

Nonprofit D&O

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Nonprofit Directors & Officers'
(D&O) Liability Insurance:
What's New &
What You Need to Know

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Agenda

- What Is D&O Insurance Coverage & How Does D&O Insurance Fit Into the Insurance Universe?
- History of Nonprofit D&O – Changes over Time
- Why Do Non-Profits Need it?
- Claims Examples for Nonprofits
- Policy Structure and Key Policy Terms
 - When to Report & Duty to Defend
- Purchase Considerations
 - Markets
 - Pricing
 - Claims Handling
 - Additional Services

What Is D&O Insurance Coverage & Where Does D&O Fit in the Insurance Universe?

- D&O in the Universe of Insurance
 - General Liability
 - Professional Liability/Errors & Omissions
 - Media & Publishing
 - Cyber & Privacy Liability
 - Not Compulsory (like Workers Compensation; General Liability or Automobile Liability)
 - How D&O Fits Into Insurance Portfolio?

History of D&O Coverage

- General History of D&O Coverage
- Evolution of Nonprofit D&O Coverage
- Current State of Nonprofit D&O

Why Do Nonprofits Need D&O Insurance?

- The Exposures: Driven by What the Organization Does
- Personal Liability
- Duties of Directors (Care, Loyalty, Obedience)

Why Do Nonprofits Need D&O Insurance?

- Volunteer Protections
- Indemnification
- D&O Insurance Does Not Replace Good Board Governance

Nonprofit D&O Claims and Litigation

Claims Overview

- Almost triple the number of NFPs reported having a D&O claim in 2010 (35%) vs. 2008 (13%)¹
- NFP claims generally targeted at NFP Organization
- 67% of claims filed under NFP D&O policies were Employment Practices Liability related¹
- Large \$\$ are on non-employment D&O side (severity)
- Significant % of all loss \$\$ are for defense costs as opposed to damages/settlements
- NFP organizations most likely to have D&O claims—35%, compared to publicly traded companies (29%) and privately held companies (26%)¹
- Claimants can be employees, volunteers, donors, members, competitors, creditors, regulators, governmental bodies, beneficiaries of service

1. Towers Watson *Directors and Officers Liability Survey* (2010)

Individual D's & O's as Defendants

- Breach of fiduciary duty
- Negligent supervision
- Mismanagement of assets
- Conflict of interest
- Misrepresentation
- Tortious Interference

Nonprofit Organization as Defendant

- Libel/slander, plagiarism, copyright/trademark infringement, unfair business practices, anti-trust
 - Competitors and Outside Parties
- Standard setting, rulemaking, certification, accreditation – anti-trust
 - Members and Outside Parties
- Discriminatory Practices
 - Customers, Members, Vendors/Service Providers
- Breach of contract
- Regulatory Violations
- Employment practices

Policy Structure & Key Policy Terms

- Policy Structure
- Key Policy Terms & Considerations

Who and What is Covered?

Informally referred to as "D&O" insurance, but actually:

- It covers Directors and Officers, **plus**
 - employees, volunteers and committee members
 - the NFP organization itself (the Entity)
- It includes Employment Practices Liability (EPL) coverage
 - full Entity coverage
 - Third Party Liability extension

Policy Overview Functional Features

- Duty to Defend (By Underwriter)
 - Underwriter selects counsel AND manages claim
 - Underwriter has obligation to defend Insureds, even if allegations are groundless, false or fraudulent
- Duty to Defend (By Insured)
 - "Pay on behalf"
 - Underwriter pays damages and defense costs directly to claimant/ defense counsel instead of reimbursing the Insured
- Aggregate Limit
 - Finite limit for all claims made during each policy year
 - Combined/separate
- Defense Costs Inside/Outside the Limits
- Exclusions

D&O Insuring Clauses

- Clause 1 or “Side-A”: covers Insured Persons for Loss which they are not indemnified for by their Nonprofit
- Clause 2 or “Side-B”: covers Loss for which the Nonprofit is lawfully permitted or required to indemnify its Insured Persons
- Clause 3 or “Entity Coverage”: covers the Nonprofit Organization itself

D&O Insuring Clauses

The Insurer will pay on behalf of the **Insureds, Loss** on account of **Claims** first made against an **Insured** during the policy period for a **Wrongful Act** committed/attempted before or during the policy period.

What Constitutes a Loss?

Loss – covered damages, settlements and defense costs

- Typically excludes taxes, fines, penalties, cost to comply with injunctive relief, amounts due under breached contract
- Includes front pay, back pay, salary and benefits components in employment context
- Enhancements may include punitive damages, multiplied damages, certain excise taxes, pre/post-judgment interest

What is a “Wrongful Act?”

A ***Wrongful Act*** means:

- any error, misstatement, misleading statement, act, omission, neglect, breach of duty or committed, attempted, or allegedly committed or attempted by an ***Insured Person*** in his or her ***Insured Capacity*** or by the ***Organization*** or,
- any other matter claimed against an ***Insured Person*** solely by reason of his or her serving in an ***Insured Capacity***;

What Is a Claim?

A **Claim** means:

- a written demand for monetary damages or non-monetary relief;
- a civil proceeding commenced by the service of a complaint or similar pleading;
- a criminal proceeding commenced by the return of an indictment; or
- a formal civil administrative or civil regulatory proceeding commenced by the filing of a notice of charges or similar document, or by the entry of a formal order of investigation or similar document

Reporting Claims

Reporting & Notice of Claims:

As a condition precedent to any right to coverage in respect of any **Claim**, an **Insured** must give the Underwriter written notice of such **Claim**, with full details, as soon as practicable after it is first made.

Reporting & Notice

- Benefits of Timely Reporting
- Downside of Late Reporting

Purchase Considerations

- Market Pricing
- Carrier Reputation & Financial Strength
- Claims Handling
- Additional Services
- When to Report & Duty to Defend

Concluding Thoughts

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Questions

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