The Devil is in the Defense

I attended many sessions at the PLUS D&O Symposium today and yesterday. One of the topics that came up repeatedly is the mind-boggling amount of money spent on defense of D&O cases.

I have often heard that over 90 cents of every dollar an insurance company pays out is dedicated to defense expense across all professional liability lines. This may well be an accurate number.

The topic of discussion made me think of one thing in particular: If all of our underwriters know and understand that defense expenses are the major part of loss, and they are within the limits -- why do carriers focus on an insured's assets or revenues as a benchmark for how much insurance is "enough", or even allowable?

As brokers, we cannot ever say to an insured "you don't need that much insurance". But carriers can sure tell us that they don't want to put up a certain limit. We have generally accepted the asset level or revenue level benchmark, and the carrier's argument that they don't want the policy to be the biggest asset as valid.

Yet in the face of runaway defense costs, and a real issues with consent to settle, reputational harm and copycat suits, is it proper to cap an insured's limit based on their assets (ostensibly the maximum probable loss that a plaintiff would aim to recover), instead of what it would cost to defend a claim seeking the maximum probable damages?