

D&O Liability Insurance Policy – Assumed Vs. Available Coverage

Headings may not always tell the full story. One cannot/ should not assume coverage on the basis of language of the headings in an insurance policy.

It is necessary to read the entire policy wording to understand the coverage and the gaps. Generally, there is no problem with explicit exclusions. Complications arise with other aspects of coverage, when one finds that the coverage provided is not the same as coverage assumed.

Some of the areas are listed below: (List indicative)

1. **Additional protection limit for directors / independent directors:**
 - a. Please check whether this is available for all directors or only independent directors.
 - b. Please check other aspects relevant to the applicability of this cover (See: <https://www.liabilityinsurancepractice.com/2018/05/22/do-liability-insurance-dedicated-additional-limit-for-non-executive-directors-independent-directors/>)
2. **Coverage for subsidiaries:** Please check whether the coverage / limits / endorsements, in their entirety, are applicable only to the parent company but also to its subsidiaries.
3. **Kidnap Response Costs:** Please note that the coverage here is for only response costs and not for settlements and that too when kidnap takes place outside the country of the insured person's normal and ordinary residence. This coverage, therefore, cannot be seen as a substitute to Kidnap & Response insurance policy. Please check the excluded territories for this coverage and other stipulations.
4. **Entity Coverage:**
 - a. Please weigh the pros and cons when entity coverage is sought to be built in as a part of the D&O liability insurance, as it has the potential to dilute the regular limits for the directors and officers.
 - b. Please check whether the entity coverage responds only when the entity is a co-defendant with its directors and officers or a claim against the entity alone can also trigger coverage.
5. **Absolute exclusions:** Please check if there are any absolute exclusions and whether any carveback is provided. Be wary of any absolute exclusion. (See: <https://www.liabilityinsurancepractice.com/2020/04/27/insurance-policies-absolute-exclusions-unexpected-consequences/>)
6. **Unscrupulous behaviour exclusion:** Please check the final adjudication language. Check whether the exclusion gets triggered upon "final adjudication," or a "judgment after the exhaustion of all appeals," or merely on the basis of a final judgment by any court.
7. **Major Shareholder Exclusion:** Please check whether the threshold percentage is measured as at the time of the relevant wrongful act or at the

time of the claim or at any time. (See: *OZ Minerals Holdings Pty Ltd. v AIG Australia Ltd.*)

8. **Coverage for investigations:** Please check whether coverage is provided for both formal and informal investigations, and whether coverage is detached from reference to a wrongful act. Also please check if coverage is available for pre-investigation costs also, as sometimes, when there are very strong grounds, it may be worthwhile to even challenge investigation (See: *Parmeshwar Das Agarwal and Others vs. Additional Director (Investigation) SFIO, Ministry of Corporate Affairs and Another*)
9. **Crisis Communication Costs / Crisis Management Costs:** Please check whether suspension of trading is also listed as a crisis situation for listed companies. (See: SEBI's letter dated August 07, 2017 to the Stock Exchanges)
10. **Interpretive Counsel:** This becomes relevant a judgment pronounced in a different country / jurisdiction needs to be interpreted. Please check whether the reference here is made to all claims or a certain type of claims like securities claim.
11. **Order of Payments:** Please check whether the order of payment of claims is listed for Side A, Side B and Side C coverages. Apart from protecting directors and officers first, it also serves to reduce disputes *vis a vis* creditors / liquidator in the event of insolvency of the corporate.
12. **Most favourable jurisdiction clause:** This becomes relevant when the policy covers cross border operations with multi-jurisdictional coverage particularly with reference to issues like punitive damages.
13. **Specific matter endorsements / exclusions:** Please check whether their impact is restricted only to the specific matters listed or otherwise.
14. **Defence Counsel Provisions:** Please check defence counsel selection provisions, if there are any.

Understanding the policy coverage, limits, conditions, exclusions, and limitations and seeking clarifications where necessary are essential to avoid unpleasant surprises. Gaining insights into coverage aspects facilitates informed buying.

Trust but Verify

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