

TRENDS IMPACTING DIRECTORS AND OFFICERS LIABILITY IN 2019

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Shareholder Class Actions

Shareholder class actions have historically been a dominant concern for any company that is publicly traded in Canada and/or the United States. Most publicly traded boards purchase a D&O program to respond in the unlikely event their shareholders allege misrepresentation in publicly released information. Since personal liability can attach to securities laws, it is important to understand the current legal landscape. For instance, in Canada, the number of Shareholder Class Action cases filed in 2018 was 8, versus 6 in 2017. While the overall frequency may not seem alarming, the cost to defend and settle these types of claims is rising and can cripple a company, hence the need for a carefully constructed Directors and Officers Liability Program.

In contrast to Canadian statistics, the US finished 2018 with record Shareholder Class Actions cases filed – a total of 441 to be exact. While the higher numbers in the US are a function of the total number of publicly traded companies, it also speaks to the higher probability of litigation in the US. In fact, the litigation rate suggests a publicly traded company in the US has an 8.4% chance of receiving a shareholder class action claim.



Tip

Directors and Officers Liability policies can be crafted to include coverage for the “Entity” named alone or alongside Directors and Officers in a Securities Class Action claim. It is important to understand the coverage response for Securities Claims when reviewing your D&O program.



Cyber

As technology continues to change and impact every business, the topic of “Cybersecurity”, and the response to a corporate breach or strength of data security will no doubt make its way to the board level. Finding board members who have even a basic understanding of the cyber exposures present within a corporation is rare. Therefore, board members can consider the following to manage their cyber risk:

- Include securing the company’s data as part of the overall risk management of the organization
- Ensure appropriate resources are dedicated to the data security process
- Ensure the Board is regularly informed as part of the Incident Response Plan
- Purchase a Cyber Insurance Policy recognizing coverages can vary amongst carriers. Discuss the merits of risk assessment, breach coaches, ransom payment, and reimbursement for public relations professionals.

Board members’ participation and oversight will be essential to a properly executed Crisis-Management Plan.



Tip

A Stand-Alone Cyber Policy can be purchased to protect your organization from cyber attacks and provide the risk assessment tools and crisis response your organization requires when an incident takes place.



#MeToo Movement

Several high-profile cases in the US have brought the #MeToo movement to the attention of the board, holding senior executives and their boards accountable for providing a harassment free work environment. There have been a number of D&O lawsuits filed against company officials in the wake of allegations of sexual harassment or discrimination. With the increased focus of this issue in the news, boards should be questioning the company’s human resources practices and response to these types of situations, as well as the response and adequacy of coverage within their Directors and Officers Liability Program.



Tip

A Stand-Alone insurance product known as Employment Practices Liability is recommended to respond to allegations such as wrongful termination, constructive dismissal and harassment in the workplace.

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Environmental Responsibility and Personal Liability

It is becoming increasingly common for the Ministry of the Environment (“MOE”) to hold directors and officers personally responsible for remediation costs in the case of environmental contamination. This includes former directors and officers and even those who have little day-to-day involvement in the corporate activities. For instance, in the Northstar Inc. case, the MOE issued orders personally against former officers and directors of a bankrupt company and of its parent company, to fund an ongoing remediation program.

Furthermore, the Redwater case in Alberta is an example that could have far-reaching implications. In this particular case, The Supreme Court of Canada ruled that energy companies must fulfil their environmental obligations before paying back creditors in the case of insolvency.

Cases such as the above bring to light the duties of directors and officers of companies that are entering the zone of insolvency, and the potential for personal liability in the performance of their duties.



Tip

SIDE A Difference in Conditions (DIC) products can be purchased to sit above a standard D&O Program to respond excess or “drop-down” in various situations. The product has limited exclusions and typically does not include a “clean up costs” Exclusion. It is recommended that all D&O programs have some level of SIDE A DIC coverage in place

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Transactional Risks

Canadian mergers-and-acquisitions activity is expected to strengthen in 2019 as a slump in oil prices could fuel consolidation among energy companies. In addition, the Cannabis sector is expected to see deals and Initial Public offerings in 2019. Transactional activity of any kind could present unique risks to Directors and Officers and their insurance programs. Consequently, there are insurance products available to protect both buyer and seller in transactions, as well as the exposures of going public. Any transactional activity should be discussed early with your insurance advisor to ensure an appropriate coverage response.



Tip

Companies that are considering a Public Offering for the first time may want to consider isolating the prospectus liability exposures using a product called Public Offering of Securities Insurance.

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Emerging Risks

On October 17, 2018 non-medical cannabis became legal across Canada. Directors and Officers in the legal cannabis sector now face new and changing risks as they contemplate the Federal Cannabis Act and any provincial Cannabis Act by which they must abide. A Director or Officer could face personal liability and associated penalties for offences under these Acts. As a result, D&O Insurers are assessing the risks while underwriting the coverage for this sector and the availability of insurance may be limited and/or include coverage restrictions.

It is essential that boards operating in this sector engage early and often with their insurance advisor to ensure adequacy of coverage, and any consideration of expanding operations into the United States, or listing on a US exchange, should be disclosed to the insurance advisor as soon as possible.



Tip

Navacord Partner Brokers have been a dominant advisor to the Cannabis sector in Canada, providing expertise in the placement of insurance programs. More importantly, Navacord has been a key educator to our Insurers on the sector risks and exposures faced by our clients.



Directors and Officers Liability Coverage Matters

Purchasing D&O Coverage for your board is an important decision, since the response of the coverage when called into action is of utmost importance. Having quality coverage in place attracts reputable and experienced board members. While overall cost is certainly a factor in the decision to pursue one Insurer over another, it should not be the dominant factor. All D&O policies are not designed equal. Longevity of an Insurer, claims experience, and a strong emphasis on the wording, particularly applicable exclusions should be a priority in the design of any D&O insurance program.



Tip

Navacord Partner Brokers review policy wordings annually and work with your Insurers to craft the most up to date coverage in the market. We do not take a "one size fits all" approach when determining the best program for our clients.



D&O Insurance Market is in need of a Correction

The D&O Insurance market has experienced what is commonly known as a "soft market" for the past several years. Consequently, an abundance of capacity and price decreases has now resulted in a disconnect between the cost of D&O and the risk taken by Insurers. As losses and claim costs rise Insurers are noting pricing inadequacy, and pursuing rate increases to build up reserves for future losses. We expect to see a pricing correction in 2019 and beyond to keep pace with loss costs as Insurers aim to improve or create the profitability of their book.



Tip

A well prepared "submission" of accurate and current information to your Insurer can often lead to better terms and conditions quoted upon renewal. Your Navacord Broker is your strongest advocate in conveying this information effectively to your Insurer.



Contact a member of your Iridium Service Team with any questions you have regarding your D&O coverage

ABOUT IRIDIUM

Iridium Risk Services offers a full spectrum of insurance services. We work with clients to manage their total cost of risk, a comprehensive approach that improves the financial position of an organization by reducing liability risks, improves loss performance, adds stability to operations and reduces costs. Iridium is a Navacord company.

ABOUT NAVACORD

Navacord is a national insurance brokerage offering risk management and consulting solutions for commercial and personal insurance, surety, employee benefits and retirement consulting. Navacord is one of Canada's largest commercial insurance brokers with over 620 employees across Canada.

About Danielle Gorst B. Comm National Practice Leader, Financial Lines

Danielle has more than twenty years in the insurance industry, with a focus on Management Liability. She has advised and placed some of the largest D&O programs in Canada, and she assists clients as part of the account team to provide advise on coverage and claims advocacy.

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