *See* 833 P.2d 545, 561.

'damages' for 'unfair competition' within the meaning of the CGL policy."[14] *Bank of the West* is cited, however, for its reasoning: to deter perceived moral hazard, restitution is uninsurable.[15]

Bank of the West may not, however, be persuasive. Assuming that it is appropriate for courts to consider moral hazard when ruling on insurance coverage issues generally,[16] it is questionable whether courts should consider it when ruling on *D&O insurance coverage* as opposed to *comprehensive general liability coverage*—the type of coverage in *Bank of the West*—for two reasons. *First*, according to various courts including the California Court of Appeals,[17] reliable D&O insurance coverage "plays an important role in corporate governance in America" of encouraging "good and competent men and women . . . to serve on corporate boards."[18] *Second*, the public policy of the "presumption of innocence" supports granting coverage not only when

[14] *See id.* at 558.
[15] *See id*. at 555.
[16] *But see William Beaumont Hosp. v. Federal Ins. Co.*, 552 F. App'x 494, 501 (6th Cir. Jan. 16, 2014) ("Common sense suggests that the prospect of escalating insurance costs and the trauma of litigation to say nothing of the risk of uninsurable punitive damages, would normally neutralize any stimulative tendency the insurance might have.").
[17] *See Mt. Hawley Ins. Co. v. Lopez*, 156 Cal. Rptr. 3d 771, 799 (Cal. Ct. App. 2013) ("Our interpretation is also consistent with the goal of encouraging individuals to serve on boards of directors and trustees of corporations and charities. Allowing insurers to provide defense costs in criminal cases against corporate agents enhances the ability of for-profit and non-profit organizations to attract directors, trustees, and volunteers who otherwise might hesitate or decline to serve because of fear of lawsuits and criminal prosecution.")
[18] *In re Worldcom, Inc. Sec. Litig.*, 354 F. Supp. 2d 455, 469 (S.D.N.Y. 2005).

directors and officers are the subject of criminal prosecution[19] but also when they face large potential civil liability.[20]

Even if *Bank of the West* is persuasive authority, it is unclear that it should apply to avoidance actions. For no-intent avoidance actions—*e.g.*, preferences and constructive fraudulent transfers (or constructive voidable transactions)—there is no risk of moral hazard.[21] And for actual fraud fraudulent transfer (or actual fraud voidable transactions), a Delaware Superior Court recently ruled that the fraud of a director or officer is insurable under Delaware law.[22] The court based its reasoning on, among other things, Delaware law authorizing Delaware corporations to purchase D&O insurance for "any liability that could be asserted against" its directors and officers.[23] Given that the Delaware statute, in relevant part, is similar to the statutes of other states,[24] such reasoning may apply in other jurisdictions.

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[19] *See Associated Elec. & Gas Ins. Servs., Ltd. v. Rigas*, 382 F. Supp. 2d 685, 700 (E.D. Pa. 2004) (WorldCom insurance coverage case) ("Unless and until [the insureds] are found guilty, they are presumed innocent and must enjoy the constitutionally-based prerogative of any citizen who stands merely accused, but not convicted, of a crime."); *Mt. Hawley Ins.*, 156 Cal. Rptr. 3d at 799 (ruling that insurers must fund insured's defense costs—notwithstanding California statute—in part because of the "presumption of innocence," the "law punishes individuals convicted of crimes, not those accused of crimes").

[20] *See id.* (Although the insureds are "defendants in numerous civil cases and, if found liable, would probably face a judgment of many millions of dollars, at this moment they have not been found liable to anyone of anything.")

[21] *See Richardson v. Tessler* (*In the Matter of Checker Motors Corp.*), 495 B.R. 355, 361-63 (Bankr. W.D. Mich. 2013) (preferences and constructive fraudulent transfers are "innocent" claims that do not involve intent).

[22] *See Arch Ins. Co. v. Murdock*, C.A. No. N16C-01-104-EMD CCLD, 2018 WL 1129110, **11-12 (Del. Super. Ct. Mar 1, 2018).

[23] *See id*. at 12.

[24] *Compare* 8 Del. C. § 145(g) *with* 805 ILCS 5/8.75. The New York statute, on the other hand, prohibits insurer "who provides payment, other than the cost of defense, to or on behalf of any director or officer if a judgment or other final adjudication adverse to the insured director or officer establishes that his acts of active and deliberate dishonesty were material to the cause of action so adjudicated, or that he personally gained in fact a financial profit or other advantage to which he was not legally entitled." *See* N.Y. Bus. Corp. § 726(b)(1).

Think Through Disclosures.

As all bankruptcy professionals know, in chapter 11, the debtor in possession "operates in a fish bowl" making its affairs an "open book."[25] As a result, a D&O insurer will have much greater access to information with which it may, among other things, rescind a policy based on misrepresentation.[26] So it is important that the bankruptcy professional review not only the D&O insurance policy—in particular whether the policy contains a severability clause[27]--but also the insurance application to understand the representations the insured made to the insurer to obtain the D&O policy. Depending on the applicable jurisdiction, if practical, bankruptcy professionals should also consider reviewing the correspondence associated with obtaining the policy.[28] As an

[25] *See In Alterra Healthcare Corp.*, 353 B.R. 66, 73-74 (Bankr. D. Del. 2006).

[26] Insurers may seek to rescind D&O policies based on misrepresentation in policy applications. *See generally* Lilit Asadourian & Whitney D. Ross, *Recent Devs. in Rescissions of Dirs. and Officers Liab. Policies*, 46-SUM BRIEF 56 (Summer 2017).

[27] Application misrepresentation severability clauses contractually limit the insurer's ability to attribute application misrepresentations to other insureds. Because such provisions are contractual, one must review the policy language closely. *Compare Executive Risk Indem., Inc. v. AFC Enters., Inc.*, Civ. No. 1:04-CV-2523-CAP, 2007 WL 9698288, *9 (N.D. Ga. Mar. 6, 2007) (relevant portion of severability clause: "[N]o knowledge or information possessed by any insured will be imputed to any other insured *except for material facts of information known to the person or persons who signed the Application*.") (emphasis in the original) *with In re HealthSouth Corp. Insur. Litig.*, 308 F. Supp. 2d 1253, 1284 (N.D. Ala. 2004) (relevant portion of severability clause: "No statement in the application or knowledge possessed by any Insured Person shall be imputed to any other Insured Person for the purpose of determining if coverage is available.")

[28] The Northern District of Georgia has ruled that under Georgia law a misleading statement in an email—about the debtor's prepetition financial statements—to the insurer constituted a material misrepresentation because it fell within the scope of the phrase "in negotiations for" the insurance policy pursuant to O.C.G.A. § 33-24-7(a). *See Perkins v. American Int'l Specialty Lines Ins. Co.*, 486 B.R. 212, 219 (N.D. Ga. 2012) (rejecting bankruptcy trustee's argument that the financial statement had to be attached to the application). Such decision may be persuasive in other jurisdictions. For example, the Georgia and Florida statutes are similar in this regard because both contain the phrase "or in negotiations for." *Compare* O.C.G.A. § 33-24-7(a) *with* F.S.A. § 627.409(1). The Delaware statute on the other hand—which is otherwise substantively identical to the Georgia statute—does not contain the phrase "or in negotiations for." *See* 18 Del. C. § 2711(a).

example, let's assume that—after reviewing the foregoing—counsel for the debtor in possession concluded that the debtor in possession's prepetition management may have overstated the debtor's revenue for the two years preceding the petition date. In that event, counsel should consider—to the extent possible—how the debtor in possession might avoid making contradictory statements about such revenue.[29] Although there are numerous ways the debtor in possession could make contradictory statements, here are some examples: (a) its response to the first question of the statement of financial affairs (which requests that the debtor in possession "disclose gross revenue of business for existing year and two prior years"); (b) testimony at the section 341 meeting;[30] (c) information in its disclosure statement;[31] (d) responses to request for information

[29] *See*, *e.g.*, *In re Application of WinNet R CJSC*, No. 16mc484, 2017 WL 1373918, *9 (S.D.N.Y. April 13, 2017) ("As officers of the court, attorneys are subject to duties of candor, decorum, and respect for the tribunal before which they appear."); *Rushton v. American Pac. Wood Prods., Inc.*, 133 F.3d 752, 757 (10th Cir. 1997) ("The debtor in possession is an officer of the court . . .."); Fed. R. Bankr. P. 1008 ("All petitions, lists, schedules, statements, and amendments thereto shall be verified or contain an unsworn declaration as provided in 28 U.S.C. §1746."); Fed. R. Bankr. P. 9011(b) (governing representations made by counsel).

[30] The debtor's representative must testify under oath in response to questions from the United States Trustee and creditors. *See* 11 U.S.C. § 341(c) & (d).

[31] As part of the plan confirmation process, the court must approve the debtor's disclosure statement as providing sufficient information for a creditor to vote on the plan. *See* 11 U.S.C. § 1125(a) & (b).

from parties in interest;[32] (e) Rule 2004 examination testimony;[33] and (f) representations to the Court.[34]

Consider Settlement.

Depending on how the policy is drafted, if D&Os have concerns about coverage, it may be prudent for them to consider settlement. For instance, in *Arch Insurance Co. v. Murdoch*, C.A. No. N16C-01-104 EMD CCLD, 2016 WL 7414218 (Sup. Ct. Del. Dec. 21, 2016), a D&O insurance policy provided an exclusion for a "deliberate fraudulent act" *if* it were "established by a *final* and *non-appealable adjudication* adverse to such Insured *in the underlying action*."[35] *See* 2016 WL 7414218, *5 (emphasis added). The Delaware Chancery Court in a memorandum opinion "repeatedly cited to fraud" regarding the defendants' activities. *See* 2016 WL 7414218, *1. Although the chancery court stated that the defendants were liable for breaching their fiduciary in an amount of approximately $150 million, it also directed the parties to confer and advise the court of "any issues that remain to be addressed." *See* 2016 WL 7414218, *1. One of the

[32] Subject to various conditions, a chapter 11 debtor in possession must "furnish such information concerning the estate and the estate's administration as is requested by a party in interest." *See* 11 U.S.C. § 704(a)(7) (obligation imposed on chapter 7 trustee); 11 U.S.C. § 1106(a)(1) (imposing obligation on chapter 11 trustee); 11 U.S.C. § 1107(a) (imposing obligation on debtor in possession); *In re Refco, Inc.*, 336 B.R. 187, 193 (Bankr. S.D.N.Y. 2006) (Such duty is "fairly extensive.")

[33] A party in interest may request the court to order the examination of a party and for such party to produce documents. *See* Fed. R. Bankr. P. 2004. While there are some scope limitations, courts have compared Rule 2004 to a "fishing expedition." *See Moore v. Eason* (*In re Bazemore*), 216 B.R. 1020, 1023 (Bankr. S.D. Ga. 1998) (quoting COLLIER'S).

[34] *See Previti v. National Union Fire Ins. Co. of Pitts. Pa.*, No. 13-56368, 639 F. App'x 416, 418 (9th Cir. Jan. 22, 2016) (ruling against insureds in D&O insurance coverage litigation in part because "they repeatedly conceded" the issue during the course of the bankruptcy litigation).

[35] Such language is one of the most pro-insured ways to draft such provision. *See, e.g., Pendergest v. Certain Underwriters at Lloyd's of London*, 600 F.3d 562, 570-75 (5th Cir. 2010); *see generally* Fang Liu, *Applying the Fraud-Exclusion Provision under D&O Ins. Policies: "Adjudication" or "In Fact"—Which is Better?*" 17 T.M. COLLEY J. PRAC. & CLINICAL L. 247 (2016) (discussing the difference between "in fact" determination and "adjudications").

defendants funded the settlement. Thereafter, counsel for the D&Os apparently "carefully drafted" the settlement agreement and proposed order approving the settlement to mitigate the findings of the earlier ruling. *See* 2016 WL 7414218, *7. In the subsequent coverage litigation, the court ruled that the chancery court's pre-settlement ruling "was, at best, interlocutory" and, accordingly, was not a "final, non-appealable adjudication." *See* 2016 WL 7414218, *8. As such, the insurer was not entitled to rely on the fraud exclusion to deny coverage. *See id.*

Preserve—and Do Not Waive—Privilege.

D&O insurance raises a number of thorny privilege issues that can—if not managed properly—result in the waiver of a D&O's privilege.[36] If a D&O contacted a D&O insurance broker to assist with, among other things, obtaining a new policy or improving the terms of an existing policy, the communications with such broker would not be privileged.[37] Accordingly, the D&O should use care in corresponding with the broker. Even if the D&O retained counsel for advice associated with obtaining a D&O policy, the privilege for the D&O's communications

[36] Although beyond the scope of these materials, D&O insurers have a number of challenging privilege issues with which to contend. For example, until the insurer denies coverage, federal courts in Florida are generally unwilling to allow an insurer to assert work-product privilege because it is an "insurer's business to investigate and adjust claims." *See MapleWood Partners, L.P. v. Indian Harbor Ins. Co.*, 295 F.R.D. 550, 629 (S.D. Fla. 2013) (collecting authority). On the other hand, some "Florida state courts have observed that an insurer's claim file is 'not relevant' to a coverage dispute, and have held that documents prepared by an insurer (including claim files and claims-handling manuals) before the final determination of insurance coverage are privileged and work-product protected in coverage actions." *See id.* at 628-629 (collecting authority).

[37] But if the broker were working with the D&O's counsel, then such communications may be privileged. *See FDIC v. Bryan*, CA 1:11-CV-2790-JEC-GGB, 2012 WL 12835873, *5 (N.D. Ga. Nov. 28, 2012) (communications including coverage counsel and the D&O insurance broker are privileged because they are within the scope of the matter for which the D&O insurance broker was hired).

solely with its counsel are not beyond challenge.[38] In addition, if the same law firm represented the debtor and the D&Os and if a trustee were subsequently appointed in the debtor's bankruptcy case, such law firm may not be entitled to resist producing documents that would have otherwise been privileged.[39] And if a D&O's counsel provides a written analysis of the merits of the claims asserted against the D&O and the defenses to such claims to counsel for the insurer pursuant to a cooperation clause in the D&O insurance policy, the D&O is subject to the D&O plaintiff asserting that it waived privilege by providing such written analysis to the insurer.[40] None of the foregoing is meant to suggest that D&Os do not regularly work through these issues without having privilege waived. Rather, it is meant to suggest that D&Os and bankruptcy professionals should be cognizant of privilege issues associated with D&O insurance policies.

Conclusion

As set forth above, it is important for bankruptcy professionals to have a working understanding of basic D&O insurance issues and to have a good grasp of the specific coverage issues at play on the front end of their engagements. By doing so, such professionals can better position their clients with respect to D&O insurance coverage.

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[38] The FDIC argued that—because counsel was giving "advice" that is "routinely provided by insurance agents and brokers"—the communications should not be privileged. *See FDIC,* 2012 WL 12835873 at *4. The district court, however, rejected the FDIC's argument. *See id*.

[39] *See In re Cardinal Fasteners & Specialty Co.*, No. 11-15719, 2013 WL 425858, **6-9 (Bankr. N.D. Ohio Feb. 4, 2013) (ordering law firm that represented the debtor and purportedly represented the D&Os to turn over documents to a subsequently appointed trustee of the debtor notwithstanding attorney-client and work-product privileges).

[40] *See generally* Lindsay Fisher, Comment, *D&O Ins.: The Tension Between Cooperating with the Ins. Co. and Protecting Privileged Info. from Third Parties*, 32 SEATTLE UNIV. LAW REV. 201 (Fall 2008).