


## WHAT D&O INSURANCE DOES & DOESN'T DO

**In Executive Risks, ignorance isn't bliss, it's expensive. So it pays to know what your D&O insurance policy does and does not cover. Probably the biggest misconception, at companies large and small, is the view that the D&O policy provides coverage solely for securities-related claims.**

While securities suits may comprise the majority of traditional claims at public companies, the reality is that they are not the only triggers of D&O coverage for executives at either public or private firms.

The danger in believing that a D&O insurance contract covers only securities claims is the likely failure to submit other claims that the policy could/would cover. Another major problem is the potential for under-insuring the exposure by underestimating the risks to which the policy would respond. Both of these errors can be highly costly.

A few examples of non-securities D&O claims.<sup>1</sup>

- Certain executives, along with the firm, are named in alleged price-fixing litigation.
  - The firm's board of directors refuses an offer to buy the company ("wrongfully" in the eyes of some of the organization's stakeholders); litigation ensues.
  - In a high stakes intellectual property battle, allegations are made that executives at a company intentionally infringed on the intellectual assets of another firm.
  - One's joint venture partner alleges that one's officers breached their duty of loyalty and duty of care to the joint venture entity.
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- Lenders allege fraudulent misrepresentation by a company executive in a loan application, when the organization is unable to repay the monies lent to it.
  - Regulators allege that the company and some of its officers misled it concerning various of the firm's business practices, and that the company's directors were negligent in their duty.
  - A highly placed executive charges that he or she was wrongfully severed from the organization due to actions by certain other directors or officers.
  - Clients or customers allege a pattern and practice of misconduct by the organization and the failure of the board to detect and deter this behavior.



- The Securities and Exchange Commission charges a company and its senior officers with aiding and abetting another company in artificially pumping up *the other company's sales* figures.

Important tip: when you see “director” or “officer” in a claim matter, think D&O coverage. If the matter is not excluded, there may well be coverage for the director or officer.

## FORMS MATTER

When seeking a general understanding of what a traditional D&O policy may cover today, one starts with the threshold question of whether the organization purchasing the coverage is publicly traded (or listed) or privately held.<sup>2</sup> This fundamental difference will dictate which contract form will be used and be highly indicative of the breadth of coverage granted to the organization. However, it will **not** likely have **any** impact on coverage extended to the directors or officers themselves. This bears repeating: typically, whether one is on a public or private company D&O form, for the Ds and Os, the coverage is basically the same. What is different is the coverage granted to the organization or company, with broader coverage given to private firms and narrower coverage to public companies. At public companies, in fact, coverage for the company itself (or entity in D&O-speak) is limited to securities claims, while the coverage for the directors and officers, as we’ve been discussing, is far more generous.<sup>3</sup>

## YOU CAN'T PLEASE ALL OF THE PEOPLE ALL OF THE TIME

Fundamentally, D&O policies were written to cover, as the name suggests, the firm’s directors and officers. Where an individual director or officer, in his or her official capacity, is named in a claim (anything ranging from a written demand alleging a wrongful act to a law suit or formal investigation), he or she is generally covered unless there is a relevant exclusion that would knock out coverage. It is when the company or entity is also included in the claim that confusion can arise. This is because the company will often have narrower coverage than the individuals – and may not be covered at all in a given claim. Where both the individuals and the entity are in a D&O claim, there may be the need to allocate costs and expenses between the covered individuals and the uncovered entity.

If you go back and consider the above examples of non-securities D&O claims, you will see that the organization or entity was involved in each of the scenarios provided. While there is potential coverage for the directors and/or officers in these examples, a different, separate analysis would be needed for the entity. The result can be a good news/bad news situation: good news for the company to find coverage, but bad news, potentially, for the individuals who then need to share the limited D&O coverage available.

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- <sup>1</sup> By “securities claims” in this context, we mean claims relating to the organization’s own securities. Some view this even more narrowly as shareholder litigation, but this ignores the growing body of D&O claims from bondholders, who should not be dismissed lightly.
  - <sup>2</sup> Alternatively, when considering how any given D&O policy is likely to respond, it is very important to **always** look to the specific wording in the particular policy in question.
  - <sup>3</sup> You might well think that this is the origin of the confusion about D&O policies only covering securities claims, but, sadly, this misconception pre-dates entity coverage or coverage for the company itself in public company D&O forms.