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Underwriters of D & O and Professional Liability Insurance

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In this issue... **We provide an update on the soon-to-expire Terrorism Risk Insurance Act (TRIA) and look ahead to an SEC roundtable planned for early 2008 on the future of private securities class action lawsuits.**

TRIA

Enacted in 2002, the federal Terrorism Risk Insurance Act, in general, mandates the offering of coverage by private insurers for losses from defined terrorist acts, and then provides a federal financial safety net to reimburse insurers in the event that such losses exceed a certain level.

TRIA has already been extended once and is now scheduled to expire at the end of 2007. The insurance industry has largely been supportive of a further extension, arguing that potentially massive losses resulting from malicious, planned attacks are substantially uninsurable and that a federal backstop is vital to permit the insurance market to provide the first line of coverage. However, opponents of an extension point out that TRIA was only intended to be a temporary measure and that retaining it removes any impetus for a private market for terrorism protection to develop.

Congress and TRIA

The mood in Congress is generally in favor of a continuation of TRIA, but there is a difference of opinion over details between the Senate and the House of Representatives.

In September of this year the House of Representatives passed its own Bill, H.R. 2761.[1] Key features of this bill include:

- A continuation of TRIA for 15 years
- Coverage mandated for nuclear, biological, chemical and radiological ("NBCR") events
- Scope broadened to cover events of domestic origin, not just those on behalf of "foreign persons or interests"
- Extend coverage to apply to group life insurance
- Reduce the industry aggregate loss trigger from $100 million to $50 million
- Provisionally maintain individual insurer's co-payment and deductible levels, with provision for amending these amounts in certain circumstances
- Possibility of increasing the program cap from the current $100 billion

On Friday November 16, the Senate passed its own extension bill.[2] As expected, it is less expansive than the House bill:

- Continuation of TRIA for seven years
- NBCR coverage not included, but its feasibility to be studied
- Scope broadened to cover events of domestic origin, not just those on behalf of "foreign persons or interests"
- No extension to group life insurance
- Event trigger maintained at $100 million
- Insurer copayments and deductibles unchanged
- The $100 billion federal cap to be maintained

Current Situation

Now that both the House and Senate have passed TRIA extension measures, they will have to reconcile their differing positions in order to achieve the necessary Congressional consensus. If they can agree on a compromise measure the bill will move forward to be signed by the President. While he has been generally opposed to extending TRIA and has

indicated his unwillingness to approve the wide-reaching terms of H.R. 2761, it appears that President Bush could accept legislation that adheres to the more restrictive Senate proposals.[3] However, if Congress sends the President a bill that he does not like the next question will be whether there are enough pro-TRIA votes to override a possible Presidential veto.

The Future of Securities Class Action Lawsuits: The SEC Invites Discussion

On August 2, 2007, six law professors from the universities of Georgetown, Duke, Fordham, St. John's, Michigan and Iowa wrote to the Chairman of the Securities and Exchange Commission (SEC), Christopher Cox. Alluding to "recent" (but unnamed) reports on the competiveness of U.S. capital markets, the letter [4] requests that the SEC open up for discussion the simple but loaded question: "How well [do] investors fare in private securities litigation?"

While the writers admit they are not of one mind on every aspect of this issue, they do agree on three basic points:

1. Most corporate securities litigation is directed at companies that typically pay any settlements out of their insurance policies, usually with some co-insurance.

2. Any compensation delivered to "suffering shareholders" is accompanied by high attorney fees and other related expenses.

3. The current system is a weak deterrent because settlements — with some notable exceptions — never come out of the pockets of the alleged perpetrators of the fraud.

Setting aside questions concerning meritorious versus vexatious lawsuits, the group of six asks the SEC to convene a series of roundtables where "thoughtful people on all sides of the issue can address ... how well investors fare under the current system, what if anything can be changed, and why."

It appears that the request fell on sympathetic ears; the SEC is scheduled to hold a roundtable discussion on the subject in early 2008. These discussions should be of particular interest to the D&O insurance industry. ❖

Sources

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