



GENLIB

SPECIALISED INSURANCE & INNOVATIVE SOLUTIONS
FOR BROKERS

DIRECTORS AND OFFICERS LIABILITY

("D&O")

Insured through:

Santam Ltd.

Western National Insurance Company Ltd.

New National Assurance Company

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WHAT IS DIRECTORS & OFFICERS LIABILITY

Directors & Officers Liability (often referred to as “D&O”) provides financial protection for the Directors and Officers of a company in the event they are sued in conjunction with the performance of their duties as they relate to the company.

Since a director can be held personally responsible for acts of the company, most Directors and Officers will demand to be protected rather than put their personal assets at stake.

The D&O cover offered by Genlib is aligned with the Companies Act 71 of 2008. Section 78 (3) of the new Companies Act allows for the indemnification of Directors and the purchase of D&O Liability insurance.

King III and the introduction of the Companies Act in 2008 has rendered Directors and Officers Liability insurance crucial for all companies regardless of size and incorporation.

Directors and Officers now find themselves in a far more onerous position than ever before, with legislation holding them more accountable for any wrongful or negligent actions, as well as breaches of their fiduciary duties.

What are the responsibilities of Directors and Officers:

- To act :
 - ✓ in good faith and for a proper purpose
 - ✓ in the best interests of the company
 - ✓ with the degree of care, skill and diligence that may reasonably be expected of a person carrying out the same functions in relation to the company as those carried out by the director having the general knowledge, same skill and experience of that director – a reasonable man/women test.

WHO NEEDS THE COVER, AND WHAT IS AT RISK

Who needs the cover ?

- ✓ Past, present and future directors
- ✓ Employees and volunteers in a managerial / supervisory capacity, audit committee or risk committee
- ✓ President / CFO / CEO / Company Secretary
- ✓ Non-Profit organisations : President / Secretary / Treasurer

What is at Risk ?

- Personal liability : property, cars, assets, savings & pension funds are at risk
- Spouse, heirs and estates (may be named in a suit)
- Financial implications of defence costs could be catastrophic
- No other insurance policy will cover D&O exposure
- Should your assets be frozen, are you able to cover the costs of schooling, housing, utilities and personal insurance ?

WHAT IS THE FUNCTION OF THE POLICY

Protect the decision makers against **ALLEGATIONS** of

- Wilful misconduct and breach of trust
- Reckless trading
- Breach of Authority
- Illegal acts (if found guilty, insured would have to reimburse insurer)
- Discrimination
- Sexual harassment

Or to **INDEMNIFY** the Insured against

- Wrongful acts – which include Breach of duty E&O, misstatement, misleading statement, Errors in judgment
- Damage and Injuries to third parties (Legal defence costs)
- Legal defence costs – it's not just about damages/ liabilities

Where could claims come from ?

- **Shareholders:** accounting fraud, dividend declaration, financial performance (or lack thereof), breach of fiduciary duties, inadequate disclosure, insider trading, investment / loan decisions, bankruptcy, mergers & acquisitions
- **Employees:** breach of contract, compensation duties, defamation, discrimination, employee benefits, employee conditions, failure to hire or promote, harassment, whistle blowing, wrongful termination
- **Competitors:** anti-competitive violations, business interference, contract disputes, copyright / patent / trademark infringements
- **Customers:** contract disputes, debt collection, fraud, refusal of credit
- **Liquidators / administrators / creditors / regulators / government**

WHAT IS EXCLUDED

- × Direct cost of bodily injury or property damage (But will cover legal defence costs)
- × Trustees
- × War/ terror where these impacts a decision maker
- × Illegal / criminal acts
- × In fighting where one director sues another
- × Stock market related issues on a listing
- × Where shareholders holding 25% or more of a shareholding, influence decisions of a director then sue the director for making the decision.
- × Where another policy is in force
- × Basic investment performance
- × Fines/ penalties
- × Where bribes have been paid
- × Environmental impairment (But there is an optional extension to cover this)
- × Wilful misconduct
- × Wilful breach of trust

EXTENSIONS

There are always limitations to a policy, and it is therefore always very important to understand what additional extension options exist. These extensions may also highlight additional exposures an insured may be exposed to and should always be considered.

Automatic Extensions

Estates and legal representatives

- If the Insured Person dies or is sequestered then this policy will cover the estate as if it were the Insured Person.

Defamation

- Includes libel, slander and defamation of character attempted by any Directors in their respective capacities as a Director of the Company.

Newly acquired subsidiaries

- Provides cover for newly acquired subsidiaries within the policy period (providing they do not exceed 25% of the company's turnover).
- Coverage only applies for Wrongful Acts committed or alleged to have been committed after such creation or acquisition.

EXTENSIONS (CONTINUED)

Optional Extensions

Investigation and Inquiry Costs

- Cover is extended to include Costs, Charges and Expenses incurred by the Insured, for legal representation arising out of attendance at any official investigation, examination, enquiry or other proceedings.

Reinstatement of limit of indemnity (Aggregate Reinstatement)

- When the limit of indemnity is reduced by a claim, this extension will automatically reinstate it to the original amount. This process will continue until the policy has paid twice the original limit of indemnity. This extension does not increase the limit in respect of any one claim or series of claims arising out of a single wrongful act or related acts.

Bail bond costs

- Bail Bond Costs means the reasonable premium (excluding any required collateral) for a bond or other financial instrument to guarantee an Insured's contingent obligation for bail required by a court following upon the Occurrence of a Wrongful Act.

Bodily injury and property damage (only legal defence cover)

- Where the Insured company has purchased, and paid the premium, for a general liability policy and that policy failed to pay a legitimate claim, then this extension would cover the Insured Person's legal defence costs if the Insured company was unable to pay them.

EXTENSIONS (CONTINUED)

Crisis Communication costs

- Crisis Communication Costs mean any reasonable professional fees, costs or expenses of any accredited strategic communication consultant, retained by an Insured with the Insurers prior written consent (which shall not be unreasonably withheld or delayed), following upon the Occurrence of a Wrongful Act.

Deprivation of asset expenses

- The Insurers will pay some of the Insured Person's necessary living expenses (Schooling, Housing, Utilities and Personal insurances) for up to 12 months after the Insured Person's assets have been seized.

Emergency Defence Costs & Legal Representation Expenses

- Covers legal expenses incurred before it was possible to obtain the Insurers' permission. Example: opposing an urgent matter over a weekend.

Extradition proceedings

- Covers the Insured Person's expenses in resisting an extradition application made by a foreign government.

EXTENSIONS (CONTINUED)

Prosecution costs

- Covers the legal and other professional fees, costs and expenses, incurred by an Insured to bring legal proceedings to obtain a discharge or revocation.

Retired Directors

- If the Insured cannot renew or replace his D&O policy with any other policy affording directors liability or similar liability cover, Insurers will allow a Discovery period of 12 months after the date of such non-renewal to inform them of any claim first made against any Director of the Company who retired before the date of non-renewal.

Outside directorships

- The policy is extended to any Insured in respect of any Wrongful Act committed by such Insured whilst serving in the capacity of Director of any other company.

HOW MUCH COVER IS REQUIRED

- ✓ Our limits are up to R 500 million.
- ✓ As much as is affordable to the company, remember legal defence costs can easily exceed R 10 million.
- ✓ Remember to buy more cover as the company grows.

A SOUND KNOWLEDGE OF CORPORATE GOVERNANCE IS NECESSARY IN ORDER TO UNDERSTAND THE OBLIGATIONS AND DUTIES OF A POSITION OF AUTHORITY. THE KING COMMISSION PROVIDES FOR A SOUND UNDERSTANDING OF CORPORATE GOVERNANCE.

FREQUENTLY ASKED QUESTIONS

Are a company's subsidiaries covered under the D&O policy?

Yes, subsidiary boards are covered. There is also provision for automatic inclusion of newly acquired or created companies; however, the Insurer would have to be notified of these.

What are derivative and class actions, and are they covered under the D&O policy?

A derivative action is when the shareholders sue a third party (such as a director or officer) on behalf of the company.

A class action is when a group of people take a person (such as a director or officer) to court. The new South African Companies Act under s157 properly introduces the concept of a class action into South African law. Any of the following persons may apply for a class action:

- Any person considered in the Act or any person acting on behalf thereof
- Any class of affected persons
- Any person acting in the public interest

The application can be made to a Court, the Companies Ombud, the Take-Over Panel, or the Commission. The application for a class action has been simplified, in that one is no longer required to act through a liquidator.

Derivative actions and class actions are both covered under the D&O policy.

The D&O policy does not cover fraudulent acts, how will a director defend a fictitious claim?

The D&O policy provides defence costs. The Insurers will decide whether to defend the director in court. Therefore, the director will not have to pay for expensive legal battles which may be drawn out for many years. Should the case be defended successfully, the director would not sustain any personal loss. However, if it is found that the director acted fraudulently, the Insurers will subrogate.

FREQUENTLY ASKED QUESTIONS (CONTINUED)

Why should private companies purchase D&O insurance?

The costs of defending legal actions may exceed the new worth of the company's assets. A judgement against a director of a private company could lead to major financial losses. Complicated conflicts of interest could arise due to the intertwined responsibilities which exist in private companies.

Who are the typical claimants on D&O policies?

There are numerous examples of D&O claimants, and these are growing as director liability is expanding. The following are a few classic examples: shareholders, investors, customers, consumer groups, competitors, unions, contractors and government.

What are some of the main exclusions on the D&O policy?

Dishonesty or fraud, questionable payments, copyright, professional indemnity, illegal profits or gains, pensions, injury, sickness, damage to property and bodily injury, and deliberate acts.

FREQUENTLY ASKED QUESTIONS (CONTINUED)

What are some typical claims examples on a D&O policy?

The types of claims against a D&O policy are extensive and continually increasing, some examples are:

- Minority shareholders allege that directors have abused their position to favour certain dominant shareholders.
- Competitor alleges that the defendant director (former employee) has misappropriated trade secrets and confidential information.
- Class action complaint from outside investors stating that directors failed to disclose material information, which could have elucidated that the company would eventually be liquidated.

Creditors allege that directors utilised the plaintiff's services for the company although the said directors were aware that the company was insolvent and would not have the ability to pay.



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