

Side A D&O policy provides immediate lifeline to embattled former executives during bankruptcy

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Directors and officers liability insurance is first and foremost protection against personal exposure of boards and management who are targeted in claims challenging their decisions in running the company.

That's why it is surprising how often dedicated "Side A" coverage — insurance coverage, subject to no self-insured retention, available exclusively for the benefit of directors and officers who are not indemnified by the company — is overlooked in placing and renewing D&O insurance programs.

One recent Texas bankruptcy ruling, *In re First Brands Group, LLC*,¹ demonstrates just how powerful Side A protection can be. There, against strong objections from the creditors' committee, the bankruptcy court granted motions by numerous former executives seeking relief from the automatic stay to recover D&O insurance proceeds, unlocking millions in Side A coverage to defend against private and governmental claims asserted in connection with the bankruptcy.

Background

An automotive parts supplier filed for bankruptcy. Following the bankruptcy filing, several former directors and officers, including the company's CEO and CFO, received investigative requests for documents and interviews from a special committee and creditors' committee, and the bankruptcy court appointed an examiner to conduct a separate investigation.

The executives were also notified of ongoing government investigations, while others were named as defendants in related adversary proceedings. These investigations and litigations required the executives to incur legal fees and related expenses.

The executives then sought coverage under the company's D&O insurance program, which included both traditional Side ABC policies (covering the company and individual insured) and Side A policies (covering only the individuals for non-indemnified losses).

The executives notified the company of their intent to file a claim for coverage and asked for confirmation that the officers would be indemnified. Shortly after, they were informed that

indemnification would not be provided and that the company believed the executives needed to obtain bankruptcy court approval before pursuing any claims for coverage under the policies.

The D&O insurance dispute

When the executives petitioned the bankruptcy court to lift the automatic stay so they could access proceeds from the company's D&O insurance tower to cover their defense costs, they were met with fierce objections.

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The creditors' committee argued that all of the company's D&O policies were assets of the Chapter 11 estate. The committee also claimed that granting relief would deplete funds available to pay creditor claims, reduce limits potentially available to other executives, and create an "insurance fortress" used solely to defend "bad managers."

Additionally, the committee warned that allowing use of the D&O proceeds could be used as a litigation tactic to drain the policy limits, and at the very least, urged the court to delay any D&O payments until after their claims for more than \$2 billion in alleged losses were adjudicated at trial scheduled several months later.

The court's ruling

The bankruptcy judge ruled that the Side A D&O insurance policies (and the proceeds from those policies) were not property of the bankruptcy estate because those policies provided coverage exclusively for the benefit of individual directors and officers, not the company, so the debtors had no interest in Side A policy proceeds.

As a result, the executives were granted immediate access to tens of millions in Side A limits to reimburse defense costs and respond to the claims against them.

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In contrast, the bankruptcy court found that the debtor retained an interest in the proceeds from the Side ABC policy. Because those proceeds were considered part of the bankruptcy estate, the judge denied the request to lift the stay but clarified that the denial was without prejudice and may be reconsidered in the future.

Takeaways

Companies and their leaders constantly face evolving risks, which intensify during periods of financial distress. The recent bankruptcy decision is a real-world reminder of how vital Side A coverage can be in protecting executives from personal liability in and out of bankruptcy.

As a result, it is important to keep the following in mind:

- (1) **Be proactive.** The best time to evaluate and strengthen a D&O insurance program is at the time of placement or during renewal. Waiting until the eve of bankruptcy or when faced with actual or imminent claims against the company or its directors and officers often means missed opportunities and limited options for enhancing executive protection.
- (2) **Consider dedicated Side A policies.** While insureds can often access traditional D&O policies in the midst of bankruptcy, the most surefire way to facilitate speedy

access to critical coverage for executives is to procure standalone Side A coverage dedicated for executive protection. Many Side ABC policies have features offering built-in Side A limits, but there can be additional benefits in securing that same coverage in standalone policies because they can include better coverage (including so-called difference-in-conditions (DIC) coverage), fewer exclusions, and more favorable provisions not found in Side ABC policy forms.

- (3) **Not all D&O policies are created equal.** D&O and other management liability insurance coverage are highly negotiable and customizable. Even without negotiating custom coverage, coverage terms vary materially between insurers, standard policy forms, and endorsements. This is even true for Side A policies, which can offer different levels of protection that can be further modified for the benefit of the insured directors and officers.

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Retaining experienced insurance coverage counsel, brokers, and risk professionals can assist policyholders in addressing these risks, structuring insurance programs and negotiating complex policy terms to help maximize recovery and robust executive protection should a claim arise.

Notes:

¹ No. 25-90399 (CML) (Bankr. S.D. Tex. Jan. 7, 2026), <https://bit.ly/3ZEyITZ>.

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