

# D&O Insurance Basics: Critical Provisions In-House Counsel Should Know

## Presenters

**DICKSTEINSHAPIRO**LLP

**Stephen Goldberg**, Partner,  
Dickstein Shapiro LLP

**DICKSTEINSHAPIRO**LLP

**Kirk Pasich**, Partner,  
Dickstein Shapiro LLP



**Dennis Stryker**, General Counsel,  
Rick Engineering Company



**Lily Yan Hughes**, Vice President & Associate  
General Counsel, Ingram Micro Inc.

## Why is D&O Coverage Important...

...to inside and outside board members?

...to officers/executives?

...to the company and its subsidiaries?

...to inside counsel (i.e., the attendees)?

## Typical Coverage Package

- Multiple insurers in layers
- Deductibles and retentions
- Primary, first excess, and “following form” policies

# The Insuring Agreement

- Side A: Direct or Liability Insurance (protects Ds and Os when no indemnification)
- Side B: Reimbursement or Indemnity Insurance (protects the company when company indemnifies Ds and Os)
  - Relationship to state indemnification laws
- Side C: Entity Coverage Insurance, usually limited to Securities Claims and Employment Practices Claims

# Trigger of Coverage and Definition of a Claim

- Typical Provision
- Typically includes “demand” and could include prior complaint to insured or to Better Business Bureau asserted prior to lawsuit

## Notice and Reporting Provisions

- Typical Provision
- Often depends on definition of “claim”
- “Claims Made” or “Claims Made and Reported”
- May depend on size of retention or deductible
- May have substantial impact on renewals

## Changes in Coverage

(change of insurers or restrictions on coverage)

- Extended reporting period coverage
- Possibility of gaps depending on when what constitutes the first claim
- Impact of non-renewal, change of insurers, known alleged wrongful acts impacting exclusions (prior and pending litigation date or expressly listed claims or lawsuits or stated business practices)



# The Insurer's Defense Obligation

- Notice and Tender Provisions
- Timing for reimbursement
- Carriers' assertion that duty to reimburse is only coextensive with indemnity obligation
- Carriers' assertion that duty to reimburse only arises upon tender

# The Allocation Dispute Between Insured and Uninsured Liability

- Description of issue and typical resolution

# The Allocation Dispute Between Insureds

- Potential Conflict of Interest
- Possible policy language options available (order of payment, sublimits for entity, etc.)
- Bankruptcy of entity

## Covered Loss

- Typical Provision
- Restitution or disgorgement

## Exclusions

- Conduct Exclusions—fraud, dishonesty, criminal conduct, profit
  - Different available wordings
  - Impact on defense or reimbursement of funds advanced

## Exclusions

- “Insured v. Insured” Exclusion
  - Negative correlation of breadth of coverage for insureds versus loss of coverage for potential suits (e.g., officers and directors of subsidiaries)
  - Is a bankruptcy trustee for entity an insured?
- Other Exclusions
  - Regulatory, CGL, ERISA, E&O, malpractice, punitive damages

# Misrepresentation/Rescission

- Effect
- Public company filings adopted as truthful
- Standard: Intent required?

## Other Issues

- Severability
- Protection of the Outside Director—Side A excess coverage
- Complexity of multiple jurisdictions and international coverage



# Practical Differences for D&O Coverage for Private versus Public Companies

# Questions

