

The background features a dark purple gradient with several overlapping circles in shades of purple and blue. A solid red rectangle is positioned in the top right corner.

Directors & Officers Liability Insurance

CA DIVYA GANDHI

Modus Operandi

- ▶ News flash
- ▶ What is expected of directors
- ▶ Duties of Directors
- ▶ Corporate Governance
- ▶ Relevant laws
- ▶ Triggers for D&O Protection
- ▶ Directors & Officers Liability Insurance

India PE & VC
deals 2014
\$15.2 bn (Bain
& co)

Ricoh India
suspects
accounting
fraud in it's India
entity

Vijay Malya –
Kingfisher Airlines
Rs.9000 crs bad
loans

NSEL
commodity
Exchange
Rs.5600 crs
scam

SEBI Orders
Sahara to
repay to
Deposit holders

Reebok India Corporate
fraud of Rs.870 crs

What is Expected of Directors

- ▶ Honest and ethical conduct
- ▶ Avoidance of conflicts of interest
- ▶ Full, fair, accurate, timely, understandable disclosures
- ▶ Compliance with applicable laws, rules and regulations
- ▶ Prompt internal reporting of code violations
- ▶ Accountability for adherence

Expanded Role

- ▶ Greater Personal Accountability
- ▶ Deemed knowledge of violations
- ▶ Distinct role of each director as against collective functionality of the Board
- ▶ Claimants to Corporate Governance widened from Shareholders/ Investors to all Stakeholders
- ▶ Duty of care expanded from that of a prudent and reasonable man to that of an expert
- ▶ Stricter monitoring and supervision required on the part of non-executive / independent Directors

Duties of Directors Companies Act-2013

Section 166

- ▶ Shall act within provisions in Articles of the company
- ▶ Shall act in Good faith
- ▶ Shall exercise his duties with Due care & diligence
- ▶ Shall not act with personal interest which may conflict
- ▶ Shall not achieve undue gain
- ▶ Shall not assign his office

Corporate Governance

- ▶ Evolved through efforts of several committees appointed by MCA and SEBI
- ▶ Even the best standards cannot prevent instances of major corporate misconduct
- ▶ US - Enron, Worldcom, Tyco and, more recently gross miss-selling of collateralized debt obligations; in the UK; in France; in Germany; in Italy; in Japan; in South Korea; and many other OECD nations
- ▶ Satyam is a one-off incident considering the size of the malfeasance
- ▶ Commitment of a company to run its businesses in a legal, ethical and transparent manner

Laws affecting Liabilities of Directors & Officers

- ▶ TORT
- ▶ CIVIL LIABILITY
- ▶ CRIMINAL LIABILITY
- ▶ LIABILITY UNDER CONTRACT
- ▶ LABOUR LAWS
- ▶ COMPANIES ACT, 2013

Companies Act, 2013 Triggers for D&O Insurance Protection

- ▶ The 2013 Act - modern legislation which enables growth and greater regulation of the corporate sector in India.
- ▶ Recognition of stakeholders committee
- ▶ Investor Protection Measures
- ▶ Class Action Suits provides -class action by specified number of Members or Depositors against the company. They may also claim damages / compensation for fraudulent/ unlawful / wrongful acts from or against the company / directors / auditors / experts / advisors etc.
- ▶ Setting of National Company Law Tribunal and Appellate Tribunal(NCLT/NCALT)

D & O Liability Insurance

Directors and Officers can be sued **personally** by any **stakeholder** for a decision taken by them on behalf of the Company in their managerial capacity



Coverage Type

- ▶ Side A- Legal Liability Brought out on Directors and officers of the company
- ▶ Side-B- Company Reimbursements
- ▶ Entity Coverage
- ▶ Allocation

Who can Sue?

- ▶ Shareholders
 - ❖ Direct and Class actions: on their own behalf
- ▶ Employees: for labor related issues such as:
 - ❖ Sexual Harassment
 - ❖ Wrongful Termination / Promotion
 - ❖ Discrimination
 - ❖ Failure to promote
 - ❖ Breach of employment contract
- ▶ Third Parties
 - ❖ Competitors (Interference, etc.)
 - ❖ Customers
 - ❖ Government (banking law violations, civil rights issues, etc.) or Regulators
 - ❖ Creditors

Grounds for Liabilities

Actual or alleged:

- ▶ Misuse of corporate funds
- ▶ Companies Act violations
- ▶ False statements to Government agencies
- ▶ Irregularities in securities issues
- ▶ Breach of duty to minority shareholders
- ▶ Misuse of inside information for personal gains
- ▶ Imprudent expansion leading to erosion of shareholder wealth



Cont..

- ▶ Bankruptcy
- ▶ Management integrity issues
- ▶ Employment irregularities/harassment
- ▶ Auditing and Accounting practices
- ▶ Mergers & Acquisitions
- ▶ Violation of legal statutes
- ▶ Listing of stock or debt on a stock exchange

What it Pays?

- ▶ D&O Insurance provides indemnity to Directors and Officers for:
 - ❖ legal and defense costs
 - ❖ Damages, judgements and settlements arising from claims brought against Directors, due to wrongful acts in their capacity as Director or Officer of a company

What constitutes claim

- ▶ A written demand or civil, criminal, regulatory or arbitration proceeding seeking compensation or other legal remedy for a specified wrongful act;
- ▶ Administrative or Regulatory proceedings or investigations of any wrongful act done
- ▶ Emergency cost,
- ▶ Regulatory crisis response,
- ▶ Bail Bond Civil Bond Expenses
- ▶ Prosecution cost
- ▶ Public Relation Expenses



Important to understand while seeking coverage

- ▶ Limit of Liability-What is the Right Limit?
- ▶ Defense Cost-within limits of liability
- ▶ Retention or deductibles
- ▶ Claims Made basis
- ▶ Duty to Defend vs Right to defend
- ▶ Retroactive Date
- ▶ Discovery Period
- ▶ Primary Insurance and Excess Insurance



Most Important Aspects in selecting D&O Insurance

- ▶ Coverage
- ▶ Directors & Officers
- ▶ Entity
- ▶ Add on
- ▶ Retention-Side A, Side B
- ▶ Extra Protection for non executive Director
- ▶ Territory
- ▶ Pricing



Add on

- ▶ Cover for Subsidiaries ,Acquiring a new company or Merger
- ▶ Outside Directorship coverage
- ▶ Cover for Retired Directors
- ▶ Employment Practice Liability (EPL) cover for directors and officers
- ▶ Cover for Regulatory Crisis Response
- ▶ Cover for Assets and Liberty Costs including prosecution, bail bond and civil bond expenses
- ▶ Cover for damage to reputation
- ▶ Spousal Extension
- ▶ Extension to estate of the deceased director
- ▶ Territory & Jurisdiction



Extensions

- ▶ Entity Securities Extension
- ▶ Entity EPLI Extension
- ▶ IPO extension

Outside the scope

- ▶ Prior Acts & Prior Litigation
- ▶ Fines & penalties
- ▶ Major Shareholder
- ▶ Personal Gain
- ▶ Known wrongful acts
- ▶ Insured vs Insured (except employment related claim)
- ▶ Property Damage or Bodily Injury claims
- ▶ Professional Liability
- ▶ Security Related claims-Insider Trading or short swing profits
- ▶ Suit brought out by Regulator
- ▶ Public Offering of securities

D&O Diary

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- ▶ Case involving a lawsuit in a sexual harassment case involving Infosys, its former employee, Reka Maximovitch, and Phaneesh Murthy, the case was settled for \$3 million. The insurer paid half the amount and Infosys the other half.
- ▶ Case relating to HP Computers, India, and its managing director being held responsible for the death of one of its staffers while being transported home in the company vehicle. BPO rape case: Supreme Court puts onus on Som Mittal
- ▶ Resin manufacturing major, Bhansali Engineering Polymers has been dragged to the company law board (CLB) by its minority shareholders for alleged financial irregularities and mismanagement of fund

2011 Survey Results of D&O Policy in UK-Willis

- ▶ Sample size 100
- ▶ Some **20% of respondents already had experience of a claim or investigation** involving a director of their company.
- ▶ A third of those affected made a claim under their D&O insurance policy, and 35% sought indemnity from their company,
- ▶ suggesting **almost equal take-up of insurance and indemnity protection**
- ▶ **Regulatory investigations and enquiries** were identified by 84% as greater risk
- ▶ **Criminal and regulatory fines and penalties** were the second biggest worry, identified by 64%
- ▶ **67%** worry whether their D&O policy will be able to respond in all jurisdictions



Towers Watson survey-USA (Sample 481 Listed, Private and Not for Profit) Highlights

- ▶ Average Policy limits \$98 mn
- ▶ Cos with more than \$10 bn in assets reported average limit of \$187 mn
- ▶ Private cos Limits Avg \$ 36 mn
- ▶ Automobiles and Transport Equipment cos were the largest limits of avg \$210 mn
- ▶ By market Capitalisation cos with more than \$ 10 bn avg limits of \$222 mn
- ▶ Near 48% of participants with more than \$10 bn in Assets faced claims on their D&O



Thank You

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