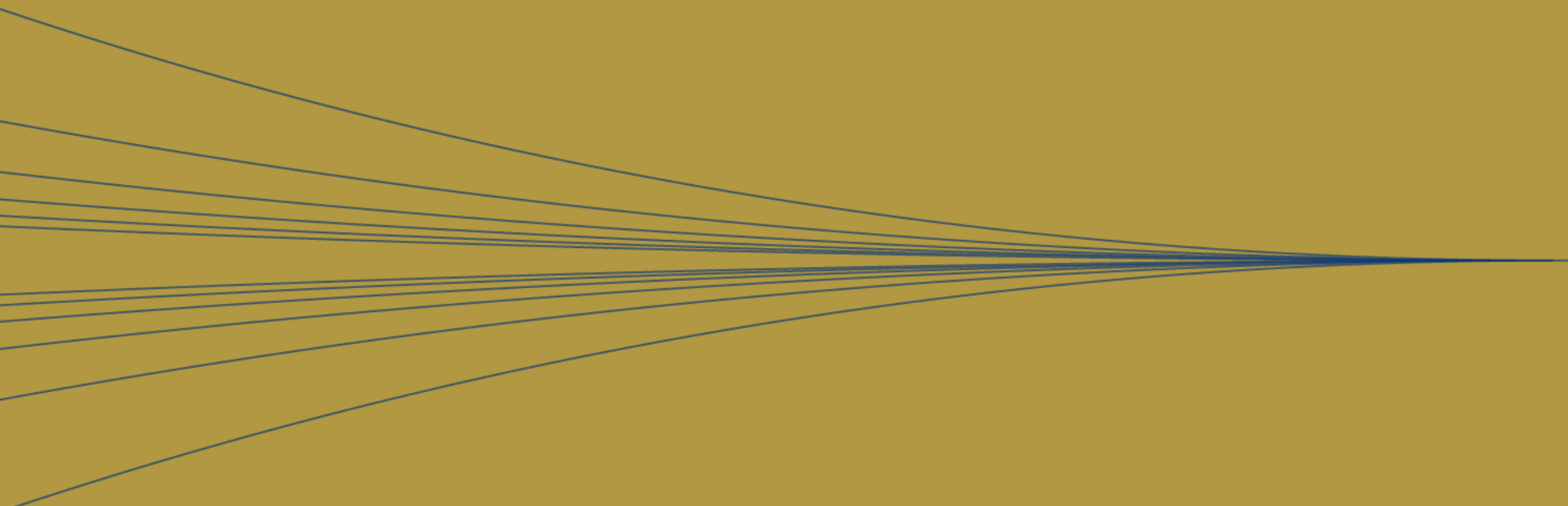




INTERNATIONAL INSURANCE BROKERS
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Bill 198 and the Impact on Directors and Officers Liability Insurance

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Introduction

- New Ontario legislation
- Creating new civil liabilities for investors in the secondary market with respect to misleading, insufficient or late corporate disclosure
- Effective December 31, 2005



Before Bill 198

- Historically, investors had a common law right to sue
 - It was difficult to use due to the high evidentiary burden Plaintiffs have to prove in order to be successful, among other things.
 - Result - few shareholder suits, as opposed to the US
- Bill 198
 - Reduces Plaintiffs' evidentiary burden and removes some elements that the Plaintiffs historically had to prove
 - Result – Too early to tell



What types of Corporate Disclosures falls under Bill 198?

- Public written documents;
- Public oral statements (eg. By D&O, Influential persons, PR firm on behalf of the company, GC, outside counsel); or
- When a company fails to make timely disclosure of a material change in its affairs



Who can be sued?

- Public Company
 - issuers
- Directors and Officers
- Influential Persons
 - control persons
 - majority shareholders
 - promoters
 - fund managers
- Experts
 - accountants
 - lawyers



Deemed Reliance – Improving Plaintiffs’ Ability to Sue

- Historically, Plaintiffs’ have to prove that they saw the statement, relied on it and suffered a loss
- With Bill 198, Plaintiffs do not have to prove that they relied upon a particular misrepresentation to establish liability (deemed reliance)
- Liability is imposed automatically in case of misrepresentations in “core” documents (eg. Financial statements, AIFs, MD&As)



Damage Calculations

- Damages are capped, for example:
 - Liability of Issuer
 - Capped at greater of \$1 MM **or** 5% of market cap
 - Liability of Individual
 - Capped at greater of \$25,000 **or** 50% of his/her annual compensation
- Proportionate Liability – Assigns damage amount by who is most responsible
 - Usually liability is joint and severable – where all parties are each responsible for the entire damage amount
- Note:
If a person/company knowingly misrepresents or knowingly fails to disclose certain information, then the cap & proportionate liability does not apply



Defenses

- Due Diligence Defense
 - Conducted a “reasonable investigation,” and
 - Defendant had no reasonable grounds to believe the document or statement contained the misrepresentation
- Reliance on an Expert
 - Required written authorization has been received and the statement fairly represents the expert’s opinion
- Safe Harbour for Forward-Looking Information
- Reliance on documents filed by other public companies
- Proving that the Plaintiff(s) had knowledge of the misrepresentation or failure to disclose



Bill 198 vs. US Laws

- Similar in many respects to US Laws [i.e. Section 10 (b) liabilities]
- Ontario's law goes further
 - Deemed Reliance – Plaintiff does not have to prove they relied on the misstatement (see previous slide)
 - No requirement of Fraud by the Defendant
 - No need to prove any wrongful state of mind by the defendant or gross misconduct in respect of core documents
 - Loss Causation – Assumes that Plaintiff's loss was caused by the misstatement
 - Discoveries Earlier (Document Disclosure)
 - Results in US lawyers bringing actions in Ontario to get around their rules
 - Results in increased defence costs



Current D&O Marketplace Response

- Projections by Insurers
 - Increase in frequency and severity of shareholder claims activity due to Bill 198
 - Increase in defense costs due to increased complexity of a Bill 198 lawsuit
- Insurers have not yet charged for an increased exposure – this is due to the continued soft market, favouring clients
- No new exclusions added to the policy to exclude coverage for Bill 198 claims



What does this all mean?

- Develop a purchase philosophy for D&O
 - D&O policy covers many parties under one contract – Directors & Officers, Public Issuer (Entity), independent directors
 - Not all parties share the same interests
 - Some parties may not want to share their limits with other parties
 - Who should the contract cover?
- Review your D&O Policy with your Broker
 - Does your policy reflect your philosophy?
 - Alternative D&O structures options
 - i.e. Purchasing dedicated limits to protect certain parties



What does this all mean?

- Limit Discussion – Are your D&O limits appropriate?
 - Bill 198 liabilities
 - Increase in Defence Costs



Limit Discussion Considerations

- Bill 198 caps liability at a maximum of:
 - For the Public Issuer: Capped at greater of \$1 MM **or** 5% of market cap
 - For the Individual - Capped at greater of \$25,000 **or** 50% of his/her annual compensation
- NOTE: If a person/company knowingly misrepresents or knowingly fails to disclose certain information, then the cap & proportionate liability does not apply
- Purchase insurance for the worst possible loss, or for the most probable loss?



Limit Discussion Considerations Continued. . .

- Other factors to consider:
 - Risk Management
 - Reviewing Corporate Governance
 - Reviewing Corporate Disclosure policies
 - Reviewing Indemnification policies
 - What do your peers purchase?
 - We can benchmark the D&O limits your peers purchase.
 - Please note that these numbers are based in historical data.
 - Insurance market conditions
 - Affordability/availability of excess limits



Questions?

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