

# By the book: Navigating books and records D&O coverage (and other extensions you may be missing)

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In recent years, Delaware corporations have seen a significant increase in stockholder books and records demands and follow-on litigation (“Section 220 cases” in Delaware parlance). Directors and officers (D&O) liability insurance may be available to cover the cost to respond to those demands.

This article discusses recent trends in Section 220 cases and highlights several types of enhanced D&O coverage — ranging from derivative demand investigation costs to crisis management costs — that companies should evaluate at their next policy placement or renewal to protect against different exposures beyond traditional “Side ABC” claims.

Mindful of the Delaware courts’ prior admonitions to file more developed complaints, the plaintiffs’ bar has increasingly availed itself of books and records inspections before bringing actions against directors and officers for breach of fiduciary duty. What is more, in recent years the Court of Chancery has demonstrated greater willingness to order inspection of records beyond formal documents like board minutes and resolutions, particularly when those records are not kept in the ordinary course of business.

Last March, Section 220 was amended as part of a larger set of legislative revisions to the Delaware General Corporation Law. Among other changes, the amendment defines the scope of books and records, limiting inspection in most instances to formal documents like board materials, minutes, annual financial statements and director independence questionnaires. Although these changes will likely bring clarity and increased predictability to books and records litigation, the number of Section 220 cases may not decrease precipitously.

The amendment still gives the Court of Chancery power to order inspection of a broader array of books and records if the stockholder can demonstrate a “compelling need” — a standard that has yet to be tested in court. Indeed, even after the amendment took effect, a stockholder of one former Delaware corporation sued for access to the company’s books and records, citing concerns that the company’s

reincorporation in Nevada was part of a multi-step plan by the company’s controlling stockholder and board of directors to evade accountability and perpetuate control of the company.<sup>1</sup>

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Even after giving effect to the recent statutory amendment, responding to books and records demands can be costly and important, both in their own right and as precursors to further stockholder litigation. Companies facing these requests may wonder if their D&O liability policies will respond to defray associated costs in investigating and responding to books and records demands. Although coverage may be available, it is not automatic and, as with most insurance questions, will turn on the specific policy language and coverage negotiated.

## 1. Books and records coverage is available

Traditionally, D&O policies have not covered the costs to respond to books and records demands. The reasons are varied — for example, insurers may take the position that the demands do not allege wrongful acts; the costs do not fit within the policy’s definition of defense costs; or simply that responding to stockholder information requests was not the kind of exposure intended to be covered by a D&O policy.

That approach has changed over the years, as insurers trying to stand out in an increasingly competitive marketplace have offered coverage for books and records requests. Coverage is often available in one of two ways.

First, policyholders may be able to obtain an expanded definition of defense costs that includes costs to respond to books and records demands. The second option is to obtain a specific extension tailored toward books and records coverage. The former typically allows access to the full policy limits (usually subject to a retention like any other claim) while the latter is typically subject to a sublimit (often part of the policy's derivative demand coverage) but may provide first-dollar coverage not subject to a retention.

*Books and records demands are one of many often overlooked extensions or enhancements to traditional D&O coverage.*

Policyholders should not be surprised to learn, however, that their “off the shelf” policy may have no or limited coverage for the costs of responding to a books and records demand. The good news is that D&O and similar management liability policies are heavily negotiable, both in terms of adding new coverages and in improving terms for existing coverage.

Working with experienced risk professionals — brokers, consultants, and outside counsel — at each stage of the policy placement and renewal process can put public companies in a stronger position to defray the potentially significant costs associated with responding to books and records demands.

## 2. Don't overlook other important coverage enhancements

Books and records demands are one of many often overlooked extensions or enhancements to traditional D&O coverage. Beyond Section 220 demands, robust D&O programs can also cover the following:

- *Derivative Demand Investigation Costs:* Often called “Side D” coverage, this extension to traditional “Side ABC” policies provides coverage when the board is required to evaluate a derivative demand made by a stockholder against the company's officers and directors. Like expansive books and records demands, derivative demand investigations can be costly and should be analyzed closely to assess appropriate sublimits, including through additional limits in excess layers. This coverage is particularly helpful in jurisdictions, like Texas, with “universal demand” requirements (i.e., that require stockholders to make a demand before they can file a derivative lawsuit).
- *Crisis Management:* Policies are available with extensions that cover “crisis management” events and associated costs. Covered events range from death of a key executive and public announcement of regulatory proceedings to employee layoffs and bankruptcy filings.

- *Outside Directorships:* Claims against directors challenging their decisions on behalf of the company will be covered, but what if the company asks a director to sit on an external board? D&O policies can include outside director coverage that extends to those risks and avoids “capacity” issues if individuals are wearing multiple hats across affiliated entities.
- *Dedicated Side A:* While “Side A” coverage is a cornerstone of traditional D&O policies to protect individuals from claims not indemnified by the company, procuring dedicated Side A limits reserved exclusively for the benefit of directors and officers can be critical to ensure that sufficient limits are available if the company is unable to advance defense costs or provide indemnification (e.g., in the event of insolvency or prohibitions on indemnification). Such coverage — which can be achieved through either built-in dedicated limits in a Side ABC policy or a separate, standalone Side A-only policy — becomes even more important in bankruptcy when insurance coverage may be the only asset available to protect against personal exposure.
- *Other Management Liability Coverages:* D&O coverage is only one part of a comprehensive management liability program. Even robust D&O policies may exclude losses related to fiduciary, employment, cyber, professional services, and a host of other potential exposures. Purchasing complementary employment practices liability (EPL) and fiduciary coverage alongside D&O or placing separate cyber and errors and omissions (E&O) or professional liability policies can fill those gaps that may not be covered under D&O policies. Taking a comprehensive approach and reviewing programs as a whole, rather than focusing only on D&O in thinking about executive protection, can help avoid surprise denials when claims are shifted to other lines of coverage that may or may not have been purchased.

*Policyholders should not be surprised to learn, however, that their “off the shelf” policy may have no or limited coverage for the costs of responding to a books and records demand.*

Books and records demands may remain common, and insurance may be available to defray those significant costs (as well as many other exposures discussed above) and provide additional protection that allows executives to avoid undue concern about managing legal costs.

### Notes:

<sup>1</sup> See *Scarantino v. The Trade Desk, Inc.*, No. 2025-0442-LM (filed Apr. 30, 2025).

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