

MEMORANDUM

DATE: January 2011
TO: **Clients of Willis**
FROM: Mick McGill, Vice President – Client Advocacy
SUBJECT: **Directors & Officers Liability Coverage**

One of the least understood insurance policies carried by many of our clients is the Directors & Officers Liability Policy. Over the course of the past few years, we have seen an increased number of claims associated with these policies.

Directors and Officers of an organization can be held personally liable for a wide range of wrongful acts or omissions that cause other persons or organizations to suffer harm that do not qualify as bodily injury, property damage, personal injury or advertising injury which are exposures covered under the General Liability policy. Directors & Officers Liability insurance is utilized to attempt to fill this gap and protect Directors and Officers against claims or lawsuits alleging such acts or omissions.

The Directors & Officers Liability policy is designed to protect the Fraternity and/or the Foundation as well as their Directors and Officers against claims and suits brought by 3rd parties alleging they sustained harm as a result of the failure of the Fraternity/Foundation and Director and Officer carrying out the fiduciary responsibilities of their position. Specific examples of Directors & Officer's claims and lawsuits that have been filed in the past include the following:

- Claims filed by members, prospective members, and alumni due to allegations of wrongful termination of membership or being wrongfully excluded from the opportunity to join the organization.
- Employment related liabilities claims relating to the following:
 - Wrongful Termination
 - Sexual Harassment
 - Discrimination
- Claims filed against the Directors and Officers by other volunteers alleging fiduciary negligence in undertaking the roles and responsibilities of their leadership position.
- Claims and lawsuits naming the National Fraternity resulting from allegations by a party alleging the chapter did not fulfill their obligations outlined in a contract.

- Claims brought by alumni or volunteers alleging mismanagement of the National Fraternity Board of Directors.

Providing a defense when these types of claims and lawsuits are filed is a significant element of a Director & Officers Liability claim. According to the provisions of the Directors & Officers Liability policy, defense cost incurred by the insured or settlements made without the prior written consent of the Insurer will **NOT** be covered under the policy. Insurance Carriers have also established Panel Rates and specific Litigation Guidelines aimed at controlling defense cost. If defense counsel is hired by an insured without prior approval from the insurance carrier, there is no guarantee all charged fees will be paid as part of the claim. In addition, there is a certain amount of inefficiency created in situations where an Insured retains legal counsel and the defense is later reassigned to an Insurance Carrier approved attorney for the reasons described above.

This policy language and other factors mentioned above can be difficult to overcome in situations where an insured obtains legal counsel and incurs defense costs prior to notifying the insurer of the claim or without prior written consent of the Insurer. Since this is the case, we recommend the following guidelines be followed when an occurrence arises that may potentially result in a Directors & Officers Liability claim:

- Immediately contact us and place us on notice of a claim or potential claim. If you are uncertain whether the circumstances could ultimately lead to a claim, please contact us and we can discuss it. We will immediately place the insurance carrier on notice of any claims and submit potential claims to the carrier as a 'Notice Only' until more information becomes available.
- In the event immediate legal action must be taken on a potential Director & Officers Liability claim, please contact us prior to incurring any legal expenses. We will contact the Insurance Carrier and push for immediate assignment of defense counsel. If the situation is of an urgent nature, and immediate attempts to contact the applicable Insurance Carrier personnel are unsuccessful, we will work with you and your personal attorney to formulate a strategy that will effectively protect the organization and minimize the expenses incurred which may potentially be disputed by the Insurance Carrier.

We recently experienced a situation where a client retained a personal attorney to provide the initial defense of a Directors & Officers claim without prior approval from the Insurance Carrier which resulted in the client incurring non-covered legal expenses of approximately \$20,000. It is critical the recommendations outlined above be followed to avoid potential problems relative to the payment and reimbursement of pre-approved legal fees and to ensure the initial adjustment of the claim is a smooth process.

As always, we are available to discuss any situation prior to submitting a claim to ensure your Fraternity's claims are properly reported to the carrier and will provide claim advocacy services throughout the adjustment of a Directors & Officers claim.

Thank you for your cooperation in this matter. Please feel free to contact me if you have any questions or concerns regarding this information.