

Lawyers should not dismiss lawyers' professional liability coverage



By Damien Magnuson

The perils facing employed lawyers have increased substantially in the past five years. Attorneys should know better than anyone about the perils that exist and the value of professional liability coverage. Yet there are a substantial number of in-house counsel who go bare.

Perhaps they mistakenly believe that they are covered under the company's directors' and officers' policy that probably has a professional liability exclusion, or they are shielded from litigation because they are employees of the company rather than outside attorneys.

Most attorney errors and omissions claims are brought by clients. Although employed lawyers only have one client, their employer, they are still exposed to suits brought by third parties such as other employees, clients, shareholders, government and regulatory bodies, and more. The American Bar Association estimates that one-quarter of all claims against attorneys are brought by third parties.

Cases such as the Hewlett-Packard spying

incident, which cost general counsel Ann Baskins and senior in-house counsel Kevin Hunsaker their jobs, illustrate the growing breadth of exposure facing these new "gatekeepers." Although shareholder suits arising out of the options backdating scandals have not materialized as aggressively as expected, general counsel have been hit, including Nancy Heinen, the former counsel for Apple who was charged by the Securities and Exchange Commission for violating securities law.

In December 2006, then Deputy Attorney General Paul McNulty, in a speech at the Lawyers for the Civil Justice Membership Conference, noted that in-house counsel play a quasi-public role in investigations of corporate malfeasance because they act on behalf of shareholders. Fortunately, as the exposure facing in-house counsel has risen, availability of insurance coverage has increased.

Following are some of the risks in-house

attorneys face and the basics of employed lawyer E&O coverage.

Services performed by employed lawyers at private companies can include contract negotiation, advice on human resources activities, mergers and acquisitions, private placements, and even initial public offerings. Attorneys at public companies face even greater exposure. Section 307 of Sarbanes-Oxley (2002), "Rules of Professional Responsibility for Attorneys," increased the scrutiny of a chief legal counsel and his or her potential exposure.

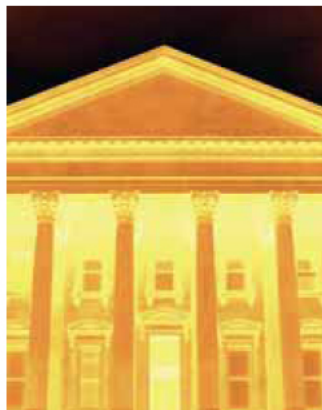
SOX provides some protection from civil suits. However, the law also allows for litigation brought by the SEC. Additionally, in December 2006, Rule 26 of the Federal Rules of Civil Procedure made electronically stored information discoverable. Electronic information must now be preserved and produced like conventional paper documents. In-house counsel must work with the information technology department to assure compliance to the newly modified rule.

The demands on employed lawyers to monitor and police their company's activities and financial condition, and to report any potential wrongdoing, continue to grow. Clients may bring suit because they relied on the attorney's advice regarding a contract that turned sour. A terminated employee may sue the company and name the attorney, claiming negligence on his or her part. Investors, regulators or shareholders may claim that the counsel made false claims, or even less overtly, simply failed to prevent others in the company from making such false claims or did not assure they disclosed potentially negative information.

In addition to the perils that face employed attorneys arising out of their direct work for the company, many are asked to perform specific pro-bono services. Many employed lawyers do work that falls outside the scope of their employment. Such "moonlighting" activities open up other avenues of exposure. Attorneys' individual situations should be examined on a case by case basis, and proper comprehensive coverage for all aspects of their exposure should be purchased.

There are several employed lawyers professional liability policies available in the market. Following are some basics of the policies and

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available coverage elements to look for:

- As with other E&O policies, employed lawyers coverage is written on a “claims-made” or “claims made and reported” basis.
- Policies are written on “duty to defend” and “non-duty to defend” basis. Some carriers allow the insured to choose whether they want the carrier to handle defense of claims, or if the insured wants to use its own counsel. That decision should be addressed by the broker and underwriter during negotiations.

- Global coverage. Coverage should be triggered no matter where the wrongful act occurred or where the claim is made.

- The definition of insured varies. It is common for part-time and contracted counsel, as well as coverage for support staff including paralegals, legal assistants, secretaries and notaries, to be included. Even if the company’s general counsel is included under the D&O policy, either by specific mention or by the fact that they are listed as an officer in the compa-

ny’s by-laws, these other individuals probably are not within the policy. Coverage of additional staff should be negotiated.

- Defense costs of claims, even if allegations are groundless, can be included.

- Brokers and applicants should look for coverage for claims by non-client third parties, including regulatory and SEC claims, claims from coworkers, employer and board of directors, and claims arising out of employer approved pro-bono and moonlighting work.

- Coverage for violations of SOX.
- Coverage of punitive and exemplary damages, where permitted by law, including “most favorable jurisdiction” wording.

- Dishonest, fraudulent, criminal or malicious acts of omissions are excluded, with some carriers using “in fact” wording, while others using “final adjudication” wording. One carrier’s policy requires the insured to reimburse defense costs once a finding of the excluded act or omission has occurred. If severability of that exclusion is not included in the base form, the placing broker should negotiate its inclusion.

- Severability of the application should similarly be included.

- No retention for claims not indemnified by the employer.

The submission and underwriting requirements for employed lawyers programs are reasonably simple for most carriers. An application and loss history are typically enough to secure a quote. For larger companies with complex in-house legal staff and for companies with some previous claims activity, more extensive underwriting and negotiations will be required. A qualified broker can secure comprehensive coverage at a competitive price.

Because the traditional role of in-house counsel has changed in recent years with expanded regulation, increased scrutiny and more internal reliance on employed attorneys, balancing attorney-client relationship with public accountability and statutory regulations has become more difficult. The need for insurance coverage to protect in-house legal staff has increased as well. There are several comprehensive policies with broad and well-tailored coverage to protect such individuals at reasonable pricing available in the current market. ■

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Executive Perils

11845 W. Olympic Blvd. #750
Los Angeles, CA 90025
Ph: 310-444-9333
Fx: 310-444-9355
CA Lic. # 0E36308

Damien Magnuson is a broker at Executive Perils. E-mail: DamienM@eperils.com.