

## LANGUAGE MATTERS

# Allocation in D&O Policies

There is little doubt that Directors & Officers ('D&O') Liability is a sophisticated product which contains potentially complex concepts and processes. Despite the low profile in a D&O policy features showreel, 'allocation' is nonetheless a key component of any contract and plays a role in all claims. The principles behind allocation are straightforward and digestible and yet there are quite different approaches to the language, not all of which are clear, and some of which have potentially different outcomes.

D&O claims can be single allegations against single insured persons for single remedies. Often, however, they embrace more complexity and involve multiple allegations against multiple parties for multiple remedies. In simple terms, allocation is the process of disentanglement which must take place to get to the components of the claim that the policy intends to cover.

The process of allocation seeks to 'allocate' loss (defence costs and damages) between covered and uncovered parties and between covered and uncovered matters. Limited guidance exists from the courts in the UK, but those in the US have made it abundantly clear that allocation clauses are obligated to describe a precise methodology by which any allocation would be prescribed. They have also ruled that general expressions of intent, such as "best efforts," do not necessarily satisfy this burden. Such an expression was, and is, rarely left unaccompanied as it was never sensible to use this as a methodology in and of itself. Underwriters seek to chaperone it with a specific allocation methodology, such as "relative legal and financial exposures of the covered parties to the covered matters", to give the meaning much more certainty and clarity.

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It can often come as a surprise to find components of claims might not fall for cover, so an understanding of allocation is good to possess. Efforts to have 'predetermined' allocation have been made in the past, where the percentages were fixed, but this often only suited certain types of claim and may potentially be disadvantageous, depending on the circumstances. As much certainty as possible is preferable, whilst perhaps never definitively possible, but it is certainly worth considering the potential benefits of, for example, 'imputability' language, which carries that greater degree of certainty, over a more nebulous 'fair' allocation. And the concept of allocation is almost inextricably linked to the choice of lawyer in a D&O claim scenario, [for reasons covered elsewhere](#). Allocation in D&O policies can be a divisive area, both literally and figuratively, and however it reads it can be central to the quality and effectiveness of a D&O policy.

## Want to find out more?

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