

PUBLICATION UPDATE

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Liability of Corporate Officers and Directors

Publication 63962

Release 30

December 2023

HIGHLIGHTS

2023 LCOD Highlights

- The 2023 revisions to **Liability of Corporate Officers and Directors** include dozens of new cases and numerous legislative and regulatory developments which impact the liability of and financial protection for directors and officers.

A few of those highlights are summarized below.

Chapter 1 (Basic Duties) updates include a summary of emerging issues for directors and officers in the current ESG landscape, different definitions of independent directors for different contexts, and evolving fiduciary duty standards for officers and de facto directors.

Chapter 2 (Business Judgment

Rule) updates include recent case law addressing procedural issues in asserting the business judgment rule as a defense and the applicability of the defense to high-risk decisions and to officers.

Chapter 4 (Duty of Loyalty) updates include recent case law addressing the standards that govern claims alleging breaches of the duty of loyalty against corporate officers, directors and controlling shareholders.

Chapter 5 (Legal Compliance) updates include a discussion of Delaware law that limits the common law doctrine of *ultra vires*; an overview of the SEC's new Pay Versus Performance disclosure requirements and the adoption and disclosure of required compensation recovery policies; and a discussion of recent case

law developments regarding the enforcement of litigation forum selection provisions.

Chapter 6 (Liability to Creditors and Other Third Parties) updates include a summary of creditor claims against directors, a discussion of recent case law developments in quiet tam actions, a summary of the substantial recoveries by the DOJ under the False Claims Act and payments by the SEC under its whistleblower program, and a discussion of the SEC's newly-adopted cybersecurity disclosure rules.

Chapter 8 (Criminal Liability) updates include a summary of the Department of Justice's new guidelines for assessing a corporation's criminality, which include as a factor the corporation's disclosure to the DOJ of facts regarding personal misconduct by directors and officers.

Chapter 9 (Liability Under ERISA) updates include a summary of the DOL's new rules related to plan fiduciaries considering ESG factors, and a discussion of recent developments in excessive fee litigation following the U.S. Supreme Court's decision in *Northwestern*.

Chapter 11 (Depository Institutions: Directors and Officers) updates include recent court decisions that threaten to limit the regulatory enforcement powers of the Consumer Financial Protection Bureau and the FDIC's administrative law judges, and a discussion of bank regulators' recent guidance regarding risks faced by depository institutions servicing the cryptocurrency industry.

Chapter 12 (Nonprofit and Charitable Organizations) updates include discussion of laws governing online fundraising by nonprofit organizations and claims that can be asserted against public benefit corporations.

Chapter 13 (Federal Securities Law) updates include summaries of recent decisions as to whether digital assets constitute securities under federal law; case law developments under Sections 11 and 12 of the Securities Act of 1933; recent federal appellate court decisions applying the *Omnicare* standard to opinion-based claims under the Securities Exchange Act to 1934; recent federal appellate court decisions construing the elements of a securities fraud action under Section 10(b)/Rule 10b-5; and case law developments regarding whistleblower actions under the Sarbanes Oxley Act.

Chapter 14 (Liability in Takeovers, Mergers and Buyouts) updates include recent case law regarding the heightened D&O liability exposures in transactions involving controlling shareholders and a change in control, the "entire fairness" standard of review for conflicted transactions, and unique SPAC-related D&O exposures.

Chapter 15 (Disclosure and Misuse of Business Information) updates include recent case law regarding the adequacy of cautionary statements accompanying a forward-looking statement and a summary of newly enacted SEC rules regarding cybersecurity disclosures and Rule 10b5-1 insider trading plans.

Chapter 17 (Defenses, Protective Measures and Compliance Programs) updates include recent decisions addressing defenses to duty of care claims and the scope of the attorney-client privilege within boards.

Chapter 19 (Defense and Settlement of Litigation) updates include recent case law on the reasonableness of defense costs when an insurer denies coverage for a claim, the transfer of the duty to defend from an insured to an insurer, the scope and standard of the duty to defend and the duty to advance, and restrictions on the use of privileged information exchanged between insurer and insured.

Chapter 20 (Indemnification) updates include a summary of recent case law regarding the enforcement of indemnification rights.

Chapter 21 (Allocation) updates include a summary of recent case law addressing the contours of the “relative exposure” allocation methodology, the distinction between the reasonableness of a settlement and the allocation of a settlement, and the applicability of a policy’s defense costs allocation provision to duty-to-defend coverage.

Chapter 23 (Insurance: Directors and Officers Liability) updates include recent case law concerning the requirements for rescission of an insurance policy, the severability of

statements made by insureds, the scope of warranty statements, and how/when an insurer can unilaterally rescind a policy based on material misrepresentations.

Chapter 24 (Insurance: Insurance Clauses and Major Provisions) updates include an expanded discussion of defense costs coverage under D&O policies.

Chapter 25 (Insurance: Exclusions) updates include recent case law interpreting various policy exclusions, including cases addressing the contours of the contractual liability exclusion, conduct exclusion, insured-v-insured exclusion, prior acts exclusion, bump-up exclusion, and bankruptcy exclusion.

Chapter 26 (Insurance: Excess Policies) updates include recent case law addressing when an insured can sue an excess insurer and whether a primary insurer’s coverage position is binding on an excess insurer.

Chapter 29 (Liability and Market Surveys) updates include summaries of several new surveys and reports on D&O claims activity and insurance purchasing trends for both public and private companies, as well as filing and settlement trends in federal securities litigation and SEC enforcement actions over the past year.

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December 2023

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