

North America Financial Lines: Private Company D&O Liability

To fully understand private company D&O exposure, it is important to consider a broad range of risks. This edition of AIG's Claims Intelligence Series is designed to shed light on private company Directors & Officers (D&O) liability exposures that have historically been underappreciated. Our analysis contemplated AIG claims data on 151 losses of \$1 million or more incurred on private company D&O policies (the D&O coverage parts of modular forms as well as standalone D&O policies) issued from 2016 to 2020 to private commercial businesses in North America.



At a glance

- Claims involving customers and competitors accounted for more than one-third (34%) of the claim count and 25% of losses paid
- The majority of private company D&O losses paid resulted from claims not stemming from antitrust and bankruptcy matters.
- Regulatory matters, often considered a public company problem, accounted for 20% of private company D&O claims studied.
- Shareholder/breach of fiduciary duty claims also accounted for 20% of the claim count and nearly one quarter (23%) of amounts paid during the period studied. These matters also had the highest average and median claim payment of any category besides antitrust claims.
- Ensuring appropriate D&O liability limits for the full spectrum of private company D&O exposures is critical to properly protect the organization and its directors and officers.

What's missing when assessing risk?

For the purposes of this study, AIG categorized claims into five categories based on the largest loss driver of each claim. Antitrust and bankruptcy-related claims represented 37% of the overall amounts paid during the period studied, leaving 63% of amounts paid attributed to other claims, namely those involving customers or competitors, regulatory matters, and shareholder/breach of fiduciary duty cases:

Category	Percentage of Claim Count	Percentage of Total Paid Loss
Antitrust	13%	25%
Bankruptcy	13%	12%
Customers or Competitors	34%	25%
Regulatory	20%	15%
Shareholder/Breach of Fiduciary Duty	20%	23%

Customers or Competitors

Claims involving customers or competitors accounted for more than one-third (34%) of claims and 25% of losses paid during the period studied. Claims in this category include general commercial disputes, product and service-related liability, and employee and intellectual property poaching allegations. Although these claims can be made by multiple plaintiffs and include associated regulatory actions, they are usually asserted by a single competitor or customer. This differs from matters in the antitrust category, which typically include class actions or suits involving multiple companies in the same market and often also include an investigation or action by at least one governmental regulatory body, such as the Department of Justice or Federal Trade Commission.

Regulatory

Regulatory matters, which include proceedings brought by or on behalf of a government entity, such as the Department of Justice (DOJ), Securities Exchange Commission (SEC), State Attorneys General, or Qui Tam actions, account for 20% of the claims reviewed in this study. Regulatory claims are often believed to be a public company problem, however, the continually evolving and tightening regulatory environment in the U.S. has made them a significant concern for all companies. Surprisingly, these claims account for 17% of total losses for smaller private companies with less than \$500 million in assets.



The Most Severe Cases

If only 37% of the amounts paid arise from antitrust and bankruptcy claims, why do these two categories get so much attention? Severity may be the answer. When looking at the top five most severe claims – understanding that the loss assessed may be mitigated by the available policy limit – four of the top five losses were antitrust claims. The fifth was a bankruptcy matter.

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Shareholder/Breach of Fiduciary Duty

Claims by a shareholder asserting a devaluation of their shares or an alleged breach of fiduciary duty – another exposure often associated with public company D&O – figure significantly in private company exposure as well. These accounted for 20% of claims and nearly one-quarter (23%) of losses paid. Notably, shareholder/breach of fiduciary duty claims had the highest average and median claims payment of any category besides antitrust claims.

As a percentage of all losses paid, experience was similar for both large (assets of \$500 million and above) and small (assets of less than \$500 million) companies: 24% of all large company loss and 22% of all small company loss. However, the character and severity of these claims typically varies based upon company size. Cases against larger private companies are often more akin to those faced by public companies, such as putative class actions alleging breaches of fiduciary duty or derivative allegations on behalf of the company. Smaller companies are more likely to see claims involving asset purchase agreements or similar contracts and a single or small number of plaintiffs.

Shareholder/breach of fiduciary duty claims had the second highest average and median claims payments of any category, second only to antitrust claims.

Category	Average Paid	Median Paid
Antitrust	\$7,142,900	\$4,875,000
Bankruptcy	\$3,713,020	\$2,598,577
Customers or Competitors	\$2,695,191	\$1,861,067
Regulatory	\$2,882,325	\$1,858,200
Shareholder/Breach of Fiduciary Duty	\$4,324,326	\$3,138,563



Case Studies

Regulatory

A criminal indictment was brought against a private company's former founder and CEO. The matter alleged that he engaged in a quid pro quo relationship with a state government official to secure a state medical services contract. The company's D&O policy paid \$7 million to fund the defense of the insured.

Customers or Competitors

A company's former employee left for a competitor organization and allegedly used his former employer's confidential information for the benefit of his new employer. A lawsuit was filed against the former employee and their new employer in state court alleging breach of contract, misappropriation of trade secrets, and intentional interference with prospective economic relations. The case ultimately settled and, despite the inclusion of both covered and uncovered allegations, \$5 million was paid under the D&O policy.

Shareholder/Breach of Fiduciary Duties

The defendants allegedly breached their obligations to their lender under a refinancing loan. The lender sued, bringing causes of action that included breach of fiduciary duty, breach of contract, tortious interference with contracts, and aiding and abetting breach of fiduciary duty. The matter ultimately settled for \$20 million, with a notable portion paid by the defendant's D&O policy despite the inclusion of both covered and uncovered allegations.



AIG has more than six decades of experience providing management liability solutions for companies, and their directors and officers. Our extensive knowledge, resources, and data enable us to tailor solutions to our client's individual needs. AIG's financial strength, integrated claims model, and proven claim expertise ensure that we are there, helping to drive the best possible outcomes for our clients.

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The scenarios described herein are offered only as examples. Coverage depends on the actual facts of each case and the terms, conditions and exclusions of each individual policy. Anyone interested in the above products should request a copy of the standard form of policy for a description of the scope and limitations of coverage.

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