

March 2017

Management Liability

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The information provided should not be relied on as legal advice or a definitive statement of the law in any jurisdiction. For such advice, an applicant, insured, listener or reader should consult their own legal counsel.

Directors' Duties and Legal Framework

Legal liabilities of Directors & Officers

- Directors of a company have several duties and liabilities imposed on them under various provisions of the law
- Duties can be found under common law and statutes. Statutes such as the Companies Act impose on directors the **duty to act with care and skill**
- If directors are held to be personally liable, they would have to defend and pay the damages on their own

Legal liabilities of Directors & Officers

Regulators in Asia are more active and focusing on;

- Transparency and disclosure
- Financial reporting
- Board practice



All above factors deriving greater expectation of best corporate governance practice

Directors' & Officers' Liability Insurance

What is D&O Insurance?

D&O Insurance provides indemnity for the Individual Directors and Officers of a company against their legal liability to pay damages to third party claimants as a consequence of the third party having suffered financial loss through the negligent act, error or omission of the Director or Officer in his/her “managerial capacity”.

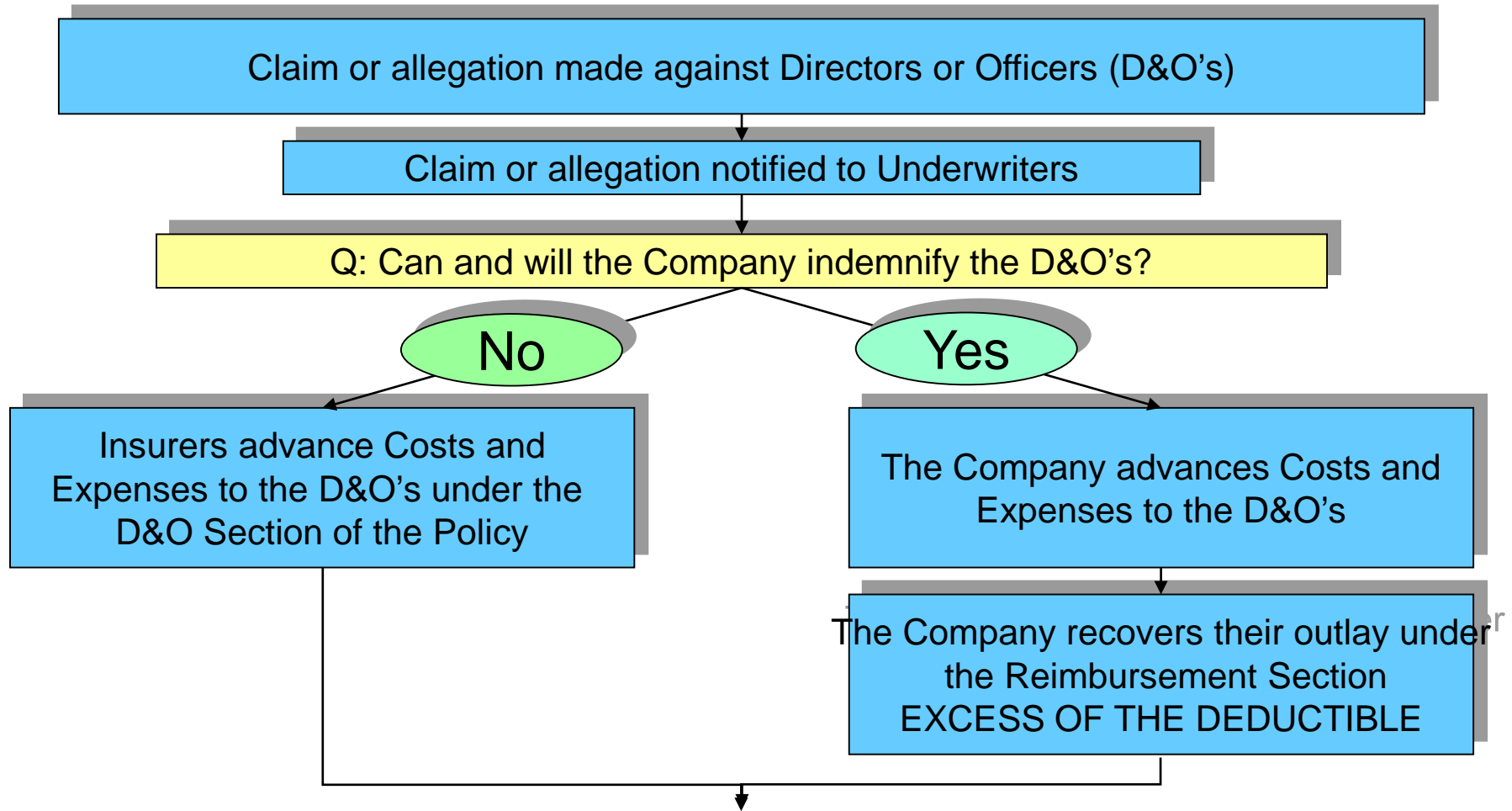
In other words, it is a “Managerial Negligence**” cover**



D&O Insurance – Insured Persons

- **All Past, Present and Future Directors and Officers (Ds&Os) of the**
 - **Insured Organisation; and**
 - **Its Subsidiaries**
- **In relation to Employment Practices Liability claims, all employees**
- **Spouses and legal representatives of Ds&Os for Wrongful Acts committed by said Ds&Os**

D&O Insurance - Structure



D&O Insurance - Structure

Liability of the D&O's is finally determined through the courts or settlement negotiations involving D&O's, The Company and Underwriters

Q: Is the Company legally able to indemnify the D&O's for their liability?

No

Insurers indemnify the D&O's under the D&O Section of the Policy

Yes

Insurers indemnify the Company Under the Reimbursement Section EXCESS OF THE DEDUCTIBLE

Claim Scenarios

Claimant Ranking

1. Third party	(30-50%)
2. Regulatory/Gov Body	(10-30%)
3. Employees	(20-30%)
4. Miscellaneous	(10-20%)
5. Shareholder	(Below 10%)

Source: various figures from different D&O insurers within Asia region

Common types of claims

- a) Shareholders:** **mismanagement, decline in investments, performance of the company, misrepresentation in offering documents, bad investment decisions**

- b) Employees:** **employment practices claims such as discrimination, harassment, libel and slander, improper working conditions**

- c) Investors:** **misrepresentation and misleading information**

- d) Competitors:** **unfair business practice, libel and slander**

- e) Regulators:** **breach of statutory provisions, market misconduct**

D&O Claim by Regulators

1. Market Misconduct:

- (a) Insider trading
- (b) Price rigging
- (c) False trading
- (d) Market manipulation
- (e) Disclosure of false and misleading information

2. Directors breaches of Statutory Duties

UBS sued by two traders fired in Singapore over rate scandal:

Two former UBS AG traders in Singapore are suing the bank for wrongful dismissal, saying the bank fired them to lessen its role in the alleged manipulation of reference rates used to price currency derivatives known as non-deliverable forwards.

Source: www.reuters.com

Employment Practice Related Claim

An ex-employee of Infosys in US filed a Sexual Harassment case against the Company and its former Director . The case was settled out of Court for US\$3 MN. D&O underwriters paid for the Director's Damages and the defence costs.

Coca Cola Sexual Harassment Claim

Miss Universe and film star Sushmita Sen alleged that she was sexually harassed by the marketing head of Coca-Cola India. Sen made the allegation soon after Coca-Cola terminated its celebrity engagement contract with her. She alleged this was being done because she had rejected the sexual overtures of a senior Coke official. Sen's lawyers also claimed a sum of INR 14.5 million by way of compensation for sexual harassment should be paid by way of charity to an orphanage of our client's choice. The sum has since been paid by Coke.

China bars GSK executive from leaving amid bribery probe:

Chinese authorities allege GSK staff bribed government officials, pharmaceutical industry groups, hospitals and doctors to promote sales

Source: <http://www.channelnewsasia.com/news/business/international/china-bars-gskexecutive/748320.html>

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Professional Liability

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Legal Framework?

Legal liabilities of Professional

- The **basis** of liability is **negligence** which means a failure to exercise a fair, reasonable and competent degree of skill as judged with reference to the standard expected of the profession.
 - An expert will be judged by the standard of experts
- Negligence arises when there is a duty of care, a breach of that duty and consequent loss or damage by the breach
- The duty of care
 - Any professional owes a "Duty of Care" to anybody who might reasonably rely on his or her service or advice. The same Duty of Care is owed whether a fee is charged or not, even if it is for an obvious secondary function or service.

Legal liabilities of Professional

....Continued

- The professional is vicariously liable for the negligence of his employees arising out of and in the course of their employment
- Liability may also arise under the Consumer Protection Act

Example: What are the liability exposures for an Architect and Engineering company?

- An Architects' duty of care extends not only to their original client, but
- Architects are also vulnerable to claims from other aggrieved persons such as potential buyer of the building, contractors or a person injured due to an alleged deficiency in the architect's design.
- Even if the claim is successfully defended, there may still be a large proportion of unrecoverable legal fees.
- And if the claim is successful, without insurance, the architect may be exposed to bankruptcy or liquidation.

BANKRUPT



LEFT WITH NOTHING...

What is PI Insurance

What is PI Insurance?

PI insurance protect Insured against financial loss resulting from liabilities for breach of professional duty by reason of a negligent act, error or omission.

This insurance contract is comprised of an operative clause, terms, conditions, definitions of cover, and exclusions that outline the obligations between the insurance company and Insured.



PI – Source of Professional Liability

- Common Law
- Civil Code
- Statute - Laws, rules, regulations etc passed by Government
- Contract

PI Cover – Who purchase?

A. Commercial Organisations like;

- Information Technology Service companies
- Property (real estate) managers
- Accountants, auditors
- Lawyers
- Media companies
- Management consultants
- Architect and Engineers
- Hospitals and Medical Professionals

PI Cover – Who purchase?

B. Financial Institutions like

- Banks / Financial Institutions
- Investment Managers / Fund Managers
- Stock Exchanges
- Financial Consultants
- Insurance / stock brokers

PI Insurance: Policy Structure

PI Policy – The Key Components

- Cover for the firm or partnership for acts of negligence - or in some cases broader civil liability/wrongful act language
- Must arise out of the professional business of the firm or partnership
- Responds to a claim made by a third party for compensation
- Covers damages/settlement and defence costs
- It is claims made cover
- Circumstances and claims can be notified
- Will contain a limit of indemnity and be subject to policy deductible

PI Policy – Various Professional Services

- Some policy forms are drafted specifically for certain common types of professions; or
- Miscellaneous PI form define services in the policy schedule – such as:
 - Accounting and audit services
 - Architect / engineering
 - Supervision
 - Management consultant
- Review to ensure definition reflects services that are performed by Insured

PI Policy - a Claim Made Basis Policy

- The Policy only covers Claims made during the Policy Period arising from Wrongful Acts committed on or after the Retroactive Date.
- Policy allows to notify any circumstances which may lead to Claims in future. Such notified circumstances are logged in during the Policy Period and insurer of that policy period will need to pay any claims related to it.
- Known Claims or circumstances before policy inception are excluded.

Common Exclusions

- Contractual liability - this is liability assumed under any express warranty, agreement, guarantee or the like unless such liability would have attached anyway.
- Personal Injury
- Employer's liability
- Property damage
- Insolvency/bankruptcy of insured
- Circumstances known at inception
- Fines and penalties
- Claims by financially associated parties - some insurers will cover these claims if they emanate from a third party

PI Claim Scenarios

Real Claim Examples:

Taiwan firm Sues Bank Over Forex Trade Losses:

A company filed a civil lawsuit to the Taipei District Court against Singapore bank for NT\$830 million (U\$42 million) over its massive losses in foreign exchange trading.

Source: <http://www.bloomberg.com/news/2012-10-05/taiwan-s-gio-optoelectronics-sues-dbs-over-forextrade-losses.html>

Real Claim Examples:

Singapore High court awards Taiwan investor US\$49m in damages:

In what could be one of the biggest legal victories to date in Singapore for the financially inexperienced investor. The Court awarded Taiwanese scientist Chang Tse Wen US\$49 million (S\$59 million) in damages plus interest and full legal costs for losses he suffered as a result of Deutsche Bank's negligent advice.

Source: <http://www.businesstimes.com.sg/premium/top-stories/high-court-awards-taiwan-investorus49m-damages-20121213>

Real Claim Examples:

Facebook IPO Fiasco to Cost Nasdaq \$40 Million:

the Nasdaq OMX Group announced it will pay \$40 million in compensation damages to brokerages that lost money because of the Facebook (Nasdaq: FB) IPO fiasco. Facebook's epic debut on May 18 was marred by technical glitches at its home exchange, the Nasdaq

Real Claim Examples: Architect & Engineers

- When: 2009
- Where: Malaysia
- Billed as the pride of the state, the RM300mil Sultan Mizan Zainal Abidin Stadium suffered a major blow when its roof collapsed



Real Claim Examples : Architect & Engineers

- When: Year 2009
- Where: India
- Metro pillar collapse incident, which claimed eight lives
- Police has charged 24 persons, including 11 senior DMRC officials, for negligence
- Investigation report reveals deficiency in preparation of structural design, especially regarding provision of less steel in overlapping



Real Claim Examples : Architect & Engineers

- When: Year 2004
- Where: Singapore
- A catastrophic cut and cover tunnel collapse occurred along a section of Nicoll Highway, where the new Circle MRT line was under construction. 4 workers were killed



Claim Issues

What Amounts To 'Insured Practice'?

Lawyers' Claim

- Insured set up branch office in Southern Malaysian State of Johor in 2007; closed it in 2008;
- 3 employee dishonesty claims notified for Johor branch;
- Loss adjusters appointed-Investigations revealed Insured allowed ex-solicitor (with expired PC) to set up branch;
- Branch effectively run by estate agents who paid Insured commissions; estate agents employed legal assistant to sign documents, but firm registered in legal assistant's name.
- Insurers determined branch was not genuine legal practice; Conduct contrary to BAR Council's Rules requiring lawyer with valid PC to run branch. Claim declined.

One Claim or Multiple Claims

Definition of One Claim in Liability Policies:

2 or more claims deemed one claim if:

- claims arise from one matter or transaction;
- claims arise from same act or omission;
- arise from series of related acts or omissions.

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One Claim or Multiple Claims

Example :

- Insured firm acted for Developer & Contractor in condominium Project— prepared S & P Agreements for purchasers, with fees paid by purchasers
- Project subsequently abandoned when contractor went bust;
- 39 purchasers sue Insured for failing to advise contractor was unlicensed and Project was not approved by authorities. **Each claim: RM250,000. Total : RM9.75M**
- Mandatory cover : RM300K ; Top up : RM1.7M = **RM2 M**

Issues:

1. Was Insured acting for developer or for purchasers?

2. Were there 39 separate claims (arising from 39 transactions), or only 1 claim?

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Notifications

Material Non-disclosure

- All contracts of insurance based on utmost good faith-failure to observe principle entitles parties to avoid the policy; i.e. insurer must be told of every fact which may influence his judgment in fixing the premium or accepting the risk.
- Additional mid-term material risk change-duty to disclose to insurers.
- Failure to disclose earlier circumstances which may give rise to a claim in renewal proposal form may mean claim will be declined in the next policy year.

Notifications

- When do circumstances become material enough or Insured to reasonably expect it to give rise to a claim and to notify Insurers?
- •P.I.policies normally renewed on annual basis-renewal form needed;
- •Renewal form requires declaration of any known claims or circumstances which may reasonably be expected to give rise to a claim.
- Insured often declare there are no known claims or circumstances—when in fact there are!
- •Insurers entitled to decline claims for non-disclosure of material facts based on renewal form.
- But...not always clear if known circumstances are sufficient to reasonably give rise to a claim!
- Test is if there is amore than 50% chance a circumstance will result in a suit.

Use of Defence Counsel

Policy usually gives Insurers right to take over the claim, but...

1. Insured may want to use own lawyer or object to Insurer's choice of Defence Counsel; If insurers agree to Insured's choice, to whom does Insured's lawyer owe a duty to, Insured or Insurer?
2. Insured's choice of lawyer may be due to friendship, commercial relationship etc...may not be competent in litigation involving professional negligence!
3. If Insured's choice of lawyer is accepted, what about advice on issues on policy coverage? Should separate Coverage Counsel be appointed?



Thanks

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