

## **Claims Occurring and Claims Made Insurance Policies – A Guidance Note for Insolvency Practitioners**

### **Context**

It is common market practice for Insolvency Practitioners in the UK to arrange immediate open insurance cover on appointment. A review of the pre-appointment policies is then undertaken by the Insolvency Practitioners broker who advises on the options available based on the particular factors of the appointment.

As part of this process, it is important that both the Directors and the Insolvency Practitioner have an understanding of the implications of cancelling pre-appointment policies particularly where there are policies on a 'claims made' basis where there would be no cover should a claim arise in the future.

### **What is a Claims Made Policy?**

Most UK insurance policies are insured on a "claims occurring" basis, where coverage is triggered at the date the incident, e.g. the injury or damage occurs, even if the claim is not made until years later. Thus if the policy is cancelled, that insurer will still deal with any future claims as long as their policy cover was valid on the date the claim occurred. A good example of this Employers Liability Insurance where a claim can be made years in advance but it is the responsibility of the insurer at the time of the accident to respond.

Some insurance policies, however, provide cover on a "claims made" (or "claims discovered") basis i.e. the coverage is triggered at the date the claim is first made against the insured, even if the incident occurred years earlier during a previous insurance period. So the insurer dealing with the claim is the insurer whose policy is in force at the time the claim is made (or discovered), even if the incident which gives rise to the claim occurred in the past. This basis of cover has the effect that if a "claims made" policy is lapsed or cancelled, there is no insurance policy in force to deal with any future claims.

Types of policies which are on a "claims made" basis include Directors and Officers Liability, Pension Trustee Liability, Charity Trustee Liability, Employment Practices Liability, Professional Indemnity and Crime. However some overseas jurisdictions also require other policy types to be on a "claims made" basis e.g. General Liability insurance in France.

It is therefore necessary to ensure that all parties are aware of the implications and adequate coverage arrangements are made.

### **Cancellation of Cover**

It is important to consider the potential implications before arranging cancellation of a policy issued on a "claims made" basis, as this could result in there being no insurance cover for any future claims that may be made against the company, or as in a D&O policy, against the individual insured persons.

A copy of the policy wording should be reviewed before issuing any cancellation instructions and the following points are of particular relevance:

## **Cancellation clauses**

- \ Some policies are non-cancellable except for non-payment of the premium. In the case of non-payment of premium the Insurer may cancel the policy in accordance with the conditions laid out in the cancellation clause, usually by giving written notice to the policyholder of cancellation within a stipulated time frame.
- \ Even if the policy is cancellable and a return premium allowable, there may be reasons why a continuation of cover is advisable e.g. is there a chance of any future claims? For example, claims could arise against an individual director who may therefore require cover under the D&O policy, so it may therefore be advisable to negotiate with insurers and continue the policy cover at least until the next renewal date rather than cancel it.

## **Alteration and Assignment clauses**

- \ This clause has the effect that rights in the policy cannot be transferred to other parties e.g. premium finance providers, unless previously agreed in writing by the Insurer and the policyholder.
- \ If the policy is non-assignable the Insurer cannot act on instructions received from any party other than the policyholder itself, or the broker acting with authority.

## **Change in Risk/Change in Exposure/Change in Control clauses**

- \ Some policy wordings will have a clause named as above which automatically triggers "run off" cover in certain situations as defined in the policy.
- \ Sale of the company or insolvency is often an automatic trigger for run off cover to start. Run Off cover means that the policy only provides cover for claims made after the date the run off cover is triggered, but which arise from events which occurred prior to the effective date the run off cover is triggered

## **Discovery Period/Extended Reporting Period clause**

- \ If run off cover is triggered, the policy cover, unless cancelled, continues in run off mode until the next renewal date when the cover will lapse. Once the policy is lapsed or cancelled there is no cover for any future claims which arise.
- \ Some policies include options for longer term discovery period or extended reporting period during which claims can still be reported, in exchange for additional premium. In the UK these long term policies are usually for periods up to 6 years (although some Insurers do offer longer term policies).
- \ However the Insurers may not be obliged to provide a quote in some situations so it is always advisable to check the wording.
- \ If run off cover has been triggered under a claims made policy, available longer term cover should be considered and taken up at the time of the run off trigger rather than waiting till the policy is to be lapsed at the next renewal date. Events such as a reported claim in between the trigger date of runoff and the next renewal date may result in Insurers altering or withdrawing any offer of a discovery period, and some policies require such cover to be taken out within strict timescales.

## **Insolvency and Administration – special considerations**

- \ The appointment of an Administrator may not in itself automatically trigger the ‘change in control/risk/exposure’ clause of a policy. However, underwriters should always be advised and the policy wording checked to ascertain the actual position in each case.
- \ Even if the initial appointment does not trigger run-off, subsequent actions of the administrator e.g., the sale of assets, may trigger the clause so that the policy will automatically go into run-off.
- \ Each case is different so assumptions cannot be made, e.g., although the majority of the assets may have been sold triggering run-off, the company directors may still be working on behalf of the company and therefore require ongoing cover under the D&O policy which will need negotiating with the underwriters
- \ Bear in mind that a D&O policy is intended primarily to protect the individual directors and not the company; consideration needs to be given as to whether a conflict of interest may arise.

## **Conclusion**

Claims made policy wordings vary and it is important to be aware of the extent of cover in order to ensure continuing protection for future claims.

It is important that the Insolvency Practitioner’s Broker highlights where claims made policies are in place so the Directors can be made aware of their options.