



## Lowenstein Sandler's Insurance Recovery Podcast: Don't Take No For An Answer

Episode 32 -  
Smoother Sailing or Choppy Waters: What Lies Ahead for  
the 2022 D&O Market?

By [Lynda A. Bennett](#), Rob Crocitto, Janet Dreifuss  
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**Lynda Bennett:** Welcome to Don't Take No For An Answer. I'm Lynda Bennett, Chair of the Insurance Recovery practice at Lowenstein Sandler, and today I'm very pleased to welcome two guests: Rob Crocitto, Chief Sales Officer of ARC Excess & Surplus, LLC, and Janet Dreifuss who's Associate General Counsel and Senior Claims Counsel at ARC. In today's episode, we're going to be talking about what lies ahead for the 2022 D&O market. As many of us know, policyholders have endured two years of a wild ride in D&O both in terms of getting their renewals in place and also getting claims paid under those policies. So my hope is that Rob and Janet are going to have good news for us on the horizon in 2022.

And so with that, I'm going to jump right in, Rob, and ask you what our policyholders likely to see in 2022 in terms of premiums, self-insured retentions and terms and conditions?

**Rob Crocitto:** Well, I'm going to tell you, I think the last—clearly the last two years have been extremely difficult for the policyholders. And I think that really stems from a decade of rates that were from an insurance company perspective, not adequate, and some really serious coverage grants. And then we take that and couple with, uh, an uptick in the number of securities claims, the severity of those securities claims. And I think we had a perfect storm brew in the D&O arena.

And the last two years have really been, from an insurance company perspective, say putting in place the right market for a correction that enables them to sustain profitability because they're in the business to make money. And they weren't making money for the last decade and they finally caught up to them.

So I think over the last two years, we've seen significant increases in premiums, significant increases in retention limits management. We're not seeing big towers of insurance anymore, where companies are putting up \$10 and \$15 million blocks of insurance. It's on difficult risks. It's not uncommon to see a major insurance company put up \$2.5 million.

I think what we could see is more of that from a pricing perspective. I think the days of 15% to 25% premium increases are behind us in most cases. You're still going to see those big increases on the difficult classes of business where there's limited competition like, and we'll talk about this later, but like crypto space or large unicorns that are potential IPO candidates where there's not a lot of availability of capacity.

**Lynda Bennett:** Are we starting to see newer entrance into the D&O market that may help to fuel some competition and some better rates for policyholders?

**Rob Crocitto:** Yeah. So, over the last two years, there's been at my current count 16 new entrances into the D&O space. And where I think you're going to see probably the most benefit for policyholders are going to be for those insureds that have stacks of D&O insurance or towers of D&O insurance because these new entrance, you know why are they coming in? They're coming in because it's an opportunistic play on their part. There's good rate now, the retention levels are good. So they're jumping in and saying, "Hey, I can make some money in this space," but where are they going? They're going on the excess. So they're targeting those excess layers where they feel they can make money in that capacity.

Coming in is driving down some of the bigger increases we were seeing in the excess space. Unfortunately for the policyholders, I still do not see these new entries really coming in from a primary perspective. They don't have the policy forms yet. Many of them don't have the staff to adequately underwrite a primary.

But what we are seeing is because they are coming in on the excess and putting pressure on the excess, we are seeing those existing longer-term excess insurance carriers, starting to pressure down and put some heat on the primary carriers because they want to maintain their elements and stay on these towers.

**Lynda Bennett:** So that's good news for policyholders. That's good. What are you seeing on renewals in terms of policyholders being probed on COVID-specific risks? Is that a passing fad or are you still seeing that policyholders are going to have to answer a lot of questions about supply chain and how COVID impacted their business?

**Rob Crocitto:** You know from a D&O perspective? It could be a passing fad only because. I think underwriters are starting to get their arms around what they are concerns from like a supply chain issue or a financial disclosure issue of an insured and how the pandemic is affecting them. But I think there are some ancillary management liability issues that are going to take center stage, like for instance, on the employment practices side.

We have a predominantly remote workforce that is eventually going to come back into the physical office. And I think there's going to be some issues in terms of who comes back, what the requirements are, and you do have to be vaccinated and what the legal ramifications are going to be there. And that could stem up to the C-suite in terms of, you know, potential void liability.

**Lynda Bennett:** Yeah, I think also there's some interesting developments, like particularly in New York, there's a lot of regulation around posting employment positions and things like that. And whether companies are paying attention and complying with that will be another potential risk area there. So Jan is going to take us on a deep dive into the claims activity over the last couple of years in D&O.

But I've got a question for you about claims through the underwriting lense. Which is, has the claims activity across all of these coverage lines over the last couple of years impacted rates and the appetite for risk in the D&O space. And by that, I mean, you know, we've seen a slew of cyber claims, we've seen a slew of Me Too claims, we've seen the slew of securities claims; is that impacting how D&O carriers are willing to write and what they're willing to price that for these policies?

**Rob Crocitto:** Yeah. So let's talk a little bit about, especially public companies, DE&I, right? So it used to be check the box now any real, good, insurance company that's underwriting primary insurance is taking a long, hard look at what companies are doing in terms of diversity, equity and inclusion. For instance, they want to know that real money is being spent on implementing the right practices and procedures and making sure that they are doing what they're supposed to be doing.

And I can tell you that, you know, having had a conversation with one of the major public D&O writers just recently. When they address this in the underwriting calls where the insureds are discussing their risk with the various insurance companies, when DE&I comes up, if it's glossed over like, "Oh yeah, we are aware. We're looking, you know, we're really taking good care of that. Now let's go to the bottom line here. Our numbers are..." If it's glossed over and it's not dove into, as though it were a major consideration of the board, they're not getting quotes from them, or they're not getting the right quotes from them. That's for sure.

**Lynda Bennett:** We'll that's great to hear actually.

All right. So are there particular industries that remain challenging to place D&O coverage? You know, for example, we've got a number of clients that are getting into the cannabis space and we've seen some real challenges in getting them D&O coverage. So have you seen that in cannabis and are there other industries that you can identify that are particularly hard to place right now?

**Rob Crocitto:** What's hard to place? Well, cannabis for sure. We could go dive into that for a second. Anything crypto-related is extremely difficult to place. Large unicorn-type private companies in the tech space are extremely difficult to place. And why? Well they're IPO candidates. They're potential deSPAC, merger candidates.

They're making representations to the street about their financials, about, you know, what they're making representations that are being used in proxy statements that are being relied on by shareholders. So what would be traditionally a normal private company risks now when those bigger unicorns

are really being looked at hard. On the crypto space, it's kind of advanced stigma that crypto has in terms of it being maybe used for like, you know, evil empires for money laundering.

Or just recently, there was an article in the Wall Street Journal earlier this week where the SEC Chairman Gary Gensler is which kind of hinting towards there being a federal SEC regulation of the crypto industry. And I think until that industry is regulated, there's going to be some real challenges in terms of insurance companies being able to play in this space.

And like in the cannabis space, which is not federally legal, that has issues and concerns of D&O insurance as well, because it's, it's difficult to place. And also there's no real re-insurance availability in that space. So, you know, these, if an insurance company is going to write cannabis, crypto, the chances are they're doing it net, and that's a concern in and of itself here.

**Lynda Bennett:**

Yeah, and I think they have a different board think in both in crypto and cannabis, you have people who have great ideas and have found people to give them a lot of money to invest in their company. They may not have all of the familiarity around compliance with regulatory issues and that sort of thing.

All right, well, that's a great overview of what's going on in the underwriting world for D&O. I want to now pivot to you, Janet. You've been in the trenches battling for claims for probably 25 years, maybe longer. What are you seeing in terms of the trends? For D&O claims currently. And what do you see coming down the pipe?

You know, talk to me a little bit about the SPAC craze. And is that going to make you super busy over the next couple of years, dealing with the claims that are going to have flowed from the 2021: the year of SPACs.

**Janet Dreifuss:**

Well, what I'll say is claims are alive and well, and I really haven't known a time when they've slowed down.

So they're very active. Now obviously the terrain is forever changing a little bit. So I think the headlines this year where that securities class actions were the percentage of claims had lowered as compared to 2020 and declined by 34%. But I think everyone has to keep in mind that, you know, statistics are statistics and can be skewed.

And I say that in the sense that it's skewed a little bit, for example, because there was a decrease in merger and objection cases. However, those we are seeing that those cases now are not necessarily being brought as class actions, but they're being brought on an individual basis. So they're still out there just not being calculated in that statistic. But what we are seeing is that the securities class actions cases are being brought. They are still being brought and followed on by derivative claims, along with that, which, you know, until the last couple of years, we're always deemed as, you know, tag-a-long cases and not significant. And now they are significant in their own right on the defense basis as well as settlement basis. So we are seeing that in addition, we're seeing the SPAC craze. The SPAC craze has brought its own litigation in 2021. There were, I think we're 613 SPAC IPO's completed.

And they raised about \$162 billion in funding. Related to that, that compares to 2020 where I think the stats are that half of that amount was raised, \$83 billion and there were only 248 SPACs.

What I will tell you is when there is SPAC litigation, right, that litigation gets commenced when there is an announcement of an acquisition, right? And the deal is going forward. And I think the statistic is for the coming year that there are 575 SPACs out there and that are, they are still waiting to announce those acquisitions.

So we do anticipate that there will be litigation relating to those. And we have a very active plaintiffs' bar in all of these cases. And what we're seeing is the plaintiffs' bar is pushing extremely hard for larger and larger, larger settlements in all of these. And they're continually looking to tap new towers of insurance, which is what's putting claims, puts the pressure on underwriting, right? And on evaluating that risk.

And so, for example, even on the SPAC litigation, we're seeing defendants being named not only from the new company that's emerging, right? But you're also seeing now Ds&Os and most of the SPAC being named.

**Lynda Bennett:**

So this is where it's going to get super naughty. You know, the SPACs people are going to need to learn about capacity, defenses, and allocation, for sure in the SPAC world. And Jan, one thing I did want to note, you talked about how derivative claims have evolved over time and how they've become different, may become more significant in the eyes of those who bring them. That's something. Remember when you're talking to Rob and you're doing your D&O renewal, you have eyes on that and you make sure that you are sublimits follow all the way up through the tower.

And you're going to have sufficient money available because most policyholders don't realize that it's sublimited on the primary, uh, at about \$500,000. That's not going to get you out of bed in handling a lot of these derivative claims these days.

**Janet Dreifuss:**

Right. You do have those limits on those derivative demand investigations and the internal costs associated with that.

And you're right. Initially those, and Rob can attest to that, right, we're only written as sub limits on the primary layer. And now you do have to make sure that as that tower goes up, that you have added coverage there.

**Lynda Bennett:**

That's why you have to have an excellent broker like ARC at the helm for you. All right, Jan, tell me, are you seeing any COVID-specific claims? And if so, what kinds are coming down the pipe?

**Janet Dreifuss:**

We are seeing them. In 2021, I'll tell you, you know, there, I think we're 42 Federal Class Actions relating to COVID and then there were derivative suits and then there were also some enforcement SEC-related claims related to COVID. And the types of claims varied. There were claims originally based on the outbreak in the facilities, you know, with nursing homes and in cruise lines and in the meat packing industry, if you recall, those were the initial

litigations. And then there were some suits related to profit motivated COVID issues, which related to vaccine development and diagnostic information and what was going forward and what was being represented.

What we think is going to happen, or what we expect now, is now I think you're going to see COVID related claims that go towards supply chain disruptions, right. Labor shortages, and really see what's now is the out falling, I guess we could say, or the what's coming out of the issue of COVID and how that's affecting the companies on an economic basis. And how they are handling it. And we think we'll see D&O claims arising out of that.

**Lynda Bennett:** So let me ask you a real quick about the cost of defending these D&O claims. This is something that we talk about year-over-year over here. Carriers seem to complain a lot about the cost of these, but are they taking any meaningful steps?

Have you seen over the last couple of years that they're taking any meaningful steps to manage the defense cost for D&O claims?

**Janet Dreifuss:** I think they're trying. And what I will tell you is I think the statistic for defense costs claims, especially on these public company, D&O claims, class action claims, they are running at \$10 to \$70 million for defense costs for these claims.

And you can imagine that the settlements of these at the end of the day has to be a multiple of that, right? So the carriers are definitely paying claims and they are paying sometimes full tower losses that are significant on these claims. And they're feeling the pain on the defense costs. And that is because, you know, as the plaintiffs are driving, it, it's very expensive to litigate.

And the defense of the claims are just as, as expensive when those plaintiffs dig in and become very aggressive. What the carriers are trying to do is a couple of things. We are seeing them, first of all, attempting to deal with their insureds in what I'll say, negotiating rate on defense counsel, right?

And with the idea that it benefits everyone, if we can contain those defense costs, there'll be more dollars there for the settlement or in the event of a judgment or an award. They are having some success in having direct negotiations with the defense counsels. I know that some carriers are trying to get 10% to 15% reductions on a hole, right.

And trying to get reasonable, what they'll consider more reasonable costs. The other thing that I know that they are doing is they are trying to negotiate a flat fee for portions of the litigation.

**Lynda Bennett:** Interesting.

**Janet Dreifuss:** And that some of the carriers are moving in to say, look, we want to negotiate a flat fee at X amount through the motion to dismiss.

And they're trying to do that because they are taking a pragmatic approach that, you know, obviously this is not a discovery intensive portion of the case and it can be quantified. So they are trying to do that so that they feel like defense counsel won't just continually bill and contain those costs.

**Lynda Bennett:** We've seen that technique used when there's not insurance in place. So it's interesting to see that that's, that the carriers are now going to try to leverage that same type of fee structure because our clients are used to that and have imposed that when they don't have insurance in place.

**Janet Dreifuss:** Right. So I think they're trying it, whether they're successful we'll see. And I guess that also depends on the defense bar, right.

And who they're discussing with, and part of it, look, the problem that the carriers also have is these are a lot of these claims are subject to very large retentions. So they really do have to work with their insureds on a mindset of trying to conserve those dollars, even when you're talking about within a \$2 to 5 million or sometimes \$10 million retention, where they don't really have a lot of control, but they, you know, obviously can impact because with companies of those size retentions, if there is a claim, they are looking at significant tower and potential erosion.

**Lynda Bennett:** All right. Well, so we're just about out of time. So I'd like each of you, Rob and Janet, to give me your best tip from the underwriting perspective and the claims perspective, what's the most important thing that a policy holder should do in 2022? To get the best D&O policy and then, Janet, to get the maximum recovery on their D&O claim?

**Rob Crocitto:** From the underwriting side, the best thing a client can do is differentiate themselves from everyone else.

Get out of that bucket of peers and make sure that you are engaged in direct discussions, obviously with your broker, but with your D&O insurance carriers and make sure you are emphasizing all the good work you're doing with respects to DE&I, with respect to your cyber practices and procedures and making sure you're overseeing, then having the best, you know, safeguards in place to fight against ransomware attacks and the like.

You really need to separate yourself from everyone else. And the only way to do that is to get in front of your insurance companies.

**Lynda Bennett:** All right, Jan, I don't say this often, but you get to have the last word over Crocitto what do you have to say on the claims side?

**Janet Dreifuss:** Loving it. What I would say is that I would encourage insureds to work with their carriers and the claims analyst on their cases. And I encourage that because the carriers do have a wealth of information as to these types of suits. What they're seeing in the, in the industry, the awards that are coming down, the judges, the mediators is how they are deciding the jurisdictions where the claims may be brought.

All of which can ultimately impact litigation and the cost of defense and the cost of settlement. So I think they need to really bring the carriers in, make sure the carriers are aware of what's going on. Obviously there will inevitably be some type of maybe disconnect at one point or another in a litigation, but at least if everyone is talking, the carriers understand what the implications are on defense, on liability, on the exposures. Then at least everyone is having that conversation and can best work to conserve those limits or use those limits appropriately where needed.

**Lynda Bennett:** Well, that's great. Thank you so much, Rob and Janet for joining us today, D&O is always an interesting topic to cover and there's nobody better to cover it with our friends at ARC.

So thank you very much for joining us today and we'll see you next time.

**Rob and Janet:** Thank you.

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