

# Briefing Paper

## Research into Directors and Officers Exclusions

by Daniel Innes of Clear Insurance

“Any Company buying Directors & Officers Insurance needs to carefully examine whether a small premium saving each year is worth the risk of having cover that won't respond when they need it most”



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**M**odern day Directors & Officers Insurance policy wordings are very wide, especially those from the major Insurers. However our experience and research has shown that in many cases these wordings can be restricted by the application of multiple exclusions which severely limit the cover provided and can, in some circumstances, make the cover offered unfit for the purpose for which it is being purchased.

In many cases the exclusions applied by the insurers are not made as prominent as they could be even though they are often referred to in the quotation document provided by insurers. We have also found situations where brokers do not fully explain an exclusion or its consequences but either list it on their quote or merely pass on an insurers policy wording and/or exclusion list.

It is our opinion that a broker needs to have a full understanding of the exclusions and should provide a commentary on each of them and the way in which they affect the policy coverage.

Whilst by no means an exhaustive list our research has highlighted a few common exclusions and the problems that could be caused by their application:

### **Absolute Bodily Injury Exclusion**

Whilst exclusions excluding any actual bodily injury are usually acceptable an absolute wording creates potential problems. Most frequently seen on heavy hazard trades such as mining or exploration 'absolute' exclusions also remove any cover for subsequent claims such as a shareholder action

for losses. This exclusion also extends to restrict cover for subsequent H&SE investigations involving Directors as a result of a bodily injury. This exclusion should be avoided where possible and insurers should rely on an exclusion for the bodily injury alone (as this should be covered under a public or employers liability policy).

### **Country or Political Risk Exclusion**

For those companies working across multiple territories a 'political' or 'country' risk exclusion is frequently broad and punitive in the way it restricts cover. Unless there is a particular, justified, reason for this to be included it should not be accepted by any insured.

### **Government Exclusion**

We have recently seen a number of cases where insurers were applying a 'Government Exclusion'. The effect of this was to exclude claims by any government or government body. On further investigation it was found that this applied globally. This meant that claims by the FSA, HSE and other UK government bodies were excluded making the policy unfit for purpose.

### **Payment & Gratuities Exclusion**

Effectively a 'Bribe Exclusion'; the problem with this is that the wording is frequently of an 'Absolute' nature and removes cover for 'innocent' Directors. In effect the actions of one Director 'guilty' of paying a bribe can impact the protection for all other Directors not involved.

### **Insolvency Exclusion**

Insolvency is one of the most prevalent causes of D&O claims and this exclusion 'kicks in' when a Director is most reliant

on cover. Whilst it may vary in severity and nature it should be avoided as insolvency is one of the key reasons Directors purchase Directors & Officers Insurance.

### Sanctions Endorsement (or exclusion)

Many insurers will now not offer policies without a 'Sanctions Endorsement'. Insurers have advised us that the endorsement merely clarifies the position 'at law' where they are not allowed to make insurance payments where barred by sanctions applied. We do however have concerns where a UK company could be insured by a US insurer. In this instance the US could impose a sanction where policy cover is affected but the UK does not have a similar sanction in place. It may also be the case that a subsidiary company could trade with a sanction barred territory and the UK parent not be aware of the issue. This endorsement would most likely limit the cover for any 'innocent' main Board director not aware that illegal trading was being undertaken.

### Major Shareholder Exclusions

These are applied to almost all policies and vary both in the major shareholder threshold and the severity of the wording applied. Whilst Directors & Officers policies are not meant to be 'business guarantee' policies for major shareholders, brokers need to carefully check and advise on when the exclusion applies and the implications for directors involved.

### North American Exclusion

This predominantly excludes any claim arising out of North America or claims bought in North American courts. Whilst a company may not trade in the USA or Canada there are possibilities of claims originating from here for UK based Companies. Insurers will generally remove this exclusion either for an additional premium or with the application of a reasonable excess. Any client who has shares traded on the US or Canadian stock exchanges, or has pink sheets, should not buy cover with any form of North American Exclusion.

### Pollution Exclusion

Policy cover for pollution is normally limited to defence costs only and typically it will have an inner sub limit. Full pollution exclusions are often applied by insurers and have similar implications to the Absolute Bodily Injury Exclusion. As insurers cover is already limited these should be avoided wherever possible in particular for companies who have a significant pollution exposure (i.e. oil & gas exploration/production companies).

### Retroactive Date Exclusion

This is typically applied when a company has undergone a 'transaction' such as a reverse take-over or acquisition and excludes cover for any acts of directors before the date specified. In some circumstances companies may have purchased 'run-off' D&O cover for the prior acts of the directors but if this is not the case directors should take a careful look at their exposure and the coverage offered to them.

As previously mentioned this is not a complete list of exclusions that insurers apply but it does describe some of those likely to have the greatest affect. Directors of all companies (not just those traded on global stock markets) need to review policies sold to them by brokers and ask them to fully explain the potential issues and consequences of the exclusions applied. If in any doubt Directors should seek the advice of an independent expert who specialises in Directors & Officers Insurance.

Directors & Officers premiums have reduced significantly over recent years and companies buying cover are now seeking alternative quotes on a regular basis. This can lead to some insurers trying to find ways to provide the cheapest quote as opposed to insurers and brokers recommending the best (or even vaguely acceptable!) policies for their clients.

We have found that some insurers will offer a much lower premium for those companies willing to accept many of the exclusions detailed above. The reasons that the premiums are lower is that the insurers know they are much less likely to pay out for claims. Any Company buying Directors & Officers Insurance needs to carefully examine whether a small premium saving each year is worth the risk of having cover that won't respond when they need it most.

To understand more about how you or your organisation may be affected contact:

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