

CLAIMING UNDER DIRECTORS' AND OFFICERS' INSURANCE – A PRACTICAL GUIDE

Directors' and Officers' (D&O) insurance provides cover to directors, officers, and certain other senior individuals at a company, where there is a threat of legal proceedings or investigations. In particular, D&O policies provide ongoing cover for the legal fees that will be incurred by those individuals (or their companies) in these situations, which can be of crucial importance.

When a claim or investigation is commenced, individuals will often find themselves grappling with a lot of urgent issues. It is, however, important to consider insurance at the earliest moment, and make sure that you are taking the necessary steps to ensure you are covered. In this guide, we consider some of the key things that companies and individuals should be thinking about.

1. NOTIFY INSURERS

If a claim is brought against a director, officer, or other insured individual, insurers should be notified as soon as possible. Sending the notification can usually be done through your broker.

Check the policy period and ensure that there is no risk of imminent expiry. Claims must be notified during the policy period (which are typically annual), and most policies will require claims to be notified "as soon as reasonably practicable". If a claim is not notified on time, this may mean that cover is excluded.

When drafting the notification, you should also consider whether there are other related claims that might arise, and whether there are upcoming deadlines or decisions you need to alert insurers to.

What is a "Claim"?

Be mindful of what can constitute a "Claim" within the meaning of a D&O policy. This is often not limited to formal legal proceedings being served. It can extend to simply a written demand made against the director (e.g. a letter alleging the director has breached their duty and is liable to pay damages), or a request to enter into a standstill agreement.

Key issues

- D&O insurance provides cover to directors, officers, and certain other senior individuals for claims made against them and defence costs.
- It is important that when a claim arises, insurance is considered at the earliest possible moment.
- Key steps that a D&O should take include notifying insurers, considering cover under the company's deed of indemnity, seeking insurers' consent for defence costs, and keeping insurers updated regarding the claim.
- A failure to notify insurers or seek their consent may create issues regarding whether the D&O will be covered.

Consider Confidentiality

Investigations in particular are often highly sensitive, and you or the regulator may have concerns about protecting confidentiality. In those situations, it will be important to consider precisely what your policy obligations are, and whether they allow you to limit what you tell insurers.

Notifying insurers of facts and circumstances that may give rise to a claim

If you become aware of something that suggests a claim could be made against D&Os in the future, that should be notified to insurers. For example, if you find out that a class action law firm has published an article on its website stating that it is investigating a potential class action against the company and its directors, that is something that could be notified to insurers as a fact or circumstance that could give rise to a claim. If a claim is threatened against the company, you should also consider whether there is a risk of subsequent claims/investigations against individuals that need to be notified.

2. CONSIDER THE COMPANY DEED OF INDEMNITY

D&Os are often covered by a deed of indemnity with the company. When a claim arises, D&Os should consider their cover under the deed of indemnity as well as the D&O insurance policy.

A deed of indemnity and D&O policy work together

A company deed of indemnity and D&O policy are intended to work hand in hand. The deed of indemnity will generally be the primary cover, and the insurance policy will provide cover where the company is unable to indemnify the D&O, either because it is unable to either legally (there are certain liabilities a company cannot indemnify a director for, such as a liability owed to the company) or practically (e.g. the company is insolvent). Where a company is paying under the indemnity, it is then normally able to recover those payments under the D&O insurance (known as "Side B" cover).

3. SEEK INSURERS' CONSENT FOR DEFENCE COSTS

D&O insurance typically provides cover for the D&Os "reasonable" legal costs incurred in defending a claim. This is usually subject to an obligation for the insured to seek the insurers' consent before incurring defence costs. Insurers' consent should therefore be sought as soon as possible following the claim being notified (or at the same time as the notification). The policy will often stipulate that the insurers' consent "must not be unreasonably withheld".

Cover before consent can be obtained

D&O policies will often provide cover for "Emergency Costs" (usually around 10-20% of the limit of liability) which will cover legal costs incurred before the insurers' consent is obtained, as practically the insurers' consent may not be provided for some time.

Consequences of failing to notify

- If you fail to notify insurers of relevant facts and circumstances that you become aware of, and a claim is later brought against D&Os arising from those facts and circumstances, cover for that claim may be excluded.
- It may not always be obvious that something needs to be notified, so if you become aware of an issue you should always consider the insurance position. Usually, if there is any doubt, it is better to err on the side of caution and notify.

Timeframe for insurers to respond

Check if the policy contains a timeframe in which the insurers are required to provide their coverage response (e.g. 30 days). Insurers should be pressed to confirm coverage in accordance with this requirement.

Obtaining consent

Insurers will often have views on the incurring of defence costs, for example on which firm should be instructed or the level of fees that should be charged. It is important to be able to justify any proposals for legal representation, for example by reference to the value of the claim or the potential reputational damage.

Policy limits

D&O policies often have a shared limit between all insureds (e.g. all D&Os and the company) and claims are paid on a “first come, first served” basis.

Separate representation

Where a claim is brought against multiple D&Os, the policy will generally allow each D&O to be separately represented if there is a conflict of interest.

4. KEEP INSURERS UPDATED REGARDING THE CLAIM

Claims cooperation obligations

D&O policies will also often have “claims cooperation” clauses which provide that the insured must keep the insurers updated regarding the status of the claim and provide them with all relevant information (e.g. key correspondence). They will typically also allow the insurers to take over the defence in certain circumstances. It is important to keep insurers updated regarding the status of the claim, **however**, be careful when providing any privileged advice to an insurer to ensure that privilege is not waived.

Seek insurers' consent for settlements

Insurers' consent must be sought before any settlement of the claim is entered into. In practice, this will often mean discussing settlement strategy and timing in advance with insurers and keeping them updated regarding any settlement discussions and settlement amounts. They will need to understand the logic behind a settlement in order to make the decision, and time for them to consider any settlement should be factored in.

Common Pitfalls

Failing to notify

- Not notifying insurers promptly when you learn of facts and circumstances that could give rise to a claim. Ensure that you notify in accordance with the policy timescales and before the policy expires.

Delays in seeking consent

- A common problem arises where the D&O does not seek insurers' consent to defence costs promptly and proceeds to incur substantial legal fees, leading to a dispute with the insurers as to how much they will cover.

Not updating Insurers

- Issues can arise where insurers are not kept up to date regarding the status of settlement discussions – you should bring insurers with you on the “journey” to settlement, so that they understand what is being agreed. Having to seek insurers' consent to a settlement at the 11th hour before a settlement is to be finalised can derail it.

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