



# AXIS INSURANCE MANAGERS INC.

*“Quality Insurance for Quality Clients”*

1108 W. 8th Avenue | Vancouver, BC | V6H 3Z5

t. 604.731.5328 | f. 604.731.3137



## D&O INSURANCE - CLAIMS AND REPORTING

Axis Insurance Managers pride themselves on offering the very best customer service. Not just when we're talking to you about gaining your business, but when you are a client, and even more importantly, when you have a claim. And this is never more important than when you've chosen an insurance policy that can be complex and tricky to understand – like Directors and Officers (D&O) Liability Insurance. Because the claims procedure for D&O is different from other insurance policies, we have prepared this guide to help explain.

*If you have any more questions – or would like more information then please contact your service manager who will be able to help.*

### What's different about Directors and Officers Insurance?

Unlike most general liability policies, a D&O policy is a “claims made” rather than an “occurrence” based policy. This means that the event that causes you to claim on the policy (the coverage trigger) is the date on which a claim is made against the insured (the Director or Officer or the Corporation where it is covered by the policy).

The Commercial General Liability Policy, on the other hand, which covers claims resulting in bodily injury and property damage is more typically issued on an occurrence basis. Therefore it doesn't matter when you get sued, or when allegations are made against you, the policy that was in force when the occurrence took place (for example, when a slip and fall actually happened) will respond to the claim. This means you could be sued years after the policy has expired, but the as long as the policy was in force when the occurrence took place you will be covered.

With D&O insurance, a claim results from allegations made against the insured arising out of a “wrongful act” which is a term defined in the policy. However, the important point is that it does not matter when the wrongful act took place (as long as it happened after any retroactive date specified in the policy), because the coverage will apply to the policy which is in force when the allegations are first made against the insured.

Therefore the D&O insurance policy must be in force when the allegations are made for the coverage to apply.

### What constitutes a claim?

Under a D&O policy there are conditions that set out what constitutes a claim. These conditions state that there must be allegations against you which demand monetary or non-monetary relief (which is defined in the policy), and most policies state that such demands must be made in writing. This would typically mean a law suit seeking compensation for damages. However, the definitions are broader than that and allow for criminal and other types of proceedings.

### THE FIVE MOST IMPORTANT THINGS TO KNOW ABOUT D&O INSURANCE CLAIMS

1. D&O policies contain stringent rules about reporting claims and the circumstances that can give rise to a claim
2. Failure to report in a prompt and timely way can lead to denials of coverage
3. Management (or insurance buyers) should make the rules known to the parties that are covered by the policy (i.e. the board of directors)
4. Always inform Axis of any litigation or issues so we can decide jointly whether they should be reported to the insurer
5. Is an issue really worth reporting? Nine times out of ten it probably is!



# AXIS INSURANCE MANAGERS INC.

*"Quality Insurance for Quality Clients"*

1108 W. 8th Avenue | Vancouver, BC | V6H 3Z5

t. 604.731.5328 | f. 604.731.3137



## D&O INSURANCE - CLAIMS AND REPORTING

Although not typical some policies may broaden the definition of claim to include oral demands. Although this may be an advantage in certain situations caution should be taken when dealing with allegations that oral in nature as they set the "clock ticking" earlier than a written demand. If the allegations are not reported to insurers promptly it creates the potential for insurers to say that their position has been prejudiced as the obligation to notify has already commenced.

### **Extended coverage options**

Under the D&O policy there are two extended coverage options automatically built into the policy. One option is usually a free extended reporting period for 60 days after the policy has expired. During this period the insured can report claims as long as the wrongful act occurred before the expiry date.

The second option is to extend this period for one year. This would incur a pre-determined Additional Premium which will cost anywhere between 50% and 200% of the annual premium, depending on the insurer and the individual policy conditions.

Unless there are extenuating circumstances or the insurer refuses to renew the policy it is more economical to renew the coverage and there is no limitation on when the wrongful act takes place. Therefore choosing an extended reporting period would only be necessary if you are in a very difficult position. In essence, this means that D&O policies have little value once they have lapsed.

### **Giving notice**

The application is one of the most important aspects of D&O insurance and most insurers require an application form at each renewal. Some applications contain warranty statements which ask if you are aware of any circumstances that could give rise to a claim – although you don't need to answer the warranty question at each renewal, just if you are taking higher limits.

As you would expect, an insurer may not want to provide cover if you state you are aware of circumstances that could give rise to claims under the policy. So under a D&O policy there are provisions that allow you to put the insurer on notice if you are aware of circumstance that may result in a claim.

There are rules that apply to what constitutes acceptable notice, but if the notice is accepted any claim that develops from those events notified to the insurer will tie any future claims to a specific policy period and therefore give everyone certainty about which wording, liability limits, etc. will govern the claim. Usually you will have to provide specific information regarding the issues and circumstances in order for the notice to be accepted. This would include information such as the names of parties, dates and the circumstances of the wrongful act. Unsurprisingly, you are not allowed to "laundry list" or just issue blanket statements in an attempt to embrace any possible claims that may come along later. However, if something happens that you can reasonably expect may turn into a claim under the policy, but does not yet meet the definition of a claim, it is probably in your best interest to report it to the insurer.

It is important to remember that when providing notice of circumstances acceptance by the insurer of such notice will secure coverage under the policy for any future claims that develop from those circumstances. However, the insurer's acceptance of the notice is not a coverage opinion and it does not automatically mean that by accepting notice there is coverage under the policy. The insurer will reserve their rights to explore the circumstance and issue a coverage opinion, which will follow after the claim has been reported.



# AXIS INSURANCE MANAGERS INC.

*"Quality Insurance for Quality Clients"*

1108 W. 8th Avenue | Vancouver, BC | V6H 3Z5

t. 604.731.5328 | f. 604.731.3137



## D&O INSURANCE - CLAIMS AND REPORTING

### **Late reporting**

You should bear in mind that any costs that are incurred before you give notice to the insurer will not be covered by the policy. In other words the two risks you face by not reporting incidents in a timely way are that the claim could be denied entirely or that all the costs already incurred are not covered- even though future costs will be.

There are several reasons for late reporting which are useful to be aware of. Perhaps the most common is that the Director or Officer involved does not recognize that the incident in question may be covered under the D&O policy.

Another reason, which is related to the first, is that the director or officer affected does not deal with insurance issues (which are normally handled by the CFO) and so is not aware of the reporting conditions and therefore doesn't communicate regularly with Axis Insurance Managers.

Finally, the director or officer may think the issue will settle under the self-insured retention (deductible). This can be a risky approach because if the matter isn't settled under the deductible, the deductible only starts being eroded once the claim is reported. For example, if you have a \$250,000 deductible - which would be quite typical for US claims on public company - and report a claim to insurers once you've spent \$200k, you'll end up spending \$450k to satisfy the deductible.

Therefore it is vitally important to report claims in a timely and prompt manner. Late reporting can cost your business a lot of money.

### **Important information about claims**

Claims or notification of circumstances must be reported promptly. If the insurer feels that their position has been prejudiced by late reporting there could be grounds for denial of the claim. As already explained, any costs that you have incurred prior to reporting the claim will be probably not be covered.

The D&O policy covers all directors and officers and in certain cases the corporation as well. A policy for a public company will cover the corporation for claims arising out of securities litigation. The sad truth is we have seen numerous claims where the insured has prejudiced their position or right of recovery for amounts they had already incurred without the insurers consent, by late reporting. This often happens when directors proceed with legal counsel and don't keep the financial managers of the corporation fully informed. In addition financial managers don't always know that a director has become aware of circumstances that should be reported under the policy.

**It is therefore our recommendation that directors are made aware of policy conditions and your service team at Axis Insurance is engaged in discussion or correspondence whenever there is a potential for a claim under the policy or the possibility of circumstances developing into a claim. This is particularly relevant if any legal advice is being sought.**

PLEASE SEE THE APPENDIX FOR SAMPLE POLICY CONDITIONS

To find out more about D&O Insurance, or to discuss your existing insurance policies, please give one of Axis Insurance's professional and experienced team members a call at 604.731.5328 or email: [info@axisinsurance.ca](mailto:info@axisinsurance.ca). We would also be pleased to outline the benefits of D&O Insurance with your management team or board members. If you would like to schedule a meeting or request an application form, please call Clive Bird direct at 604.708.6245 or David Marsh direct at 604.708.6242.



# AXIS INSURANCE MANAGERS INC.

*"Quality Insurance for Quality Clients"*

1108 W. 8th Avenue | Vancouver, BC | V6H 3Z5

t. 604.731.5328 | f. 604.731.3137



## D&O INSURANCE - CLAIMS AND REPORTING

### *Appendix*

#### **EXAMPLE OF TYPICAL POLICY CONDITIONS**

##### **Defense and Settlement**

- Subject to the subsection, it shall be the duty of the Insured Persons and not the duty of the Company to defend Claims made against the Insured Persons.
- The Insureds agree not to settle any Claim, incur any Defense Costs or otherwise assume any contractual obligation or admit any liability with respect to any Claim without the Company's written consent which shall not be unreasonably withheld. The Company shall not be liable for any settlement, Defense Costs, assumed obligation or admission to which it has not consented.
- The Company shall have the right and shall be given the opportunity to effectively associate with the Insureds in the investigation, defense and settlement, including but not limited to the negotiation of a settlement, of any Claim, that appears reasonably likely to be covered in whole or in part by this coverage section.
- The Insureds agree to provide the Company with all information, assistance and cooperation which the Company reasonably requests and agreed that in the event of a Claim the Insureds will do nothing that may prejudice the Company's position or its potential or actual rights of recovery.
- Defense Costs are part of and not in addition to the Limits of Liability set forth in Item 2 of the Declarations for this coverage section, and the payment by the Company of Defense Costs reduces such Limits of Liability.

##### **Reporting and Notice**

- The Insureds shall, as a condition precedent to exercising their rights under this coverage section, give to the Company written notice upon knowledge or discovery by the Chief Executive Officer and or Chief Financial Officer as soon as practicable of any Claim made against any of them for a Wrongful Act.
- If during a Policy Period or Extended Reporting Period (if exercised) an Insured becomes aware of circumstances which could give rise to a Claim and given written notice of such circumstance(s) to the Company, then any Claims subsequently arising from such circumstances shall be considered to have been made during the Policy Period or the Extended Reporting Period in which the circumstances were first reported to the Company.
- The Insureds shall, as a condition precedent to exercising their rights under this coverage section, give to the Company such information and cooperation as it may reasonably require, including but not limited to a description of the Claim or circumstances, the nature of the alleged Wrongful Act, the nature of the alleged or potential damage, the names of the actually or potential claimants, and the manner in which the Insured first became aware of the Claim or circumstances.