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........