

Analysis of potential recoverable costs due to coronavirus outbreak – D&O Insurance – IMI Side A / B

This analysis comprises a summary of D&O insurance cover that would be potentially responsive pursuant to the Howden Fund and Investment Management Liability Insurance version 14.3.1. It is a summary only, and in assessing the coverage available reference should be made to the specific terms of the policy of insurance under consideration.

Who is covered? Directors, officers, members and partners of insured organisations (the policyholder and any insured subsidiaries, and including investment managers, general partners, insured funds) will be covered, including those that have retired or resigned from the board and non-executive directors. Cover is in respect of their acts in the relevant role (i.e. as a director), and (for retired directors) whilst directors of the company. Cover also extends:

- (i) to members of advisory boards or committees of the management insured entity or fund entity;
- (ii) to those individuals subject of regulatory approvals and other senior individuals;
- (iii) to employees when acting in a managerial or supervisory capacity, named as co-defendant with another insured person, where alleged to have committed an employment practices act, or where subject of a regulatory investigation; and
- (iv) to individuals while acting as a director or officer of an outside entity at the behest, or with the knowledge and consent, of the management insured entity or fund entity.

Each is referred to as an Insured Person in this summary.

How does the policy interact with indemnities from the company? Depending on the jurisdiction, the organisation will often indemnify its directors in respect of claims and legal costs. In that case, it is the company that is provided with coverage under the D&O policy to the extent of that indemnity and subject to any specific excess under the policy (Side B cover), and which will have primary responsibility for ensuring compliance with policy terms. If a company does not or cannot indemnify, it will be the director that claims directly on the D&O policy and no excess will generally be applicable (Side A cover).

Coverage Element Trigger

<p>Third party claims:</p> <p>Amounts which the Insured Person is legally liable to pay on account of a Claim made against them ("Side A").</p> <p>Amounts per above for which the organisation has indemnified an Insured Person ("Side B").</p>	<p>Cover requires three limbs:</p> <ul style="list-style-type: none"> (i) a Claim (i.e. written demand for damages or other relief, or criminal or civil proceedings); (ii) made against the Insured Person during the Policy Period; (iii) for a Wrongful Act by the Insured Person in their capacity as such (i.e. actual or alleged acts, errors or omissions in their role as an Insured Person). <p>Covered loss includes damages and other amounts pursuant to judgments or settlements, claimant costs, and interest on awards.</p> <p>The intent is that this comprises a broad insuring clause, providing cover for Insured Persons in respect of claims such as those alleging:</p> <ul style="list-style-type: none"> • Mismanagement of the business during the Covid-19 interruption; • Failure to have suitable and adequate business continuity plans in place; • Failure to ensure that the business plan of a distressed assets fund was appropriately implemented in the global downturn resulting from the Covid-19 outbreak; <p>Note – the D&O cover is not intended to provide cover for claims that are effectively professional indemnity claims against the organisation (so should fall under the PI cover) – so failings in the provision of specific professional services to clients. D&O cover is focused on failings of management – such failure to plan, failure to supervise.</p>
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<p>Defence costs (Costs, Charges and Expenses):</p> <p>Defence costs incurred by an Insured Person in defending or investigating a Claim (Side A).</p> <p>Defence costs for which the organisation has indemnified the Insured Person (Side B).</p>	<p>Cover is triggered by a Claim being made against the Insured Person, per above. The cover is in respect of reasonable costs and charges incurred in respect of a Claim, including costs of experts in assessing related evidence.</p> <p>Defence costs must be incurred with the prior consent of insurers (although the insured has the right to choose the appointed lawyers, with insurer consent to rates required only over a £500 per hour threshold). The policy also provides protective cover for defence costs where insurers' consent to the incurring of defence costs cannot reasonably be obtained (the 'emergency defence costs' extension).</p> <p>The cover includes premium for any bail / civil bonds that are required to be posted by an Insured Person.</p>
<p>Employment practices claims:</p> <p>Amounts which the Insured Person is legally liable to pay on account of a claim alleging an Employment Practices Act made against them (Side A) or for which the organisation has indemnified them (Side B).</p>	<p>Under the D&O section of the policy this cover is limited only to cover for claims against Insured Persons, not the entity.</p> <p>Employment Practices Act cover is triggered by a Claim (as per above) which is made against an Insured Person, alleging failures in relation to an individual's employment (wrongful dismissal, failure to promote etc).</p> <p>Potentially relevant examples in the current Covid-19 scenario include:</p> <ul style="list-style-type: none"> • Failures of management to provide complete and/or consistent information to employees, resulting in anxiety and stress; • Claims relating to discrimination in the workplace regarding Covid-19; • Employment disputes arising as the result of workforce downsizing (e.g. due to lost contracts etc). • Claims alleging that employees were required and/or pressured into attending work in person, resulting in their contracting coronavirus. <p>Note that the D&O policy has an exclusion for bodily injury claims, but that does not apply to defence costs or to claims for mental anguish or distress arising from an Employment Practices Act.</p>
<p>Regulatory proceedings - fines and penalties</p> <p>Civil and/or regulatory fines and/or penalties, or payments which represent compensation (e.g. payments ordered to be made into an equitable relief fund).</p>	<p>Cover is triggered by the commencement during the Policy Period of a formal administrative or regulatory proceeding or investigation concerning the conduct, activities or affairs of an insured individual or entity, or an outside entity. The investigation is taken to have commenced once an insured is requested or invited to attend and/or produce documents to and/or answer questions by, and/or attend interviews with any regulator, or Identified in writing as an actual or potential target of the investigation. This does not include routine compliance or inspections.</p> <p>Resulting fines and penalties are insured to the extent insurable by law – noting as an example that insurability under English law is fact-specific save where legislation provides otherwise (e.g. FCA penalties are not insurable). Criminal fines and penalties are not insured.</p> <p>Potential scenarios relevant to Covid-19 include:</p> <ul style="list-style-type: none"> • Regulatory investigations into business preparedness / continuity plans (i.e. a post event 'stress testing' exercise) resulting in an investigation into alleged conduct failings on behalf of senior personnel; • Regulatory investigations into specific senior management functions tasked with business continuity (resulting from, for example, a series of failures of transactions due to business continuity issues); • Failure to ensure regulatory compliance with call recording/monitoring requirements where working from home has been implemented.
<p>Regulatory proceedings – formal investigation costs</p> <p>Investigation costs incurred by an Insured Person in defending or investigating a formal investigation.</p>	<p>Cover is triggered by commencement during the Policy Period of an investigation as outlined above. Cover is for reasonable costs, charges, fees, disbursements and expenses incurred by the Insured.</p> <p>Note that this cover may apply in some scenarios where the fines and penalties cover is unlikely to apply. An example is insider trading investigations, where it is alleged that Insured Persons have had inside information on the impact of Covid-19 on business performance, and are accused of having traded in shares on the basis of that knowledge. If insider trading is found to have taken place, the exclusions for dishonest or fraudulent conduct is likely to apply – so the core cover in practice is for investigation costs in successfully defending such allegations.</p>

<p>Regulatory proceedings – regulatory crisis events</p> <p>Costs incurred by an Insured Person to retain legal advisors to represent them in connection with a Regulatory Crisis Event.</p>	<p>Cover is triggered by a Regulatory Crisis Event during the Policy Period, being:</p> <ul style="list-style-type: none"> (i) A raid on or onsite visit to an Insured Person or insured organisation (including an outside entity) by a regulator, which involves review of documents or interview of an Insured Person; and (ii) A public announcement relating to (i) above. <p>The cover also extends to include self-report investigations – i.e. any internal investigation by an Insured or an outside entity into the conduct, activities or affairs of an Insured Person or insured company (including an outside entity) which could result in a formal written notification to a regulator, informing them of an actual or suspected breach of legal or regulatory requirements or duties.</p> <p>Cover is primarily for reasonable costs, charges, fees, disbursements and expenses incurred by the Insured Person in that respect (as any fines or penalties are likely to arise only after a formal investigation has been commenced).</p>
<p>Asset and liberty / extradition costs</p> <p>Cover for costs incurred by an Insured Person arising out of proceedings to confiscate their property, suspend rights of property ownership, prohibit them from holding the office of director, deport them, or restrict their liberty to a specific domestic property.</p> <p>Cover is also provided for costs in challenging extradition proceedings brought against the Insured Person.</p>	<p>Cover is triggered by the commencement during the Policy Period in respect of such proceedings or an arrest warrant for an Insured Person. Cover is provided for reasonable costs and expenses incurred in respect of such proceedings.</p> <p>In the case of Covid-19, this would provide cover should an Insured Person be subject to proceedings to restrict their liberty (or otherwise quarantine them) or to deport them. However it does require proceedings to be commenced or a formal warrant, meaning that governmental steps taken to date internationally are unlikely to trigger the cover.</p>
<p>Crisis Communication Costs</p> <p>Cover for costs in employing a PR consultant.</p>	<p>Cover applies only if the organisation or an Insured Person consider that urgent action is needed to avert or mitigate a Claim– and requires that notice of the potential Claim and the action to be taken must be provided to insurers within 30 days.</p> <p>The occurrence of / business impact of Covid-19 is unlikely to be sufficient to trigger the cover, given the need for a specific potential Claim or adverse coverage to be identifiable. Rather, the cover is intended to allow the organisation / Insured Person to respond appropriately once a potential Claim or investigation (which would fall within the covers outlined above) is identified or a specific failing has been identified such as:</p> <ul style="list-style-type: none"> • The absence of an internal business continuity plan; or • An informal suggestion of discrimination in the workplace by an Insured Person based on race in the context of Covid-19.
<p>Risk management costs</p> <p>Costs of legal advice in relation to a potential Claim.</p>	<p>Cover is provided for costs of advice from legal counsel as to the Insured Person’s legal position and any steps which may be appropriate to avert or minimise the risk of a Claim, following the Insured Person becoming aware of any circumstance which may subsequently give rise to a Claim.</p>

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