

## 2016 PLUS D&O Symposium Day Two Recap, *Advisen Front Page News*, by Marc Voses and Patrick Kennell

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*Common themes discussed during day 2 of the PLUS D&O Symposium included the competition between insured companies and insured persons for policy limits, notification of and coverage for pre-“claim” investigations, and issues that arise when insurers and insureds unleash their respective coverage counsel.*

### D&O Insurance: Private & Non-Profit

The panel’s members started their conversation discussing wage and hour coverage with one panelist noting the unavailability of coverage for wage and hour claims for large organizations. Another remarked that late notice of claims is an issue that is on the uptick. This is especially an issue when the insured is handling a claim within a large retention, but the claim unexpectedly escalates and the insurer must get involved yet no notice has been provided up to that point. The panel also mentioned that the issue of “joint employers” is a significant issue that underwriters and insureds need to be aware of due to the spreading of exposure for wage and hour claims.

The discussion turned to the False Claims Act. Medicare and Medicaid fraud investigations are increasing and the government’s recovery efforts have been largely successful, which will keep fueling these investigations. The debate over the nature of the government’s recovery and whether it is covered under a policy is an ongoing discussion between insurers and their insureds.

The panel members then turned to the matter of notification of claims. One panel member remarked, with others nodding their heads in agreement, “always give notice.” The fear insureds have of giving notice is not reasonable given the sophistication of the parties involved.

Private companies are very concerned about cyber events. A recent poll indicated cyber liability is the number two concern for non-profit boards. In the absence of cyber coverage, one panelist suggested that D&O policies could respond to third party claims, but there would likely be a coverage gap when it comes to first party losses incurred when responding to a breach. It was also noted that cyber exclusions were not being added onto D&O policies yet, and that might be because there are not a lot of third-party cyber claims against non-profits. The panel all agreed that a data breach plan must be put into action and that first party coverage should be secured.