

# De Jure

April 8, 2022

## D&O Diary



---

## BACKGROUND

In a fast-moving competitive environment, the Directors and Officers of an organization are required to take bold and crucial business decisions from time to time. Any wrong decisions can possibly trigger legal actions (both civil and criminal in nature) against them. As a consequence of such actions, there is a potential exposure of loss of reputation and financial liabilities for them.

A few instances of liabilities against Directors and Officers are a breach of duties, shareholder and stakeholder claims, sexual harassment allegations, violations of corporate governance regimes, enquires and investigations initiated by the governmental authorities, money laundering offenses, tax liability (*in certain instances where the company has defaulted but a director is held personally liable*) and liabilities under various statutes.

While the liability of the company is limited, the liability of the Directors and Officers is unlimited. Considering the potential risks associated with their profession, the Directors and Officers liability insurance policy, popularly known as D&O Policy, is one of the key insurances policies for any organization to cover losses.

## UNDERSTANDING D&O POLICY

D&O Policy is a liability insurance covering Directors and Officers of the organization from claims made against them. The policy not only covers the current directors but also future, past directors and non-executive directors, and officers of the organization.

---

---

*"Understanding whether or not the defence costs are inside the limit or outside the limit is very important, since these costs add-up quickly leaving the claimant to incur these costs out of their own pocket."*

The risk scenarios essentially covered under the policy include prospectus financial liability, damages, and defence costs (including related and ancillary cost) for the legal actions initiated by or against them. Typically, defence costs comprising attorney fee, cost of filing legal paperwork, investigation cost and cost of expert witnesses make up a large sum of the total claim amount. In specific cases, the cover also gets extended to include the company itself. However, insurance providers will have to be told that both coverages are required.

An alternate avenue or a supplementary measure to protect the director is to earmark funds annually or periodically, for making good the loss. Some big corporations do have the funds allotted specifically to indemnify their Directors and Officers. A well-drawn policy and a separate committee will be key for its implementation.

## **MISCONCEPTIONS ABOUT D&O POLICY**

While there is no mandatory requirement to have the D&O Policy, the common misconception is that it is mostly required for a public company or may not be required for smaller companies. Infact, big organizations have more deep pockets than smaller set-ups to indemnity and have alternate plans in place for their Directors and Officers. Hence, the nature and size of an organization cannot be a barometer to decide whether or not the cover is required. Although it could be the determining factor to decide the extent of coverage required by an organization.

Another misconception is that the potential liabilities of directors or companies will be covered under other policies like general insurance liability, errors and omissions policy, and professional liability policy. However, D&O Policy is specifically designed to protect the Directors and Officers from their actual or alleged wrongful actions, which protection may not be granted in other policies.

---

---

In certain cases, a company may not want to consider D&O Policy because it may have separately agreed to indemnify its Directors and Officers. However, the Directors may have issues recovering the losses if they are no longer directors of the company or the company itself becomes insolvent or it has no funds to indemnify its Directors, or in cases, where the company itself is the claimant. Taking a D&O Policy can cover such eventualities to protect them.

## EXCLUSIONS

Every insurance policy specifies what it will cover and what it will not cover. Similar is the case for the D&O Policy.

A D&O policy does not cover instances where the Directors and Officers have acted in a dishonest or fraudulent manner or when directors and officers fail to comply with the signed contract. In certain cases, one insured director may bring a claim against another insured director or where a company may have several insurance covers and a particular claim may fall within the scope of another insurance policy. Even in such cases, D&O cover cannot be invoked.

Some of the other exclusions could be pollution claims, workmen compensation, criminal activity, instances of theft, and claims normally covered under other or prior insurance.

While one may assume they are covered under the policy, it may so happen that exclusions may apply. As such, the most important aspect to be considered at the time of taking a D&O Policy is to carefully analyze and understand the

exclusions. Although a time-consuming exercise, it is crucial to devote time, focus on and fiercely negotiate the exclusions, since it may affect the coverage of potential claims.

*"The most important aspect to be considered at the time of taking a D&O Policy is to carefully understand and negotiate the exclusions."*

---

---

## CONCLUSION

With the evolving business environment, there are many potential sources of claims for the directors and officers. Add to it, the broadened scope under the statutes (like the Companies Act, Factories Act) which put certain specific and stringent compliance obligations on the Directors and Officers; besides imposing stricter civil and criminal penalties on them. Many investors in private equity and M&A transactions also insist on having a D&O cover for their nominee

*"D&O Cover will not only protect the director and officers from potential claims but also help the company to attract the best talent, protect their long-term interest, and to retain qualified executives and board members."*

directors on the Board of Directors. Hence, it is worthwhile for the company to consider D&O liability insurance. To conclude, however, before going for a D&O Cover, it will be important to consider the following questions (i) What does the typical D&O policy look like? (ii) What is covered, how much is covered and

who is covered (iii) What is not covered? (very important) (iv) How can risk management protect the Directors and Officers from different claim scenarios? and (v) What do different insurance providers have to offer based on the requirements of an organization?

### CONTRIBUTED BY:

**Amish Shroff, Partner:** [amish@rajaniassociates.net](mailto:amish@rajaniassociates.net)

**Ruchi Sethna, Associate:** [rsethna@rajaniassociates.net](mailto:rsethna@rajaniassociates.net)

### DISCLAIMER:

This Article is meant for information purposes only and does not constitute any legal advice by Rajani Associates or by the authors to the article. The contents of the Article cannot be intended to be comprehensive legal advice and would require re-evaluation based on the facts and circumstances. We cannot assume any legal liability for any errors or omissions. Should you have any queries on any aspect contained in this article, you may contact the author by way of an e-mail or write to us at [editorial@rajaniassociates.net](mailto:editorial@rajaniassociates.net)

---

---

## AREAS OF PRACTICE

| Capital Markets | Private Equity | Mergers and Acquisitions | Corporate Litigation & Arbitration | Projects & Project Finance |  
| Real Estate & Trust | Corporate & Commercial | Banking & Finance | Structuring | TMT | IPR | Employment

---

## DISCLAIMER

This update only contains a summary/ limited description of the topic dealt with hereinabove for general information purposes and should not be construed as a legal opinion or be relied upon in absence of specific legal advice. For further information or legal advice please feel free to contact us.

---

## Contact US



**Rajani Associates**

**simple solutions**

**Address:** Krishna Chambers  
59 New Marine Lines  
Churchgate  
Mumbai 400020  
Maharashtra, India  
**Telephone:** (+91-22) 40961000  
**Facsimile:** (+91-22) 40961010  
**Email:** [dejure@rajaniassociates.net](mailto:dejure@rajaniassociates.net)  
**Website:** [www.rajaniassociates.net](http://www.rajaniassociates.net)

---