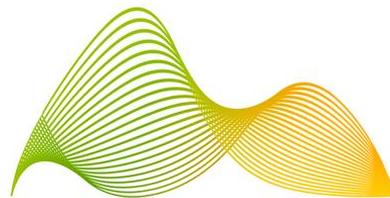


# THE IMPACT OF MALICIOUS ACTS ON D&O INSURANCE

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## OVERVIEW OF D&O INSURANCE IN BRAZIL

- Started its sales around 1997: privatization.
- Foreign executives moved to Brazil and requested the insurance.
- It was regulated as a modality of civil liability insurance (Circular Susep 336/2007), until a specific regulation was enacted .

# OVERVIEW OF D&O INSURANCE IN BRAZIL

- Circular Susep 553 of May 23rd 2017, enforced after November 2017 (still a civil liability insurance).
- Claims made policy.
- The basic coverage includes legal costs, indemnities or settlements made with the insurer's authorization.

## OVERVIEW OF D&O INSURANCE IN BRAZIL

- Allows the possibility of an extension of coverage for penalties (civil and administrative only). However, there is no definition of penalties in the regulation.
- Increase in the amount of penalties in the Brazilian SEC (CVM), antitrust regulator (CADE) and banking authority (BACEN).
- A natural person can obtain the D&O insurance individually.
- The insurance can cover only legal costs (provision included for pension funds).

# THE MALICIOUS ACT ON D&O POLICIES

- As a principle, the malicious act is not covered, and the insured must reimburse the insurer of all the amounts received if he acknowledges his liability or a malicious act is recognized in a judicial decision.
  - Usually, the defense costs are advanced by the insurer.
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# THE MALICIOUS ACT ON D&O POLICIES

- Brazilian Anti Corruption Law: August 2013.
  - Operation Car Wash: March 2014.
  - Initially focused on Petrobrás, with 55 phases up until September 2018.
  - Many companies with D&O policy were involved.
  - Large amounts involved and large number of claims.
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# THE MALICIOUS ACT ON D&O POLICIES

- The Market adopted the injurious acts provision, according to which in case the claim involves a personal advantage, fraud, corruption, payment of a commission, donation to political parties, money laundering, etc, there is no coverage.

# THE MALICIOUS ACT ON D&O POLICIES

- The issue is that SOME policies, and even some biddings establish that in case of an injurious act as setforth in the specific provision, the defense costs will NOT be advanced, and the insurer will only pay them if the insured is found not guilty later on.
- Difficulty in recovering the amounts spent after Operation Car Wash.

# RECENT JUDICIAL DECISIONS

- São Paulo State Court of Appeals: the parties were discussing the arbitration clause, and the claim was denied by the insurer because of a malicious act, recognized in a testimony by the insured.
- The principal is involved in Operation Car Wash. The insured confessed his wrongdoings and entered into a plea bargaining.
- The judge analyzed the legality of the claim, and declared that if there was a lawsuit, it would not be successful because the crime was confessed and the insurance cannot cover malicious acts.

# RECENT JUDICIAL DECISIONS

- Paraná State Court of Appeals: the claim was denied due to the express exclusion for malicious acts and the non disclosure of relevant facts at the policy 's inception.
- The Court stated that the D&O insurance does not give a financial support for directors to engage in illicit behavior.
- Since the illicit behavior was proved, there is no coverage and the Court decided that it is not necessary to prove the non disclosure and discuss this point.