

D&O liability dangers outside the U.S. borders

In foreign venues, individual risk can be amplified. Here are some questions for your chief risk officer.

BY JAMES H. PROFERES

AS A DIRECTOR, you are at greater risk of a foreign directors and officers (D&O) liability lawsuit today than ever before, and your financial exposure is growing.

The adoption of new laws by countries outside the United States, as well as more stringent corporate governance and increased regulatory activity, are creating an increasingly litigious multinational business environment. For example, when South Korea enacted the securities-related Class Action Act of Korea, the number of securities lawsuits filed increased from 18 cases in 2000 to 326 cases in 2004. Meanwhile, investors are reaching settlements in excess of \$100 million in countries such as Canada, Australia and the Netherlands, where Royal Dutch Shell settled a securities lawsuit in 2007 with its European investors for about \$450 million.

But the uptick in lawsuits and the promise of big payouts are only part of the reason for the growing threat of a foreign D&O lawsuit. At the same time that D&O liability risks are increasing, companies are rapidly expanding their operations outside their home country's borders.

The 2007 Chubb International Risk Survey of U.S.-based companies found that three in four companies surveyed plan to expand foreign operations or introduce new products outside the United States, two of three expect to hire more employees or open a new plant or office, and nearly half plan to acquire another

company outside the U.S. In a recent survey by the Fulbright & Jaworski law firm, more than one-third of companies reported that up to 20 percent of their dockets originate in foreign venues.

As a result of these regulatory and economic changes, directors and officers are finding that they are now accountable to regulators on a global scale. This means that if your company has business operations outside your home country, you need to know how the company is managing your personal risk in the event of a foreign D&O liability lawsuit. Will the company's D&O liability insurance coverage function effectively if there is a lawsuit in those locations? If the D&O insurance policy does not perform as expected, it could have devastating implications for your personal risk.



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Here's the critical thing to recognize: In this increasingly litigious international business environment, directors and officers want their D&O liability insurance to function effectively in a foreign jurisdiction. In foreign venues, individual risk can be amplified. In Brazil, for example, if the company's D&O coverage is not provided by a locally admitted insurer, payment of loss is prohibited into the country from an insurer outside the country. If your company cannot indemnify you, you may not have protection beyond your personal assets.

Many other countries also have such regulatory requirements. For instance, in late 2006 Romania became the first

country in the European Union to enact a compulsory D&O insurance requirement, which requires locally admitted coverage for local business operations.

Even a small to mid-sized business with a handful of offices in one or two foreign countries faces a rising risk.

As a director, you need to know whether those vulnerabilities are being appropriately addressed and managed. If you aren't certain whether they are, don't be shy about asking the company's chief risk officer or risk manager to enlighten you. You may also want to seek guidance from general counsel. Here are some questions you may want to ask:

- Will my D&O liability insurance policy cover me in [name of country in which your company does business]?
- Will our D&O coverage work as intended, given the particular local legal requirements?
- How does the company keep current on changing regulations around the world that can affect D&O liability?

Remember that what constitutes risk for you may spell opportunity for someone else. The rapid development of laws and regulations worldwide and the rising number of multimillion-dollar foreign investor settlements are creating new opportunities for plaintiff attorneys to more aggressively pursue U.S.-style class actions outside the United States.

In self-defense, you need to understand the risk management measures your company is taking to protect you from the financial risks of an international D&O liability lawsuit — including D&O liability coverage specifically designed to work in each foreign locality in which your company operates. That could mean you'll need to cultivate a closer relationship with your company's chief risk officer, risk manager, and/or general counsel in order to keep up to date on the changing liability landscape — and your vulnerabilities — around the world. It could be one of the most important relationships you form as a board member. ■

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