

# MAXIMISING RETURNS: Insurance Recoveries in Insolvency

22 November 2017

Sarah Turpin, Partner

Jonathan Lawrence, Partner

Clare Tanner, Special Counsel



# INTRODUCTION





# INSURANCE AS A CORPORATE ASSET



# ASSETS

- Insurance claims represent assets which may be capable of realisation or even assignment
- May prove to be significant source of recovery
- BUT benefits of insurance often lost as result of:
  - lack of awareness of policies in place
  - lack of understanding of how and when to claim
  - late notification
  - allowing cover to lapse (failure to extend)

## IMMEDIATE CHECKLIST CONSIDERATIONS

- What policies are in place?
- What is the renewal date?
- Can the cover be extended?
- What are the disclosure obligations (Insurance Act 2015)?
- Who can claim?
- What are the notification requirements?

## WHAT POLICIES ARE IN PLACE? (IDENTIFYING THE CONTRACTUAL DOCUMENTS)

- The Proposal Form (application for insurance)
  - not normally part of contractual documents
  - may assist in assessing scope of cover
- The Policy Schedule
  - “personalised” section - details named insured, sums insured, policy period etc.
- The Policy
  - main contractual document
  - standard form wording - produced by broker/insurer
  - bespoke wording – tailored/negotiated
- Endorsements
  - may be many or very few
  - can significantly extend or reduce scope of cover provided

## WHAT POLICIES ARE IN PLACE? (IDENTIFYING THE CONTRACTUAL DOCUMENTS)

- Cover Note
  - typically produced by the broker
  - not normally part of contractual documents
  - summary of cover only
- Who holds the contractual documents?
  - can vary depending on the size of the organisation e.g. insurance/risk manager, finance director, company secretary, compliance officer
  - broker may prove best source
  - may involve different brokers for different classes of risk
- Some persistence may be required!



# CLAIMS





# WHO CAN CLAIM? (DIFFERENT TYPES OF CLAIM)

- (A) Claims under insurance contract
  - first party: direct losses
  - third party: liability claims
- (B) Claims against third parties (and D&Os) who may have the benefit of insurance
- Common theme: timely notification

# FIRST PARTY INSURANCE: DIRECT CLAIM

- Covers direct financial loss of company
  - specific types of asset e.g. Property, Plant and Machinery, Motor Fleet, Aircraft, Goods in Transit
  - specific types of event e.g. Legal Expense Insurance to cover cost of legal proceedings, Crime/Fidelity for fraud or dishonesty by third parties/employees, Credit Risk for non-payment for goods/services, Political Risk for non-payment caused by political turmoil in other jurisdictions, Cyber for data breaches/cyber attacks
- Trigger for notification: loss or damage or circumstance which may give rise to loss

## THIRD PARTY LIABILITY: THIRD PARTY CLAIMS

- Covers liabilities to third parties for claims made against company
- Examples include Public Liability, Product Liability, Professional Liability, Environmental Liability, Cyber Liability
- Typically covers defence costs and damages/settlement payments
- Trigger for notification: claim made or circumstances which may give rise to claim

# CLAIMS AGAINST THIRD PARTIES WHO HAVE INSURANCE

- Professional Liability/Civil Liability
  - covers liability of professional for actual or alleged negligent acts or omissions in conduct of professional services
  - covers both defence costs and damages/settlement payments
  - often a professional requirement e.g. solicitors, surveyors, accountants
  - cover may be subject to minimum standard terms
  - even if not subject to standard terms, certain policy terms/exclusions are relatively common

# COMMON PROFESSIONAL INDEMNITY EXCLUSIONS

- Fraud and dishonesty (but not vicariously liability for fraud/dishonesty of employees)
- Contractual liability/guarantees
- Property damage and bodily injury
- Prior claims and circumstances
- Prior or pending legal action

# CLAIMS AGAINST DIRECTORS & OFFICERS WHO HAVE INSURANCE

- Directors & Officers Liability
  - **Side A:** Covers liabilities of D&Os in respect of actual or alleged wrongful acts or omissions in their managerial capacity (to the extent not indemnified by company)
  - **Side B:** As above to the extent company has indemnified (Corporate Reimbursement)
  - **Side C:** Corporate Liability cover (often limited to securities claims)
- **NB:** D&Os typically include current and former, shadow and de facto directors. May also include employees but often limited to those acting in managerial or supervisory capacity or where sued alongside D&Os.

## COMMON D&O EXCLUSIONS

- Fraud and dishonesty (final adjudication)
- Illegal remuneration or personal profit (as above)
- Insured v insured (typically US only)
- Professional services (not failure to manage)
- Property damage and bodily injury
- Prior claims and circumstances
- Prior or pending legal action

## “CLAIMS MADE” NATURE OF D&O COVER

- Typically covers “claims made” against insured during policy period
- Even if acts giving rise to claim occurred much earlier
- No cover for claims made after policy has expired (unless notice of circumstance given)
- Common mistake in insolvency context
- Essential to ensure claim intimated against D&Os and notified to D&Os insurers before policy expires
- **NB:** Company typically has authority to give notice on behalf of D&Os



# MAXIMISING RECOVERIES

- Pleading fraud
  - pros and cons
  - provision of cover until trial
- Pleading everything but the kitchen sink
  - non-disclosure
  - prior claims and circumstances exclusion
- Identifying the best targets
  - adequacy of policy limit
  - eroded on “first come, first served” basis

# IMPACT OF INSOLVENCY ON CONTINUITY OF COVER

- Insolvency may result in D&O cover entering “run off”
- D&O policy remains in force
- BUT will only respond to claims based on acts or omissions pre-insolvency
- Consider possible need to extend cover if D&Os have ongoing obligations e.g. solvent subsidiary or joint venture company

# CHECKLIST

- Obtain details of insurance policies (primary and excess) in place (including D&O)
- Check the renewal/expiry dates
- Consider scope for cover to be extended
- Notify any claims (or circumstances) to insurers as soon as possible and before expiry date
- Notify potential claims against third parties (and D&Os) who have benefit of insurance



# THIRD PARTY RIGHTS IN INSURANCE



# CONTRACT (RIGHTS OF THIRD PARTIES) ACT 1999

- Contract must confer a benefit on a third party, identified by:
  - name
  - class
- Examples
  - Construction All Risks – subcontractors
  - Personal Accident – employees
- **NB:** 1999 Act often excluded from insurance contracts

# THIRD PARTY (RIGHTS AGAINST INSURERS) ACT 1930

- Aimed at ensuring that, in the event of insolvency of insured, proceeds of an insurance policy would reach those injured persons they were designed to protect rather than be used to pay creditors
- This Act is still applicable to policies/claims arising prior to 1 August 2016 if (prior to this date):
  - insured had become a “relevant person” (i.e. insolvent)
  - relevant person had incurred liability against which they were insured
- *Redman v Zurich* (REV 1) [2017] EWHC 1919

# THIRD PARTY (RIGHTS AGAINST INSURERS) ACT 2010

- This new Act replaced the 1930 Act for insolvencies after 1 August 2016
- Main changes
  - easier for third party to bring claim against insurer when insured party has become insolvent
  - third party only has to issue one set of proceedings, to establish both
    - insolvent insured's liability to third party
    - insurer's liability under the policy

## THIRD PARTY (RIGHTS AGAINST INSURERS) ACT 2010

- Insolvent insured need not notify insurer of claim if third party does so
- No requirement to restore dissolved insured company
- Extends insolvent company definition
- Automatic transfer of rights under the policy from insolvent insured to third party
- Defences of insolvent insured transfer to insurer



## THIRD PARTY RIGHTS TO INFORMATION ABOUT INSURANCE COVER

- Reasonable belief of existence of policy and insured's liability
- Notice in writing to insolvent insured
- Any person able to provide such information: including insolvency practitioners, insurers, brokers and anyone else authorised

The image features a blue bokeh background with a central orange band. The bokeh consists of numerous out-of-focus light spots in various shades of blue and white, creating a shimmering effect. The orange band is a solid, horizontal strip that spans the width of the image, positioned in the middle. The word "QUESTIONS?" is written in white, uppercase letters, centered within the orange band.

QUESTIONS?

# CONTACTS

Sarah Turpin  
Insurance Coverage  
sarah.turpin@klgates.com  
020 7360 8285



Jonathan Lawrence  
Non-Contentious Insolvency  
jonathan.lawrence@klgates.com  
020 7360 8242



Clare Tanner  
Contentious Insolvency  
clare.tanner@klgates.com  
020 7360 8258

