



Elite D&O

Directors & Officers liability insurance



*In today's increasingly litigious environment the need for Directors & Officers liability insurance has never been more important. With recent business scandals across the world, it is clear that the responsibilities of directors and officers are mounting. Increased shareholder activism and tougher punishment for non compliance give rise to personal exposures for directors and officers. At ACE, we have used our experience to further develop the **Elite D&O** product for the areas of responsibility owed by directors and officers, and the potential risks faced by them in the managing of their business.*

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“We should remind ourselves that being a company director is a wonderful thing but it is a position of great responsibility which involves running the affairs of a company for the benefit of other people. It is a heavy responsibility we should not water down.”

Lord Goldsmith, Lords Grand Committee, 6 February 2006, column 291



The challenging environment for directors and officers

With the recent corporate scandals reported, directors and officers are experiencing the toughest environment they have ever had to endure. With both executive and non executive directors' responsibilities mounting, it is important that they seek adequate cover to mitigate these exposures.

There are many and varied groups of people or bodies who can bring actions against directors: employees, the government, competitors and shareholders. The legal environment is becoming increasingly hostile with directors being held ever more accountable for their actions or lack of action.

In the UK, publicly listed companies have to comply with more regulation than ever before, examples of which are as follows:

The Combined Code - 2006

The main principle of the Combined Code is that every company should be headed by an effective board which is collectively responsible for the success of the company. The company is expected to comply or explain where they fail to do so.

Financial Services and Markets Act (FSMA) 2000

The Financial Services Authority (FSA) has powers to prosecute directors who mislead the investors of their company. For both listed and non-listed companies, directors are required to act in good faith to avoid conflicts of interest and not to profit from their offices.

Companies Act 2006

This received Royal Assent on the 8th November 2006 and will be brought into force fully by October 2009. The Act is a comprehensive code of company law. It restates and replaces most of the existing company legislation and also introduces a wide range of changes to a number of areas such as directors' duties and liabilities and shareholders' rights.

With the enactment of the Companies Act 2006, which codifies directors' duties for the first time, there can be no doubt that we are at the beginning of some challenging and exciting years.

The UK is not the only country to increase its regulation of directors and officers. In the United States of America the SEC has imposed the Sarbanes-Oxley Act. This requires directors to certify the companies financial accounts. Should they fail to comply, the SEC may impose criminal punishment for such offences. The Sarbanes-Oxley Act not only regulates US domiciled companies, it also applies to foreign issuers of US listed securities.

Legislation is continually changing around the globe. Previously, we only had class actions arising from the US. Now we are seeing such claims in Australia and Canada with other European countries beginning to allow collective actions.

An *Elite D&O* policy brings peace of mind, and provides directors and officers with the confidence to perform their roles secure in the knowledge that they have considerable protection from one of the world's leading insurance and reinsurance companies.



*“The **Elite D&O** policy could cover the legal representation expenses and defence costs for the directors as well as some of the damages awarded.”*

Claims examples

Insolvency

Two directors of a company were found guilty of wrongful trading following the failure of their company. One of the directors had paid off a debt to another company he owned in preference to other creditors. They were both held personally responsible and liable for over £400,000 of the company’s debts.

The Elite D&O policy could cover the defence costs, but would NOT cover liabilities arising if there is any proven fraud or dishonesty.

Misrepresentation

A UK company was sold to an overseas buyer who, some two years later, claimed against the directors of the UK company for misrepresentation, issuing a writ in excess of £50 million. The directors had maintained their D&O policy and insurers were able to arrange a settlement nearer £3m.

A UK tour operator was sold to a US company. Within 12 months of the sale it was reported that the buyer was suing the eight main board directors for misrepresentation, believed to be in the order of £10m.

Three directors of an internet start up company were charged with conspiracy to defraud. It is alleged that the individuals issued false statements in prospectuses and concealed material facts in order to encourage people to invest.

Misrepresentation claims could be covered under the Elite D&O policy although any element of fraud or dishonesty would not be covered (such as in the third example).

A parent company and its subsidiary were placed into administration due to its failure to secure further funding from its bank. As a result of the administration, thousands of customers failed to receive goods that they had ordered and previously paid for. Twelve directors of both its parent and subsidiary have been and continue to be investigated by the administrators and the Department for Business, Enterprise and Regulatory Reform (formerly Department of Trade and Industry).

The Elite D&O policy could cover the legal representation expenses and defence costs, but would NOT cover liabilities arising if there is any proven fraud or dishonesty.

A “whistleblower” reported his company to its governing body, alleging that the company deliberately submitted annual returns to the regulatory authority in order to justify an increase in price. After preliminary investigations which lasted over a year, the matter was formally referred to the Serious Fraud Office. The SFO investigation which spanned over two years resulted with over twenty directors, officers and senior managers being interviewed.

The Elite D&O policy could cover the legal representation expenses but would NOT cover liabilities arising if there is any proven fraud or dishonesty.

A company’s office in Paris was subject to an investigation by the labour department of France investigating breaches of French labour code provisions. As a result legal proceedings were brought against the president of the company in respect of breach of section 212-1 of the labour code which sets the maximum weekly hours of 35 and section 212-7 which



controls the required rest period.

The Elite D&O policy could cover the legal representation expenses and defence costs.

US claims

A UK company signed a confidentiality agreement in order to begin negotiations to purchase a US company. The UK company ultimately decided to purchase a rival instead. The US company sued the UK company and two directors for a breach of the confidentiality agreement in gaining knowledge that could be used by their rival. A settlement was agreed in excess of US\$1million.

As a result of a fraud committed by one of its US subsidiaries, a company was forced to restate its accounts for the years 2000 and 2001. The restatement of accounts precipitated a number of civil, regulatory and criminal actions. These actions include a US Securities Class Action, court ordered investigation into the management of the of the company, and a criminal investigation of the directors both in the US subsidiary and the European parent company. A settlement was agreed in excess of US\$1billion.

The Elite policy could cover the defence costs for the directors as well as some of the damages awarded.



The *Elite D&O* product has been amended, reducing exclusions from previous versions.

Coverage

We have developed the *Elite D&O* product to provide cover that is far reaching and includes broad definitions of the following:

Claim

There is a broad definition of types of act which constitute the basis of a claim, including:

- Written demands, civil and criminal actions and administrative and regulatory proceedings.
- Employment related wrongful acts.
- Whistleblower issues.
- Action raised against insured persons in respect of pollution.
- An extradition proceeding - for clarity, no allegation of a wrongful act is required in respect of an extradition proceeding.

Definition of loss

This has been extended to include the following:

- Bail bond costs
- Crisis costs
- Deprivation of assets expenses
- Prosecution costs
- Public relations expenses
- Reputation protection expenses
- The multiplied portion of damages.

Wrongful act

- *Elite D&O* includes a wide definition of wrongful act including breach of trust, error, omission, misstatement, misleading statement, neglect or breach of duty.
- Any other matter claimed against an insured whilst acting in the capacity of an insured, including any violation of the Companies Act 2006, Sarbanes-Oxley Act of 2002 or any equivalent law, rule or regulation in any other jurisdiction.

Legal representation expenses

- The *Elite D&O* product offers full policy limit for the reasonable legal costs or related professional fees incurred by or on behalf of an insured in connection with an insured preparing for or attending an investigation.
- There is no requirement for an allegation of a wrongful act, simply when the attendance of an insured is first required or requested to attend an investigation.

Outside entity

- Outside entity has been redefined removing the minimum ownership threshold. An outside entity will be any entity that is not a subsidiary and does not have any of its securities listed in the United States of America. As with *Elite III* an outside entity will include a not-for-profit entity.

The *Elite D&O* product has been extended considerably to grant cover for the following:

Additional excess limit for non-indemnifiable loss

- In the event of a non-indemnifiable loss and following the exhaustion of the policy limit of liability, any other directors and officers policy which covers the loss and any other indemnification available to the directors, *Elite D&O* provides an aggregate excess limit for all main board directors (not just non executive directors) in addition to, and not part of, the original limit of liability of the policy. Within this aggregate each director will be offered a sub-limited individual excess limit.

Emergency defence costs and legal representation expenses

- Should our insured be subject to a dawn raid or similar and is unable to obtain prior



consent from us, the **Elite D&O** product offers the insured up to 10% of the limit (or sub-limit if applicable) for expenditure on defence costs, legal representation expenses, bail bond costs or public relations expenses.

Retired Director or Officer cover

- The **Elite D&O** product has extended the coverage offered under previous Elite policies to provide up to 10 years coverage for retired directors.

Tax extension

- The **Elite D&O** product offers coverage for any personal liability of a director that may arise if the company becomes insolvent and has unpaid taxes. Such taxes will include the National Insurance Contributions that were offered under previous Elite policies. Such coverage will be sub-limited as it was before.

Bail bond costs, crisis costs, public relations expenses and reputation protection expenses

The **Elite D&O** product will pay on behalf our insured the following:

- Bail bond and Civil bond costs
 - Where our insured is required by a court to pay bail or an equivalent in another jurisdiction, our product will provide coverage for such costs of the bond. These costs will not include the collateral itself. The coverage is sub-limited to 10% of the limit.
- Public relations expenses
 - Our product will offer sub-limited coverage for our insured to assist them in appointing a public relations firm or consultant, crisis management firm or law firm, to prevent or limit adverse effects or negative publicity which it is anticipated may arise from any claim or investigation. The key

element of this coverage is that cover will be afforded prior to a final adjudication.

- Reputation protection expenses
 - Our product will offer sub-limited coverage for our insured to assist them in appointing a public relations firm or consultant to diffuse the findings of a final adjudication.

In previous Elite products, bail bond costs and public relation expenses were tied into extradition proceedings, we have now given this cover free standing.

Extradition

- Should our insured find themselves subject to an extradition proceeding, the **Elite D&O** product will provide cover for defence costs, bail bond costs, crisis costs, public relations expenses and reputation protection expenses in relation to such proceedings.

Prosecution costs

- The **Elite D&O** product will assist our insured should they need to bring legal proceedings to obtain the discharge or revocation of:
 - An order disqualifying them from holding office as a company director
 - An interim or interlocutory order confiscating, controlling, suspending or freezing rights of ownership of real property or personal assets
 - An order of a court imposing their liberty
 - Deportation for any reason other than their conviction of a crime.

Foreign Corrupt Practices Act

- Should our insured be the subject of civil fines and penalties imposed under the Foreign Corrupt Practices Act, or similar legislation in any other jurisdiction, our product will provide sub-limited cover for such loss.



“ACE is one of the most innovative providers of insurance products and services in today’s global marketplace.”

Occupational health and safety extension

- The **Elite D&O** product will pay defence costs and legal representation expenses should our insured find themselves subject to a claim or investigation alleging the following:
 - Involuntary manslaughter
 - Constructive manslaughter
 - Gross negligence manslaughter
 - A breach of the Health and Safety at Work Act 1974 legislation or any similar legislation in any other jurisdiction.

Deprivation of assets extension

- In the event of an interim or interlocutory order confiscating, controlling, suspending or freezing rights of ownership of real property or personal assets of our insured, **Elite D&O** will pay for the following services:
 - Schooling
 - Housing
 - Utilities
 - Personal insurances.

The payments of these services will be paid following 30 days after the order freezing the assets and will be in excess of any personal allowance directed by the court.

By amending the severability paragraph to include non rescission language we are addressing any concerns insureds may have over our ability to rescind the policy.

This latest **Elite D&O** product has amended and reduced the exclusions in previous Elite

products as follows:

- Insured v insured claims are no longer excluded outside the United States of America.
- Insured v insured claims are covered if claim brought by the insured, but continue to be excluded where brought by the company.
- Insured v insured claims in the United States of America are covered for claims made by the company or an outside entity against an insured person for the following:
 - A claim for contribution or indemnity
 - A claim arising from any shareholder derivative action
 - Claims by a liquidator, receiver or administrative receiver.
- Full limit bodily injury and property damage cover is now granted for non-indemnifiable losses.
- Full limit pollution cover is now granted for non indemnifiable losses in addition to the shareholder derivative claims that were covered under previous Elite policies.
- The exclusions have been made fully severable.

Should our insured find themselves subject to a takeover/merger, ACE provides an option for up to 6 years run-off cover if the company is acquired, providing cover for claims notified after expiry of policy period.

For full policy terms, conditions and exclusions please refer to a copy of ACE Elite IV policy wording.



Why choose ACE?

Stability

ACE Europe is a leading provider of insurance and reinsurance in Europe. Headquartered in London with a network of offices across 19 European countries, ACE Europe is part of the ACE Group of Companies, one of the world's largest providers of property and liability insurance and reinsurance. Established in 1985, the ACE Group has grown rapidly by building long-term partnerships with our brokers and clients in each of the world's major insurance markets.

Innovation

ACE is one of the most innovative providers of insurance products and services in today's global marketplace. We pride ourselves on the quality and experience of our staff who are specialists in their fields. Using this experience we focus on products and services in market segments where this specialist knowledge creates a natural alliance with customers. In addition, we tailor our products and services to support the key business goals of those select segments.

Experience and expertise

ACE Europe has a highly respected underwriting team holding a significant degree of knowledge on the issues and liabilities faced by directors. Working with brokers and clients, we provide quality cover and a claims service that meets the needs of companies and directors in today's rapidly changing legal environment.



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