



ERIS “TRUE” Follow Form Excess D&O Policy

Directors' and officers' liability (“D&O”) insurance has become a topic of much discussion and scrutiny. In fact, today, it is not uncommon to have several experts including the risk manager, the insurance broker, in-house and external legal counsel review an organization's D&O insurance program to ensure the accuracy and breadth of coverage terms. Unfortunately these reviews typically concentrate on the primary D&O insurance policy with little time devoted to the specific language contained in the excess D&O insurance.

Undoubtedly, one of the reasons for the cursory review of excess policies is the moniker “follow form” used by insurers to promote their products. While this phrase *should* imply that the policy provides coverage for the same set of potential losses as the underlying policies (“follows”), a closer review often reveals significant coverage gaps from the primary D&O insurance. As claims severity and associated defence costs have increased, so too has the importance of excess insurance. Several high profile D&O coverage disputes in the U.S. involving the excess insurers has increased the focus of attention on D&O excess insurance. The court decisions and expert reviews reveal very troublesome concerns including:

- **Policy Exhaustion Language:** Many excess D&O policies require exhaustion or depletion of the primary policy by the actual payment of losses by the underlying insurer. This restrictive language has been judicially determined to not recognize payments by the insured where it seeks to contribute to fund a settlement not otherwise covered by the underlying insurance, thereby destroying access to the excess insurance.
- **Restrictive Definitions:** Many excess D&O policies use unique definitions which are inconsistent with the underlying policies they are intended to follow.
- **Additional Exclusions:** One of the most common exclusions added to excess policies is a reliance endorsement which may act to redefine the severability provided under the primary policy.
- **OFAC Restrictions:** Many global insurers with a head office in the U.S. may be subject to trade sanctions under laws such as the *Office of Foreign Assets Control* which preclude the insurer from providing coverage to organizations conducting business in restricted countries. Some carriers may go so far as to cancel coverage, without return of premium, fail to pay a claim or defend an insured with a connection to a sanctioned country.
- **Terms and Conditions:** Excess policies can have differing terms and conditions in regards to cancellation, jurisdiction and claims notification.

Inconsistencies in an excess program can act to exclude an otherwise covered claim. The problem is amplified throughout a D&O program as it is common for excess D&O policies to state that they will be no broader than the most restrictive underlying policy and, thus, the program ends up “following” the restrictive terms of the underlying excess policies.



Executive Risk Insurance Services

Executive Risk Insurance Services (ERIS) is a preeminent provider of niche insurance products dedicated to mitigating the risks incurred by companies and their boards of directors, officers, trustees, employees and pension plan fiduciaries. We are recognized as an agile innovator of products, whether that be adding new concepts to traditional insurance or addressing new issues that have arisen in the Canadian marketplace.

We are characterized by our differentiated capacity to quantify risk on an individual basis and provide comprehensive clear coverage, using our profound knowledge and experience in business, finance, law, claims handling, underwriting and brokerage.

Coverage Highlights

Recognizing the growing need and demand for certainty and consistency in excess D&O insurance, Executive Risk Insurance Services (ERIS) has developed a "*TRUE*" Follow Form Excess Directors and Officers Liability insurance policy.

- Provides "TRUE" follow form coverage over the underlying policies
- Simple, understandable wording
- Recognizes a partial payment in a compromised coverage settlement under the underlying policy without imposing a similar restriction on the excess policy
- Modification to underlying policies only require ERIS consent if the change is material

Not all D&O excess policies are the same. For further information and a detailed **ERIS – "TRUE" Follow Form Excess Directors & Officers Policy** discussion, please contact your insurance broker or an **ERIS** representative:

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