
Briefing D&O Insurance

Important questions to ask...



INSTITUTE OF DIRECTORS
IN IRELAND

This briefing was produced by the Institute of Directors in association with McCann FitzGerald for use in Ireland. McCann FitzGerald is one of Ireland's premier law firms, providing a full range of legal services to many of Ireland's leading businesses. Clients include international organisations, major domestic concerns, emerging Irish companies and clients in the State and semi-State sectors.

Directors know that directors' and officers' ("D&O") liability insurance is important, particularly in regulated and prudential industries and in businesses that operate in the USA.

A director will often ask a company how much D&O insurance cover there is in place before he or she accepts appointment to its board. However the amount of insurance cover is not the only question for a director to ask because the detail of policies differs, 'small print' may limit the directors' protection and, in practice, some insurers are slow to pay. Simply having a D&O insurance policy in place may give false comfort. Therefore this factsheet looks at other considerations of which a director or a prospective director should be aware.

Even honest directors can be sued

Bad things can happen to good people. In 2005 in the UK, for example, after landmark proceedings involving Equitable Life Assurance Society¹, nine former non-executive directors, along with the former auditors, were sued for £3 billion. It was alleged that the former directors had failed to appreciate the correct meaning of a provision in the articles of association. The non-executive directors had very good reputations and, although eventually vindicated in a settlement, by then the parties had spent £75 million on lawyers' fees and expenses.

¹ *Equitable Life Assurance Society v Alan David Hyman* [2000] 1 ALL ER 961

The regulator calls

A police or public inquiry may lead to arrest or ‘dawn raids’ on homes or offices. Regulators within Ireland and abroad may wish to interview a director and public inquiries and criminal trials are high-profile. A director under threat often needs first class advice at short notice.

The law’s wheels grind slowly

Most directors of reputable companies are unlikely to be successfully sued or convicted. However, legal processes are painstaking and often move very slowly. The Equitable Life non-executive directors endured years of litigation-related uncertainty and expense before the claims were abandoned. Whilst a case is ongoing, a director may lose the support of the company’s board, or simply retire. Directors need to know that they will be able to benefit directly from the policy for as long as a case continues.

Important policy features

- Severability clause: this protects innocent directors where another director has misled insurers or committed some other serious breach of the policy.
- Dishonesty: even if allegations of dishonesty are made, a good policy will continue to pay a director’s defence costs unless in due course a court finds that the director had been dishonest, or he or she admits dishonesty.
- USA: if the company has any USA business, the directors must have specific cover for that business.
- Choice of representatives: insured parties should be free to choose specialist legal advisers. Individual directors may require separate legal advice too, where more than one director is sued.
- No delay: legal costs and expenses should be payable as incurred and without unnecessary delay.
- Disputes clause: a good policy provides for a speedy and fair means of dealing with disagreement between the insured and insurers.

The broker's job

D&O insurance is not like car or fire insurance. It is specialist insurance so specialist advice is essential. For example, the company's broker should brief the board in person each year about the D&O policy in place including how it compares to typical policies in the market at that time and alert directors to what is not covered or what additional cover may be available in the market at reasonable rates. The broker should also advise retiring directors about the arrangements to protect against late claims.

Further information is available from



Roddy Bourke

Partner

+353 1 607 1315

roddy.bourke

@mccannfitzgerald.com



Brian Quigley

Partner

+353 1 607 1471

brian.quigley

@mccannfitzgerald.com

Alternatively, your usual contact in McCann FitzGerald will be happy to help you further.

A message from the IoD

Glennon Insurance has created a number of tailored insurance schemes exclusively for IoD Ireland members. These include, Directors' and Officers' Insurance, as well as Car & Home Insurance Schemes. Visit the member benefits page on the IoD Ireland website for more information.



INSTITUTE OF DIRECTORS
IN IRELAND

© McCann FitzGerald and Institute of Directors in Ireland 2020. All rights reserved.

Institute of Directors in Ireland, Europa House, Harcourt Street, Dublin 2
01 411 0010 | info@iodireland.ie | www.iodireland.ie

This document is for general guidance only and should not be regarded as a substitute for professional advice.
Such advice should always be taken before acting on any of the matters discussed.

© McCann FitzGerald, September 2020