



## Holland & Knight



### Thomas H. Bentz Jr.

Thomas H. Bentz Jr. is a Partner in the law firm of Holland & Knight and leads the firm's D&O and Management Liability Insurance Team.



### Shannon A. Graving

Shannon A. Graving is a Senior Counsel at the firm and also practices insurance law with a focus on D&O policy negotiation.

For more information on the D&O Insurance Team please contact Thomas H. Bentz Jr. at [thomas.bentz@hkclaw.com](mailto:thomas.bentz@hkclaw.com) or Shannon A. Graving at [shannon.graving@hkclaw.com](mailto:shannon.graving@hkclaw.com)

## Holland & Knight Takes a First Look at the New D&O Insurance Policy from Chartis Insurance

Thomas H. Bentz Jr.

Shannon A. Graving

Chartis Insurance is introducing a new primary D&O insurance policy for public companies called the "Executive Edge." The new policy (which should be available in May 2010) has many enhancements that Chartis contends are designed to provide "best-in-class" protection for directors and officers. To test this assertion, Chartis allowed Holland & Knight a sneak peek at the new policy and encouraged us to compare it with other policies in the marketplace. We are happy to report that the new policy does, in fact, offer many market-leading terms. The following are some examples:

### 1. Automatic Advancement of Defense Costs if the Company Fails or Refuses to Indemnify a Director or Officer

One of the most significant enhancements in the Executive Edge Policy is that Chartis will now advance defense costs to directors and officers – even if the company they serve fails or refuses to satisfy its indemnification obligations.

To illustrate the impact of this change, consider what happens if there is an *indemnifiable* claim against a director but the company refuses or fails to indemnify him or her.<sup>1</sup> With other D&O policies currently in the market, the director would be required to pay the retention (*i.e.*, the deductible) before any insurance coverage would apply. Since many public companies have retentions of \$1 million or more, this could obviously put a severe burden on the director and even impair the director's ability to defend against the claim.

The Executive Edge Policy fixes this coverage gap by guaranteeing "dollar one" advancement to directors and officers if the company they serve "fails or refuses to advance, pay or indemnify covered Loss of an Insured Person within the applicable Retention ... ." This language (typically only found on Side A Only policies) helps ensure that individual directors and officers do not have to come out-of-pocket before their insurance protection will respond.

Holland & Knight LLP  
2099 Pennsylvania Avenue, N.W.  
Washington, DC 20006  
[www.hkclaw.com](http://www.hkclaw.com)



## 2. New Limits on the Conduct Exclusions

The Executive Edge Policy also has improved language in the fraud and personal profit exclusions, otherwise known as the “conduct exclusions.” Most shareholder claims against directors and officers include allegations of fraud or other illegal conduct which, if proven, would be excluded from coverage. Thus, how a policy determines whether a “conduct exclusion” applies – and who gets to make this determination – is extremely important.

The Executive Edge Policy offers some of the best language available today from the perspective of protecting the insured directors and officers. The policy provides that the illegal conduct must be proven by “a final and non-appealable adjudication in an action or proceeding other than an action or proceeding initiated by Chartis.” This is preferable to many other policies that allow improper conduct to be proven by a lower standard (*e.g.*, by any adjudication or admission or by an “in fact” determination). This also ensures that the insurer cannot bring an action against its insured to establish the alleged improper conduct if such improper conduct is not established in the underlying claim. These are significant enhancements to the protection typically provided to directors and officers by D&O policies.

## 3. New and Improved “Insured vs. Insured” Exclusion

The Insured vs. Insured exclusion bars claims brought by or on behalf of one insured against another insured. The purpose of the exclusion is to ensure that the insurer does not cover collusive, inter-corporate disputes. However, many Insured vs. Insured exclusions cast too broad a net and can severely impair much needed coverage.

The Executive Edge Policy has dramatically narrowed the scope of its Insured vs. Insured exclusion. Now, only suits brought by the “Insured Entity” or an “Outside Entity Executive” against an insured are excluded. This change significantly reduces the risk of a suit brought by a rogue or disgruntled director or officer against another director or officer, or against the company being uncovered.

## 4. New Executive Protection Suite

Continuing with the theme of providing more protection to directors and officers, Chartis has added several new coverage grants to the Executive Edge Policy. For example, it provides coverage for SOX 304 Costs, Extradition Costs, UK Corporate Manslaughter Act Defense Costs, Personal Reputation Expenses and Asset Protection Costs. It also adds “first dollar” coverage for E-Discovery Consulting Services. Although some of these additional protections are more valuable than others, each appears to expand coverage for the insureds.

## 5. New Global Protection With Optional Passport Feature

How a D&O insurance policy will respond to claims against directors or officers in foreign jurisdictions has presented tremendous challenges for the insurance industry in recent years. Complicated and inconsistent laws in many foreign jurisdictions make it less than certain whether a D&O insurance policy purchased in the United States may respond to a claim against a director or officer in a foreign jurisdiction. The optional “Passport” coverage offered by the Executive Edge Policy attempts to address this complex issue.

According to Chartis, the optional Passport protection available in the new policy provides insureds with the opportunity to best effectuate application of the D&O insurance coverage to claims in foreign jurisdictions. If purchased, Chartis will issue foreign underlyer policies in the relevant jurisdictions where the insureds operate. These policies will comply with all local laws and regulations in order to provide maximum coverage to the insureds. Furthermore, the Executive Edge Policy states that to the extent permissible, as between the Executive Edge Policy and the foreign policies, the terms that are most favorable will be applied.

## 6. Additional Enhancements

Many of the enhancements to the Executive Edge Policy were to incorporate endorsements that Chartis was offering “upon request” to its “old” form. Although some of these changes were commonly available for some time, it is beneficial to have them offered now as part of the standard



form. This helps ensure that insureds will not miss anything simply because the change was not requested.

Some examples of the now “standard” enhancements include:

- coverage for Derivative Investigation Costs
- a more limited definition of “Application”
- fully non-rescindable coverage
- a Severability of the Application provision
- Spousal/Domestic Partner coverage

### Conclusion

Many of the enhancements in the Executive Edge Policy are designed to provide greater protection for individual directors and officers. For most insureds, this should be highly desirable. Nonetheless, insureds should carefully consider the impact of the enhanced coverage to ensure that they do not dilute the protection for their most important risk management concerns. And, like all D&O policies, it will be important for insureds to carefully review the coverage to determine where improvements can be made and coverage gaps may be filled.

While we believe that there is still room for improvement to the Executive Edge Policy, we can confirm that it offers some of the broadest coverage available for public company insureds today.

<sup>1</sup> *There are many recent examples of companies failing to indemnify its directors and officers. For example, a company may not indemnify at the request of a government agency or may refuse to indemnify a former director or officer after a change in control.*

*Thomas H. Bentz Jr. is a Partner at Holland & Knight where he leads the firm’s D&O and Management Liability Insurance Team. Shannon A. Graving practices insurance law with the firm where she focuses on D&O Insurance and Mergers and Acquisitions. Together, Mr. Bentz and Ms. Graving are among the nation’s leading authorities on D&O and Management Liability Insurance. Holland & Knight has been consistently recognized as one of the nation’s leading law firms for director liability issues by Directors & Boards magazine.*

### About Holland & Knight’s D&O and Management Liability Insurance Team:

The team, led by Partner Thomas H. Bentz Jr., assists clients in evaluating, negotiating and enforcing their D&O and other management liability insurance policies. Located throughout the country, our clients range from Fortune 500 companies, to smaller corporations, to boards of directors seeking independent advice with their D&O insurance programs.

### About Holland & Knight:

Holland & Knight is a global law firm with more than 1,000 lawyers in 17 U.S. offices as well as Abu Dhabi, Beijing and Mexico City. Our lawyers provide representation in litigation, business, real estate and governmental law. Interdisciplinary practice groups and industry-based teams provide clients with access to attorneys throughout the firm, regardless of location.

For more information on the D&O Insurance Team please contact Thomas H. Bentz Jr. at [thomas.bentz@hkllaw.com](mailto:thomas.bentz@hkllaw.com) or Shannon A. Graving at [shannon.graving@hkllaw.com](mailto:shannon.graving@hkllaw.com)

Holland & Knight LLP  
2099 Pennsylvania Avenue, N.W.  
Washington, DC 20006  
[www.hkllaw.com](http://www.hkllaw.com)