

4 key items of cover for a Directors and Officers Liability policy

D&O Insurance can be complicated, especially when no two policies are the same. However, there are some crucial coverage features that you must ensure your policy contains:

- a. Advancement of Defence Costs
 - b. Final Adjudication Language
 - c. Solid severability
 - d. Investigation cover not connected to a wrongful act
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1. Director's liability is a personal liability. This means that in the event of a claim a director will be personally liable for all costs (which can run into the millions), unless someone pays on their behalf. It is vital to ensure that your D&O policy has strong language around advancement of defence costs. You want the Insurance Company to pay the money upfront, as opposed to you having to find the money to pay, and then seek reimbursement.
 2. Final adjudication language. No D&O policy wants to cover a director or officer where they have committed a fraudulent or dishonest act. Therefore every policy will have an exclusion to such effect. However, if there has only been an allegation of fraud and dishonesty you will at least want your day in court. If your policy does not have 'final adjudication' language then the 'fraud & dishonesty' exclusion could be triggered upfront based on an allegation alone, which means you get no cover until finally proven innocent. A D&O policy with good 'final adjudication' language will cover you (and all costs) at least up until the point where you are proven to have committed fraud or been dishonest.
 3. Severability. This is often overlooked in D&O policies but vitally important. This is the clause that basically states that the knowledge and acts of other Insured parties aren't carried over to you. For example, if one of your fellow directors has been guilty of fraud, you would not want the D&O policy to stop covering you just because it says that the knowledge of one director is imputed to all directors! You want the policy to respond to you personally. One way to get this to happen is to have very strong severability language.
 4. Investigation cover. Almost all D&O policies cover an Investigation when there has been an allegation of wrongful act e.g. the regulator alleges you have provided misleading statements and is now investigating you. However, oftentimes the investigation is to 'find' the wrongful act. If your policy connects investigation to wrongful act, then you will have no cover for the times when the investigation is trying to find a wrongful act, but not alleging one upfront. This cover is readily available, but there are a few pitfalls to be aware of which many Brokers and Insurers have missed.

Would any other topics be of interest?