

ALERT

The Newest Game in Town: Rescinding Your D&O Liability Insurance—What Can You Do About It

By William G. Passannante and Vianny M. Paulino¹

A \$92 million dollar blow was delivered to Tyco by Chubb and excess insurance companies in the form of additional premiums to “maintain and extend” D&O liability insurance which has already been paid for, recent press accounts reports. Shortly after the announcement, a lawsuit to void Tyco’s insurance was withdrawn. The tactic used was the threat of rescission. The latest 2002 Tillinghast-Towers Perrin survey reports 97% of those surveyed are buying D&O Policies. This overwhelming market penetration in the market to sell policies is overshadowed by D&O insurance companies’ attempts to rescind the policies they sold. The threat of rescission seriously threatens the policyholder, especially given the increasing importance of D&O liability insurance. The general standard for granting rescission is restrictive and often prevents an insurance company from using this tactic. The law regarding rescissions varies from jurisdiction to jurisdiction, and policyholders should be prepared to prevent attempts at improper rescission.

.....
“Rescission is the
Latest Post-Loss
Underwriting”
.....

ANDERSON KILL & OLICK, P.C.
1251 Avenue of the Americas
New York, NY 10020-1182
(212) 278-1000 Fax: (212) 278-1733

ANDERSON KILL & OLICK, P.C.
1600 Market Street
Philadelphia, PA 19103
(215) 568-4202 Fax: (215) 568-4573

ANDERSON KILL & OLICK, P.C.
One Gateway Center, Suite 901
Newark, NJ 07102
(973) 642-5858 Fax: (973) 621-6361

ANDERSON KILL & OLICK, L.L.P.
1275 K Street, N.W., Suite 1101
Washington, DC 20005
(202) 218-0040 Fax: (202) 218-0055

ANDERSON KILL & OLICK
190 South Lasalle Street, Suite 800
Chicago, IL 60603
(312) 857-2500 Fax: (312) 857-0122

ANDERSON KILL & OLICK, P.C.
Two Sound View Drive, Suite 100
Greenwich, CT 06830
(203) 622-7668 Fax: (203) 622-0321

www.andersonkill.com

Who Are The Players?

The latest 2002 Tillinghast-Towers Perrin survey reports that three sellers dominate the D&O liability insurance market. AIG with 35% share, Lloyds with 14%, and Chubb with 13% share. The remaining insurance companies have a 5% share or less.

What You Need to Know About Rescission

The Enron, Tyco and WorldCom scandals undoubtedly have damaged the D&O Liability Insurance market. Policyholders must be aware of the potential risks in their policies. The standard for rescission varies from state to state. Typically rescission requires a misrepresentation in the policy application that is: (1) material; and (2) of such nature that defeats or seriously interferes with the insurance company's ability to accept or reject the application. Usually a matter is not material unless the misrepresentation is substantial and influences the party to whom it was made. Some courts have held nondisclosure on the part of policyholders does not necessarily void a policy if no duty to disclose exists. In addition, intent to deceive is difficult to prove even when a material misrepresentation is made in the policy application if made innocently and in good faith. The insurance companies bear the burden to show that the requirements of rescission have been met.



who's who

William G. Passannante is Editor of the Executive

Insurance Alert. Mr. Passannante is also Co-Chair of Anderson Kill's Insurance Coverage Group. He has represented policyholders in litigation and trial in major precedent-setting cases. Mr. Passannante is a Vice Chair of the Professionals, Officers and Directors Liability Committee of the Tort and Insurance Practice Section of the American Bar Association. Mr. Passannante has been a member of the Directors and Officers Liability Committee of the Insurance Committee of the Association of the Bar of the City of New York.

© Copyright 2003 Anderson Kill & Olick, P.C.

GET IT FIRST, GET IT FAST

If you are presently receiving our newsletters via regular mail but would like to receive them via e-mail, visit our website at <http://www.andersonkill.com>

NEWSLETTER READER'S SURVEY

Your opinions matter to us, visit our website at <http://www.andersonkill.com> to complete our survey.

To subscribe to this or any of the Anderson Kill & Olick Newsletters and Alerts, visit us at:

www.andersonkill.com/subscribe

Rescission Is The Latest Post-Loss Underwriting

Insurance companies attempt to tackle the burden of proof and the restrictive standards of rescission by making leaps to assert alleged omissions and misrepresentations and asserting the materiality of the information in question. Rescission has become the new form of post-loss underwriting. Insurance companies are presumed to know the business of their policyholders. This has been the rule since the advent of insurance, literally hundreds of years ago. After a claim is made, insurance companies may attempt to gather irrelevant information and argue that it was omitted or misrepresented by the policyholder. Policyholders should protect themselves from this practice. Insurance companies must make their underwriting decisions prior to selling policies, not after a claim has been made.

How You Can Protect Your D&O Liability Insurance

Understanding the requirements for rescission will help policyholders fight improper rescission attempts. The best advice is to avoid these problems before they happen. Work with an insurance broker or insurance consultant experienced with D&O liability insurance policies. Seek severability in the application and in the "bad acts" exclusions. Policyholders can also prevent grounds for rescissions and D&O claims with a good corporate governance structure. It is important to choose D&O liability insurance policies carefully and keep in mind protection for "innocent directors" who may suffer most if the policy is rescinded. The bottom line is that insurance companies will routinely challenge significant claims. Policyholders should not accept attempts at rescinding bought and paid for D&O liability insurance policies. ■

¹*Vianny M. Paulino is an insurance litigation paralegal in the New York office of Anderson Kill & Olick, P.C.*

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.

Eugene R. Anderson	(212) 278-1751	eanderson@andersonkill.com
Paul E. Breene	(973) 642-5862	pbreene@andersonkill.com
Robert Chung	(212) 278-1039	rchung@andersonkill.com
John H. Doyle, III	(212) 278-1753	jdoyle@andersonkill.com
John N. Ellison	(215) 568-4710	jellison@andersonkill.com
Jean M. Farrell	(212) 278-1222	jfarrell@andersonkill.com
Robert E. Frankel	(215) 568-4295	rfrankel@andersonkill.com
Jeffrey E. Glen	(212) 278-1009	jpglen@andersonkill.com
Joshua Gold	(212) 278-1886	jgold@andersonkill.com
Finley T. Harkham	(212) 278-1543	fharckham@andersonkill.com
Alex D. Hardiman	(212) 278-1471	ahardiman@andersonkill.com
Robert M. Horkovich	(212) 278-1322	rhorkovich@andersonkill.com
R. Mark Keenan	(212) 278-1888	rkeenanan@andersonkill.com
John G. Nevius	(212) 278-1508	jnevius@andersonkill.com
Rhonda D. Orin	(202) 218-0049	rorin@andersonkill.com
William G. Passannante, <i>Editor</i>	(212) 278-1328	wpassannante@andersonkill.com
M. Christina Ricarte	(212) 278-1796	mricarte@andersonkill.com
David M. Schlecker	(212) 278-1730	dschlecker@andersonkill.com
Lauren B. Sobel	(973) 621-5143	lsobel@andersonkill.com
Edward J. Stein	(212) 278-1745	estein@andersonkill.com
Ernest Summers, III	(312) 857-2680	esummers@andersonkill.com