

The D&O Flashpoints for Libor-Related Insurance Claims

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The financial news has been dominated in recent weeks by the news that a number of banks are facing civil and possible criminal investigations over allegations that they improperly manipulated Libor and Euribor, the London interbank offered interest rate and Euro interbank interest rate applicable to loans made between banks and large corporations.

The costs arising from large exposure matters such as the Libor-related claims and investigations are often substantial, but the purpose of insurance is to mitigate these damages. Defense costs in particular are likely to be high and the contemporaneous payment of defense costs is an important benefit of D&O coverage. Policyholders facing large exposure D&O claims should resist any attempts by insurance companies to limit or eliminate coverage and pursue their coverage early and aggressively.

Faced with the banks' claims for coverage under their D&O policies, insurance companies are likely to raise a host of coverage defenses in an effort to avoid their coverage obligations under those policies. The menu of coverage defenses insurance companies may raise in connection with Libor-related claims likely will reflect many of the defenses that any policyholder may face when submitting a large exposure insurance claim under a D&O policy. Good arguments exist against many of those coverage defenses. Policyholders should proactively pursue all avenues for coverage to maximize their potential recovery.

Likely Flashpoints for Libor-Related Claims Coverage for Antitrust Claims

The Libor-related civil lawsuits allege antitrust violations. While insurance companies may assert that no coverage exists under a D&O policy for antitrust Libor suits, to the extent a complaint also alleges securities law violations, D&O policies may provide coverage for the defense of such actions. In addition, a number of courts have held that an insurance company has a duty to defend against antitrust claims under general liability policies' personal and advertising injury coverage.

Subpoena as "Claim"

The Libor investigations also may raise the issue of coverage for government investigations. Insurance companies frequently take the position that the costs of responding to government subpoenas or requests for information as part of a Libor-related investigation do

not constitute a "claim" sufficient to trigger a D&O policy. A number of courts, however, have found that government investigatory requests or subpoenas may constitute a claim sufficient to trigger coverage. In addition, to the extent a policyholder is incurring costs in conjunction with a government investigation while at the same time defending a civil lawsuit, the costs of investigations may be reasonably related to the defense of those claims and should therefore be covered under a D&O policy.

Restitutionary Damages

To the extent that shareholder claims seek damages for a dilution in share value, or antitrust claims seek restitution or disgorgement, insurance companies may assert that such damages are not insurable because they purportedly constitute "restitution." However, good arguments exist that these kinds of damages are not "restitution" or "disgorgement," and therefore are insurable.

Bad Acts Exclusions

D&O policies typically contain a number of "bad acts" exclusions that purport to exclude coverage for claims where a policyholder has engaged in fraud, gained an illegal profit or has engaged in a criminal act. Depending on the wording of the bad acts exclusion contained in the D&O policy at issue, insurance companies may contend that a deferred or non-prosecution prosecution agreement with the government, or an agreement with a regulator to pay a fine for Libor-related acts, constitute an admission of wrongdoing that would bar coverage for costs arising out of Libor-related suits and investigations. Very good arguments exist, however, that only a formal judgment of a "bad act" by a court can trigger a bad acts exclusion.

Criminal Charges

If an individual director or officer is convicted of criminal charges, or they confess or plead guilty in that proceeding, the insurance company may argue that there should be no coverage for the corporate entity itself based on that director or officer's criminal acts. Many D&O policies, however, contain a "severability" clause which limits the extent to which one insured's act is imputed to another for the purposes of coverage and therefore may prohibit imputing the knowledge and misconduct of one insured to other insureds.

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