

BREAKING NEWS - WILLIS LAUNCHES CYBER PROPERTY INSURANCE: CyPro

WHAT IS WILLIS CyPro?

Willis has extended the range of Cyber Risks Products, CyPro, to include Cyber Asset Protection Insurance. CyPro includes a First Party Cyber Property policy (non physical damage) designed to protect a company's intangible assets and reduce its liability exposures resulting from risks associated with technology use, such as electronic processes and interactions arising from technology/e-activities.

Property and liability policies do not traditionally cover damage to or loss of intangible assets. This can leave companies vulnerable in the event of a network failure caused by a malicious attack by hackers or accidental damage to or failure of the system. Whilst technology seeks to protect network security, it is not infallible. To help protect intangible assets and reduce liability exposures, specialised insurance solutions and consulting expertise can play a major role.

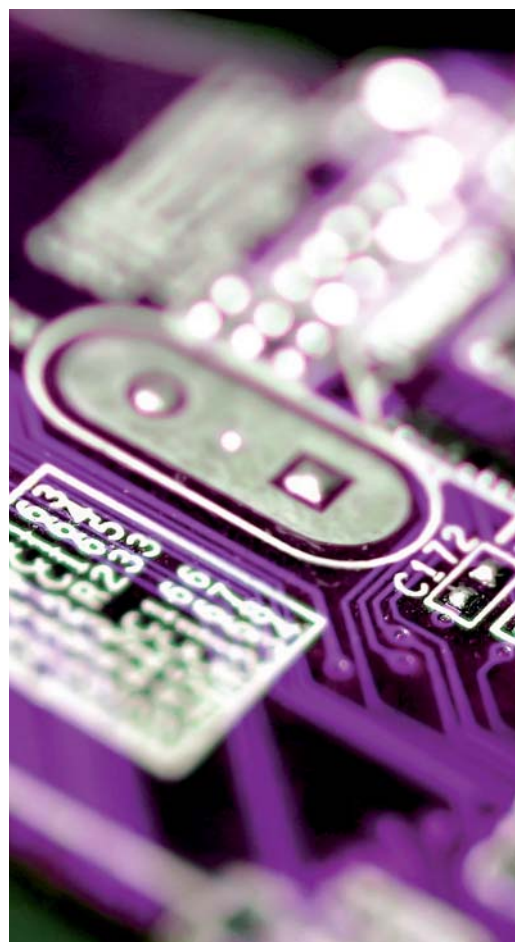
The threat of data loss and systems failure can have severe repercussions for businesses. With an ever increasing reliance on technology, an IT security incident could have the following potentially damaging repercussions:

- Impact revenues adversely
- Create significant legal liabilities
- Undermine public confidence in your brand and/or products

Using our experience in the specialist areas of Business Interruption and Cyber Risks, we would initially carry out a gap analysis between your traditional insurance programme and your reliance on and exposure to technology. We would then be in a position to deliver a bespoke insurance policy which would provide indemnification for your non-traditional risks including protection against the following exposures:

EXTERNAL THREATS

- Natural disasters
- Outsourcing – failure of IT partners and/or suppliers to manage their own key risks
- Denial of service attacks
- Computer viruses and other malicious attacks
- Hackers
- Cyber terrorism (optional extension)
- Third party fraud (optional extension) – Electrical Outage



INTERNAL THREATS (FROM EMPLOYEES)

- Human error
- Error in data processing
- Employee malicious attack
- Physical loss or damage
- Theft or misuse of data (by employee)

SEMINAR

A seminar was held on Tuesday 26 February in the Tower Room at Ten Trinity Square – attended by over 100 delegates on the subject of “How to respond when your reputation is in crisis” focussing primarily on cyber risks and the new CyPro product developed by the Willis Technology Practice. The speakers included Neil Hare-Brown, CEO of QCC, Information Security Specialists, and Quentin Archer, Partner and Head of the TMT Practice at Lovells.

Neil Hare-Brown gave a brief overview on “The Art of Incident Response” commenting that “Personally Identifiable Information (“PII”) is just one category of information important to any business. The first step in protecting your assets is realising where it is located/stored, processed and transmitted within and outside your organisation. As part of this process you can identify which information assets are most critical to your business. It is then much easier to understand the true impact when incidents occur.”

Quentin Archer spoke on “Security Problems and Damage to Reputation” explaining that, “When a security breach occurs, it’s normally a human problem, not a technology problem.

Reputations take years to create but can be lost in a matter of hours, so strict policing of information flows is necessary in order to ensure that trust in an organisation can be maintained.”

Terri Driscoll-Cooper, Business Development Director within FINEX explained the benefits of the CyPro cover which has been specifically developed to help clients reduce their exposure to risks associated with technology use incorporating a stand-alone First Party non-damage Business Interruption cover. Cover is available for the following exposures:

- Recovery costs
- Business Interruption loss where no physical damage to the system has occurred
- Human error
- Full virus protection
- Outsource partners
- Financial assistance for mitigation of damage to reputation for example by employing the services of a PR firm

Contact details:

For further information on CyPro, please contact:

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MARKET CONDITIONS

After the softening rating conditions of 2007, the UK Professional Indemnity market has continued to show some of the softest market conditions we have experienced in the last 20 years. The reinsurance market renewal season at 1 January 2008 further reflected this trend. Whilst the financial press has been dominated by the sub-prime/credit crunch headlines this year, we have not until very recently seen any noticeable impact on rates and capacity in the insurance market.

This is set to change in two specific areas – namely financial institutions and within the property sector, for surveyors/valuers. Over the last few weeks we have been tracking a material hardening in premium rating for valuation work, with a number of insurers withdrawing from this area of underwriting altogether. In our next newsletter, we will report further on this development and will be in a position to provide you with a clearer view of the likely rating developments for the remainder of 2008.

Claims arising directly from the current significant problems within the financial markets are likely to involve

misrepresentation, mis-allocation, mis-management and mis-appropriation. There have been some new insurers entering the Professional Indemnity market during the latter half of 2007 and early 2008. Nick Evans heads the Professional Lines business at Aspen Insurance UK Limited, supported by an experienced team of underwriters and risk/claims management specialists, who will be serving clients – principally in the UK and Australia. Nick explained that “The current conditions in the global economy and the effect of several years’ rate reductions are providing many challenges for policyholders and insurers alike. Against this background, the team’s approach centres on knowing the individual business inside out rather than focussing on a particular commercial or professional sector. Business will be considered as long as clients can provide adequate information on their management structure, risk monitoring and control systems, along with the results of their own investigations into any notified claim circumstances.” Aspen is currently A rated by Standard & Poor’s and has a maximum line of £5m (or currency equivalent).

David Eynon has established a new Professional Indemnity account at Sagicor Insurance Company with effect from 1 January 2008 which will concentrate on UK and international business with capacity up to £10m. Sagicor has an A rating from AM Best.

In the Technology, Media and Telecoms (TMT) sector, the market's appetite for underwriting TMT business has not diminished in 2007/08 – and some insurers, including Kiln and ACE UK, have commenced offering First Party coverage. We expect this to be a key growth area in 2008 as the proliferation of technological capabilities of businesses dovetails with an increasing number of network security and privacy breaches. Further information on this new cover can be found in the article on "Cypro" on the front page of this newsletter.

Whilst we have seen a downward trend in the US market rates in all lines of Professional Indemnity, these have not been as great as those in the UK market. The litigious environment in the US continues to generate significant claims activity both in terms of frequency and severity – (most notably within the lawyers' Professional Indemnity Insurance arena) and this has had an overall effect of keeping rates more stable. The recent financial market uncertainties/credit crunch

will certainly impact key professions in the foreseeable future as referred to above.

In light of the continuing speculation on exposures as a result of the sub-prime lending and general economic challenges, many insurers who underwrite programmes for lawyers, accountants and other professional advisers, are currently asking very detailed questions relating to mortgage lending, mortgage securitisation and several other issues linked up to the wider credit crunch. Interestingly until very recently in the area of M&A, companies/clients were able to negotiate funding deals with their banks in which many of the standard covenants were omitted or diluted. These same lenders are now said to be critical of such deal structures and are raising questions of their legal advisers as to why the loan documentation was negotiated in this way.

In summary, insurance market rates remain soft but insurers have increasing concerns over the effects of the unravelling of the mortgage lending/securitisation markets coupled with the overall financial and credit problems affecting the worldwide economy. This will undoubtedly have an impact on insurance rates for key professions as we head into the second and third quarters of 2008.



THE WHO, WHAT, WHEN & WHY OF NOTIFYING CIRCUMSTANCES

For any Insured that has a policy written on a 'claims made basis,' the trickiest question often relates to the whys and wherefores of how to deal with 'circumstances which may give rise to claims.' A recent and controversial Court decision focuses on what should be notified, when and how.

HLB Kidsons v Lloyds Underwriters

BACKGROUND TO KIDSONS' INSURANCE CLAIM

HLB Kidsons were a firm of accountants (prior to a merger with Baker Tilly in 2002) who owned and managed Solutions @ Fiscal Innovation Ltd (**S@FI**). S@FI marketed tax avoidance schemes between 1999 and 2002. In 2000 a tax manager within the firm began to raise concerns in relation to a number of the schemes which eventually led the Board to instigate an investigation in August 2001.

At the same time the S@FI Board notified the placing team at its insurance broker, (**the Broker**) about the investigation, which fell during the policy period May 2001 – April 2002 (**the 2001 policy**). The Broker presented the letter from its Client (**the August 2001 letter**) to the leading Lloyds Underwriter, who noted the information, but nothing was passed to the Syndicate's Claims Department at that stage.

In October 2001 a copy of the August 2001 letter was passed to the Broker's claims department, where it was recognised as a notification. A file was produced, but the content was only shown to the two leading Lloyds syndicates. An entry was also added to a separate Kidsons bordereau file stating:

"Possible tax errors in fiscal engineering work."

This entry stated that it related to Kidsons subsidiary S@FI, but the bordereau file was not shown to all applicable insurers either. S@FI'S investigation didn't uncover any major issues other than a possible problem in respect of the Company's two Discount Option Schemes. When writing to the Broker on 28th March 2002 (**the March 2002 letter**), S@FI's Partnership Secretary only made specific reference to possible claims arising from the Discounted Option Schemes. Whilst

sight of the March 2002 letter was provided to the leading insurers prior to expiry of the 2001 policy, it was not seen by XChanging Claims Services, (**XCS**) (who represented the follow Lloyds underwriters) until July 2002, some four months later, and three months after the 2001 policy had expired.

Following the merger with Kidsons, Baker Tilly produced a lengthy report detailing possible claims arising from 15 of S@FI's schemes. This was sent to the Broker in October 2003 in support of the August 2001 letter/policy notification. Insurers denied liability to deal with any claims.

THE COURT CASE REGARDING POLICY COVERAGE

The case was heard in the Commercial Court before Mrs Justice Gloster. In order to decide the case it was necessary for her to consider whether there had been an effective notification and what had the Insured actually notified (did any of the claims that Kidsons now faced arise out of the notification that was made?).

General Condition 4 of Kidson's 2001 Professional Indemnity Policy states:

"The Assured shall give to the Underwriters notice in writing as soon as practicable of any circumstance of which they shall become aware during the period specified in the Schedule which may give rise to a loss or claim against them. Such notice having been given any loss or claim to which that circumstance has given rise which is subsequently made after the expiration of the period specified in the Schedule shall be deemed for the purpose of this Insurance to have been made during the subsistence hereof."

Mrs Justice Gloster recognised the value of General Condition 4, namely providing Insured with the ability to notify circumstances which may not develop into actual claims until after policy expiry, which she saw as an extension to the cover provided under a claims-made policy. However, she took the view that the requirement to provide such notice **as soon as practicable** was crucial to insurers to enable them to assess their

exposures. She confirmed that whilst it was not expressly stated in the policy wording, timely notification was a prerequisite to cover, i.e. **a condition precedent to liability**.

In her final judgement Mrs Justice Gloster expressed distaste for purported notifications which give little or no detail: the intention of an insured to provide a notification should be reasonably clear to a reasonable person in the position of the recipient. In this case, the August 2001 letter was considered too vague to amount to a notification of anything. The March 2002 letter did provide specific and sufficient detail to be accepted as a valid notification, but only with regard to the Discounted Option Schemes. The information provided on the bordereau was also criticized for being too limited.

Therefore, it was concluded that only the two Discounted Option Schemes were adequately notified to specific markets. As the Insured was clearly of the view, (evidenced by the March 2002 letter) that only the Discounted Option Schemes were a problem, it could not subsequently argue that it was **aware** of circumstances in relation to its other products during the 2001 policy period. However, the Insurers represented by XCS had not been advised of the circumstances surrounding the Discounted Option Scheme until four months after the Insured was **aware**. For those insurers the requirement to notify **as soon as practicable** had not been complied with and as such those insurers were not bound to provide indemnity.

THE IMPLICATIONS

In her judgement Mrs Justice Gloster made it very clear that, based on the wording of General Condition 4, timely notification of circumstances, and the provision of unambiguous, specific detail about what is being notified are key to an insured being granted indemnity in the event that a claim develops after the expiry of a policy. Information provided should include:

- Identification of the alleged or actual **neglect, error omission, mis-statement, misleading statement, actual or alleged breach of duty or breach of trust or breach of warranty of authority...*** or other wrongful act on the part of the insured.
- Clarification that the identified neglect, error, etc., may lead to a loss being suffered by a third party.

- Identification of the possible claimant.
- Clear indication that the information being provided is intended to be interpreted as a notification which may give rise to a claim.

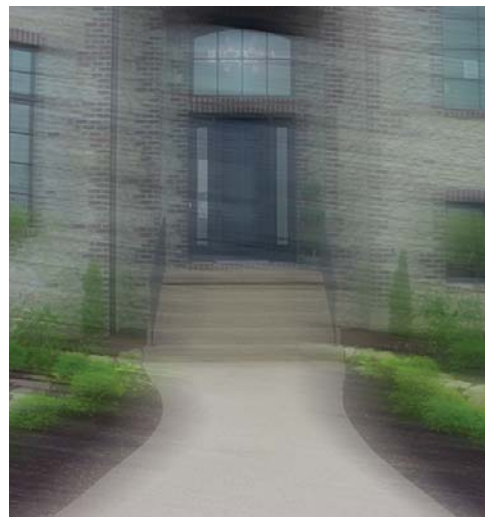
This case was fact specific; however the wording of the policy is not markedly different from provisions found in most claims-made policies. This case sets a precedent with regard to Insurers rights in relation to dealing with the notification of circumstances. The judgement was scathing of **laundry lists**, where a large number of circumstances are notified just prior to renewal, often with limited information. In addition, it could be argued that, based on the wording in this case, Insurers have been given an opportunity to refuse to deal with a claim where the circumstance was advised within the policy period, but not **as soon as practicable**.

The message here is simple: look at your policy wording, and particularly the notification provision, very closely. Just because it doesn't say that timely notice is a condition precedent, doesn't mean that the Court will not interpret a clause that way. Most importantly, **don't delay notification – provide as much detail as possible, as soon as possible**.

Any questions regarding the issues raised in this article should be addressed to Jayne Goddard, FINEX Claims.

* Or as per the claim/wrongful act definition contained within your Professional Indemnity Policy.

Jayne Goddard Cert CII
Divisional Director
FINEX Claims





MORE BREAKING NEWS

- WILLIS LONDON ON THE MOVE

Willis has moved into an iconic, 28-storey headquarters directly opposite Lloyd's of London.

Our new address is:
The Willis Building
51 Lime Street
London, EC3M 7DQ

Switchboard number: +44 (0) 20 3124 6000

“The Willis Building is a reflection of how far we’ve come, but also symbolises a new chapter in insurance broking. Risk is rapidly evolving and we are challenging the status quo to deliver cutting-edge solutions to you our clients. We look forward to working with you as partners in this evolution.”

- Joe Plumeri, Chairman and CEO,
Willis Group Holdings

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