gered by the mere allegation of fraud or illegal profit.

Generally, "final adjudication" exclusions favor policyholders because they prevent an insurance company from relying upon an exclusion to deny coverage until there has been a finding of the prohibited conduct in the underlying lawsuit. With an "in fact" conduct exclusion, an insurance company is free to litigate the issue in a separate coverage action, as long as it did not control or direct the underlying litigation. In this way, "final adjudication" exclusions do not bar coverage for settlements (or the costs to defend actions resulting in settlements); this is true even when the allegations may point to fraud or illegal profit.

With Madoff and other financial frauds, policyholders and insurance companies will be monitoring the progress of investigations and underlying lawsuits to determine just how far the fraudulent acts extended. Companies that are alleged to have participated in the fraud (or to have received fees or compensation for managing accounts that they essentially turned over to the fraudsters) will likely see their insurance companies assert conduct exclusions as a bar to coverage.

Should you provide the insurer with a notice of circumstances?
Many E&O and D&O policies permit notice of circumstances that may give rise to a claim. This allows a policyholder to secure coverage for a future claim within the current policy period. Determining whether—and when—to provide such notice is a critical issue. Act too soon and you may be locked into limits already diminished by other claims. But it may not pay to wait, especially if insurance companies write financial fraud exclusions into successive policies. There are many variables to consider, and determinations must be made on a case-by-case basis. ■

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Should I Change D&O Carriers?

by Cort T. Malone and Jane A. Horne

Given the volatility of today's economy, many policyholders are considering switching insurers. While changing providers can lead to coverage gaps no matter the line, searching for new D&O insurance is particularly perilous. If you are planning to explore the D&O market, there are several factors to keep in mind.

First, be sure to tailor any new policy to your business. It is difficult to determine the right amount of coverage when buying D&O insurance. Though the usual concern is whether a company has sufficient coverage, some people go overboard and buy coverage they do not need. Privately held companies and other nonpublic organizations, for example, do not have the same shareholder derivative action exposure as public companies. But many pay high premiums to insure a nonexistant risk.

Others looking for better policies make the mistake of limiting provisions in "claims-made" D&O policies. D&O insurance polices are by nature claims-made policies, which means they cover only claims asserted during the policy period. The "prior acts" exclusion found in many D&O policies, for instance, excludes coverage for any claim that occurred prior to a certain "continuity date" (generally the date the policyholder first purchased coverage.) If you buy a policy containing a prior acts exclusion from a new D&O carrier and the continuity date is the inception date, this could create a coverage gap. That fact makes it imperative to negotiate for "full continuity" by having the new carrier either remove the prior acts exclusion or use the same continuity date as the old policy.

D&O insurance companies also often require new policyholders to declare that no insured is aware of any circumstances that could give rise to a future claim and to list any exceptions to this warranty. This, too, can create a coverage gap since claims arising from any listed circumstances will not be covered by the new policy (as a result of the warranty) or by the old policy (assuming it expires before the circumstances lead to an actual claim). To eliminate—or at least narrow—this gap, either negotiate narrower language to limit the warranty's exclusionary effect or provide your current carrier with a notice of circumstances that may give rise to a claim before your current policy expires.

Another thing to keep in mind is that bigger is not always better. The first step in researching a D&O provider is to check its rating. While the rating is important, do not automatically be swayed by rankings, size or market-share. The best coverage is not necessarily offered by the largest carriers. Many D&O insurance companies that are not household names offer effective polices and may even be able to provide more tailored underwriting.

Ultimately, maintaining your current D&O insurance has a genuine "legacy advantage," meaning that it avoids the possibility of limiting new policy language and decreases the risk of coverage gaps. On the other hand, exploring the market has its own advantages of competitive pricing and better selection. Neither option is necessarily correct, but understanding all the relevant issues will ensure the policyholder is able to obtain the most favorable D&O coverage—regardless of option. ■

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