

# Don't DO Without

## UNDERSTANDING DIRECTORS & OFFICERS INSURANCE

BY ERIC JOHNSON

**T**he days of rubber-stamping the management's decisions are long gone. Welcome to the 21st century. Your decisions as a board member are now scrutinized by your fellow board members, members of the club, employees of the club, the government, even the general public. It's important that you arm yourself with the necessary tools to protect your club's assets, as well as your personal assets.

Directors and officers are held to a high standard and must practice the duties of loyalty, care and obedience. The duty of loyalty means that directors and officers must act in the best interest of the organization. Directors and officers should not use their position for their own personal gain and should avoid conflicts of interest. The duty of care requires a director or officer to act in a prudent manner. Directors and officers should make informed decisions and exercise due diligence in performing their board obligations. The duty of obedience means that directors and officers must act within, and obey the bylaws of the organization. For nonprofits, this means working to fulfill the mission of the organization.

And if you dot all of your "I"s and cross all of your "T"s, are you safe from litigation? Unfortunately, the answer to that question is a resounding NO. In today's litigious environment, directors and officers (D&O) insurance is crucial to the health and long-term survival of any institution.

## What is Directors and Officers Insurance?

Directors and officers insurance is one of a number of management liability insurance policies at the disposal of your club. Specifically, D&O insurance provides protection for the board of directors against allegations of mismanagement, including alleged errors in judgment and breach of duty. Common examples of D&O insurance claims include: defamation of character, libel, slander, copyright infringement, membership discrimination, third party harassment and discrimination, as well as mismanagement of funds. It is typical for nonprofit D&O insurance policies to include employment practices liability insurance (EPLI) coverage as part of the insurance policy form. EPLI coverage protects an organization against allegations or claims made by its employees. Common examples of employee-related claims include: discrimination, wrongful termination, sexual harassment, failure to hire or promote, and hostile work environment. According to a 2006 survey conducted by Towers Perrin, 92 percent of all nonprofit D&O insurance claims are employee related, which is similar to club-related claims handled by Aon Affinity Services, Inc.

## Why is it Important?

Directors and officers can be held personally responsible for the decisions made by the board of directors. Believe or not, your personal assets—your home, property and other investments—are at stake for the decisions you make, or fail to make as part of the board of directors. This comprises the day-to-day decisions made by the board, including asset management, hiring and firing decisions, as well as decisions regarding the direction of the organization. Even those decisions made by the people you hire to

## The NCA-Endorsed Directors & Officers (D&O) Liability Insurance Program

The National Club Association (NCA) has endorsed Aon Association Services, Inc.'s Directors and Officers Liability Insurance Program for clubs since 2001. The specifically designed coverage includes:

- a 5 percent member premium discount
- membership discrimination coverage
- a waiver of the deductible for finding no liability
- Federal Immigration and Nationality Act penalty coverage
- More club-specific coverage, not provided in other policies

For more information, call or have your insurance broker call 800-432-7564, or visit [nationalclubinsurance.com](http://nationalclubinsurance.com).

manage your club are attributable to the board of directors. Regardless of the reason, directors and officers can be brought into expensive lawsuits, whether frivolous or not. Even if a claim is frivolous, and the club ultimately wins the lawsuit, defending a claim can be a financial drain for the club. The average cost to defend an employee-related claim is in the neighborhood of \$140,000. D&O insurance is designed to provide that all important legal defense.

## Evaluating Your Coverage

There are important coverage features that each and every club should insist upon when choosing a D&O insurance policy. Below you will find a list of the most important coverage features, along with a brief explanation of each feature. It's important that you work with your insurance broker to secure the appropriate coverage for you and your organization.

### CLAIMS MADE COVERAGE

Claims made coverage refers to a policy that covers claims made during the policy period, regardless of when the wrongful act(s) occurred. This is also known as "full prior acts" coverage. This doesn't mean that all prior acts are covered—coverage >>>

# Could it Happen to You?

## A Few Things You Should Know About D&O Claims Against Clubs

Clubs face numerous types of directors and officers (D&O) insurance-related exposures. Lawsuits derived from accusations of mismanagement are a common basis of D&O insurance claims. Allegations can range from discrimination and wrongful termination to poor judgment and self-dealing.

The following claim scenarios exemplify why having the proper D&O coverage is so important. These are anonymous, composite examples of claims. In short, they could happen to you!

To learn the resolution of these case studies, please visit [nationalclubinsurance.com](http://nationalclubinsurance.com).

### A Case of Age Discrimination—Greenskeeper Begins to See Red

A local club had a long-time employee—a head greenskeeper, in this case—who was approaching retirement. Yet at the time, the club's board of directors and general manager knew they needed to upgrade their facilities. Therefore, they asked this long-time employee to delay retirement and remain in the position while they completed their upgrades. The club also asked the long-time employee to assist in selecting a successor. Following the completion of the upgrade and the selection of the successor employee, the club held a retirement party for the long-time, but departing employee.

However, six months later, when the retired employee realized his retirement income was not quite what he expected, he began to believe the club forced him to retire. So he decided to file a charge of age discrimination with the Equal Employment Opportunity Commission (EEOC).

*Could your club afford to defend such a claim?*

### Changing the Bylaws—Grandfathers Want to Be Grandfathered

A club's bylaws provided that senior members were not required to pay annual dues, but still retained the right to use the club's facil-

ities and to vote for the board of directors. Then, the board proposed an amendment to the bylaws, which required all senior members to pay annual dues to maintain their membership in good standing. In spite of the strong objections of several senior members, the club's members approved the amendment to the bylaws. However, some senior members still refused to pay the dues. The board suspended these memberships and their rights to use the club's facilities.

In turn, the dissident senior members sued the board for a declaratory judgment that the change to the bylaws was invalid and for reinstatement as members in good standing.

*Do the senior members have a case?*

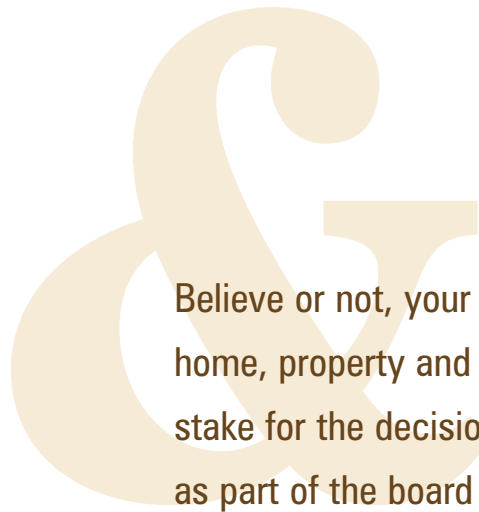
### A Case of Unfair Trade Practices—A Member Wants His Fair Dues and Due Process

An established club had seen a decline in new members, primarily due to increased competition from new clubs in the area. To help boost membership, the club's board of directors approved a major reconstruction of its golf course. It also offered a discounted initiation fee during the construction phase.

A few new members joined the club at the reduced initiation fee. But following the completion of the golf course reconstruction, the board extended the period for the reduced initiation fee in an effort to further bolster membership. One of the new members threatens to sue the club for fraud and misrepresentation, claiming that the board had fraudulently induced him to join with the false promise that the reduced initiation fee was available for a limited time.

*Could the club be forced to defend such allegations?*

These claims scenarios provide a peek into the minefield within which your board operates. You should be certain that your club is armed with the necessary ammunition to defend not only the club's assets, but also the assets of the club's board members.



Believe or not, your personal assets—your home, property and other investments—are at stake for the decisions you make, or fail to make as part of the board of directors.

would be subject to the policy definitions, exclusions and endorsements. You should review your policy with an insurance professional to determine the extent of your prior acts coverage.

#### DUTY-TO-DEFEND POLICY FORM

In a duty-to-defend policy form, the insurance company has the obligation to appoint counsel and defend the insured against a covered claim. This ensures that an attorney experienced in the type of law in question will handle your claim. This is important because your business attorney who reviews your contracts may not be experienced in the intricacies of employment law. Employing an “expert” in the field gives your club the best opportunity for a successful defense.

#### ENTITY COVERAGE

This feature, also known as “Side C” coverage, provides protection for claims filed against the club itself. This is crucial because many lawsuits include the entity as one of the parties named in the suit.

#### EMPLOYMENT PRACTICES LIABILITY COVERAGE

This provision provides coverage for allegations or claims made by a club’s employees. Most common are allegations of wrongful termination and discrimination. This coverage is vital because more than 90 percent of nonprofit D&O claims are employee-related allegations of mistreatment.

#### THIRD PARTY DISCRIMINATION AND HARASSMENT

This feature provides coverage for allegations of discrimination and/or harassment made by a third party (non-employee). Third parties may include members of the public, vendors and independent con-

tractors. This feature is important if your organization interacts with the “public,” as most organizations do.

#### MEMBERSHIP DISCRIMINATION

This provision protects a club in the event of allegations of denial and/or refusal of membership, as well as other allegations regarding membership status. If you’ve been paying attention for the last decade, you’ve seen the importance of this coverage feature play out on your local and national news broadcasts. You should insist that your D&O insurance policy specify coverage for allegations of membership discrimination.

#### OUTSIDE DIRECTORSHIP COVERAGE

Outside directorship coverage provides protection for board members, directors and officers serving on the boards of other nonprofit entities at the request of the club’s board of directors. Most often this “outside service” is on the board of an affiliated nonprofit. A common example is a request for service on the board of a club’s nonprofit foundation.

### Compare Wisely

These are a few of the elements you should consider when choosing a directors and officers insurance policy. It goes without saying that pricing is important and always a consideration, but you must remember that D&O insurance is not a commodity. All policies are not created equally. A true evaluation will include a comparison of the coverage, as well as the premium. The club’s assets, as well as your personal assets are at stake. ■

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