

Directors & Officers Liability Insurance Experience



OUR EXPERIENCE

K&L Gates maintains an extensive and active policyholder-oriented directors and officers (“D&O”) insurance coverage practice, having represented well over 100 clients. Our practice is devoted primarily to maximizing recovery on complex and challenging D&O insurance claims and reviewing and negotiating the terms of D&O insurance contracts. Our clients consist primarily of large publicly traded companies with national and international business operations, including leading financial

institutions, as well as major energy, entertainment, utilities, aviation, chemicals, metals, high technology, retail, and manufacturing companies. Our D&O insurance coverage clients also include mid-sized and smaller publicly traded companies, as well as privately held companies engaged in a wide variety of business enterprises. In addition, K&L Gates’ insurance practice includes representation of individual directors and officers on D&O insurance matters, as well as nonprofit organizations, such as hospitals and educational institutions. Below, we provide an overview of our D&O insurance practice.

MAXIMIZING RECOVERY ON D&O INSURANCE CLAIMS

A substantial portion of K&L Gates’ D&O insurance practice involves maximizing our clients’ recovery on contested claims for coverage. Such claims typically share several characteristics: they are highly complex, both factually and legally; they involve substantial risk to the corporation, senior management, and board members themselves (as evidenced by the highly publicized settlements to which certain outside directors of WorldCom and Enron contributed approximately \$32 million); and, increasingly, they are vigorously disputed by insurers. K&L Gates’ coverage group has represented numerous companies and individuals in a variety of D&O insurance claims, drawing, where appropriate, on the experience of K&L Gates’ securities and enforcement practice group.

A selected list of such engagements follows:

- Represented a leading financial institution in federal insurance coverage litigation with respect to a multimillion-dollar D&O insurance claim arising out of underlying governmental and private-party claims based on allegedly misleading financial statements and public filings.
- Represented an energy-related company in a multimillion-dollar D&O insurance arbitration proceeding involving commercial fraud claims against company officers.
- Represented a leading health management organization in D&O insurance litigation in state court arising out of an underlying securities lawsuit based on allegedly misleading financial statements and public filings.

- Represented hospital trustees in bankruptcy court with respect to multimillion-dollar D&O insurance claims arising out of breach-of-fiduciary-duty claims.
- Represented a leading manufacturer in court-ordered mediation of multimillion-dollar D&O insurance claims arising out of an underlying securities lawsuit based on allegedly misleading financial statements and public filings.
- Represented a leading financial institution in state court insurance litigation involving multiple underlying actions arising out of allegedly misleading statements in connection with a failed bond offering.
- Represented a large, publicly traded retailer (that eventually filed for Chapter 11 bankruptcy relief) in connection with a D&O insurance claim arising out of underlying securities class actions, derivative action lawsuits and a U.S. Securities and Exchange Commission investigation arising from a restatement of financial statements, which resulted in recovery of policy limits.

K&L Gates' clients have succeeded in obtaining multimillion-dollar insurance payments from their D&O insurers and collectively recovering hundreds of millions of dollars in each of these engagements.

In some instances, our clients' interests are better served by negotiating directly with D&O insurers and avoiding litigation or formal dispute resolution. K&L Gates lawyers, on behalf of our Fortune 500 and other clients, regularly advise on the strengths and weaknesses of claims for D&O insurance coverage arising out of a variety of securities litigation and governmental proceedings, derivative actions, and other D&O insurance claims; develop and implement coverage recovery strategies; negotiate directly with insurers; and frequently obtain substantial insurance recoveries at minimal cost.

POLICY NEGOTIATIONS

One of the most important, but often only partially understood, realities of D&O insurance is this: the terms of coverage provided by particular D&O insurance policies vary dramatically. Those differences can determine whether or not a claim is covered. Historically at most companies, the responsibility for obtaining and negotiating D&O insurance policies was lodged primarily with non-lawyer risk managers, finance and/or treasury department personnel, and brokers. Legal counsel, whether inside or outside, often had little or no involvement in the process of negotiating the terms of coverage.

Many companies in today's legal environment are recognizing that they need to engage legal counsel at the outset; that is, not simply after claims are submitted (when it is often too late)—but to evaluate and negotiate the initial terms of the D&O insurance contracts. While many brokers can and do play a constructive role in placing D&O contracts, they necessarily act as an intermediary between the insured and insurer, rather than as a full-fledged legal advocate for the policyholder.

Clients have increasingly turned to K&L Gates for D&O insurance contract advice before claims are submitted. We regularly advise clients on the strengths and weaknesses of their insurance programs and collaborate with risk managers, insurance lawyers, senior management and the brokers to negotiate wording to improve coverage. We negotiate directly with the world's leading D&O insurance markets, both domestic and foreign, when requested. We often are asked to prepare written presentations to senior management and corporate boards as part of this effort,

and, where appropriate, to speak directly to the board. We have obtained substantial knowledge regarding not only what “best practices” are, but also what may or may not be achievable for a particular company, as a result of our involvement in more than 100 projects of this type. Our clients tell us that their investment in this “upfront” work is well worth the cost.