



Ian H. Graham/CNA Claims Guide

Is Your Homeowner Association Informed and Prepared for a Directors' & Officers' Liability Insurance Claim?

Directors' & Officers' (D&O) Liability Insurance is *not* like property, general liability, or automobile insurance. Your association will hopefully have fewer claims on D&O than any other insurance coverage, but when you do have a D&O claim—do you know what to expect? Are you comfortable that the premium paid is giving you the protection you need? Do you know what constitutes a claim or potential claim? Do you know when to report it to your insurance agent/carrier? Do you know why certain things are never covered under a D&O policy?

You and your board's personal assets as well as the association's assets are at risk--take the time to be informed and prepared for a D&O claim.

How to Report a D&O Claim or Potential Claim

What constitutes a D&O Claim?

Check the definition of *Claim*. How does your D&O policy form define "claim"?

- ✓ Does it include non-monetary relief?
- ✓ Does it include administrative hearings?

The CNA D&O policy form defines claim as follows (see 'Association Liability,' page 1):

- a. a written demand for monetary damages or nonmonetary relief against a named entity insured for a wrongful act;*
- b. a civil, criminal, or administrative adjudicatory proceeding against a named entity insured for a wrongful act, including any appeal therefrom; or*
- c. a proceeding before the United States Equal Employment Opportunity Commission or any similar state, local or territorial governmental agency, against a named entity insured for a wrongful act which is a wrongful employment practice.*

What if you have a situation that does not meet the above definition?

If there is a situation where verbal demands have been made and there are threats of lawsuits, etc., where there is a potential for a written demand—it should be reported to your carrier.

- ✓ Most D&O policies have time requirements for reporting a claim. What does your D&O policy say?

On the CNA form you can find reporting requirements under, 'Notification of a Potential Claim' (see GTC, page 6):

If, during the policy period the named entity insureds first become aware of a specific wrongful act which may reasonably give rise to a future liability claim and during such period give written notice to the Insurer of:

- a. the names of any potential claimants and a description of the wrongful act which forms the basis of their potential claim;*
- b. the identity of the specific named entity insureds allegedly responsible for such specific wrongful act;*
- c. the consequences that have resulted or may result from such specific wrongful act;*
- d. the nature of the potential monetary damages or non-monetary relief which may be sought in consequence of such specific wrongful act; and*
- e. the circumstances by which named entity insureds first became aware of such specific wrongful act; then any liability claim otherwise covered pursuant to the liability coverage part which is subsequently made and which arises out of such wrongful act shall be deemed to have been first made and reported to the Insurer by the named entity insureds at the time such written notice was received by the Insurer. No coverage is provided for fees and expenses incurred prior to the time such notice results in a liability claim.*

Are there any problems with putting carrier on notice? Will this negatively impact my D&O experience and/or premium?

- ✓ Most insurance carriers would answer, no.

CNA would prefer to be notified of any potential claims. This ensures that the situation will be handled appropriately from the start. CNA or assigned defense counsel can often provide guidance to the insured that might mitigate an actual claim. Underwriters look at notification claims as the insured being prudent and mindful of their risk of D&O claims.

If there is a D&O Claim, should carriers of our other lines of our insurance be notified?

- ✓ Yes.

Oftentimes coverage for a claim could be found under both the D&O policy *and* the General Liability insurance policy. CNA (and generally all carriers) will work with the other carriers to handle the claim, defense and settlement.

Where do I send notices of claims or potential claims?

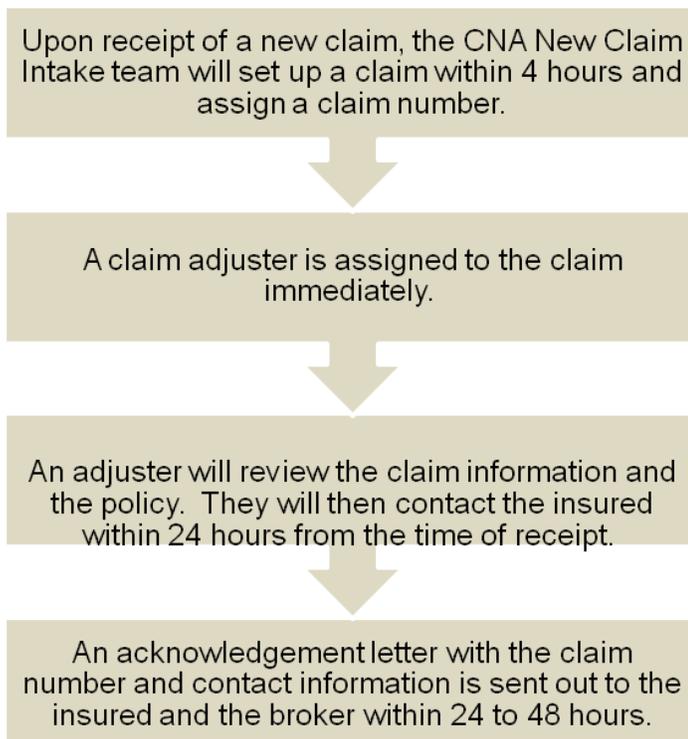
- ✓ Send any written documents, demands, etc. to your insurance agent. You can also check your policy for specific carrier instructions for claims reporting.

Claims Process: What to Expect

What happens when a claim or a potential claim is reported to your carrier?

Do you know how your claim will be processed by your D&O carrier? Does the carrier have timeframes so that you know what to expect? As a D&O policyholder, it is fair for you to ask your carrier what their claims process is.

CNA's Claims Process



Other Key Information

Who handles the defense? Does the carrier hire an attorney? Can we use our association's

attorney?

- ✓ With a “duty to defend” policy, the carrier will assign an attorney to handle the defense for the board, board members and association.

Is your policy “duty to defend”? The CNA policy is.

- ✓ In some cases, the carrier may use in-house counsel or the adjuster may be able to handle the claim without assigning the matter to an attorney (in some cases).

Ask your carrier how they handle. Depending on the claim, CNA will determine what is appropriate for each claim situation.

- ✓ You should ask your D&O carrier if they use experienced community association attorneys. Community associations are a unique area of law and experience in D&O for associations is an important factor when you or your board or association needs expertise.

CNA has a panel of community association attorneys throughout the country.

- ✓ If your association’s in-house counsel has been advising you on a matter that later gives rise to a claim, it may not be advisable to have the in-house attorney act as counsel as it may pose a conflict of interest. Talk with your D&O carrier’s claim team to find the appropriate solution.

CNA is always willing to discuss your association’s defense and choice of counsel with you.

Is there a Deductible paid by the association?

- ✓ Typically D&O policies have a per claim deductible. Check the terms of your policy.

The CNA D&O policy has a ‘mediation credit’ for community associations. If, within 60 days of a claim, the association agrees to go to mediation and the claim is resolved, the insured will receive a 50% deductible credit.

Does your D&O policy have a “hammer clause” and what is it?

- ✓ A hammer clause pertains to the settlement of a claim. If there is a proposed settlement to a claim and the insured refuses to unreasonably consent to settlement, then the hammer clause could apply. There are various degrees of a hammer clauses as described below:
 - There are “hard hammer” clauses, which mean the association must bear all expense (defense and settlement) over and above the proposed settlement amount.
 - There are “softened hammer” clauses, which mean that the insurance carrier will pay

a percentage of the expense over and above the proposed settlement amount.

The CNA policy has a “softened hammer clause” of 80/20. CNA will pay 80% of any amounts (defense and damages) over and above the proposed settlement amount. The insured will pay 20%.

These percentages vary so be sure to check your policy’s hammer clause.

What else can I do to ensure a smooth D&O claims process?

- ✓ Keep all lines of communication open.

Make sure that you know the following for each D&O claim:

1. Your insurance agent’s contact information.
2. Homeowner association’s main point of contact for the insurance adjuster.
3. Insurance carrier’s adjuster and contact information.
4. Assigned defense counsel’s contact information.

Having one point of contact for the association will lessen the likelihood of miscommunication or information getting lost among various parties.

Have the association’s main point of contact call your insurance agent or the insurance carrier’s adjuster anytime. They are there to assist in the process and should keep the association apprised of the status of your claim.

Ian H. Graham is also a resource for you. Should you have any questions, call IHG at 800.621.2324 or visit them the [Ian H. Graham](#) web site.

This article provides information, rather than advice or opinion. Please remember that only the relevant insurance policy provides actual terms, coverages, amounts, conditions, and exclusions for an insured. Examples are for illustrative purposes only and not intended to establish any standards of care, serve as legal advice, or acknowledge any given factual situation is covered under any CNA insurance policy. All CNA products may not be available in all states and may be subject to change without notice. CNA is a registered trademark of CNA Financial Corporation.

Ian H. Graham Insurance, is the brand name for the brokerage and program administration operations of Affinity Insurance Services, Inc.; (AR 244489); in CA & MN, AIS Affinity Insurance Agency, Inc. (CA 0795465); in OK AIS Affinity Insurance Services Inc.; in CA, Aon Affinity Insurance Services, Inc., (0G94493), Aon Direct Insurance Administrators and Berkely Insurance Agency and in NY AIS Affinity Insurance Agency.

