



COMMON D&O COVERAGE EXCLUSIONS LIST

Typically, a Directors & Officers policy will include wrongful acts, including settlements, judgments, costs of litigation and investigation, attorneys' fees and other related items. Below we have listed exclusions to look out for on your policy:

- **Breach of Contract-**

The reason for this is that a contractual duty is not a liability imposed by law but rather a voluntarily undertaken obligation. Failure to comply with a signed contract would fall under willful or intentional wrongdoing and would not be covered.

- **Claims Normally Covered Under Other or Prior Insurance-**

Coverage is typically excluded if the company's payment for loss or indemnity is covered by other or prior insurance. For example, bodily injury and/or property damage would normally be covered under your General Liability policy and would not be written into your D&O coverage. In this way, ERISA (Employee Retirement Insurance Savings Act) claims would most likely be covered under a Fiduciary Liability Policy.

- **Personal Gain-**

Claims relating to personal profit or advantage to which the insured was not legally entitled would not be covered. Directors and officers are expected to act with a duty of loyalty that includes refraining from furthering personal interests and any personal action that may be damaging to the organization.

- **Insured vs. Insured-**

Actions brought by the board of an association against the association or third parties would not be covered. This prevents companies from suing their own directors and officers in an effort to collect insurance proceeds. D&O policies are intended to defend the insured for their conduct, which does not include funding an action by the insured against others. As an example, this would include shareholder derivative suits or representative class action suits.

- **Dishonest, Criminal or Fraudulent Conduct-**

Directors and officers have a duty of obedience to act in accordance with all laws, statutes and regulations pertaining to their industry.

- **Fines, Penalties and Punitive Damages-**

Because fines, penalties and punitive damages are meant to punish bad behavior, insurance companies in certain states can not cover these charges as that would cancel the deterrent effect of the penalty.

- **Discrimination/Wrongful Termination-**

Employees who feel they have been wronged may file a claim even if it is baseless and in this case you would have to pay legal fees even if the case is thrown out. If your D&O policy does not offer employment practices liability coverage it may behoove you to purchase a separate EPLI policy.

- **Defamation, Libel and Slander Claims-**

Since directors and officers must speak often about others, at times their comments may be taken as defamatory which could lead to a lawsuit. This type of claim happens most frequently in the context of termination of employee services and the distribution of organization newsletters or commentaries.

- **Prior Acts/Prior and Pending Litigation-**

Since D&O policies are typically written on a "claims made" basis, all claims should be filed during the policy period. The policy will only cover claims made during the policy period, regardless of when they occurred, which is the norm with a General Liability policy.

- **Willful or Intentional Wrongdoing**

It may be debatable if an action by the board was willful or intentional and there may be an option that makes coverage dependent upon a final judgement of wrongdoing. A board may still be able to recover a fine resulting from intentional conduct if it can prove that it was only vicariously liable for misconduct but willful or intentional wrongdoing is normally not covered by D&O policies.

*** For each exclusion, it may be possible to purchase an endorsement to the policy, or a separate policy, to cover the excluded area.**