

Private companies and their directors and officers are not immune to lawsuits. According to a survey by Chubb Insurance, 12% of privately held companies experienced a directors and officers (D&O) liability suit between 2005 and 2010. During this same time frame, more than 25% of companies with 50 or more employees experienced a D&O liability lawsuit. Private company executives and boards face many of the same risks as do those of public companies, as discussed below.

Who is suing private companies? D&O liability lawsuits against private company boards and its organizations have many sources. Lead among these sources is customer claims. Customer D&O claims led the 2010 Chubb survey at 29%, followed by government/regulatory agencies (28%), Vendors (20%), competitors (17%), and partners/shareholders (6%). In most instances, the claims described would not be covered under Commercial General Liability (CGL) insurance or any other insurance that companies typically purchase, but could be covered, and typically are covered, under the RHA Executive Liability policies.

D&O insurance provides coverage to protect the balance sheet of the company and the personal assets of the directors and officers. Among the companies in the Chubb survey that experienced a D&O liability lawsuit in the past five years, the average claim cost (settlement, judgment, and legal costs) was \$225,682! D&O liability is a low frequency/high severity risk. While only 12% of the companies reported being sued in the past five years, some of the losses were valued at \$1,000,000 and \$5,000,000. A decision to ignore the potentially serious D&O liability risk could prove financially disastrous – to your organization, you, and your spouse.

#### **NO COVERAGE UNDER CGL POLICY**

D&O insurance can provide coverage to you and your company if you are accused of fraud, breach of duties owed to shareholders, unfair competition and infringement of trade secrets, just to name a few. Most of these types of claims “fall through the cracks” of the coverage that is afforded by a CGL policy. If there is no property damage, bodily injury, personal injury, or advertising injury, a CGL policy is not going to respond.

#### **DUTY TO SHAREHOLDERS**

One of the misconceptions many people have is that directors and officers of privately held companies do not face the same risks as do directors and officers of a publicly held corporation. That simply is not true. Directors and officers of privately held companies owe the same duties to shareholders as do their counterparts at publicly held corporations. And it is no safe harbor, for example, that all of the shareholders of a privately held company may be relatives or friends. Friends one day can be bitter enemies the next, even when they are relatives. To quote Michael Rossi, an attorney in the firm of Insurance Law Group, Inc., and an expert on the subject of D&O claims, “If you think differently, follow the saga of divorce law in the United States.”

#### **CLAIMS BY SHAREHOLDERS**

A variety of shareholder claims have been made in the past, and continue to be made. Some claims allege there were breaches of the duty of care with respect to how the directors and officers handled the sale of the corporation, or how they missed a great opportunity for the corporation. Some claims allege there were breaches of the duty of loyalty with respect to deals the corporation had entered into with companies owned in whole or in part by one or more of the directors and/or officers.

#### **CLAIMS BY EMPLOYEES**

Several types of claims have been made by employees, with alarming frequency in the last several years, especially in the area of Employment Practices Liability (EPL). For example, claims for wrongful termination, discrimination and harassment. Such claims have been in the form of both allegations of actual wrongful termination, discrimination or harassment, as well as negligent supervision and/or failure to follow up with respect to complaints of wrongful termination, discrimination or harassment. Similar to D&O insurance, EPL insurance is designed to protect the balance sheet of the company in instances where claims are brought by employees, frivolous or not. Median compensatory awards for EPL lawsuits in 2008 were \$326,640, as reported by Jury Award Trends and Statistics (2009 edition). The RHA Executive Liability Program includes the option to purchase this coverage.

#### **CLAIMS BY COMPETITORS, CUSTOMERS**

Directors and officers of privately held companies face claims by any party with which the company contracts or even discusses a contractual relationship (whether competitor, customer, or other contracting party). Because many contracts and other negotiations for privately held companies are handled by an officer of the company (especially for small privately held companies), officers are at risk for claims arising out of their contracting and negotiating activities.

#### **CLAIMS BY OR WITH GOVERNMENT AGENCIES**

A variety of claims can be made by government agencies against the directors and officers of privately held companies. For instance, discrimination claims can be investigated and brought by the Equal Employment Opportunity Commission.

#### **SPOUSE AND ESTATE EXPOSURE**

Another little known fact is that the spouses and estates of directors and officers also are exposed to the liabilities faced by directors and officers. The RHA policy extends coverage to the spouses and estates of directors and officers, with respect to claims against such directors and officers. (The policy will not respond to claims against a spouse for conduct of the spouse.)

Directors and officers of privately held companies should insist that the company carry some form of D&O insurance; otherwise, you are exposing your company’s assets and your personal assets, as well as those of your spouse and your estate. There could not be a better time for RHA members to buy D&O insurance. The coverage offered by the new RHA Executive Liability Program is broad and premiums are affordable. The program combines coverage for D&O and Employment Practices Liability. RHA also offers Fiduciary Liability and Crime insurance.

To find out more about the RHA Executive Liability Program contact Tammy Glaser at [tammy@rhainsure.com](mailto:tammy@rhainsure.com) or visit RHA’s website at [www.rhainsure.com/insurance-programs/Executive-Liability-Program](http://www.rhainsure.com/insurance-programs/Executive-Liability-Program).