Frequently asked questions.

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Claims examples
D&O

Whenever spectacular „business scandals“ dominate the press, one insurance comes into focus: D&O. It might be assumed that breaches of duty by management only represent a threatening scenario for DAX executives and international corporations. But appearances are deceptive. The vast majority of claims and actions for damages are directed against the boards of small and medium-sized companies.

Claims against company managers can be raised by the company itself (so-called „internal liability“) and by third parties (so-called „external liability“). Below you will find some background information and examples of damages.

Internal liability

- Directors of German corporations „[...] are required to conduct the company’s affairs with the due care of a prudent businessperson.“ (§ 43 para. 1 GmbHG) or „[...] are to exercise the due care of a prudent manager faithfully complying with the relevant duties“ (§ 93 para. 1. p. 1 AktG).
- Directors „who breach the duties incumbent upon them are jointly and severally liable to the company for any damage arising“ (§ 43 para. 2 GmbHG) or „acting in dereliction of their duties are liable as joint and several debtors to compensate the company for any damage resulting from their actions . Where it is in dispute whether or not they exercised the due care of a prudent manager faithfully complying with the relevant duties, the onus of proof is upon them“ (§ 93 para. 2 AktG).

The direct, personally unlimited as well as joint and several liability of the executive body towards its own company is derived from the two general provisions of § 43 GmbHG and § 93 AktG. The basic prerequisite for a claim is a loss suffered by the company, the causal cause of which lies in a breach of duty by the manager, as well as default. The duties of the managers are essentially derived from the GmbHG and the AktG.

In the case of an internal liability, the company only has to show and prove that the damage it has suffered is due to the conduct of the manager. The manger is entitled to exculpate himself if he can prove that he has not committed a breach of duty or that he is not at fault.

External Liability

External liability is the direct liability of the board towards a third party. The board is held liable not by the company itself, but by an external third party. There are many possible claimants (e.g. customers, business partners, tax authorities, social security institutions). The basis of the claim is also manifold. For example, the board of directors can be held liable under § 823 BGB. In addition, a large number of special legal provisions give rise to countless other possible liability risks, e.g. in connection with criminal law provisions such as § 263 StGB (fraud), § 266 StGB (breach of trust) or § 266a StGB (withholding and embezzlement of remuneration). High liability risks also exist in connection with company insolvencies (§§ 15a and 15b InsO), claims under the General Equal Treatment Act (AGG) or tax law (§§ 69, 34 AO).

Claim Examples

Since the general norms for claims against the company‘s executive bodies are worded very broadly and the „ due care of a prudent businessperson“ is not defined in more detail, there are countless possible claim scenarios in the context of internal liability cases. Due to the large number of possible claimants and the high number of possible sources for claims, external liability cases of any kind are also imaginable. We have compiled a selection of typical liability cases below. In all these cases the D&O insurer has examined the question of liability and subsequently granted defence cost coverage or indemnified the insured person against the alleged claims.

→ Purchase of Overpriced Goods:

The managing director of an internet company purchased hardware and software that subsequently turned out to be considerably overpriced. The company claimed damages in the amount of the excess part of the purchase costs.

→ Late Application:

A retail company was entitled to short-time working benefits in the challenge of the Covid-Crisis. However, the managing director failed to file an application with the employment agency in time. The company made a claim against the manager for the amount of the short-time allowance that had not been paid.

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→ Lack of Supervision I:

At a bank, an employee embezzled customer funds amounting to a six-figures sum. This was only discovered after several years and the bank employee was imprisoned. The imprisoned employee was unable to pay the amount, so that the bank suffered considerable damage.

The bank‘s managing director at the time was accused of not sufficiently controlling and supervising the employee. The bank made a claim against the managing director for the amount embezzled and all other costs incurred by the bank.

→ Lack of Supervision II:

The general manger of a food chain ordered the wrong ingredient in its purchasing department, which was unusable for the company. The orders could not be contractually reversed, so the company suffered damages of more than 1 million euros. The damage was claimed against the general manger, who, however, only has to pay approximately 100,000 euros to the company due to the employee liability privilege. The damage in excess of this was claimed under the own damage cover and from the managing director of the food chain. The alleged breach of duty was lack of supervision and control of the authorised signatory.

→ Passing on of Fines:

A cartel fine of 70 million euros was imposed on a sanitary ware manufacturer. The board members were accused of having violated preventive and supervisory duties. Among other things, because they failed to create a compliance system to prevent cartel violations. The company took recourse against the board members in the amount of 70 million euros. Even though the court ruled that fines against companies could not be recovered from the boards, the boards incurred considerable defence costs.

→ Failure to Conduct Due iligence:

A managing director did not carry out sufficient due diligence when taking over a company, resulting in a bad investment leading to losses. A claim was made against the managing director for the suffered loss.

→ Turning Away From Core Business:

The managing director of a company no longer focused on the core business of the company but on real estate transactions. These transactions caused the company millions in damages, which were claimed against the managing director.

→ Formal Errors in Severance Agreements:

After the liquidation of a former subsidiary, it turned out that due to a formal error, the severance agreements for the employees who remained in the group were void. The Labour Court ruled that these employees were entitled to full severance pay. A formal error by the managing director resulted in damages amounting to several million euros, which the company claimed against the managing director.

→ Non-Extension of Lease Agreement:

The board of directors of a golf club had failed to timely exercise the option to renew the lease of the club‘s premises under the previous terms and conditions. The landlord agreed to extend the lease only at a significantly higher rent. The golf club took the board to court for damages in the amount of the additional costs for the increased rent.

→ Failure to Request a Certificate of Good Conduct:

A managing director had failed to request a police clearance certificate when hiring a controller. The man, who had several criminal convictions, embezzled a substantial amount of money. The company made a claim against the managing director for the amount embezzled.

→ Adverse Contracts:

By entering into disadvantageous contracts, a managing director allegedly caused damage amounting to several hundred million euros. After the group audit pointed out that he may have neglected and breached the duty of care in his expansion policy, the company made a claim for damages against the managing director.

→ Miscalculation:

The managing director of a construction company agreed with a client on a lump sum price for the construction of a warehouse. After completion, the actual construction costs were considerably higher than the fixed price, leaving the construction company on part of the costs. The company sued the managing director for damages due to incorrect calculation of the fixed price.

→ Incorrect Liquidity Planning:

Due to the oversized renewal of the machinery, liquidity problems arose in the company. An impending insolvency could only be avoided through expensive interim financing. The company took recourse against the responsible board member in the amount of the additional costs.

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→ Liability for Social Security Contributions:

A managing director did not pay social security contributions on time. For the non-payment of social security contributions on wages and salaries paid to employees, the social security agency made a direct personal and unlimited claim against him under § 823 para. 2 of the German Civil Code (BGB) in conjunction with § 266a para. 1 of the German Criminal Code (StGB). A negligence-based liability is sufficient and fault is regularly presumed. The managing director had sole responsibility, i.e. he could not exonerate himself with instructions from the shareholders or a shareholders resolution.

→ Late Filing for Insolvency and Payments after Insolvency Maturity:

The managing director of a GmbH filed for insolvency late and made himself thereby liable to prosecution. The late filing for insolvency also established his liability towards the creditors or shareholders. Furthermore, the managing director was also liable to pay damages to the GmbH (resp. the insolvency administrator) because he made payments after the insolvency had occurred.