

The merged firm of Clyde & Co and Barlow Lyde & Gilbert

CLYDE&CO

THOSE MYSTERIOUS EXTENSIONS OF COVER

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Structure of the Talk

- PII – Typical / Ubiquitous Problem – But developing areas of Exposures and Cover
- Extending Cover – Issues and Complexities
- Specific Examples:
 - Mitigation Costs Cover
 - Regulatory Cover
- Nuts and Bolts

Mitigation Costs Cover – Introduction

- No cover for Mitigation Costs without express policy provision – see *Yorkshire Water Services v Sun Alliance* [1997] 2 Lloyds Rep 21
- Coverage for Mitigation Costs can however be achieved in a variety of ways:
 - Primary Insuring Clause
 - Use of Policy Definition
 - Specific Extension of Endorsement

Mitigation Costs Cover – Pros and Cons

- Open to Insurers not to provide Mitigation Costs Cover
- Argument as to False Economy
- The Demands of Insureds
 - Civil Litigation Environment
 - UK Regulatory Environment

Mitigation Costs Cover – Standard Life

Standard Life v ACE European (2012 – Court of Appeal)

"...any payments of loss, costs or expenses reasonably and necessarily incurred by the Assured in taking action to avoid a third party claim or to reduce a third party claim (or to avoid or reduce a third party claim which may arise from a fact, circumstance or event) of a type which would have been covered under Policy (notwithstanding any Deductible amount)."

Mitigation Costs Cover - Analysis

- Different contexts to consider:
 - Rework / Mitigating Actions Undertaken
 - Costs of dealing with Circumstances
 - Investigating the Problem
 - External and Internal Costs
- PI or Non-PI Purpose – Self Reporting
- Other Considerations – Claims Cooperation

Regulatory Cover – Introduction

- Developing area of Exposure
- What cover is there under the Policy – often none
- Where cover does exist – lack of standardisation of policy provisions for such cover
- Three points to focus on in terms of cover specifics:
 - (1) Triggers for Cover
 - (2) Sui Generis Financial Costs
 - (3) Fines and Penalties

Regulatory Cover

(1) Triggers for Cover

- Huge diversity from Insured's perspective – does the cover match what is likely to happen in reality?
- Three Examples of Points re Scope of Cover:
 - Requirement to Attend Hearing (vs General Response to Investigation)
 - Investigation into Insured (vs Insured's Client)
 - What is the "Insured" (PI vs Operational Investigations)

Regulatory Cover

(2) Sui Generis Financial Costs

- Costs of a type unique to Regulatory Exposures
- Example – Costs of “Skilled Persons Reports” under UK FCA Regime
- Example of broader issue – importance of the Policy “plumbing” (the nuts and bolts that make the cover work effectively and without hiccups)

Regulatory Cover

(3) Fines and Penalties

- Scope of the Contractual Cover (if any) – by Express Provision or by Implication
- The “Uninsurable by Law” Overlay:
 - Application of “ex turpi causa”
 - *Osman v J Ralph Moss Ltd* (1970)
 - *Griffin v UHY Hacker Young* (2010)
 - *Safeway Stores v Twigger* (Court of Appeal – 2011)
 - Wide variety of Regulatory Exposures

Regulatory Cover

(3) Fines and Penalties - Examples

- Worked Examples of Tax Shelter Settlements with US DoJ
 - Firm A: USD400m / DPA / Senior Level Involvement
 - Firm B: USD100m / NPA / No Senior Involvement
- 3 Stage Analysis
 - (1) Is there Liability?
 - (2) Is the amount Reasonable?
 - (3) Is the Payment Insurable by Law?
- A Twist – Forfeiture of Criminal Property
- Defence Costs

Nuts and Bolts / Plumbing Issues

- Is the wording serviceable / up to date. For example:
 - Use of Endorsements
 - “Basis of Contract” Clauses / Warranties
 - Old Fashioned / Outgrown Wording
 - Excess Layer Wordings
- Other Nuts and Bolts – For example:
 - Personal Appointments Cover
 - Secondments
 - Exclusions

Conclusion

- Final Thoughts
- Any Questions.....