PrivateEdge: D&O Claims Trends and Undercurrents in the UK SME Market
Few people have a clearer perspective on the emergence and development of D&O claims than those who actually handle them. This note is drawn from the experiences of our D&O claims adjusters Kathryn Smith and Jonathan Henney and their colleagues.

We hope it gives brokers, policyholders and directors some helpful insights into some of the D&O trends we are seeing - and a clearer sense of the protection afforded by their PrivateEdge management liability policy.

Noona Barlow
Head of Financial Lines Claims Europe

This booklet outlines some of the cover available under PrivateEdge. It is intended as a summary guide only, please refer to your insurance broker or the policy wording and schedule for further details of cover and terms and conditions.
Insolvency actions, a “double whammy”

As the numbers of company and individual insolvencies rose in 2017, recent changes in the way the Insolvency Service deals with them are likely to have an impact on the numbers of prosecutions against directors.

Following rule changes from 2016, Insolvency Practitioners now have to report on the circumstances of a business insolvency including, in all cases, the conduct of its directors for the 3 years prior to insolvency (it used to be just 2 years). Shadow directors now also have to be included in the report, which didn’t used to be the case, and the Insolvency Service now has 3 years after an insolvency, instead of 2, to bring disqualification proceedings against directors.

OUTLOOK

We expect that this “double whammy” – making directors conduct more visible and giving regulators more time to react will inevitably feed through to an upturn in post-insolvency regulatory actions against individual directors.

PrivateEdge covers reasonable professional and legal costs of preparing and defending directors (and shadow directors) against regulatory actions after an insolvency – including any subsequent disqualification proceedings.
You can’t legislate for people: unfounded allegations

Directors are often surprised to be on the receiving end of claims when they believe they have done nothing wrong. This trend is set to continue as emotionally fuelled actions, especially by “litigants in person”, still need defending.

In our experience it doesn’t matter how blameless the insured is; it is the attitude of the claimant that drives the claim. An aggressive and determined litigant can incur many thousands in costs and many months of time, even when their case has no legal merit. We see this typically when claimants feel very strongly about an issue and plunge ahead taking action without following any legal advice.

OUTLOOK

In the absence of professional guidance to advise about the facts of their case, irate and intractable claimants will no doubt continue to pursue bitter but groundless actions which can still be very time consuming for insureds, and very expensive for their D&O insurers, to defend.

PrivateEdge covers the reasonable costs of defending allegations of wrongful acts that are made against directors and officers – even baseless, mischievous or malicious ones.
HSE sentencing changes raised the financial stakes

Investigations and prosecutions by the Health and Safety Executive after a serious workplace accident are already a frequent source of D&O claims, and recent changes in the HSE’s fines raise the stakes even higher for the companies they investigate.

After a serious workplace accident the HSE will investigate the business and the individuals involved. If there has been a serious breach in health and safety law they will prosecute and press for the highest fines possible. The stakes were raised in 2016 when the levels of fines were substantially increased and 2017 saw more HSE business fines over £1m than in the previous 20 years put together.

OUTLOOK

Looking ahead, all this intensifies financial exposures after an accident. It’s now more important than ever that businesses and individuals have expert representation during an investigation to try to head off a prosecution, and expert representation during a prosecution to try and minimise the level of any fines.

PrivateEdge cannot cover HSE fines but does provide “end-to-end” health and safety protection for individuals and companies (sublimited for companies) covering their representation and defence costs for HSE investigations and prosecutions.
Contract disputes an everyday part of business life

We are seeing increasing levels of D&O claims activity in relation to contract disputes, with clients embroiled in disagreements with suppliers or customers.

We see a wide range of contract dispute claims under PrivateEdge: such as refusals to pay invoices on the basis that the product or service in question did not do what it should have done, or disputes about whether contract terminations are in line with contract terms and conditions. Unsurprisingly in light of today’s global procurement, it’s not unusual for these claims to have an international dimension as well.

OUTLOOK
These types of entity claims are more commonplace than actions against directors for breaches of duty that D&O cover was originally designed for. Looking ahead we expect them to continue to increase as clients and brokers become more aware of the breadth of cover provided by their D&O insurance.

PrivateEdge provides sublimited cover for the costs of defending contract disputes with suppliers and customers (but not the alleged failure to deliver professional services, which ought to be insured elsewhere).
Directors have an array of fiduciary duties and we are seeing a general increase in D&O claims, usually initiated by investors, that directors have breached one or more of these duties.

Directors owe a range of duties to their company and its investors, which are in some cases very general such as the duty to “promote the success of the company”. We see a regular flow of claims about alleged breaches of these responsibilities, from authorising an unreasonably high executive remuneration package, to conflict of interest allegations about awarding a contract to another company that the director sits on the board of.

OUTLOOK
The general nature of the directors’ fiduciary duties presents wide-ranging management liability exposures. Looking ahead we expect the claims associated with these exposures to continue increasing as understanding of the scope of cover provided under D&O policies continues to improve.

PrivateEdge gives extensive protection to each director for defence costs, damages and settlements, if they’re sued, investigated, threatened or prosecuted* because of their management of the company.

* Cover is not provided if fraud is proven
Barristers, eDiscoverers and increasing defence costs

The overall costs of defending management liability claims against businesses and their directors are continuing to increase.

The costs of disclosure have escalated. The documents relevant to a case used to exist as hard copy letters and memos. Today vast quantities exist digitally, and the costs of finding and reviewing thousands of emails and texts, often via specialist eDisclosure experts, can be high. Additionally we see more willingness on the part of legal advisers to draw on barrister support for legal opinion, drafting documents, all of which increases defence costs.

OUTLOOK
Looking ahead the highly competitive legal market may slow a continuing increase in defence costs, but there is no question that the factors outlined above that have driven costs upward to today’s levels are here to stay.

PrivateEdge covers all reasonable representation and defence costs – including all of the items above*. Importantly several directors may be brought into an action – with each individual requiring their own separate defence fund.

*Cover is not provided where fraud is proven or for professional services claims which ought to be insured under a PI policy.
INTRODUCTION

INSOLVENCIES

UNFOUNDED ALLEGATIONS

HSE SENTENCING

CONTRACT DISPUTES

FIDUCIARY DUTIES

DEFENCE COSTS

REPUTATIONAL PROTECTION

PR and reputational protection: bad news travels fast

We are paying out more and more under PrivateEdge for PR support to help insureds manage their external messaging after a claim.

Some events behind a D&O claim (e.g., investigations and serious accidents) can attract intense media scrutiny. News and speculation can be shared instantly reaching customers, suppliers and employees very quickly indeed. We have known insureds to be so preoccupied in dealing with the crisis at hand that they have not communicated effectively with these vital stakeholders – with detrimental (even fatal) impact on their business. This is why we are increasingly paying for clients’ PR support as part of a D&O claim.

OUTLOOK

At what may be a critical time for their business, clients may need professional expertise to guide their communication strategies and help build specific messaging for their customers, press and employees. With the accelerating speed of social media and online news platforms this trend is set to continue.

PrivateEdge covers professional PR costs (sublimited) not only for any event that is covered by PrivateEdge but also for a wide range of discrete crisis events that might be detrimental to the business (such as the death of a Chief Executive or the loss of a major contract).
The claim scenarios described herein are for general informational purposes only. These statements do not amend, modify or supplement any insurance policy. Whether coverage exists for any particular claim under any policy depends on the facts and circumstances involved in the claim and all applicable policy wording. Consult the actual policy for details regarding terms, conditions, coverage, exclusions, products, services and programs which may be available to you.

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