



Insurance Flash June 2024

Construction Agents: Covered by PI or D&O Policies?

While PI and D&O insurance policies typically delineate the insured's status, real-world ambiguities often necessitate a case-by-case analysis to determine coverage. This complexity intensifies within the construction sector, where discerning the coverage of construction agents, professionals, managers, or employees based on their roles and responsibilities can be challenging. The following guidance, applicable under Spanish law, may assist in this determination.

I. Insured Status under the D&O Policy

In D&O insurance, the insured are primarily the company's directors or managers, including those with formal positions and shadow directors (Article 236 of the Spanish Companies Act, and Spanish Supreme Court Judgement no. 721/2012 of 4 December 2012).

Spanish law doesn't explicitly define a director, but courts have interpreted this role as individuals who are part of a company and can make decisions that guide the company's actions. Recent judgements from the Spanish Courts of Appeal provide further clarity, defining directors as "persons authorised to take decisions on behalf of the company" with organisational and control powers within the company.

We refer by way of example to the recent judgments of the Spanish Courts of Appeal (albeit in the administrative jurisdiction) of 24 and 25 April 2024 who have ruled in this regard on the conduct of certain executives about alleged unfair competition practices in the railway sector.

Although in the field of competition there is no definition of what should be understood as a management body, the Court considered that, in line with the interpretation of the Spanish Competition Regulator, directors are "*persons authorised to take decisions on behalf of the company*" [...], '*who have powers of organisation and control within the company*' [...] '*with the authority to bind the company by their actions and in which they were entrusted with functions of special responsibility, which they performed with autonomy*'. The judgement continues saying that the '*...definitions of management body are very close to those of the subjects referred to in article 31.bis.1.a) of the Criminal Code: "those who ...are authorised to take decisions on behalf of the company or hold powers of organisation and control within the company"*'.

This interpretation aids in identifying managers for D&O policy coverage. However, it's crucial to consider the individual's actual involvement in the actions to be judged (Supreme Court Judgement of 1 October 2019).

II. Insured Status under the PI Policy

PI policies typically cover individuals or companies named in the policy who are performing their professional duties and are liable for claims due to negligence or professional misconduct. However, Spanish law isn't always explicit about extending coverage to collaborators, subcontractors, or employees of the insured professional.

III. Applying these Criteria in the Construction Sector

The construction sector presents unique challenges due to the diverse risks and the variety of individuals involved in the construction process. In the context of D&O insurance, coverage can extend to directors, officers, or employees of the developer or construction company, provided they have decision-making authority.

For PI insurance, coverage typically extends to professionals managing the work, such as designers or work execution managers. Other technicians, like construction company employees, may also be covered if they are in charge of directing the works.

IV. Practical Recommendations

When facing a claim, it's crucial to first determine if the involved parties are insured under the policy. This requires a thorough analysis of the case, the claim, and the insured's status and functions. In the construction industry, defining the roles and responsibilities of each potential insured is crucial. Additionally, obtaining documentary evidence that clarifies the roles and functions performed is recommended, considering the features of the Spanish legal system.

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