

FINPRO Focus

Extradition and Directors and Officers Insurance Coverage

Recent press reports state that three British bankers have been extradited from the United Kingdom to the United States to stand trial for fraud in connection with the Enron scandal.¹ As this case of the so-called “NatWest Three” caused controversy in the United Kingdom about extradition to the United States, the head of a U.K. civil rights group forcefully argued against extradition, telling *The Wall Street Journal* the NatWest Three should not be extradited because “the defendants are British, the victims are British (and all of the alleged criminality took place in Britain.”²

In addition to protests from civil rights groups, the case of the NatWest Three prompted concern from directors and officers on both sides of the Atlantic about the increased threat of extradition and raised the issue of whether defense costs for an extradition proceeding are covered under directors and officers (D&O) liability policies. This white paper focuses on coverage for directors and officers who reside in and are covered by a policy issued in the United States.

What Is International Extradition?

Extradition is the formal legal process for transferring a person from the country where he/she is located (the requested country) to another country that requests such person’s presence (the requesting country) for the purpose of criminal prosecution in the requesting country. The authority to extradite a person from the United States to a foreign country is based upon statute,³ and the grounds for extradition are governed by treaties by and among the United States and other countries. The United States has extradition treaties with more than 100 countries, and U.S. citizens may be extradited from the United States to foreign countries to face criminal charges there.

¹ “U.K. Court Allows the Extradition of Banker to U.S. in Enron Case,” *The Wall Street Journal*, February 22, 2006

² Id.

³ 18 U.S.C. Sec. 3181(a)

How Is Someone Extradited From the United States?

In the U.S.-U.K. Extradition Treaty, for example, when the United Kingdom seeks to extradite a person (the defendant) from the United States to the United Kingdom, the process is generally as follows:⁴

- 1) The United Kingdom files charges against the defendant in a U.K. court, and an arrest warrant is issued for the defendant's arrest.
- 2) The United Kingdom prepares a petition for provisional arrest for purpose of extradition—or petition for extradition—that is sent through diplomatic channels to the U.S. Department of State.
- 3) The State Department reviews the petition for extradition to ensure it is in compliance with the extradition treaty. If the petition is in compliance, it is sent to the U.S. Department of Justice, which forwards it to the U.S. Attorney's office where the defendant is located. Generally speaking, an extraditable offense is one that carries punishment of one year or more of confinement in both the requesting and the requested countries.
- 4) The U.S. Attorney's office prepares a petition for extradition and files it in federal court.
- 5) After the court grants the petition for extradition, federal agents arrest the defendant, who is brought before a U.S. federal magistrate judge (magistrate) for an extradition hearing.
- 6) The defendant has the right to counsel at this hearing and, if financially unable to retain counsel, may have one appointed by the court.
- 7) The magistrate conducts a hearing to determine: (a) whether there is probable cause to believe there was a violation of the requesting country's criminal law; (b) whether such violation would also violate U.S. criminal law; and (c) whether the right person has been detained.⁵
- 8) There is technically no right to appeal the magistrate's decision, but the defendant may request a review of the magistrate's decision by the U.S. District Court.
- 9) If the U.S. District Court upholds the magistrate's decision, there is no right to appeal, but the defendant may file a writ of habeas corpus to challenge the decision to extradite.
- 10) If the defendant loses on the writ of habeas corpus in U.S. District Court, this decision may be appealed to the U.S. Circuit Court of Appeals and then the U.S. Supreme Court.
- 11) Assuming the defendant loses the legal challenges, he or she is then taken to the United Kingdom by law enforcement officers.
- 12) U.S. law allows bail for defendants detained for international extradition, but magistrates rarely permit bail in these situations due to the international flight risk inherent in extradition cases.

Directors and Officers Coverage Implications

Generally speaking, directors and officers (D&O) liability policies provide coverage for loss based upon a claim that alleges a wrongful act. The term "wrongful act" is broadly defined to include, among other things, any act, error, or omission. "Loss" is defined as the amounts the insured is legally obligated to pay arising from a claim, which specifically includes defense costs. "Claim" is usually defined to include,

⁴ U.S. Department of State, Fact Sheet, U.S.-U.K. Extradition Treaty, www.state.gov/p/eur/rls/fs/34885.htm

⁵ McNabb on International Extradition, www.internationalextradition.com/extradition.htm

among other things, a “written demand for nonmonetary relief.” For a relevant example in the criminal area, D&O liability policies routinely cover post-indictment criminal defense costs.

From the above description of international extradition proceedings it is fairly clear that defense costs should be covered under most U.S. D&O liability policies. As stated above, it is common for policies to define a claim to include a written demand for nonmonetary relief. The petition for extradition is clearly a written demand for nonmonetary relief, i.e., a demand to appear in and be transferred to a foreign country.

Some policies go a step further and also define a claim to include a civil or criminal proceeding for nonmonetary relief. While inclusion of the term “criminal” in the definition of claim provides more comfort that coverage will be triggered for extradition proceedings, the term “criminal” is not technically necessary and the language “written demand for nonmonetary relief” should be sufficient to trigger the insurer’s duty to pay defense costs to litigate a petition for extradition.

Although rarely granted, U.S. law permits bail in international extradition proceedings, and other countries may also permit bail. This raises the question of whether a standard D&O liability policy provides coverage for the premium for a bail bond. The policies offered by major insurers cover, for example, the cost of “any appeal bond, attachment bond or similar bond arising out of a covered judgment.” While we have never seen this tested in the United States, it is likely insurers will argue that a bail bond pending international extradition is not a covered judgment. Accordingly, coverage for the premium for bail bonds for extradition should be expressly addressed in the policy.

U.K. Insurers’ Response to Recent Events

The NatWest Three case prompted a good deal of publicity and concern among directors and officers in the United Kingdom, and as a result some U.K. insurers—in an effort to provide a higher level of comfort to directors and officers in the United Kingdom—drafted an endorsement to expressly provide coverage for defense costs for extradition proceedings. This endorsement also contains enhancements to provide coverage for:

- a. the services of a public relations firm to assist in contesting extradition;
- b. the cost of psychological counseling to assist the defendant in dealing with the stress of extradition;
- c. the cost of tax advice in the requested country if the defendant spends enough time in the country to become subject to its tax laws; and
- d. the premium for a bail bond if the requested country permits bail for those facing extradition.

U.S. Insurers’ Response to Recent Events

For U.S.–based companies, Marsh is currently negotiating language with U.S. insurers to add a policy endorsement that will include the same features as those available in the U.K. endorsement outlined above. Of course, adding such an endorsement will be subject to underwriting each company’s risk in this area.

Conclusion

In the post-September 11 world, the United States and other countries have sought to streamline their extradition treaties. While this is a laudable goal in connection with international terrorism, it may have the effect of making it easier for countries to extradite directors and officers from the United States for business-related offenses. Nonetheless, well-drafted D&O liability policies should provide coverage for the legal fees incurred in contesting a petition for extradition.

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