Speciality Management Liability Insurance

Case studies

Board decisions during litigation

The independent directors of a private equity-owned company have been asked to consider declaring a significant cash dividend. The directors have expressed concern about making a dividend before the final resolution of a well-publicized lawsuit currently made against a third party. The company is not named as a defendant in the litigation, but the lawsuit relates to business that briefly transacted through the company by its former owner. The company has a full indemnity from the former owner for any liabilities arising from the litigation, but the creditworthiness of the former owner is questionable. The litigation has been analyzed as being without merit, but the quantum of damages sought by plaintiffs is significant. An independent legal opinion has been provided to the board advising that the decision to make the distribution is prudent in light of all of the facts. Nevertheless, the directors are concerned that if the company is ultimately named in the litigation and found liable for damages, and the former owner cannot satisfy its indemnity obligation, the plaintiffs could attempt to hold the directors personally liable for the judgment because of their decision to distribute the cash that otherwise would have been available to satisfy the judgment. As a solution, the directors may procure a Specialty Management Liability Insurance policy to respond to claims made by the plaintiffs relating to the decision to make the dividend.

Liquidation of a company

A team of executives is retained to liquidate an entity operating under bankruptcy protection. The executives require a policy that is separate from the D&O policy issued to the entity and its directors and officers. They also require a long-term policy that will span the time period of their tenure. As a solution, a six-year Specialty Management Liability Insurance policy may be obtained by the company for the benefit of the newly-retained executives and converted into run-off upon the liquidation of the company.

Insolvent mutli-employer defined benefit plan

An insolvent multi-employer defined benefit plan has been terminated and, as the plan no longer has sufficient assets to pay benefits, the sole role of the trustees is to administer minimum benefits received from the Pension Benefit Guaranty Corporation (PBGC) to be paid to beneficiaries. The trustees are not prepared to serve unless a dedicated policy (not shared with former trustees who are being sued by the PBGC) can be provided to them. As a solution, a Specialty Management Liability Insurance policy may be procured for the benefit of the current trustees only.

Liability concerns prevent liquidation

The liquidator of a UK-based company that is undergoing a solvent liquidation has determined in good faith that all known liabilities have been satisfied. The liquidating entity is wholly owned by a US-based private equity fund. After it has received the proceeds of the liquidation, the fund intends to liquidate and make a final distribution to its partners. The liquidator is unwilling to make a distribution without an indemnity from the fund because of concerns about being held personally liable for unknown liabilities that may be discovered in the future. The private equity fund is unwilling to provide an indemnity because of its own imminent liquidation. As a solution, a Specialty Management Liability Insurance policy may be purchased by the fund on behalf of the UK company to respond to claims for unknown liabilities that may be discovered in the future.

Shareholders' representative in a company sale

A company owned primarily by management and private equity interests is in the process of being sold to a large publicly traded entity. Due to the fact that many of the private equity sellers are non-US based, the purchaser does not wish to negotiate with more than one party relating to any post-transaction adjustments or indemnification obligations under the sale agreement, and has insisted that all such negotiation be conducted with one party. The shareholders have agreed to appoint the former chairman of the company to act as the shareholders' representative, but his D&O insurer is unwilling to cover him in this capacity. He is unwilling to serve without insurance coverage for any claims that may be made against him for his service in this capacity. As a solution, a Specialty Management Liability Insurance policy may be obtained by the company on behalf of the former chairman, permitting the transaction to close with the former chairman as the shareholders' representative.

Role of independent fiduciary

After reviewing the facts and the likelihood of recovery from the former trustees for breaches of their fiduciary duty with respect to a multi-employer benefit plan, the new trustees of such plan believe that a decision to settle litigation against the former trustees for a modest amount is in the best interests of the plan. For prudence sake, the trustees retain an independent fiduciary to review their proposed decision. The independent fiduciary is unwilling to accept the assignment unless he is provided with an insurance policy covering any potential liability that she may have in connection with her services as an independent fiduciary of the plan. She is not prepared to accept coverage under the trustees' liability insurance policy for the plan. As a solution, a Specialty Management Liability Insurance policy may be obtained by the plan on behalf of the independent fiduciary solely for claims against her that relate to the specific assignment.