



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

Episode 112:
New Year, New D&O Insurance Trends

By [Eric Jesse](#), [Matthew Kerman](#)

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- Lynda Bennett:** Welcome to the Lowenstein Sandler podcast series. Before we begin, please take a moment to subscribe to our podcast series at lowenstein.com/podcasts. Or find us on Amazon Music, Apple Podcasts, Audible, iHeartRadio, Spotify, Soundcloud, or YouTube. Now let's take a listen.
- Eric Jesse:** Welcome to *Don't Take No for an Answer*. I'm your host, Eric Jesse from Lowenstein Sandler's Insurance Recovery Group. Now, here on *Don't Take No*, we like insurance as interesting as possible and to share some practical insights with our audience. Today, I'm pleased to welcome Matthew Kerman, who's a partner and senior vice president at ARC Excess & Surplus. Welcome to the podcast, Matt. Good to have you back.
- Matthew Kerman:** Thanks so much, Eric. I really appreciate you having me on.
- Eric Jesse:** Absolutely. Matt is a friend of the show, and he's an insurance broker, and he specializes in placing financial lines insurance, including D&O insurance for corporate policyholders.
- One of the most important insurance policies a company can have is directors and officers insurance. So today, we're going to discuss the current state of the D&O insurance market and what companies need to do to best position themselves during the underwriting process.
- Matt, just to kick things off, we often hear the phrase the market is changing, but what does that mean for D&O insurance right now? What are you seeing out there in the market?
- Matthew Kerman:** D&O is one of those coverages where headlines, market cycles, and small wording changes have an outsized impact on directors and officers personally. It's a great time to talk about what's really happening in the D&O market and what companies should be focused on.

When people say D&O, the D&O market is changing, what they really mean is what we've moved out of the extreme hard market and what we experienced a few years ago right before COVID, and are moving to a more balanced, in some cases, softening environment.

Eric Jesse: Oh, great. So, in terms of premiums, what does that mean? Are you seeing premiums just that are remaining stable or going down a little bit? And also, just tell us about retentions as well. Are you seeing policyholders able to push back on retention increases and keep them stable or even ask for lower retentions?

Matthew Kerman: Over the last 24 to 36 months, there's been a ton of new capacity of it that has entered into the directors and officers' liability marketplace. And that additional capacity in all these different insurance companies have spawned a large increase in competition between each of the insurance companies. So, a lot of our clients are experiencing decreases in relation to the market softening.

In addition to the premiums coming down, retentions are also stabilizing or coming down, especially for companies that have had clean claims experiences in the past. I would definitely consider the D&O market softening with rates coming down, for sure.

Eric Jesse: Good to see that good behavior being rewarded too if you have that clean claims history. Good.

But you touched on this, but I just want to put a finer point on it. A lot of times, we have clients that are just doing what I like to call just kind of housekeeping and taking a look at their insurance programs and thinking about what changes, if any, need to be made. And sometimes they're talking about or asking about, is it time to increase the D&O policy limits that we have? Would this be a good time to consider doing so? It sounds like this might actually just be the right time to consider increasing policy limits.

Matthew Kerman: This is one of the best times, and we're seeing a lot of our clients doing that, where capacity for excess is fruitful with a lot of insurance companies that are writing excess business, some specifically only writing excess business. A lot of our clients are able to utilize some of that premium savings with the softening of the D&O market and use some of that premium to increase their limits. Really, finally, reasonable rates, unlike where rates throughout the primary and excess were exorbitant.

Eric Jesse: Excellent. Good, good. Let's get into the weeds a little bit on just the underwriting process itself and what you're seeing there. So, what are D&O insurers focused on and concerned about today during a renewal or underwriting process, especially more so than they might've been in prior years?

Matthew Kerman: So, underwriters and insurers are still focused on underwriting fundamentals, strong balance sheets, strong cybersecurity postures. Digital asset exposure, I think, is something that companies or insurers are now focusing on, where we've seen a lot of our clients and just public companies in general contemplate digital asset treasury strategies, where they historically have been a client or a company in a different segment of business, nothing related to digital asset or cryptocurrency at all. And they've gone down the path of raising a substantial amount of pipe funding and purchasing digital asset. Digital assets sometimes scare underwriters, where not everybody has an appetite to write companies with any sort of digital asset exposure. So underwriters, in some cases, are having some of their insureds purchase digital assets throughout the policy period, which has really spooked some of these carriers. And we've seen some carriers add exclusions to try and preclude coverage for these digital asset exposures.

Eric Jesse: Okay. Matt, let me just ask another question. I mean, if there is an exclusion being added for digital assets, is that something like a cyber policy could potentially step in and fill in or?

Matthew Kerman: No, it's the exclusions that these underwriters are adding. I would say that it's really only the carriers that don't have an appetite for writing digital asset strategies. So I don't think that there's another risk transfer vehicle that would really pick up that exposure. But I would say that those carriers, because they don't have an appetite and they're trying to preclude the coverage for the cryptocurrency, other carriers that do have an appetite to write insurance with cryptocurrency or writing that business or replacing that business. So I would say that incumbent insurers are not really accomplishing or are not being supported in getting those exclusions, those cryptocurrency exclusions on the policy as there's still other carriers that are willing to write that business. And we've seen companies move to carriers that have the ability to write companies in the cryptocurrency or digital asset space.

Eric Jesse: Okay. Here on *Don't Take No*, one of our catchphrases is about the devil being in the details and how the words matter. So I know you mentioned the digital asset exclusion, but what other changes are you seeing to

policy language, and where else are insurers looking to limit coverage in recent months and years?

Matthew Kerman: I would say in the current state in the market, it's really quite the opposite where underwriters are expanding coverage. If they're working with a sophisticated broker that has the knowledge to ask for enhancements, underwriters have been willing and accepting to broaden coverage. And keep in mind that all of these coverage enhancements or 99 percent of the coverage enhancements that underwriters are willing to provide come at no additional cost to the client, where it's just working with a trusted risk management consultant, whether it be an insurance broker or an outside counsel partner to know to request various different enhancements.

So I would say it's quite the opposite, where underwriters are still expanding this coverage. Directors and officers liability policies are not all the same. Each base policy form, it's typical to have 40-plus different enhancement endorsements to expand coverage. So, I would say with the softening market environment that D&O insurance companies are in, right now it's the more expansive side than the restrictive side.

Eric Jesse: That's great news. And you do touch upon, raise a good point, which is you don't get what you don't ask for. So, I think you spoke about the value of having a broker who really has good relationships and knows their way around a D&O policy like you do or working with coverage counsel to put together the list of asks. And that's been our experience too, where you can get a lot of enhancements to the policy wording. And again, at no additional premium, you just have to ask for it. So, are there some specific areas where you've been most successful in getting that expansive wording or expansive coverage? Are there a few key things that are maybe low-hanging fruit to go out and get?

Matthew Kerman: For sure. So, I would say majority of private company D&O policies have an antitrust exclusion, which is extremely broad and precludes coverage for things just that are not only antitrust-related, where it's price-fixing or anti-competition type claims, and underwriters are in the private company space and many times able to provide full antitrust coverage. So that's an area where on wishlist that we see that request being granted pretty often in the current marketplace.

On the public company side, the expansive coverage is more on the investigation side for the entity, where it's very typical for an insured person to be covered on public company D&O policy for an informal investigation or for a formal investigation, but the actual cost associated with the entity is limited. So, we've seen carriers agree to expand the

entity investigation costs that are related to a securities claims, agree to more often than we had in the past.

And historically, that coverage had been associated with an additional premium. And now we're seeing carriers for the related to securities claims really throw that in in most cases and not charge that additional premium.

Eric Jesse: Excellent. No, those are great tips to share, so I appreciate that.

Shifting gears just a little bit, because I guess I have to ask you about this because it is the hottest topic of the day, which is AI. How are insurers looking at those AI risks, what are they asking policyholders about?

Matthew Kerman: Sure. So, I would say there's a healthy amount of capacity from insurers for AI-related risks, that's first off. And then within the AI class of business specifically, underwriters are focused on the company's ability to raise capital, the company's past funding events, and an increased regulatory exposure that some of these companies are facing.

I would say on the public side specifically, underwriters are also concerned with AI washing claims, which the market has experienced. And AI washing D&O claims refer to lawsuits against companies and directors and officers alleging they misrepresented or overstated their use of AI.

Eric Jesse: Okay.

Matthew Kerman: So, it's almost the opposite where they're overstating that their company is using AI, where that might not be the case or might not be the case to the extent that they're claiming they are. So that's something that underwriters have experienced on the claim side and are asking more questions about and are really focused on risk disclosures and financial statements in public filings for AI-related companies in relation to that.

Eric Jesse: Got it. Are there some specific things that policyholders need to do when they're going through the underwriting process from an AI risk perspective? And I guess this maybe falls into two broad categories, companies that are in that AI space and then companies that just use AI to perform their services or their operations.

Matthew Kerman: I would say there's not a one-size-fits-all approach to this, but I would say that part of our underwriting process, and I think that leads well to better results, is we take the approach of partnering with our clients to go out to

market, where we think that we know D&O insurance better than anybody else, but we don't know their client's business better than they do. So, ambiguity, I think, leads to increased premium. So we really partner with our client and get them in front of D&O insurance underwriters so they can explain their business, get out in front of any questions that underwriters might have, and address any concerns to relieve that ambiguity, which really tends to lead to better results in not only pricing, but retention and terms and conditions.

Eric Jesse: Excellent. That all makes sense. And I can appreciate the not one-size-fits-all, again, because obviously every client is different, but I think you highlighted just an important general point, which is communication is key, education is key. So, it seems like that, at the end of the day, is the best method for a smooth underwriting process.

Let me ask this question: Are you seeing insurers use AI in their underwriting process? Are they evaluating risks using an AI platforms, or is that around the corner?

Matthew Kerman: They absolutely are. And I think underwriters are afraid for their jobs, but we're not there yet. So, I think everybody, and that's not a relief, but we're not there yet where AI is taking over, but they're assisting with the underwriting process, where insurers are using AI for submission triage, for benchmarking, for financial analysis, claim recognition patterns, things of that nature. So, it's really less about replacing underwriters and more about helping them identify risk signals to help them better underwrite.

Eric Jesse: Yeah, I think that makes sense in a way. The human judgment component isn't there yet. Even as we see AI on the legal side, you still need that human judgment to know what's the argument that might persuade a judge. AI might not be able to tell you that.

Matthew Kerman: That's very right.

Eric Jesse: Some specific or maybe just some tips for our audience here. What are some just best practices or baseline things that companies should be doing in the underwriting process to be viewed as a good risk when their policies are up for renewal?

Matthew Kerman: I would say at the most basic levels, I think companies need to understand what insurers actually rely upon to underwrite D&O. So, for private company, that typically means a completed D&O application, current financial statements. And those are the two core pieces of information that we take to the market to procure quotes.

For public companies, it's actually, it's much simpler. Underwriters rely upon public filings, earnings calls, and disclosures. There isn't a separate underwriting process, items that are needed to go out and procure quotes, but being a good risk goes well beyond just providing documents or financial statements. It's really that story that you can go out and tell underwriters and show how risk management is on the front-end of the company's DNA. That sort of process really helps differentiate clients and insureds from one submission to the other. Being on an underwriter's desk is really being upfront and being able to articulate the company's financial position and having that relationship with underwriters is really important.

Eric Jesse:

Absolutely. And I've seen firsthand, and I know that you work with clients closely to walk them and prepare them for that process, especially when they're speaking live with the underwriters.

All right, Matt. Well, I appreciate all the insights you've been sharing with our audience here and sharing your expertise and experience. So, this last question here, it's probably going to be a little bit of an unfair one. I'm going to ask you to look into your crystal ball. And when we're doing this podcast in 2027 or 2028, what do you predict will be some of the hot button issues that insurers are going to be focused on?

Matthew Kerman:

If we're sitting here in 2027 or 2028, I think the hot-button issues will be an evolution of what we're already experiencing, just with higher stakes. First, AI-driven liability and decision-making. AI won't just be an operational issue; it'll be a governance and disclosure issue, where insurers will be focused on how boards oversee AI, how decision-makers are made and documented, and whether companies can explain and defend AI influence outcomes. I think that's going to be a large component into the future.

Secondly is regulatory enforcement and individual accountability. I expect continued expansion of regulatory scrutiny, with more focus on holding individual directors and officers personally accountable. That will keep side A coverage and policy wording front and center.

And then third, cyber events as D&O claims, not just as cyber claims. Cyber incidents increasingly turn into D&O claims through allegations of oversight failures, disclosure, missteps, or delayed responses, so insurers will be laser-focused on governance, not just technical control. So those are the three major components that I think that underwriters are going to continue to stay focused on in years ahead.

Eric Jesse: All right. Well, we'll have to have you back on the podcast in a year or two and we can revisit that all this came true, but that all certainly makes sense from our perspective here as well. So Matt, again, thank you for joining the podcast today and sharing your expertise and insights with the audience. So, it was a great discussion today, so we appreciate it.

Matthew Kerman: Eric, thanks so much for having me on. And to the entire Lowenstein family, thanks very much, we really appreciate it.

Eric Jesse: Of course, anytime. All right, take care, everyone. Thank you.

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