

DID YOU KNOW?

Thames Water, a private utility company, was fined £250,000 after it failed to properly maintain two of its pumps, which then caused untreated sewage to leak into a nearby brook. The case marked the first time that a company had been sentenced under the new Sentencing Council guidelines for environmental offences.



SEPTEMBER 2015

Government Increases Fines for Environmental Breaches

The Court of Appeal has passed new sentencing guidelines for environmental offences made by very large organisations (VLOs), which will raise fines exponentially. Under the new guidelines, if a VLO is found guilty of an environmental breach, it may be fined up to 100 per cent of its pre-tax profit for a given year. Based on the new sentencing guidelines, fines will be determined by:

- The culpability of the VLO
- The severity of harm caused
- The size of the VLO

Under these criteria, a VLO that has had no previous offences could receive a fine equal to that of a repeat offender. With potential fines of up to £100 million, this legislative change holds directors and shareholders of VLOs more financially accountable for their actions.

The aim of these fines is to illustrate to directors and shareholders the importance of compliance in their efforts, maintenance and responses to crises. Therefore, to minimise exposure to sizeable potential fines, VLOs will need to commit to implementing measures that address potential environmental crises in a prompt and thorough manner.

Industry experts predict that similar sea changes are on the horizon regarding financial penalties for regulatory and business non-compliance.

Packetts

The Limits of Your D&O Indemnity

If your company is considering expanding internationally—even if it just means working with a new supplier abroad—you should consider how it will affect your D&O liability cover. Start by reviewing your policy's specific language to identify the limits of your cover. As you review your policy, make sure that it does these eight things to avoid gaps in your cover:

1. Specifies the differing legal requirements for each international jurisdiction, and any potential liabilities that your directors and officers may face.
2. Ensures that the director indemnification agreement clearly outlines the extent of the cover and any legal restrictions or requirements.
3. Removes or modifies any 'presumptive indemnification' language to ensure consistency.

(Continued on next page)

5 Key Changes and How Best to Comply with the Insurance Act 2015: An Update

On 12th February 2015, the Insurance Act 2015 received Royal Assent and marked the greatest change to English insurance law in over 100 years. The considerable impact of this profound transformation is, in part, due to these five key changes, which come into force in August 2016.

1. **Utmost good faith/non-disclosure:** Under the act, you are bound to hand over any necessary information to insurers in order to make a 'fair' presentation of your risk. When volunteering this information, you must carry out a 'reasonable search' for information, ensuring that you are presenting an accurate portrait of your company's risk in a clear, accessible manner.
2. **Remedies:** If your company made a deliberate or reckless misrepresentation or non-disclosure, your insurer can void the policy and keep the premium.
3. **Warranties and other policy terms:** All warranties that your company has will become 'suspensive conditions'. This means that your company's insurer will not be liable for loss during a period of non-compliance, but can become liable after the breach has been remedied.
4. **Fraudulent claims:** If your company is found to have made a fraudulent claim, your insurer can terminate your contract and keep the premium. In addition, your insurer is not liable to pay a fraudulent claim and can recover any sums already paid related to that claim.
5. **Contracting out:** Your company's insurer will be able to contract out of the act and introduce more stringent terms, as long as the changes are brought to the attention of all stakeholders in a way that satisfies the act's transparency requirements.

Although you still have one year before the act comes into effect, you should begin preparations now. With help from Packetts, ask yourself whether there is anything special or unusual about your business's risk that you should identify early on to your insurer. Discuss how you can document that your company undertook a 'reasonable search' for information to prove your compliance. Also, compile a list of any employees who needed to be consulted when conducting the reasonable search.

For more information on the Insurance Act 2015, visit:
www.legislation.gov.uk/ukpga/2015/4/contents/enacted

The Limits of Your D&O Indemnity

(Continued from previous page)

4. Verifies that the provided definition of the term 'claim' encompasses the differing types—such as civil, criminal and regulatory—for each of the international jurisdictions.
5. Confirms that the policy covers the cost of fighting extradition.
6. Outlines your business' compliance with the policy's required claims notification process. Make sure you know the time limit during which you must submit the claim and any notification provisions to reduce potential non-compliance.
7. Establishes that in the event of a claim, the directors will ideally be able to select their own defence solicitors. In the event of a conflict of interest between directors, the policy should specify how that situation should be resolved.
8. Stipulates that the wrongful acts of one insured director cannot impact the cover availability for the other presumably 'innocent' directors.

By ensuring your policy adheres to these eight factors, you should be sufficiently prepared to expand your business into international jurisdictions.