

# Side A Difference in Conditions (DIC): Explained

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17 October 2019



# 21<sup>st</sup> Century Fox and The Weinstein Company

## What are the issues:

- A culture of systemic sexual / racial harassment and retaliation that is no longer strictly an EPL matter
- A culture that has been permitted by the company's management to continue
- A culture that has brought financial and reputational damage to the company

## Settlements:

- 21st Century Fox: \$90m derivative loss (paid by insurance)
- The Weinstein Company: still ongoing



# A brief history



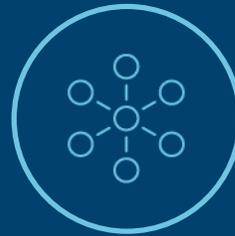
## New York Supreme Court

The 1939 New York Supreme Court decision stated that corporations could not reimburse its directors



## Bankruptcy

The D&O market in the early 80s was rife with bankruptcy claims due to economic downturn



## Mergers & acquisitions

A significant number of mergers and acquisitions followed as the economy recovered



## Creation of CODA

CODA was formed by policy holders of 53 US corporations looking to provide a standalone Side A solution



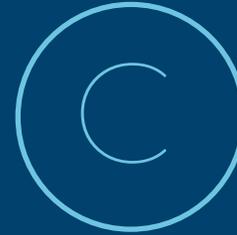
### Directors held personally liable

Smith vs. Van Gorkom (Trans Union case)



### Insured vs insured exclusion

Bank of America v. Powers



### Intro of Side C Coverage

Nordstrom vs. Chubb



### IDL & DIC gain traction

Policy limit concerns - leaving little coverage for the directors and officers

SIDE A  
NON-INDEMNIFIED

SIDE B  
INDEMNIFIED

SIDE C  
ENTITY

**SIDE A**  
NON-INDEMNIFIED

**SIDE B**  
INDEMNIFIED

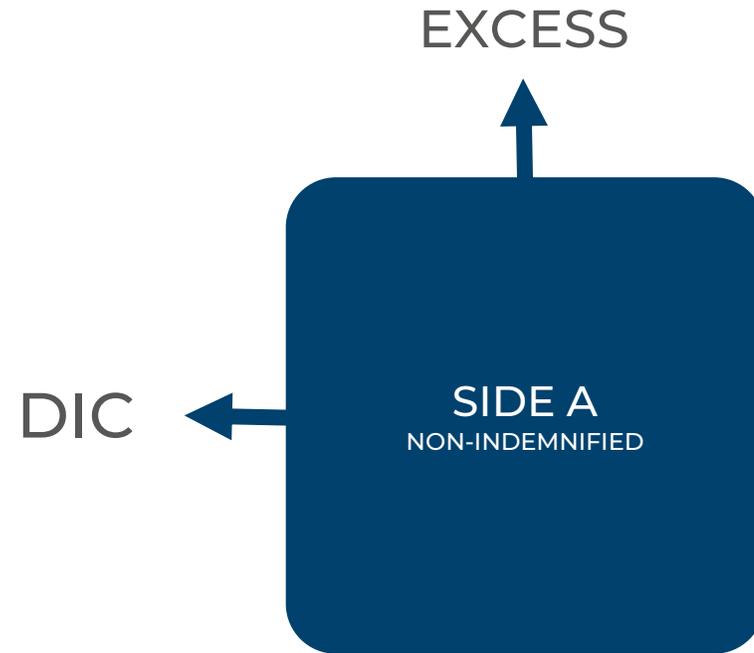
**SIDE C**  
ENTITY



# Non-indemnified

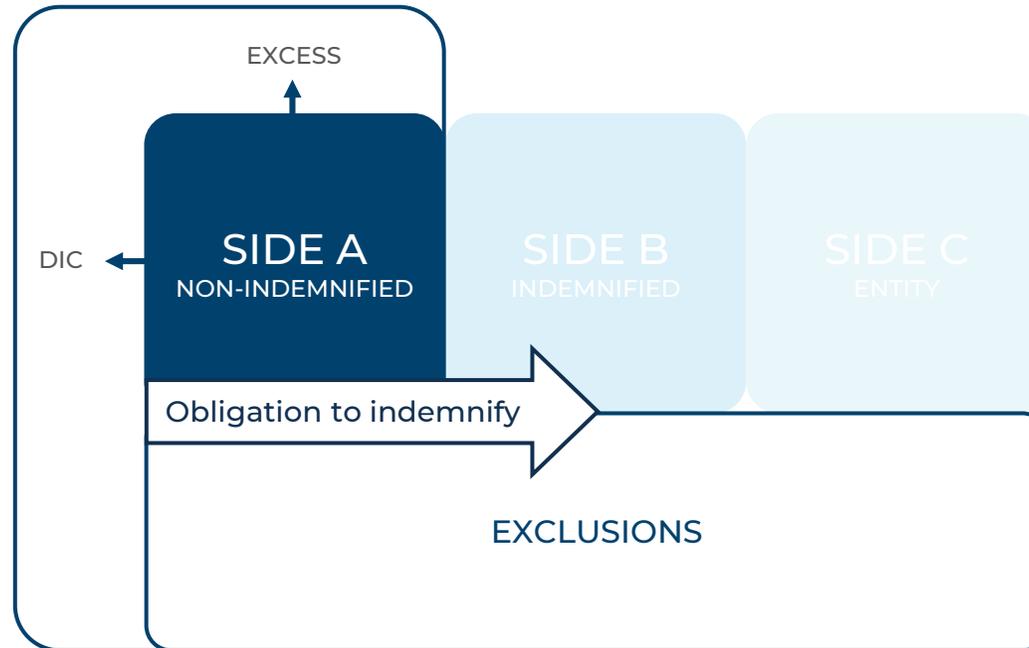
When a company is **unable** to or **chooses not** to indemnify  
the directors and / or officers

# Side A DIC: how it works



# Side A DIC: how it works

- Exclusionary language
- Denial of claim
- Cancellation / rescission
- Inability to play
- Derivative actions





# Derivative action

a claim **brought by one** shareholder or D&O **against another** D&O in the name of and for the benefit of the company

*Derivative actions seek redress for a breach of fiduciary duty, gross negligence, mismanagement or other serious matters by a D&O where the company declines or fails to address the matter*

The logo features the text 'PG&E' in a bold, sans-serif font. The 'P', 'G', and 'E' are white, while the ampersand '&' is a golden-yellow color. A white triangle points upwards from the top of the ampersand, extending towards the top center of the image. The background is a solid blue color.

PG&E

**yahoo!**

theranos

Mismanagement

Misrepresentation

Sexual harassment

Data breach

Wage  
&  
hour

Side A DIC is for  
any D&O

Public, private, non-profit



Derivative claims are **not only about** financial loss,  
but the result of an action (or inaction) by a D&O

# What to look for in a policy

Non-cancellable

Non-rescission

Built-in reinstatement

Non-presumptive language

Drop down in 60 days

Exclusionary language

# Any questions?

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