

TAKING THE PENALTY

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HFw's Ben Atkinson explains why insurance cover for environmental fines cannot cover every eventuality

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Under the new guidelines, organisations such as port and terminal operators who are convicted of offences under the EPA or the Environmental Permitting (England & Wales) Regulations 2010 (EPR) could be subject to fines of up to £3m, with fines for the most serious offences starting at £1m. These are only a recent example from

England and Wales of the range of potentially severe fines and penalties faced internationally by port and terminal operators in respect of a range of matters, including for example, pollution, safety, passenger rights and antitrust issues.

In some cases, such liability can accrue even where the port or terminal operator is not itself directly at fault, such as in the case of the EPR, under which port or terminal operators may find themselves liable for "knowingly permitting" a breach of the regulations on the part of a tenant.

In view of this significant and potentially wide-ranging exposure, prudent port and terminal operators will as part of their risk management be considering the opportunities for insuring against such fines and penalties. There are a number of questions which arise in this context, including the extent to which liability for fines and penalties is included within the operator's standard liability policy (in our experience they may be, but are often specifically excluded). Operators may also wish to consider whether they have sufficient cover for pollution liability under their standard



public liability insurance or whether a specific environmental impairment liability policy, which is likely to be wider in scope, should be purchased.

Gap insurance

Under English law, a clear rule has developed that, for public policy reasons, insurance purporting to insure against criminal fines, such as those levied under the EPA and ERA, will be considered void and unenforceable by the courts. The policy reason for this rule is that it should not be possible for a party to insure against the consequences of its own deliberate wrongdoing, as this would frustrate the aims of the criminal justice system. Therefore, although it may in theory be possible to purchase such a product (although experience suggests that this would be highly unusual), it is impossible to enter into a legally binding contract of insurance in such terms.

The position under English law as regards insurance against civil fines and penalties is less clear. Academic opinion suggests that an English court may be prepared to consider binding and enforceable a contract of insurance against the risk of receiving a civil fine, insofar as that fine relates to a non-deliberate act or omission. This is on the basis that the public policy objection to insuring the consequences of one's own deliberate wrongdoing would not apply to such an act or omission.

This distinction explains why, in practice, while some insurers specifically exclude fines, as explained above, others are prepared to offer cover, albeit that it is usually said to be covered "insofar as insurable by law". Indeed, some policy wordings address the distinction between insurable and uninsurable fines more directly, providing cover for fines where "such liability arises from an unintentional breach of the statute, law or regulation" in question.

Although there may be some apparent ambiguity in such wording as to whether this includes cover for criminal fines incurred due to non-intentional wrongdoing (for example, some criminal offences can be committed recklessly, which could be argued to be non-intentional), it seems clear, as set out above, that there is a general rule under English law prohibiting insurance against criminal liability, no matter the precise mental component of the offence (presumably on the basis that all criminal conduct is ultimately deliberate wrongdoing, whether the wrong is in the act itself or in the recklessness of the conduct).

Liability cover

Where insurance for fines and penalties is available, this is usually as part of an operator's general liability policy, although, as set out above, there is no general rule and some such policies routinely exclude such cover). In addition, prudent directors of port and terminal operators who are faced with the possibility of personal exposure to civil fines will take steps to ensure

that their D&O policy will cover them if they are investigated personally. As with cover for port and terminal operators more generally, cover will depend upon the precise wording of each policy and may well be excluded in some cases, and such fines will only be insurable (subject to the uncertainty referred to above) under D&O policies to the extent that they are not criminal or incurred as a result of deliberate wrongdoing.

Another issue which has arisen in the context of D&O insurance for fines is the extent to which the rule that no legal action may be founded on illegal or immoral conduct (sometimes described for the purposes of shorthand by way of the Latin maxim 'ex turpi causa non oritur action') might prevent a claim under an insurance policy in respect of fines. The 2010 case of *Safeway v Twigger*, arose out of an Office of Fair Trading investigation into antitrust issues involving a number of supermarkets, and a subsequent attempt by one of those supermarkets to claim an indemnity



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BEN ATKINSON, ASSOCIATE



from its D&O insurers (via a claim against its directors) in respect of the penalty imposed by the OFT, although the reasoning would apply equally in a case involving port and terminal operators.

In holding that there was no claim against the directors in *Safeway v Twigger* - and therefore no access to the D&O policy in question - the Court of Appeal clarified that the *ex turpi causa* maxim will operate to preclude a claim for an indemnity wherever the conduct in respect of which a fine or penalty incurred involves intent or negligence (note that this second limb is wider than the general public policy rule against insuring criminal fines, which is concerned only with deliberate wrongdoing).

Although, as noted, this was strictly speaking a claim by the supermarket against its directors, this principle would also appear to prevent an insured port or terminal operator from claiming an indemnity from its insurers in respect of any fine or penalty incurred directly by it.

International variation

The majority of this article has considered the position under English law, but the position is likely to be similar, albeit with some noteworthy differences, in other jurisdictions. For example, it is common in Australia for cover to be provided in respect of civil fines and some insurers have extended liability insurance to include criminal fines imposed in circumstances other than where the insured has behaved in a reckless manner (or worse). Whether or not such policies are legally enforceable remains a hotly contested issue, but despite the difference in approach from the English position, the underlying public policy issues are the same.

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In the US, a number of products are available which provide cover in respect of investigations under the Foreign Corrupt Practices Act, although in keeping with the policy considerations described throughout this article, cover is limited to the costs of such an investigation and coverage for any fines or penalties is specifically excluded.

Although potential exposure to fines and penalties is an important risk management consideration for port and terminal operators, it appears that the extent to which insurance for liabilities of this nature can be obtained is limited, at least in England and Wales. It is clear that as a matter of English law, criminal fines and penalties cannot be insured for public policy reasons and, although there is no law in this area, similar considerations are likely to apply in the case of civil fines, so that these will only be insurable where the conduct in respect of which they are incurred does not involve deliberate wrongdoing.

The *ex turpi causa* maxim means that even where such cover can be obtained, an insured will be precluded from making a claim if the conduct to which the fine or penalty attaches involved intentional or negligent conduct. Port and terminal operators must work closely with their advisers to assess their exposures in this regard and establish what, if any, cover is available to manage the risks.

For more information please contact [Ben Atkinson](#), Associate, on +44 (0)20 7264 8238 or ben.atkinson@hfw.com, or your usual contact at HFW.

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