

ALERT

Zero or the Sky is the Limit: What's Your Retention?

By William G. Passannante

You are a registered representative of a broker-dealer in the business of selling securities. While working for the broker-dealer an arbitration is commenced against you and the broker-dealer for alleged "wrongful acts" committed in the course of your professional services. Calmly confident you think to yourself, "This is why I buy my malpractice insurance."

During the arbitration, the broker-dealer is unable or unwilling to pay any amount due in the arbitration.

The claim is submitted to the malpractice liability insurance company. The insurance company assumes the defense on your behalf and on behalf of the broker-dealer, subject to "all applicable retentions" under the insurance policy. Professional liability (E&O) or directors and officers liability (D&O) policies usually contain a low or zero retention for claims against individuals which are not paid by the corporate entity. When selling insurance, let's all make it seem as though we protect the "little guy."

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"Essentially, this argument leaves the individual... potentially uninsured for the large deductible"
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How The "Little Guy" Gets Left Out

Some broker-dealer insurance policies contains a provision regarding retentions:

The Retention stated in . . . the Declarations as the "Broker/Dealer Retention" [i.e. \$50,000] shall apply to Claims for which coverage is provided under Insuring Agreement A of this policy.

The Retention stated in . . . the Declarations a the "Registered Representative Retention" [i.e. \$0] shall apply to Claims for which coverage is provided under Insuring Agreement B of this policy except for those Claims described immediately below.

In the event of a Claim (or Claims alleging Interrelated Wrongful Acts) for which more than one retention amount set forth in . . . the Declarations is applicable, then all such retentions shall apply to the Claim(s); provided, however, that the maximum retention shall not exceed the highest applicable single retention amount.

Typically, the Retention for the individual registered representatives is much smaller than that of the broker-dealer. This may be significant to individuals who are registered representatives and who seek peace of mind

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from their insurance. In a case where both the registered representative and broker-dealer are named in the claim, insurance companies argue that the higher retention applies, even though the broker-dealer might be unwilling or unable to pay the retention.

At claim time, insurance companies argue, the little-guy gets left out. Essentially, this argument leaves the individual registered representative potentially uninsured for the large deductible.

What is a Policyholder to Do?

Some policyholders may be able to protect themselves from this retention issue by requesting for a "separation of insureds" provision. This provision states that each policyholder is treated as a separate insured person under the insurance policy. Each policyholder may only be liable for its own retention and not the higher retention that may apply when more than one policyholder is named in a legal proceedings. Even with a "separation of insureds" provision, problematic retention provisions should be addressed when the policy is purchased.

D&O Policies May Also Surprise Individual Insureds

The same retention argument may arise under directors and officers ("D&O") liability insurance policies. The individual defendant named in the suit along with the insured company may also face a retention if the company becomes defunct or otherwise is unable to pay its portion of the retention. Many D&O insurance policies contain language; however, which eliminates the retention requirement if the company goes into bankruptcy or is otherwise unable to pay its retention.

Policyholders—particularly individual insureds—should be aware of retentions in their insurance policies and how the retentions work before a loss is suffered. Your insurance broker should be able to clarify the insurance policy. ■

For more information on these or other executive insurance matters, please contact one of the lawyers listed, each of whom practice in the area.

The information appearing in this newsletter does not constitute legal advice or opinion. Such advice and opinion are provided by the Firm only upon engagement with respect to specific factual situations.

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