



**Generally, claims which occur on Directors and Officers Liability (D&O) policies do not get a great deal of publicity as quite often, part of the settlement agreement includes a confidentiality clause.**

In order to try to clear up some of the mystery over the type of incident which may occur where a D&O Policy may respond, we have summarised some actual examples of claims in this document. The events are real but the identities of the interested parties have been omitted.

### **Golf Club internet fraud**

The treasurer of a golf club was tricked by an internet fraud and paid over the entirety of the club's subscriptions to the fraudster. The treasurer was sued by the members of the club and the policy responded providing an indemnity and defence costs.

### **Life Policy did not pay out**

A claim was brought against the Managing Director (MD) and a subsidiary of the insured company

arising out of the alleged failure of the subsidiary/the MD to pay out £60,000 on a Death In Service Policy to the estate of a deceased employee of the subsidiary.

The MD personally signed some of the Death In Service documentation and a breach of trust was alleged against him personally. He was entitled to defence costs rebutting the allegations of breach of trust and the claim itself was ultimately paid by the subsidiary.

### **Financial Controller sued**

The financial controller of the insured company was seconded to another business where he committed a theft. After the business sued the financial controller and the insured, the policy responded to indemnify the insured company in respect of the full amount claimed.

### **Directors defend disqualification proceedings**

The directors of a website provider and developer, in liquidation, faced an investigation into the affairs of the company relating to the provision of allegedly false information and

accounts, and a failure to assist the administrator during the administration process.

The liquidator's investigations, pursuant to sections 235 and 236 of the Insolvency Act 1986, had to be dealt with in order to head off subsequent disqualification proceedings. The policy provided cover for the defence costs incurred during the investigation.

### **Defamation claim against a Director**

The Director of a company resigned his post. A fellow director sent a mail-shot letter to the company's clients advising that the Director had walked out of the company, hinting that the reason he left was because he had mismanaged the company.

The letter was alleged to be defamatory and triggered a defamation claim.

The claimant brought the claim against both the director who wrote the letter and the company, on the basis that it was vicariously liable and claimed costs (including conditional fee agreement, success fee and after the event insurance premium costs, which were in excess of £100K before any award).

The D&O policy responded and covered defence costs, including specialist defamation counsel. Defence of justification (ie truth) resolved that the claimant had mismanaged the company and had walked out, which helped achieve a global settlement of circa £50,000.

Without D&O cover, the defendant director would have been exposed to a personal liability well in excess of six figures.

## Directors alleged to have provided misleading information

- A bank took legal action against the directors of a company for failure to disclose material facts when they entered into a financing agreement with the bank. The projected cash-flow showed that the loan was unsustainable. The bank accused the Directors of providing misleading information.
- Directors of a construction company were successfully sued for losses incurred by an architect who relied on a Director's assurances that a contract performance bond had been arranged.
- An action for breach of trust was brought against a Director following the release of an employee's medical records.
- The Directors of a property owning company were prosecuted after their failure to identify the company correctly on the company notepaper and invoices were found to be in breach of the Companies Act.
- The Directors of a company which failed to comply with the time limit for delivery of Accounts to the Registrar of Companies and then did not disclose certain Directors' appointments were prosecuted under The Companies Act.

## Director alleged to have been in breach of duty

The directors of a right to manage company were subject to leasehold valuation proceedings in which they were alleged to be in breach of their duties in numerous respects.

The applicants sought an order that the directors were replaced and an order for costs.

The applicants were not actually seeking damages but the policy responded to provide defence costs, including specialist advice defending the leasehold valuation proceedings. The application was dismissed.

## Employment practices liability extensions are available

The claimant went on maternity leave and following her return to work was informed her role was at risk of redundancy. A consultation process was undertaken which culminated in the insured confirming that the claimant would be made redundant. The claimant alleged that there had not been a genuine redundancy leading to her dismissal and, on that basis, her dismissal was unfair. The claim was partially covered due to an endorsement which led to insurers contributing towards the settlement and defence costs under the Employment Practices Liability section.

## Accusations of price fixing refuted

The Office of Fair Trading (OFT) commenced a price fixing investigation under the Competition Act into a company involved in the distribution of sports garments. If the infringement was found to be true, the directors faced potential disqualification for up to 15 years under the Director Disqualification Act 1986 or prosecution by OFT/Serious Fraud Office if a cartel offence had been committed under the Enterprise Act 2002.

The Directors faced a possible custodial sentence, so it was a matter of the utmost importance to the D&Os of the company. The policy responded and specialist competition lawyers represented the directors through to the closure of the investigation.

It was found that the directors had over-stated the company's financial position to encourage investment. The D&O policy paid out £10,000 in costs.

## Shareholder actions

Minority shareholders sued the company for not accepting the highest offer that was made in a take-over. The company defended

its actions by saying that the entity making the accepted offer was better for the long term interests of the company – despite this there was still a valid claim and the company incurred large defence costs and the policy responded.

## Financial performance

Two directors were held liable for payments made to another director. The payments took place shortly before the company went into liquidation.

It was successfully argued by the firm's creditors that they should take precedent over the director and an award of £800,000 was made. Directors have a fiduciary duty to take the correct course of action.

It is also an established part of the UK legislative framework that directors should not profit from their position.

MOFS can provide advice and assistance in arranging your D&O cover to ensure that you and your fellow directors and officers are adequately protected. For advice or a quotation, contact Keith Burn.



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