INSURANCE CORNER

# Micro-Cap Company Insurance

Most articles written about the insurance needs for Micro-Cap companies focus on changes created by The Sarbanes-Oxley Act of 2002, the resulting additional responsibilities and the shift in corporate protective measures. This column, however, aims to inform C Suite executive officers, company board members, and shareholders regarding important and often overlooked insurance aspects of corporate well being and financial protection. I will be highlighting important insurance products, going over some common mistakes, providing general insurance strategies, and also offering some do's and don'ts of coverage.

Directors & Officers (D&O) insurance is purchased to protect personal assets of directors and officers as well as to protect the assets of the firm. It serves to provide reimbursement to the organization, to indemnify Ds and Os for their losses, and to help the firm monitor and provide defense costs associated with responding to lawsuits or investigations.

The basic D&O policy includes coverage for the entity as well as the Ds and Os on an aggregate basis, but can leave the Ds and Os exposed should the entity use up the limits of liability and not have the means to indemnify the Ds & Os for their defense and indemnity expense. A popular D&O derivative product is Side A "DIC" policy. This is basically the same D&O coverage, except it only applies to Ds and Os (no entity) and is non-rescindable by the carrier. Many SME's and Micro-Caps already purchase this type of a program, however, I'd like to introduce another D&O derivative product, the Personal Director's Liability Insurance (PDL).

■ BY EUGENE B. PODOKSHIK

### PRODUCT HIGHLIGHT- PERSONAL DIRECTOR'S LIABILITY INSURANCE (PDL)

PDL is essentially an individual personal liability policy for independent directors serving on one or more boards. It's unique as the limits are not shared with other directors or with the organization and the policy can be tailored for the individual to cover one, all, or any combination of boards a director serves on. Insured directorships can be with publicly traded, privately owned, or not-for-profit organizations.

This policy is an excess policy over any other D&O coverage that may be available containing drop-down and limited difference-in-conditions (DIC) features. In other words, PDL activates when indemnification is not available from any source, and losses are in excess of other D&O liability insurance, or losses are not paid by underlying D&O liability insurance and certain drop down or DIC features of the policy are triggered. Limits available are generally up to $10 million.

Some positive features of PDL policy are:

• No deductible

• Freedom to choose defense counsel with carriers consent

• Spousal coverage included

• Bilateral extended reporting period

• Dedicated PDL claims professionals are available to guide insureds through the claims process even if the policy is not triggered.

• PDL responds as primary Insuring Clause 1 coverage if a loss is not paid under the underlying insurance because of financial impairment of all underlying insurers, claim denial due to a materially false warranty made by any person or organization (other than the insured person), or if all underlying insurance is rescinded.

Why consider a PDL policy? If you're a Director or Officer of any company, it's definitely worthwhile to consider this type of program, especially if you have assets worth protecting. Here are few of the common scenarios that a D and O can encounter with their traditional D&O policy:

• D's and O's run the risk that large claim(s) settlements can exhaust D&O limits

• Entity or individual directors can erode coverage protection for D's and O's

• D&O program can be tied up in bankruptcy estates and defense costs may not be provided for many years (i.e. a U. S. bankruptcy court has ruled that all underlying insurance and its proceeds are assets of a bankruptcy estate and unavailable to pay any covered loss)

• The D&O policies can be rescinded by the carrier for various causes

• Poorly structured severability provisions can expose innocent directors

### COMMON INSURANCE MISTAKES:

When providing insurance reviews, I often find that a great deal of time was spent on D&O insurance, but very little time was spent on the other coverages. If not structured properly, these other coverages may not respond to a claim, which can have a significant impact on the company's balance sheet, income, and if severe enough, can even result in bankruptcy. Carriers are unforgiving when it comes to using the fine print in their policies to disclaim coverage. Someone needs to make sure that you have the right coverages, and that they are written correctly from a technical standpoint. Take a look at your insurance program to see if you can find some of these common insurance mistakes.

• Missing names on the named insured schedule

• Missing locations

• Limits are too low (building, contents, liability)

• No flood or earthquake insurance, no utility service interruption coverage

• Insufficient business income

• No hired/non-owned liability coverage

• Improper classifications / Exclusions for your business activity

• Professional liability definition of your services is too narrow or incorrect

• Your broker, or a lower level employee completed your insurance application

• The excess policy does not follow from the primary or underlying policies

• You didn't purchase the proper coverage -you can see a listing of common coverages purchased by Micro-Cap companies here www.ffbinsurance.com/microcap

## GENERAL INSURANCE PROCUREMENT ADVICE:

Here are some of the generic takeaways that might be of benefit to know relating to insurance procurement.

• If your insurance premiums are over $200,000, ask your broker to net out their commission and instead negotiate a service fee with them.

• The name of the game is to be prepared. You need to dedicate a professional to be responsible for risk (insurance) management. For most Micro-Cap companies, this falls on the shoulders of the CFO. Whoever it is, please make sure that adequate time is spent on exposure review and analysis. Hire a consultant or engage your insurance broker to perform this service if you cannot dedicate the time or do not possess the expertise. Your broker relies on the information you give him/her, and your insurance carrier can use the submitted application to deny coverage if they find misrepresentation.

• Engage an insurance broker who can provide risk management services and act as an extension of your firm, rather than just be an insurance vendor.

• No matter how solid your relationship is with your insurance provider, we recommend that you engage a third party to "check" your program at least once every three years. There may be significant gaps in your insurance program and you may not be utilizing the optimal risk transfer structure for your operations. Reviews can be confidential.

• Meet your underwriter. If there's a claim, you want to know the underwriter personally. He/she is the only one (other than your attorney and broker) that can go to bat for you when you have a questionable claim.

• Understand your indemnification relationship with your company.

• Read and understand your policy. Well, that actually may not be realistic, the understanding that is. It is better to hire an attorney who is familiar with insurance policies and have them liaison with your broker to secure the appropriate coverages. This additional expense will be a tiny fraction of the premiums you pay, but you will be in a better position when the claim does arrive. If you don't want to rely on your corporate counsel who may not have this expertise and need a recommendation, please contact us, we have put together a panel of various insurance attorneys.

## FIRST FIDELITY INSURANCE RATE PROJECTIONS FOR 2013:

Below is a general guide to what is expected to take place in commercial insurance in 2013. The actual rates will depend on the specific exposure changes, carrier appetite changes, carrier rate increase mandates, loss history of the insured, class of business, and many other factors.

I hope this information was useful. Until next time.

| Coverage* | % Increase |
|---|---|
| Property | 7% to 12% |
| Casualty | 2% to 8% |
| Excess Liability | 3% to 12% |
| Workers Compensation | 3% to 15% |
| Directors & Officers | 5% to 10% |
| Errors & Omissions | 4% to 6% |
| Employment Practices | 3% to 12% |
| Employee Benefits | 3% to 10% |

*Assumes good loss experience.

## ABOUT FIRST FIDELITY BROKERAGE:

Founded in 1994, First Fidelity Brokerage is a leading international property and casualty insurance broker. First Fidelity developed and administrates several special insurance products, including insurance programs for Micro-Cap companies. Headquartered in New York City, First Fidelity differentiates itself by providing insurance procurement and advocacy services using experienced legal professionals. The addition of legal expertise in insurance procurement is what FFB refers to as "The game changer in insurance procurement."™ This service model untimely leads to better protection and less claim denials.

For more information on First Fidelity Brokerage, please visit www.ffbinsurance.com.

## BIOGRAPHY

Eugene B. Podokshik, CPCU, CRIS, an insurance coverage technician, is the Principal & CEO of First Fidelity Brokerage, a specialty commercial insurance broker providing insurance risk transfer solutions to SMEs & Micro-Cap companies. Mr. Podokshik has worked in insurance product development and in various positions servicing middle market and national accounts (ranging from privately held companies to large publically traded investment banks) most recently as an EVP for a national insurance broker where he led insurance due diligence, program placement and portfolio aggregation programs (domestic and international) for private equity firms. Eugene graduated from NYU with a BS in Economics and a BA in Political Science, and holds the CPCU and the CRIS insurance designations. He also serves as Board President of CIDNY-ILS, a New York City not-for-profit Home Care Agency with nearly 700 employees, and is Treasurer of the Brighton Ballet Theater, one of the nation's largest children's ballet schools.

If you have any questions for Eugene Podokshik, he can be reached at (212) 933-9050 x1801 or via email epod@ffbinsurance.com. Mention "MicroCap Review" magazine to have First Fidelity's fees waived when engaging them for a basic insurance review and rate comparison. ■