

THE PROBLEM WITH AFFIRMATIVE COVER IN FINANCIAL LINES

In recent years there has been a discernable trend in financial lines insurance towards affirmative cover, i.e. additions, amendments, endorsements and tweaks to cover which 'affirm' that a policy will respond to a particular type of claim or loss. Nowhere is this trend more evident than in the field of D&O insurance. For example, most policies now routinely 'affirm' that insurers will cover events as disparate as corporate manslaughter, extradition and race and sex discrimination. Perhaps the time has come to challenge the assumption that affirmative cover is always in the buyer's best interests.

Financial lines is loosely comprised of:

- Directors and Officers Liability Insurance (D&O)
- Transaction Liability Insurance (i.e. protection for initial public offerings and warranties and indemnities given in the context of share sale agreements (among other things)
- Professional Indemnity (PI)
- Financial Institutions Insurance (comprising bankers blanket bond and bankers professional liability cover and D&O)
- Employment Practices Liability cover (EPL)
- Crime/Fidelity Cover
- Computer Crime
- Pension Trustee Liability Cover (PTL)

These products provide either first party protection, i.e. cover for financial losses suffered by the insured themselves or third party protection i.e. cover for claims made against the insured by third parties. Sometimes they offer a mixture of both. Even without the trend towards affirmative cover, such policies often contain a complex mix of terms, conditions and exclusions. To examine the development and scope of each product would require a series of articles, if not a book. Instead, we focus on a few examples and start with an illustration drawn from an unrelated insurance product of the particular challenges posed by affirmative cover.

A LESSON FROM TRAVEL INSURANCE

If you are planning a trip (whether for business or pleasure) you are usually advised to take out travel insurance, i.e. cover in respect of financial loss and/or injury and death, occasioned to you or your family - in connection with travel or planned travel. Most travel policies do not contain insuring clauses to such simple effect. Instead they follow an 'insured perils' approach to cover. Such perils might include cancellation, accident, delay, theft, illness etc. Each such peril may have its own triggers, conditions and sub-limits.

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There is nothing inherently wrong with this approach. Indeed it is often turned to marketing advantage, i.e., 'here are all the many things for which you are covered'. What it does mean though is that you need to have a full and proper understanding of the basis on which insurers are prepared to cover you. Say, for example, a recently married couple were to take out travel insurance in respect of an expensive honeymoon.

The wife then becomes pregnant and receives medical advice against travel to the (remote, but beautiful) country of choice. If that couple were to claim the cost of the cancelled trip under their travel insurance, they may well find that there is no cover because 'becoming pregnant' is not an insured peril.

WHAT HAS ALL THIS TO DO WITH FINANCIAL LINES?

On one view, 'affirmative cover' has its origins in the 'insured peril' approach to insurance. As with insured perils, affirmative covers carry with them the risk that claims may fall between specific affirmations of cover. A few examples will serve to illustrate the point.

CORPORATE MANSLAUGHTER

Many (if not most) D&O policies contain corporate manslaughter extensions to cater for the Corporate Manslaughter and Homicide Act of 2006. Many different approaches are taken to this extension. Some define elements of offences under the new Act. Others simply use the phrase 'corporate manslaughter'. Yet others identify specific aspects of the Act which insurers are and are not prepared to cover. Part of the problem with all these approaches is that they ignore the fact that the risk of criminal sanction against individuals in responsible positions within companies involved in the death of a person exists outside the scope of the Corporate Manslaughter Act. For example, section 37 of the Health and Safety at Work etc. Act allows prosecutions against individuals who consent to or connive in exposing employees to risk of their safety.

STANDARD 'DEATH' EXCLUSION

To make matters worse, most D&O policies also contain a standard exclusion for 'death'. The danger of affirmative cover for corporate manslaughter coupled with an exclusion in respect of death which is unqualified, is that a claim under the policy for a prosecution, investigation or other proceeding against a director arising from a fatality in which the company is implicated but which is not for 'corporate manslaughter' might well not be covered by the D&O policy.

EXTRADITION PROCEEDINGS

In response to the infamous case of the NatWest three; this being the attempt by the U.S. authorities to extradite three former employees of NatWest Bank to face charges of wire fraud, many (if not most) D&O policies now provide affirmative cover in respect of extradition proceedings. Again, a whole variety of different approaches are taken to this extension. Some policies refer expressly to the Extradition Act of 2003. Others variously define extradition proceedings. Certain policies provide affirmative cover in relations to appeals against extradition proceedings to the European Court of Human Rights on the basis that this was a route down which the NatWest three themselves went.

In common with other affirmative covers, provided that the protection offered is broad enough and sufficiently well understood by those on behalf of whom it is purchased there should be no problem. Even here however difficulties can arise. For example would a European Arrest Warrant trigger always trigger the cover? What if a request for cooperation is made by a foreign prosecuting authority of a U.K. national? Would this be covered? What about countries not covered by the Extradition Act?

A simpler approach which arguably might do away with the need for any extradition endorsement would be to ensure that the trigger for cover under the definition of 'claim' was sufficiently broad to capture any form of extradition request.

A DIFFERENT APPROACH?

Of all financial lines products, the one which has perhaps shown the most resistance to the affirmative cover approach is professional indemnity insurance. Most PI policies cover the risk of firms and/or individuals being sued in connection with the provision of professional services. There is a relatively well understood and accepted body of terms, conditions and exclusions and relatively few add ons.

It is often objected that a comparison between, for example, D&O insurance on the one hand and PI insurance on the other is unfair. The former (it is said) is necessarily much more complicated than the latter. There is a need to identify and list numerous and specific perils faced by company directors. This gives rise to unavoidable additional complexity as indeed does the position of the company both as (in most cases) the payer of the premium and as one of the indemnifiers of the directors alongside the insurer.

Most if not all of these propositions are open to challenge. The starting point has to be the philosophical approach to the cover. If one proceeds down the insured peril/affirmative cover route, one inevitably starts to enumerate the various insured scenarios. By contrast if one adopts a more all encompassing 'all risks' based type approach, broader and more general insuring clauses may well suffice.

We suggest that the number of ways in which a professional person can be found negligent are as rich and varied (if not more so) as the ways in which a company director can be found liable. The difference lies more in the degree of comfort (false or otherwise) which a purchaser of D&O insurance is willing to accept from a broad (albeit non affirmative) approach to the insuring clauses.

If one holds fast to the all risks approach to D&O insurance, we suggest that ways and means can be found to overcome most (if not all) of the objections raised by those who argue that this product must necessarily remain relatively complex. Is it really necessary for example to use up to 100 words to define the meaning 'Loss' in a D&O policy?

'LESS CAN BE MORE' APPROACH

We go so far as to suggest that the 'less can be more' approach could be applied to other financial lines products to good effect. Whether the market is ready for such a departure from what has become the accepted norm (at least at the D&O end of the financial lines spectrum) remains to be seen.

WILLIS' FINEX NATIONAL DIVISION NAMED BROKING TEAM OF THE YEAR AT LONDON MARKET AWARDS

AWARD GOES TO BROKER'S FINANCIAL, PROFESSIONAL AND MANAGEMENT LIABILITY DIVISION

FINEX National, a division of Willis Group Holdings (NYSE: WSH), the global insurance broker, was named 'Broking Team of the Year' at the Insurance Day London Market Awards on Thursday December 2, 2010 for leading the way in providing insurance solutions for Directors & Officers (D&O) Liability, Professional Indemnity (PI), Commercial Crime and Financial Institutions cover.

The awards were judged by a panel of seven experts from the insurance industry and were presented at the Grosvenor House Hotel in Park Lane, London. Based in Ipswich, London and Manchester, FINEX National comprises over 30 Associates specialising in all aspects of financial and executive risk. Some of the team's recent highlights and achievements include:

- The launching of a new initiative from its well-known VEAGIS offering which provides specialist PI insurance services to property professionals including valuers, estate agents, auctioneers and surveyors.
- Forming a global Hedge Fund Practice Group earlier this year comprising over 1,000 hedge fund clients with over USD 150 billion in assets under management.
- The rollout of an electronic trading platform which revolutionises the placement process and supports full binding authorities, providing small and mid-market U.K. businesses with direct access to leading D&O, PI and Crime products and insurers.
- The provision of a market-leading scheme and wording for Intellectual Property insurance.
- Connectivity to the vast Willis network with a focus on key areas of cross sales for SME businesses.

Paul Richards, Co-Practice Leader of FINEX National said, "It is an honour to be recognised by our peers with this award. We have created something unique with FINEX National, offering clients a dedicated and highly experienced service team combined with the resource and assets that only a global broker like Willis can provide. Such resources include our contracts advisory team to assist in the development and creation of broad policy coverage, unique tools like the Willis Quality Index® designed to assist our clients with insurer selection, and claims service where one in four FINEX Associates are claims handling professionals."

Roland Avery, Chairman of FINEX Global, added, "We are responding to the evolving needs of our clients and the market through initiatives like e-trading, industry practice groups and facilities. All of these initiatives have helped position FINEX National as an innovator and a leading service provider to financial institutions, commercial organisations and professional services firms. This award is recognition of the hard work and effort of all FINEX National Associates."

FINEX National specialises in providing PI, D&O, Employment Practice Liability (EPL), Pension Trustees Liability (PTL) and Crime insurances for professionals, financial institutions and commercial businesses in the small and mid-market sector through dedicated specialist service teams. The team's value proposition is built on the pillars of innovation, boutique service, industry experience, transparency and expertise.



WINNER

Broking Team of the Year

Insurance Day

London Market
AWARDS 2010

WILLIS' FINEX GLOBAL DIVISION APPOINTS DR. PAUL SEARCH AS HEAD OF RISK AND ANALYTICS



London, U.K., January 12, 2011 – Dr. Paul Search has been appointed Executive Director and Head of Risk and Analytics for FINEX Global, Willis' financial, executive risk and professional liability business, effective immediately. Based in London and reporting to Duncan Holmes, Managing Director, FINEX Global, Search will lead the newly created Risk & Analytics Practice within the division.

Search will spearhead thought leadership in risk analytics and consulting services for international financial institutions, professional service firms and major corporate clients. By harnessing industry knowledge and expertise from across the Willis Group, and applying risk and insurance insights and analysis, Search will deliver risk management and insurance solutions to FINEX Global's clients.

Search joins Willis after 12 years at Marsh where he held the position of Head of Operational Risk and Senior Vice President of the Financial Services Practice. In this role he was responsible for areas of client engagement including operational risk/Basel II consulting and capital mitigation, regulatory risk advice and strategic insurance reviews.

Commenting on the appointment, FINEX Global Chairman Roland Avery said, "We are delighted that Paul has joined Willis to lead our new Risk & Analytics Practice within FINEX Global. Paul and the team will work closely with Willis' leading analytics and risk advisory teams to further enhance FINEX Global's development of risk and insurance solutions for clients in the financial, professional and corporate sectors."

Dr. Search holds a PhD in Economics from the University of London and is a Fellow of Institute of Risk Management.

MEET THE TEAM



DAVIDE BALOCCO

Davide Balocco joined Willis in 2000 as Account Executive. Prior to this, Davide graduated from the Turin University, Italy with a degree in Law and spent nearly two years dealing with commercial law and intellectual property matters at a law firm in Italy.

Davide specialises in Directors' & Officers', Professional Indemnity and Public Officials Liability having worked on these classes for both direct and reinsurance clients for over 10 years. He has also been dealing with Italian Medical Malpractice and Bankers Blanket Bond business since 2008.

Davide now mainly focuses on Italian D&O and PO business, with the aim to work in other territories and also develop FINEX Global's D&O portfolio in Greece and Turkey.

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