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## Directors' & Officers' Insurance – The Claims Experience

### Introduction

Directors' & Officers' insurance (D&O) is a personal insurance purchased by the employer for the benefit of its directors and officers. ITIC's D&O product protects both individual directors from claims against them in person and also the company that has to indemnify these senior staff. For a comprehensive understanding of the terms and scope of ITIC's D&O insurance, please read the simple three page insurance policy available from ITIC's website. However, the following claims examples are provided to illustrate how D&O insurance could benefit you as a member of ITIC.



### Claims from regulatory authorities

Health and safety in the workplace, statutory accounting and tax provision, compliance with governmental and regulatory authority requirements; in the modern business world, more and more professional corporate governance is expected of individual company directors. ITIC's D&O policy includes legal costs coverage to help respond to regulatory inquiry.

A company director received a letter from the government authority responsible for overseeing the annual registration of company accounts. The letter suggested that the director had submitted incorrect information and a fine was likely. An inquiry began. With the agreement of D&O underwriters, assistance was provided by a firm of consultants to show that no such breach of regulations had occurred.

### Associated companies

A director of a marine services company was required by his employer to also sit on the Board of Directors of another company, to whom corporate services were provided. Another director was also asked to sit on the Board of the local Port Authority.

Rather than rely upon any other D&O policy, both directors agreed an "associated directorship" extension whereby their additional directorships were also insured under their own ITIC D&O insurance policy.

### Claims from third parties

Commercial partners, customers or even members of the public might consider bringing a claim against an individual person rather than the company.

A marine and transport consultancy contracted to provide services to an oil major. It was later alleged that a director of the consultancy had breached the confidentiality provisions of the contract by passing over sensitive commercial information to a competitor. The consultancy services were terminated and a significant legal action commenced. This alleged not only breach of contract but also a "wrongful act" on the part of the responsible director of the consultancy, thereby resulting in financial loss for the oil major. The individual director denied that he had done anything wrong and asked his employer to indemnify him.

The employer approached D&O underwriters for support. Insurance coverage was provided on the basis that an allegation of a "wrongful act" had been made against an "insured person" (company director). The allegation of misconduct was not admitted, nor had it been proven in final adjudication. The company was obliged to indemnify the director until or unless his misconduct was established. D&O coverage was provided under the company reimbursement provision of the D&O policy. A firm of defence lawyers was appointed together with D&O underwriters. Although the oil major's claim was upheld in the first instance court, it was overturned on appeal and the director was cleared of the allegations made against him. The cost of defence was, however, significant, in the region of USD 500,000.

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### Claims from staff (Employment practice liability)

Personal claims against individual directors and officers can be brought by staff who may allege that they were discriminated against (age, gender, religion etc) or had their employment terminated unfairly.

A marine and transport services company made the difficult decision to reduce the number of its staff. Business volume had declined and this was the only way forward. On receiving notice from the company, several members of staff consulted an employment lawyer and subsequently began a legal action against the company and the individual directors responsible for their dismissal.

At the same time, a member of staff who had also been dismissed began a separate legal action. Her allegation was that one particular director had always discriminated against her on the grounds of her being female and of a different religious faith. She considered that this was the reason why she had been made redundant.

D&O underwriters were approached and lawyers appointed to defend the allegations against the individual directors. An allocation of costs was agreed for the defence of the company (not itself insured under a D&O policy) and the defence costs for the "insured persons" i.e. directors. At the subsequent employment tribunal, the individual directors were cleared of any wrongdoing and the company reached a settlement with the former employees. Despite the outcome the D&O defence costs for the individual directors were significant and were met by the policy.



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### Claims from shareholders

D&O insurance responds to claims brought against individual directors and officers by shareholders of the company. Claims from shareholders often follow a worse than expected financial performance of the company.

A ship management company, and all of its Board of Directors in person, received such a claim from its shareholders. This alleged that one or more directors were in breach of their duty to act in the best interests of the company when they failed to ensure that the company had a reasonably comprehensive liability insurance programme in place to protect its assets. The year before two incidents had occurred. An employee sadly had been killed in a car crash whilst on a business trip. Employment liability underwriters had declined to pay the family compensation based on a provision in the policy which required the company to declare certain information at renewal. Due to an oversight, they had failed to do so. Later that same year, fire damage to one of the company's offices had not been reimbursed due to the insolvency of the insurers.

Both claims had resulted in significant losses on the balance sheet of the ship management company. A sum close to USD 1 million had been paid.

The individual director on the Board responsible for "risk management" received a claim, in person, from the company shareholders. D&O underwriters agreed to consider the claim on the basis that the alleged "wrongful act" required a defence. Shortly before going to trial, the case was settled. D&O underwriters agreed that although the claim could be defended, there was a significant chance the shareholders would be successful in bringing their action. As a result, a settlement was negotiated for two thirds of the claimed amount.

These examples are illustrations only. They do not substitute the provisions of the insurance policy, which will be interpreted on a case by case basis.

If you would like a quotation for ITIC's D&O insurance, please contact your insurance broker or your underwriter at ITIC.

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