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Corporate Indemnities and D&O Insurance :: Harmonious or Discordant?

BY BEVERLY B. GODBEY

In these COVID times, it is more important than ever for both public and private companies to attract and retain top-level directors/managers for their corporate boards. A key component by which directors/managers measure board security and desirability is the scope and breadth of the corporate indemnity. Although corporate indemnities generally are reviewed regularly for compliance with existing laws, most are not examined in the context of the company's Directors and Officers ("D&O") liability insurance. Does the indemnity match or exceed the scope of the D&O insurance? Are there any conflicts between the language in the indemnity and the coverage in the D&O policy(ies)? Forward-facing general counsel are undertaking these cutting-edge analyses to make sure that the indemnities are as broad as possible—just what their directors/managers are demanding.

Corporate indemnities have been around for a long time—can they really be improved and better tailored to complement existing D&O coverages? Surprisingly, the answer is yes. Here are just a few examples of issues I have seen recently in a variety of indemnity agreements:

1. The D&O coverage applies worldwide, but the indemnity is geographically limited or silent on the issue;

2. The indemnity dictates certain circumstances under which a director/manager must repay insurance proceeds, but this issue should be addressed solely between the insured and the insurer (who is not a party to the indemnity);

3. The indemnity does not encompass new D&O coverages such as coverage for return of indictments, notice of charges, subpoenas, document requests, and notices of extradition;

4. The indemnity contains inadequate notice requirements, which can hinder a director/officer who has been denied indemnity from timely noticing a potentially covered claim to the D&O insurer; and

5. The indemnity language regarding appointment of defense counsel conflicts with the D&O policy language on the issue of duty to defend or advancement of defense expenses, potentially leading to impaired coverage.

Issues like these and other similar discrepancies usually are easy to remedy with a few adjustments to the indemnity language. The process begins with a review of any applicable D&O policies and culminates with a comparison of the D&O coverages against the scope of the indemnity, with recommendations for revisions to the indemnity language. The result — a broad indemnity agreement that protects the directors/managers in harmony with the D&O coverages.

In discussing these issues with colleagues, some believe that it doesn't hurt for the D&O coverage to differ substantially from the indemnity. While D&O coverages and indemnity language rarely are coterminous, the indemnity normally should occupy the frontline with the insurance as a backstop. My experience also confirms that most indemnities are broader than the D&O coverage, and that directors/managers prefer to demand indemnity rather than face a potential battle with a recalcitrant, or at a minimum, unpredictable insurer. Accordingly, the best possible solution appears to be an enhancement of the indemnity language (within the constraints of applicable law) to harmonize it with the D&O coverage, remove any conflicts with the D&O policy language and ensure that the indemnity language incorporates any new or updated D&O coverages.

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