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Professional Indemnity Insurance Claims for Asset Managers in a post–Covid 19 World

As the world continues to adjust to the Covid-19 situation, we take a look at what the future may hold for professional indemnity policy wordings and claims. There are a number of key wordings points that were already becoming battlegrounds in a hardening market. Those issues will likely continue, as policyholders consider their cover and the claims they may face.

The Future of Investment

Asset managers and investment managers will already be considering their investment strategies in the current climate and post-crisis. Predictions of a recession deeper than the post-2008 financial crash, and comparisons between the likely unemployment rates and those seen during the Great Depression make it difficult to know the worldwide economic future.

Coupled to that, governments worldwide are amending the law in substantial ways almost every day in an effort to protect business and people. The challenge for investors in reading the impact on the economy of these changes, in seeking value in current markets, and formulating long-term investment strategies as the position changes so significantly so frequently, cannot be overstated.

Looking to the medium term, there are questions of whether the huge lifestyle change many have faced will have continuing impacts once some degree of normality resumes. What impact will the increased use of online delivery services mean for the future of the high street? Will businesses that have been able to function without face-to-face meetings and without people in offices see increased home working and reduced business travel as a way of saving on costs and reducing a carbon footprint (in keeping with an increased focus on ESG)? These are just two issues that could have an impact on supporting industries, including transport, airlines, oil and gas, and retail.

Insurance Implications – Notification of Claims and Circumstances

From an insurance perspective, a less predictable market makes losses more likely. More losses mean more claims. Trading errors could also be exacerbated if markets continue to move dramatically. Liaising early with your insurance broker on claims is always important, and will become more so if there is a huge influx of claims.

Particular care and consideration should be given to the ability to notify circumstances that could, may, or are likely to (depending on the policy language used) give rise to a claim. The so-called "circumstances language" allows notification of an event or set of facts, rather than an actual claim. If a claim then arises out of those facts, that claim will be tied back to the policy on foot at the time the notification of circumstances took place. Helpfully, that also means the claim will be assessed by reference to the terms of that policy, which could be important if insurers seek to restrict coverage on future policies. We will now take a look at some restrictions on coverage that may emerge out of the Covid-19 crisis.

Insurance Implications – Future Coverage Restrictions?

Renewal of an insurance policy is, of course, an annual event. The insurance market will see its own share of upheaval resulting from Covid-19. As a result, it will be important for you (and your broker) to keep a watchful eye on restrictions insurers may seek to impose as Professional Indemnity policies come up for renewal. Here, we list five points to keep in mind as renewals proceed:

1. The most obvious term that might be added to a policy is a **Covid-19 Exclusion**. It may seem that claims arising from investment decisions (for example) should not be caught by such an exclusion. However, a broad exclusion can allow an insurer to argue that a loss is in some way "indirectly connected" to Covid-19. The drafting of the clause, and ensuring it is narrowed appropriately and tested against possible scenarios is, therefore, crucial. Not all exclusions are created equal.

2. Similarly, an **Insolvency Exclusion** may not be a cause for concern per se. However, there is a key distinction between an exclusion that deals with the insolvency of the insured, and an exclusion that references insolvency generally. The latter could catch claims that relate to the insolvency of entities into which investments have been made. Any Insolvency Exclusion should be considered carefully.

3. A third exclusion that could see a resurgence is the **Corporate Business Policy/Practice Exclusion**. This excludes claims if they are found to relate to a board decision to endorse a particular practice that causes loss to clients. Whilst it is intended to operate in respect of matters where a policyholder is deliberately seeking to act to the detriment of clients, the wrong wording can allow for an argument that, for example, an unsuccessful investment strategy is caught. At the very least, the exclusion has been used by insurers to justify asking questions about corporate/board policy, and to delay payment of claims.

4. Finally on exclusions, we have already seen examples of insurers seeking to use **Market Fluctuation** exclusions, to remove from cover claims that stem from abnormal movements in markets. As ever, quite how an exclusion might operate will be determined by the words used and the precise factual scenario, although clearly they have the potential to take out many claims if drafted and interpreted broadly. Questions of what is "abnormal" (on one view, the current conditions are entirely normal within the context of a worldwide economic lockdown), and whether a claim is sufficiently connected to the fluctuation, are ripe for argument.

5. The **Mitigation Cover** is the focus of the resolution of any trade error, and is also one of the first areas insurers look to restrict when the insurance market becomes more difficult. Sub-limits, a requirement to prove a claim would have been brought and covered (as opposed to could have been brought), and an absolute requirement for insurer consent before a trade can be undone, can all make the cover more difficult to access in a timely manner when it is needed.

6. The discussion points with insurers on the scope of **Investigation Cover** include whether the entity will be covered in respect of investigations, and the point at which the cover will be triggered. Whilst regulators have made some positive noises about latitude during the crisis, new working arrangements make compliance more difficult, and regulatory investigations could follow. The cover for investigations, therefore, could be key and is something that is already on the list of insurers to review carefully.

Even if a claim is, ultimately, covered, an ill thought through exclusion can make the claims process more difficult. In the meantime, there may be commercial imperatives to settle with an ongoing client, and a reluctance to incur legal costs fighting a disputed claim. Ensuring the policy wording is fit for purpose from the outset, and that the scope of any exclusions or other wording restrictions is clear, remain an essential part of a smooth claims process.

Insurance Implications – Policy Limits

A further issue is consideration of policy limit. If losses and claims are likely to be (a) larger; and (b) more frequent, policyholders will wish to consider whether their limits are appropriate. However, as anyone that has tried to buy hand sanitiser, pasta or toilet roll in recent weeks will tell you, an increased demand does not necessarily mean there is an increased supply. Discussions about increased limit should be started as soon as possible.

Insurance Implications – The Howden Service

None of us know what the future holds, but our experience in policy wordings and claims means that we will be alongside you to ensure you have the right cover, and that claims get paid. Please do contact us if you have any queries about any of the points raised in this article.

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