

The Importance of Directors and Officers Liability in the Construction Industry

Directors and Officers cover is designed to protect past, present and future D&O's by indemnifying them for loss resulting from a wrongful act, for which the D&O is alleged to have committed in their capacity as a Director or Officer.

The cover includes reimbursement for defense costs, judgments and settlements to the D&O's company/employer for any indemnification to the director or officer for any such costs.

The construction industry involves multiple risk categories ranging from contractual to personal injury and as such has been the focus of claims in the past. In many construction industry cases, taken it is the directors and officers who are the focus of actions, which may persist long after the project they relate to, has been completed.

The standard corporate governance issues apply to construction companies. In addition to these issues, however, the tendency to use Special Purpose Vehicles for individual projects can lead to complications with regards to insurance for the directors and officers, these complications are often in relation to claims which arise after the project has been completed and the SPV wound up, this needs to be specifically addressed in structuring any cover.

As expected, "Health and Safety" exposures are extensive within the construction industry with the potential for expensive statutory investigations in addition to significant damages and other expenses. These can be covered with the appropriate policy specifications.

Construction companies also face extensive environmental claims risk which can manifest prior to, during or after the completion of a project and can persist for many years. These risks can be insured against but must be detailed and addressed in any cover being taken out as they are not standard.

Do I need D&O if the company has PI insurance?

Professional Indemnity Insurance (PI) covers a company for costs and damages in respect of claims made against them for breach of professional conduct. D&O provides cover for the Directors in respect of breaches of Boardroom responsibilities. PI does not cover this and offers little or no protection to them if they are sued either individually or as a group for these

breaches. The professional indemnity policy will have a Directors and Officers Liability exclusion and visa versa

Non Executive Directors

A non-executive director is as legally liable for their actions to those of their fellow directors and officers. The lack of awareness or involvement in the day to day activities of a company could result in no defense against an action. It is imperative that an appropriate D&O policy is in place as a condition of joining any board.

Disqualification for insolvent trading

Two directors knew that their company could not realistically avoid collapsing, but carried on trading. In the last two weeks before receivership the company incurred VAT liabilities of R1 000 000, which were never satisfied. For this insolvent trading, the directors were at first disqualified from being company directors in the future. On appeal, the courts criticised the directors, but decided they were not incompetent enough to deserve the ban, so lifted it.

Defence costs: R1 000 000.

Defamation

A company's managing director was quoted in two newspaper articles as having concerns as to the propriety of the owner of one of the company's suppliers. The owner claimed for defamation. The claim was eventually dropped, but only after insurers had funded the managing director's defence costs.

Defence costs: R320 000.

Health and safety

A managing director and several technical managers faced criminal prosecutions for alleged breaches of health and safety legislation, which resulted in the accidental deaths of two employees.

Defence costs: R8 900 000.

Shareholder claim: abuse of position

Three friends set up a construction company, they were the company directors and they owned shares. Some years later one of the friends, in her position as shareholder, complained that the other two had breached

their fiduciary duties as directors in a number of ways. These included unnecessary client entertainment expenses by attending sports events abroad; allowing friends excessive credit for building works; abuse of position and company assets to purchase other companies for themselves; and misuse of the company for work on one's home.

Defence costs: R5 000 000.

Creditors

Under the "wrongful trading" provisions it is possible for a director to be held personally liable for some, or all, of a company's debt. There are numerous actions arising from such situation and the legal defence costs provided by a D&O policy is of particular importance. Where directors are subsequently found guilty of "wrongful trading," any judgement awarded may be the subject of indemnity by the D&O policy.

A Company went into liquidation shortly after one of its directors ran up a bill with a vehicle repairer for the cost of repairs carried out to a company vehicle. The costs were incurred on behalf of the company. The vehicle repairer brought an action for the outstanding invoices and there was a suggestion that the director was liable personally in view of the provisions of the Insolvency Act.

A Director who signed a company cheque whilst the company was in receivership, found that the cheque was dishonoured and he was held personally liable to the payee.

An affidavit given by a director contained a statement that the company had insufficient resources to meet a solicitors' fee in respect of an action being brought against the company. Before the fee was paid, the company went into liquidation. The Legal Representatives sought R3 000 000 directly from the director.

A director made a speech at a conference stating that his company was making a bid for another company and that his company's merchant bankers had disclosed details of the bid to another bidding company. A claim was brought by the bankers refuting that they had acted as described.

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