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Client Alert

Insurance Coverage & Recovery Practice Group

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Update on Recent D&O Coverage Decisions

Your company's directors and officers (D&O) liability insurance coverage is a critical resource in the event your directors and officers are named as defendants in a securities class action, derivative suit, or related regulatory investigation. Given recent market volatility and the prospect of increased securities claims and regulatory scrutiny, now may be a good time to consider updating your company's D&O program to ensure that it affords all of the protections available in the market. This client alert briefly summarizes three D&O coverage decisions issued over the last two months, all of which demonstrate the need to pay careful attention to policy language when negotiating your D&O program or making a claim.

Fifth Circuit Decision highlights pitfalls of settling with primary carrier for less than policy limits in *Citigroup Inc. v. Federal Insurance Inc., et al.*, No. 10-20445 (5th Cir. Aug. 5, 2011).

- Citigroup sought D&O coverage under its primary D&O policy and nine excess policies for certain underlying claims that it had settled for over $240 million, after incurring over $20 million in defense costs. The integrated D&O program provided a total of $200 million in coverage.
- Citigroup's insurers initially denied coverage for the settlement, but Citigroup later entered into a settlement with its primary carrier, pursuant to which the primary carrier paid $15 million of its $50 million limits, in return for a release from coverage.
- Citigroup sued its excess insurers for coverage. Focusing on the exhaustion language in the excess policies, the Fifth Circuit found that the excess policies required the primary insurer to pay all of the primary limits before excess coverage could attach. Thus, Citigroup was unable to access its excess coverage.

Second Circuit Decision in *MBIA, Inc. v. Federal Insurance Company* (2d Cir. July 1, 2011) confirms that D&O coverage may be available to indemnify costs associated with informal regulatory claims.

- MBIA purchased D&O coverage for costs of defending or investigating "Securities Claims," including "a formal or informal administrative or regulatory proceeding or inquiry commenced by the filing of a notice of charges, formal or informal investigative order or similar document."

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- The Court held the D&O policies covered MBIA's costs incurred in responding to informal investigations by the NY Attorney General's office and the SEC into allegedly unlawful accounting practices. The Court broadly interpreted the definition of "Securities Claims" in MBIA's policy, reasoning that a NYAG subpoena "is at least a 'similar document' to a 'formal or informal investigative order' that commenced a regulatory proceeding."

Decision from the Southern District of New York in *Greenman-Pedersen, Inc. v. Travelers* (S.D.N.Y. Aug. 9, 2011) emphasizes need to consider D&O insurance in M&A transactions.

- In *Greenman-Pedersen*, an acquiring company sought D&O coverage for costs of suit arising from an asset purchase transaction. After the transaction, the acquiring company sued the former officers of the target company (who had since become officers of the acquiring company) based on alleged material misrepresentations about the target company during and after the transaction.
- When the acquiring company sought D&O insurance, coverage was excluded by an insured-versus-insured exclusion. Coverage also was excluded on the same basis when the same claims were pursued as a purported shareholder derivative action.

All three of these recent decisions highlight practical considerations your company should consider when negotiating D&O program renewals and making claims.

- Policyholders should always carefully review exhaustion requirements before settling claims with D&O carriers. Further, because primary carriers often attempt to settle claims for less than the policy limits, companies should seek guidance from their broker and coverage counsel who can negotiate broader exhaustion language in the excess policies to cover the insured's contribution to a settlement.
- While not all policies contain the same definitions for key terms like "Claim" and "Securities Claims," coverage may be available under your D&O program when your company and its directors and officers are confronted with expensive "informal" regulatory demands, which in some cases can be as costly to defend, if not more costly, than shareholder securities litigation.
- Finally, given the litigation risks inherent in M&A transactions, corporate counsel should involve coverage counsel in due diligence to ensure deal partners and their directors and officers are adequately protected post-integration.

We work closely with our clients and their risk managers to ensure their D&O and professional liability insurance affords adequate protection in the event of securities claims and to assist them in being reimbursed by their insurers for losses arising from these types of claims.