

**Professional Indemnity
Forum Conference:
Dancing in the Dark**

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Music Maestro!

- A. Introduction
- B. Future exposures for FI insurers;
- C. Consequential exposures for PI insurers;
- D. A blurring of the line between D&O and PI cover?
- E. Changing legal and regulatory landscape;
- F. Policy coverage and underwriting considerations.

A. Introduction

- Deep recession and economic restructuring in many Western economies;
- Sovereign debt crisis in Europe;
- Financial institutions in the Eye of the Storm in a way not seen for decades;
- Social pressures/Social Media Networks;
- Not just a US problem anymore. Look inwards, not outwards.

B. Future Exposures for FI Insurers

1. Consumers getting their own back
 - Banks overdrafts
 - Interest Rate Swaps
 - Credit Cards
2. Banks own account recoveries
3. High Frequency Trading/Dark Pools
4. Executive Pay – Shareholder Activity

Future Exposures (I)

Banks

Overdraft Investigations

- Bank's justification for size of OD fees – in proportion to amount of money overdrawn?
- Penalties too high
- Alleged manipulation of timing of transactions
- Mis-selling of overdraft programs
- Fee exclusion wordings in FIPI policies

Future Exposures (II)

Interest Rate Swaps

- Interest rate hedging products sold to small and medium sized businesses
- Barclays Bank have admitted to mistakes;
"I can guarantee you in some cases we have made mistakes" (Bob Diamond)
- FSA contacted largest UK banks to ask them to conduct an internal investigation
- £5billion put aside although estimates are £10billion-£20billion
- UK and Germany – not contracts but a bet on interest rates rising

Future Exposures (II) ... cont'd

- Hedging contract which became a pre-condition of a loan with fixed interest rate
- Form of insurance against interest rate and rises
- Interest rates, however, have been significantly reduced
- Litigation Funding
- Mis-selling issues similar to pension mis-selling

Future Exposures (III)

Credit Cards

- Interest Rates disproportionate to amount charged
- Data-privacy issues
 - Wyndham Worldwide Corp
- Credit card securitisation – FSA Review

Future Exposures (IV)

iii. Banks own Account Recovery

- Hapoalin v Bank of America
- DZ Bank v HSBC/J P Morgan
- Non disclosure of banks re legal proceedings and loss estimates

Future Exposures (V)

High Frequency Trading/Dark Pools

- Trade of securities in nano seconds
- Complex computer programs to trade and execute millions of orders simultaneously
- Lack of transparency
- Pipeline Trading Systems fined in October 2011
- Infinium Capital Management fined in November 2011

Future Exposures (VI)

Shareholder Activity

- 3M, Aetna, Alliance Trust, Astra Zeneca, Aviva, Barclays, Cairn Energy, Citigroup, Credit Suisse, RBS, Trinity Mirror, UBS, Well Point, WPP,
- Short term profits vs long term benefit.
- Remuneration Committees Make up
 - High Pay Centre: "New Closed Shop: Who's deciding our Pay".
- Enterprise & Regulatory Reform Bill.
- Law suits against Remuneration Committee members and companies for mis-management.

C. Consequential Exposure for PI Insurers (I)

- Financial institutions not operating in isolation;
- Search for deep pockets and wide coverage;
- Potential danger areas.

C. Consequential Exposure for PI Insurers (II)

- Auditors and accountants;
- Lawyers;
- Others:
 - Insurance brokers;
 - IT Professionals;
 - Construction professionals.

C. Consequential Exposure for PI Insurers (III)

Pension Trustee Insurance

- Low investment returns creating pressure on pension funds;
- 'Failure to fund' exclusions;
- Investment duties;
- Error in retirement quotations;
- Other problem areas

D. A Blurring of the Line between D&O and PI Cover

- Is there blurring between the application of the PI cover and the D&O cover?
- Deletion of PI exclusion in D&O
- Professional services definition
- In what capacity was the wrongful act committed?

E. Changing legal and Regulatory landscape

- Third party litigation funding;
- Norton Accord;
- Contingent and Conditional fees;
- Class actions.

F. Policy Coverage and Underwriting Considerations (I)

1. 28 U.S.C. S1782 (Brandi-Gohrn v IKB Deutsche Industriebank AG)
2. S166 FSA – Skilled Person’s Report – What aspect
3. Non-Rescindable language for non-disclosure
4. Trigger of Coverage
5. Pay me my loss!

F. Policy Coverage and Underwriting Considerations (II)

1. Disclosure

Anselm Brandi – Dohrn
Vs
IKB Deutsche Industriebank AG
11-4851 – CV
March 6, 2012

F. Policy Coverage and Underwriting Considerations (III)

Rule of Law

28 U.S.C. S1782

Court permitted to order a person within its jurisdiction to "give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign tribunal"

F. Policy Coverage and Underwriting Considerations (IV)

Facts

- i. Request to US Court to subpoena evidence in aid of a German proceeding.
- ii. Securities fraud action brought in Germany by a shareholder against the German bank, IKB
- iii. Plaintiff alleged that IKB failed to disclose the extent of its exposure to CDO's backed by subprime mortgages
- iv. German trial court dismissed the case at first instance and on appeal
- v. Plaintiff asked US Court to issue S1782 subpoena to three American non parties to obtain documents for use in German appeal, and also by other clients suing IKB

F. Policy Coverage and Underwriting Considerations (V)

Consequences

- i. Admissibility of evidence in foreign Courts is not a requirement for disclosure of evidence
- ii. US discovery is now available to parties litigating disputes outside of the US
- iii. A reinsurer involved in a coverage dispute outside the US could invoke S1782 to subpoena US files/documents of an insured's affiliates in the US

F. Policy Coverage and Underwriting Considerations (VI)

Concerns

- i. Compliance with S1782 very expensive
- ii. Requires disclosure of sensitive/private information
- iii. Expose banks to future liability
- iv. Compliance of document production requests even if not litigating in the US

F. Policy Coverage and Underwriting Considerations (VII)

- S166 FSA – Skilled Person’s Report
- Non-Rescindable language for non-disclosure
- Trigger of Coverage
- Pay me my loss!