

Directors and Officers Liability

? Frequently Asked Questions

Why Buy D&O Cover?

Legislation and corporate governance place far more onerous responsibilities on Directors and Officers than before, making them liable in their personal capacity for business decisions. Directors and Officers Liability cover is important as it:

- provides financial protection against lawsuits that could threaten the sustainability of the Insured's business;
 - enhances the credibility and brand of the Insured as it assures their clients and investors that there will be support if an error or Wrongful Act occurs.
 - enables Directors to undertake decision making to promote the growth of the company without the fear of paying damages if sued in their personal capacity.
 - provides cover if a claim against the Insured Person(s)'s lawful spouse is included in a claim against the Insured.
 - gives access to professional advice in handling claims. There are often frivolous claims that can easily be rebutted.
 - enables your business to keep operating whilst handling claims for Wrongful Acts and protecting your reputation.
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How do Legislation and Corporate Governance impact the fiduciary duties of Directors and Officers?

Legislation: The Companies Act of 2008

The Companies Act of 2008 now holds a director personally liable for wrongful decisions, lending itself to accountability. Previously personal liability was reserved for sole business enterprises and partnership and the legal liability of a Company rested within the Company itself. This is no longer the case.

- It is important to have both an understanding and appreciation for the responsibilities placed on a Director.
 - No matter the extent of business acumen or the degree of prudence used when making a decision, wrongful decisions do occur, and they often have financial implications.
 - It is important for a Director to make good decisions and to not be risk averse.
 - Buying a D&O Liability policy gives Directors the confidence to carry out their duties and make decisions in the best interest of the business, knowing that they will be indemnified in their personal capacity in case of a Wrongful Act claim. The policy responds to legal costs, investigation costs, and court settlement awards.
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Corporate Governance and the King IV Report

The King Report is a code of corporate governance principles that influenced the way effective and ethical leadership is being defined and raised the expectation that Directors should steer a company to achieve sustainable economic, social and environmental performance.

Whilst the King corporate governance codes are not enforced by law, many of these principles have now been encapsulated in the Companies Act.

Buying a D&O Liability policy gives Directors the assurance of personal indemnity should their acts not satisfy the "Apply and Explain" approach required by the King IV Report. This approach assumes that entities are applying each Principle and ought to be able to explain how this was achieved.



What is required of a Director in terms of Corporate Governance and Legislation?

The expectations of a Board of Directors are very high:

According to the King Code IV, the key functions of the Board of the Directors are:

- Strategic decision making
 - Ensuring management implements these strategic plans
 - Ensuring the effective control of the company.
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The Companies Act of 2008, Section 76(3), further states that a director of a company, when acting in that capacity must perform the functions of a director;

- In good faith and for a proper purpose
 - In the best interests of the company
 - And with reasonable care - with the same degree of care, skill and diligence that may reasonably be expected of any other Director in a similar position and having the same general knowledge, skill and experience of that Director.
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Who needs Directors and Officers Liability cover?

Directors and Officers Liability cover applies to Private Companies, Public Companies, Close Corporations, Non-Profit Organisations and Non-Governmental Organisations.

The following persons will require Directors and Officers liability cover:

- any natural person who has been, is or will become duly elected or appointed Director or Officer of the Insured;
 - any employee of the Insured, but only to the extent that such employee is acting in a managerial or supervisory capacity or Outside Directorship, or with respect to any Claim in which such employee is named as co-defendant with a Director or Officer;
 - any natural person who has been, is or will become duly elected or appointed Trustee of the Insured;
 - a member of a Close Corporation;
 - retired Directors and Officers.
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What is the implication of the Duty of Reasonable Care?

Directors are expected to carry out their duties with the same degree of care, skill and diligence that may reasonably be expected of any other director in a similar position, and having the same general knowledge, skill and experience of that Director.

Directors are not only tested on what they know, but what they ought to have known. Lending itself to Accountability. No longer can you say that you didn't know, because you ought to have known.

Who can sue a Director?

There are a wide range of stakeholders who have vested interests in the successful running of a company. These stakeholders are therefore likely to hold management liable for any errors or reckless management decisions. It is for these reasons that claims brought against a director can arise from either internal (employees) or external stakeholders (i.e., shareholders, customers, Government and Regulatory authorities and competitors).

Shareholders are part owners of a company and provide the necessary capital for the successful performance of the business. Whilst Directors and Officers are responsible for creating and implementing strategies, Shareholders carefully monitor and measure these decisions through the financial performance of the business. Should Shareholders find themselves unhappy with the performance of the business, they are entitled to take steps to rectify the situation and protect their investments.

Employees are an integral part of any organisation and therefore Employment Practices Liability is an exposure faced by all organisations no matter the size. Whilst most Employment relationships are protected by adherence to Labour Laws as well as fair and measurable Human Resource policies and procedures, there will always be an element of exposure. Often these exposures are born out of opportunistic claims, but no matter the root cause of these claims, Directors and Officers are exposed to a lawsuit.

Customers are necessary for the survival of any business. This therefore means that a disgruntled customer or customers could also result in the demise of a business. This could arise from customers feeling as though they have received sub-standard service, been taken advantage of or treated unfairly. Should they feel strongly about this, Directors and Officers are exposed to the legal action that may be brought against them.

Government and Regulatory authorities are required to establish and monitor the legal environment that business operate in, as well as their adherence to these policies. Breach of these policies is not taken lightly and often results in the Executives of businesses held accountable for this.

Competitors are part of any business environment. It makes sense that for the Eco-System of the business world to sustain itself, rules are required to ensure that all stakeholders can trade freely and fairly. Healthy competition is therefore pertinent to the business world. Price Fixing and Uncompetitive Behaviour is carefully monitored, and any infringement will result in legal action. Often behaviours are perceived to be anti-competitive. Allegations made against Executives, result in legal and investigations costs as well as cost arising from the claimant seeking compensation for damages incurred.

How much D&O Liability cover should be purchased?

It is difficult to evaluate how much cover is enough, however, the more cover the more peace of mind. Ultimately it may come down to affordability. Some key factors to consider in determining the amount of cover required, are:

- Regulatory Environment
 - Stakeholders
 - Company Growth / Company Reductions
 - The nature and type of business
 - Potential Liabilities – Creditors
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What are the Underwriting Considerations when assessing a Directors and Officers Risk?

Some considerations include but are not limited to the below:

- The Financials of the company
 - The reputation of the client
 - Industry Risk
 - Macro-Economic Factors that the country, industry and business are faced with
 - Claims History
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Why are the financials of the company one of the underwriting considerations when assessing a Directors and Officers risk?

This is necessary because as Underwriters, we are establishing the success of the management decisions of the Board. The financial statements could then be considered the "report card" of the Directors. A financially sound entity is reaping the benefits of good decisions and a company well steered.

What does Directors and Officers Liability cover?

The policy is immediately triggered when there is an allegation brought against a Director. The policy will respond to legal defence costs as there are large costs, even when proving one is innocent. Whilst the policy does not protect you from a criminal point of view, it will cover actual Wrongful Acts as well, as long as they were not intentional.

What is a "Wrongful Act"?

A Wrongful Act is an error in your decision or an omission that has resulted in loss. Examples of a Wrongful Act:

- It could be an omission with an employment related issue e.g., a promotion was overlooked, and this has led to an employee related lawsuit;
 - It could be an error, e.g., a product offering that has proved to be more of a cost than profit generating;
 - It could be a violation of Regulation, e.g., a listed company having not updated the stock markets with events that occurred within the company that would have affected the company stock value. This could be the Sens report not updated about changes regarding the change of auditors, the appointment or resignation of a board member, or the change of a supplier or vendor.
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What is "Defence Costs"?

Claims against Directors do not always lead to damages. This is where a D&O Liability policy can help the Insured, as we can provide the legal assistance and expertise to defend the Executive against such claim. The Defence costs are the costs of such defence and is included in the D&O Liability Insurance policy.

What is Side A, Side B and Side C cover?

Directors and Officers Liability Insurance consists of Side A, B and C cover:

Side A – Directors & Officers Individual Cover:

Side A cover indemnifies the Executives directly when the company is not able to do so. An example of when this section of the policy is triggered, is during company insolvency. The company itself may not be able to pay for the defence or compensation of third parties on behalf of Executives and therefore the Insurer will protect the Executives under Side A cover.

Side B – Company Reimbursement Cover:

Side B cover is triggered when a company incurs expenses in defending their Executive team, as part of its corporate duty. The Insurer will reimburse the company against these expenses under Side B cover.

Side C – Securities Claims Liability Cover

This section of cover is triggered during shareholder related disputes. The purpose of Side C cover is to protect the company against legal and claim settlement costs whilst defending the decisions taken by its Executive team.

What does "Security" mean?

"Security" means any shares and includes stock and debentures convertible into shares and any ownership rights or interests in a company.

What is a Securities Claim?

Any claim brought by one or more shareholders of the Insured, in their capacity as such, alleging a violation of any common or statutory law; or based upon, arising out of or attributable to the purchase or sale of, or offer to purchase or sell, any Security issued by the Insured.

What Automatic Extensions are available under a Directors and Officers Liability policy?

The following extensions are automatically included when you buy Directors and Officers Liability insurance:

Estates and Legal Representatives - covers claims for Wrongful Act made against the estates, heirs, legal representatives or assigns of any Insured Person(s) who are deceased.

Spousal Liability - cover if a claim against the Insured Person(s)'s lawful spouse is included in a claim against the Insured.

Safety Legislation and Corporate Homicide - reimburse the Insured for the Defence Costs which they are legally allowed to pay on behalf of an Insured Person(s) caused by

- a Claim under safety legislation (or similar legislation in any other jurisdiction) against an Insured Person(s) for a Wrongful Act or
- a Claim alleging homicide against an Insured Person(s) for a Wrongful Act.

Extradition Costs - Costs of defending extradition proceedings.

Legal Advisor - The provision of professional advice or services of any internal legal adviser.

Emergency Costs - In the event that the Insured is unable to contact the Insurer to obtain consent to authorise Defence Costs and Expenses following a Claim, the Insurer will reimburse those costs.

Deprivation of Personal Assets - We will pay directly to service providers expenses incurred by an Insured Person(s) relating to schooling, housing, utilities and personal insurances for a period not exceeding 12 months commencing 30 days after the execution of an interim or interlocutory order confiscating, controlling, suspending or freezing rights of ownership of, or creating a charge over, real or personal assets of such Insured Person(s).

Public Relations Expenses - pay fees, costs and expenses of public relations consultants, crisis management firm or law firm in order to prevent or limit adverse effects or negative publicity.

Shareholder Derivative Actions (Pollution) - cover is granted in respect of Loss arising from shareholder derivative actions as a result of Pollution.

Injury and Damage Defence Costs - pay the Defence Costs of an Insured Person(s) in any instance where the general liability insurance effected by the Insured fails to respond.

Acquisitions and Mergers - If during the period of insurance, the Insured creates another organisation or acquires any organisation by merger such organisation and its Insured persons will be covered.

Retired Directors and Officers Cover - indemnify any retired director or officer in respect of Claims brought against such person.

Non-Executive Directors Protection - In the event of Leppard voiding this contract from inception or from the time of any variation in cover due to fraudulent conduct, non-disclosure, misrepresentation or intent to deceive by the Insured or one or more of the Insured Person(s), We shall maintain cover for each non-executive Insured Person who is covered under this contract until the expiry date of the contract.

Tax, COID and UIF - Loss arising from the Insured Person(s)'s personal liability for unpaid taxes, compensation for occupational injuries & disease and unemployment insurance fund contributions where the Insured have become insolvent.

Fines and Penalties - pay on behalf of the Insured Person(s) any civil fines and penalties imposed on such Insured Person(s) by law.
(This is on the provision that Insurers are legally allowed to do so.)

What Optional Extensions are available at underwriter's consideration?

Employment Practice Liability - provides indemnity in the event a claim is made by employee for Breach of Labour laws, breach of duty of care, defamation of an employee, discrimination or harassment towards an employee and breach of employee confidentiality.

Outside Directorship Liability - provides cover for the Wrongful Act of Directors who sit on the board of outside entities at the behest of the Insured.

Pollution Defence Costs - cover in respect of Defence Costs incurred in connection with actual, alleged or threatened discharge, release, escape, seepage, migration or disposal of Pollutants.

Public Finance Management Act - cover is granted to the Accounting Officer and Accounting Authority (as defined by the Public Finance Management Act, sections 36 and 49 respectively) in respect of claims made as a result of a wrongful Act.

USA / Canada - covers Wrongful Acts committed and Claims arising out of this region.

What does "Claims Made" mean?

Claims first made against the Insured, during the Period of Insurance, arising out of an insured event occurring on or after the Retroactive Date of cover. Once the policy is cancelled or lapsed, there will be no cover in place to respond to any claims, irrespective of when they occurred.

What is the significance of a Retroactive Date on a Directors and Officers Liability policy?

The retroactive date is the date inserted onto the claims made policy in terms of which claims arising out of management decisions made prior to this date are excluded from cover. The retroactive date is normally the date of the Insured's first Claims Made policy issued and renewed without interruption, irrespective of prior Insurers, but subject to previous cover being of a similar nature and providing insurance for the same type of events. Where the Insured has been in business without insurance cover, retroactive cover can be purchased by the Insured. Leppard may be willing to backdate the cover by one or two years within reason and at an appropriate price. The retroactive date would then be the inception date of the backdated cover.

What basis of cover is available on a Directors and Officers Liability policy?

Aggregate – this is when all the claims paid on the policy are accumulated over the insurance period; payment of claims will cease once the specified limit has been reached.

Aggregate Plus Reinstatement – claims (whether one or many) will be accumulated over the insurance period and paid in total up to the specified limit; once this limit has been reached / exhausted, the specified limit is Reinstated up to the original limit so that the insured will still have cover for any future claims that may occur during the insurance period.

What is a deductible?

The amount borne by the Insured as the first part of a claim.

What constitutes a Directors and Officers Liability claim?

- a written demand, or
 - a civil proceeding including third party proceeding, counterclaim, or arbitration proceeding, commenced by the service of a writ, summons, or similar proceeding, or
 - a criminal proceeding commenced by the laying of charges or similar process, or
 - a formal administrative or regulatory proceeding commenced by the submission of a notice of charges, formal investigative order or similar document, or
 - any arbitration for a Wrongful Act, including any appeal.
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When should a potential matter be notified?

The Insured should give written notice thereof to the Underwriting manager as soon as reasonably possible. The Insured Person(s) must include with such notice a description of the circumstances or Wrongful Act.

Which entities require the Public Finance Management Act Extension?

The **Public Finance Management Act, No. 1 of 1999** regulates the management of finances in **national, provincial government and Public Institutions**, and therefore only the aforementioned entities require this extension.

What is outside directorship liability?

The liability of an Insured person(s), who sits on the board of an outside entity, at the behest of the Insured.

Are the Directors & Officers of Subsidiaries included?

Yes, any subsidiary of the Insured whereby the Insured has a Majority shareholding or Majority Voting rights is considered a subsidiary of the Insured and therefore included in cover.

What are Standard Directors and Officers Liability Exclusions?

Leppard Underwriters will always be willing to consider requests for amendments to cover, risk dependent.

- Asbestos Exclusion
 - Commissions and Bribes Exclusion
 - Cyber and Impersonation
 - Employment Practice Liability Exclusion
 - Fraud and Willful Violation Exclusion
 - Initial Offering / Secondary Offering / Prospectus Exclusion
 - Insolvency Exclusion
 - Insurance Exclusion
 - Major Shareholder Exclusion
 - Money Laundering Exclusion
 - Nuclear and War Risks Exclusion
 - Pension, Share Option and Trust Exclusion
 - Personal Profit Exclusion
 - Pollution Exclusion
 - Previous Litigation Exclusion
 - Previous Claim Exclusion
 - Infectious Disease Exclusion
 - Professional Services Exclusion
 - Outside Position Exclusion
 - Sanctions Exclusion
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