MAXIMISING D&O INSURANCE RECOVERIES IN INSOLVENCY

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Insurance claims represent assets in insolvency which may be capable of realisation or assignment by an insolvency practitioner (**IP**). If properly managed, such claims can prove to be a significant source of recovery. However, in practice, the benefits of insurance are often lost for a variety of reasons, including:

- lack of awareness of policies in place;
- lack of understanding of how and when to claim;
- late notification; and
- allowing cover to lapse.

This is a particular concern in the context of Directors' & Officers' (D&O) liability insurance, given that it is not uncommon for corporate insolvency to be caused by or give rise to claims against directors and officers. There are a number of claims which can be brought by an IP against directors and officers, including wrongful trading, breach of fiduciary duty, fraudulent trading or other misconduct.

A common misconception is that D&O cover ceases on insolvency. On the contrary, most D&O policies operate on a "claims made" basis and will continue to provide cover for claims made against directors and officers up until the expiry of the policy period, albeit only in relation to acts or omissions prior to insolvency. This means that, in practice, there should be scope to give notice of claims (or circumstances which may give rise to claims) during the remaining policy period (or during any extended notice period, discussed further below).

In most cases, D&O insurance is taken out by the company for the benefit of the directors and officers. Therefore, in contrast with other situations where IPs may be considering claims against third parties, IPs should have access to the D&O policy terms on appointment and be able to assess whether an individual in question is covered and the scope of cover available.

The following checklist sets out the issues IPs need to consider:

- Where is the D&O Policy? This will typically comprise the policy schedule, policy wording and any endorsements and may be contained in more than one document. The location of the policy documents can vary depending on the size of the organisation e.g. with the insurance/risk manager, finance director, company secretary, compliance officer or the directors and offices themselves.

- Who is covered by the D&O Policy? Most D&O policies will cover both current and former directors as well as shadow and de facto directors. Employees may be covered but this will often be limited to those acting in a managerial or supervisory capacity or where they are sued alongside directors and officers. The policy wording needs to be carefully examined to determine precisely which individuals are insured.
- What are the policy limits? Many D&O programmes comprise both primary and excess layer cover, so it is important to consider both to determine the overall amount of cover available.
- When does the D&O policy expire? Another common mistake in the insolvency context is an assumption that claims can be notified after the policy has expired. Unless there is an extended notice period, this may not be the case. Most D&O policies operate on a "claims made" basis which means that the cover is triggered by claims being made against the directors or officers (and notified to D&O insurers) during the policy period. It is therefore essential for an IP to adopt a pro-active approach and to consider early on whether there are grounds (or at least potential grounds) to pursue a claim against one or more directors and on what basis.
- What are the notice requirements (including any time restrictions imposed)? D&O policy wordings do vary but, in addition to requiring notification within the policy period, most policies impose time restrictions within which notice of a claim must be given to insurers. This can vary from a specific time period to a requirement to give notice immediately or as soon as practicable. Failure to comply may result in a denial of cover, so it is important to establish what obligations are imposed.
- Can notice be given of potential claims or circumstances? Most policies provide for notification both of claims and of circumstances which may or are likely to give rise to a claim against the directors and officers (and in some cases employees). The latter can operate to extend the policy cover because the policy will typically provide that, if notice of a circumstance is given, any claim which later arises from those circumstances (even after the policy has expired) will be deemed to have been made and notified during the policy period. Notice of a circumstance can therefore prove highly beneficial where there is a potential claim on the horizon, even if the underlying facts are still under investigation.
- Are there any extended notice or discovery periods? Do these require payment of additional premium? If so, consideration may be needed as to whether such payment and additional cover is likely to be in the best interests of creditors. An IP will need to weigh up the expense of paying the premium against the value of the potential claim. The directors and officers may need to be notified if the decision is made not to extend the cover.
- Does the company have authority to give notice on behalf of the D&Os? The company will typically have express authority to give notice on behalf of the insured persons although, in practice, the directors and officers may give notice to D&O insurers directly. If there is an intention to pursue a claim against the directors, it will be important to put the directors on notice of the fact that a claim is (or may be) pursued against them.
- Is there any need for ongoing D&O cover, for example to cover directors of solvent subsidiaries or joint venture companies? If so, it may be necessary to purchase additional D&O cover to ensure cover is maintained for these entities going forward.

While IPs face many demands on their attention at the time of appointment, it is important for careful consideration to be given at an early stage (and before the D&O policy expires) to the type of claim which might potentially be pursued against the directors and officers, and against which particular individuals. It is worth considering strategically which individuals are potentially at risk of a claim, and on what grounds. There may be potential downsides in an IP pleading certain causes of action against the directors and officers if ultimately this is likely to trigger one or more policy exclusions. Legal advice is essential to navigate these issues.

Some notice provisions are quite specific in terms of the information required, for example, the identity of the potential claimant, insured persons and the type of claim anticipated. If this information cannot be provided, D&O insurers may reject a notification as speculative or premature. It is therefore important that an early assessment is made, which in most cases will necessitate legal advice. A notification based purely on the fact that the company is insolvent is unlikely to prove sufficient.

There are many other potential challenges to insurance recoveries in the insolvency context. Overall, the key messages for IPs are to obtain the full insurance picture immediately on appointment, to ensure that recovery opportunities are not missed needlessly, and to seek legal advice on insurance coverage response.

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