UK Shareholder Class Actions: An Emerging Threat for D&O Insurers?

PLUS Staff: [00:00:00] Welcome to this PLUS podcast. Before we get started, we'd like to remind everyone that the information and opinions expressed by our speakers today are their own, and do not necessarily represent the views of their employers, or of PLUS.

The contents of these materials may not be relied upon as legal advice. With the housekeeping announcements out of the way, I'm pleased to turn it over to Owen Dacey.

Owen Dacey: Thank you, Tyla, for the introduction. And yes, welcome to this episode of the PLUS podcast brought to you by the London Chapter of PLUS.

Before we start, just a quick thank you to our London Chapter sponsors, Berkshire Hathaway, Specialty Insurance, Marsh, Clyde & Co and my employer, Rising Edge. So, today's topic, we're here to talk about UK shareholder class actions. Being from the D&O insurance market myself, the question I have is whether this is a looming threat to D&O insurers.

But before we get to that we're going to provide you with an introduction to really the legal basics of shareholder class actions in the UK. [00:01:00] And then run also through some of the key dynamics at play with these types of claims looking at the litigation itself and then some of the key insurance issues to be considered.

With me, we're very lucky to have experts here from the law firms Herbert Smith Freehills and Reynolds Porter Chamberlain. Starting with HSF, we have partner Chris Bushell, who is a solicitor advocate. He has significant experience acting for clients in across a range of different areas and commercial disputes.

He's got a particular focus on class actions and disputes work, so he's very well placed to talk on this topic. He's also advised a number of companies from different industries in the defense of significant shareholder class action claims in the UK too. Chris is also listed as a leading individual in the Legal 500 for 2024.

Then also from HSF, we have Greig Anderson. He's also a partner and solicitor advocate, assisting clients with commercial disputes. He specializes in

insurance disputes, helping policyholders, brokers, [00:02:00] insurers, reinsurers on claims and all sorts of coverage issues that can arise in respect of a wide variety of insurance and reinsurance.

He has a broad range of experience across all different types of lines, but also D&O, which is the relevant one we're thinking of here when we talk about this type of claim. And he also advises on non-contextual matters such as policy drafting and review, which again is something, a point that kind of comes out in what we're talking about today.

He's also ranked as a leading individual in the Legal 500 UK for insurance litigation for policy holders. And then we have James Wickes. James is a partner at the law firm, RPC, head of the Professional and Financial Risk team in London. He acts for insurers and reinsurers on complex coverage matters and disputes, again, across a range of different lines of business, including D&O, which we're talking about today. James also has some experience defending directors. But importantly today, James and his team at RPC have also acted for the D&O market and on many of the UK Section 98 FUSMA claims [00:03:00] we're talking about today over the last decade.

So, like Chris and Greig, he's very well placed to share his insights on today's topic. And finally, you have me, I'm Owen Dacey. I'm Head of Claims and General Counsel at Specialist Insurance Underwriting Agency Rising Edge. And what I'll say about myself is I've handled quite a few D&O claims, management liability claims in my life.

With that, we'll get started with the basics. And we'll come to you, Chris, for this. Shareholder class actions are still relatively uncommon in the UK compared to other jurisdictions like the US or Australia. Could you just explain on a high level the legal framework here in the UK where shareholders are trying to take collective action against the company, what is the legal basis for these claims and how do they get off the ground?

Chris Bushell: Yeah, sure. So, in terms of how the claims are put there's a number of different ways that we often see them. There are misrepresentation claims, there are negligent misstatement claims, there are tort or deceit claims, but primarily, when we're talking about securities class [00:04:00] actions over here, we're really talking about claims brought under Section 90 or 90A of FISPA, as you alluded to in the introduction.

Section 90, if we take that one first so this is talking about untrue misleading statements or omissions in the context of prospectuses. So that's the relevant

document. We're talking about prospectuses here. In terms of, the relevant standard for those claims, it's essentially negligence. And there is a defense of reasonable belief.

And we may come on to talk later, I think a bit about some of the kind of strategic decisions that need to be taken in relation to how you make out that defense. And in terms of who the claims are brought against they can be brought against the issuer. So, there is the company. They can be brought against, frankly, anyone who is responsible for the content of the prospectus, most obviously the directors, the issuer, but also potentially [00:05:00] investment banks, law firms. As far as I'm aware, and I think James and Greig will correct me if they disagree, so far, no one has brought a claim against a bank or a law firm, but it's quite typical on a section 90 claim for it to be brought against both the issuer and the director.

If we flip over to 90A, which is probably more "in vogue" at the moment we're talking about untrue misleading statements or dishonest omissions or dishonest delay. This is basically in the context of any other information that is published on a recognized information service. All the other stuff that is pumped out there into the market and the typical documents that is identified is usually something like an annual report, and quite often reference to statements in an annual report about corporate [00:06:00] governance and processes that the issuer has in that regard. In terms of the relevant standard, we're basically talking about fraud, so dishonesty or recklessness and in terms of whose knowledge is relevant there, there is this concept which again I imagine we may return to later on in terms of talking about battleground areas.

There is this concept of a person discharging managerial responsibility, so a PDMR. That is a kind of relevant personal persons within the issuer whose knowledge is relevant. And in terms of who the claims can be brought against a significant difference, they can only be brought against the issuer.

So not the kind of wide-ranging list of potential targets that we talked about in the context of section 90. Only against the issuer, but obviously people like the directors are still going to be very relevant as part of the defense of the claim because they will be part and parcel of this [00:07:00] PDMR discussion.

Um, I think you quite fairly mentioned, Owen, in the introduction that shareholder claims against listed companies are a pretty recent phenomenon here. There haven't been that many so far. I think it's less than 15, more than 10 in terms of where proceedings have actually been issued.

There are a few reasons for that. I guess for anyone who might be listening from a kind of US background, we use this phrase sort of class actions not really as our kind of US colleagues would understand it. We don't have an opt out regime here. What we're really talking about is a claim form with a long list of claimants attached to it and you see you have to opt in to the proceedings. And the fact that it is generally that mechanism is one of the reasons perhaps why there haven't been that many to start with.

The first one was back in sort of 2009-ish. Again, Greig will correct me if I've got that wrong, but that was RBS, which was a matter that my [00:08:00] firm was involved in. It rose out of the 2008 financial crisis to do with RBS rights issue. There was then the HBOS Lloyds matter which followed not that long after, although actually was not brought as a section 90 or 90A claim, but for reasons that we probably need not delve into on this podcast.

And then there was a bit of a gap. And then there's been a sort of a relative flurry in recent years, so Tesco, RSAH, 4S, Circo, Barclay, Standard Charter, Glenco, BT Petro Boohoo. Bricket, Benkeiser, those are the ones that immediately come to mind, but I think I can't add them up that quickly, that's still probably less than about 15.

Obviously, all sorts of free action correspondence floating around on these kinds of claims, but in terms of ones that have actually been issued, we're talking about relatively small numbers. We don't actually yet, have a judgment really in this kind of space. There was a judgment in the Lloyd's [00:09:00] HBOS claim, but as I mentioned, that wasn't actually brought as a Section 90/90A claim, and whilst there was a judgment in a case called Autonomy on 90A, which is helpful in terms of a bit of guidance on main backgrounds there. That wasn't actually a securities class action, so it was in a sort of different context.

There is quite a lot of uncertainty still in this area, which is both helpful and unhelpful, depending on which side of the fence you are in these kinds of matters.

Owen Dacey: Yeah, definitely. Very interested in understanding what's driving this? Because, like you say, there was that lull, and it does seem like there's a flurry. What's going on in the UK landscape now? Who and what is driving this trend? And what are the motivations, do you think, or that you can allude to that's driving this trend?

Chris Bushell: Yeah, I think there's a few factors in no particular order I think the rise of litigation funding and insurance within this jurisdiction, insurance in relation to adverse costs. There is more money around, I think, in terms [00:10:00] of for claimants and claimant law firms to look at to fund these kinds of cases, because let's all be honest about this, these kinds of cases are big and they are expensive. So often they do not get off the ground unless you have got that kind of funding and insurance in place. Secondly, and I've alluded to it already, but there is just a bigger market of boutique claimant firms now who are interested in bringing these kinds of claims and frankly, I think there's just a sort of better quality of claimant firm around these days.

I think probably if you were talking to people 10 years ago or 15 years ago, this was an area that was considered sort of corporate ambulance chasing and a bit grubby. And there might have been some question marks about the quality sometimes of people being involved in looking at these kinds of claims.

That's not the case now. There are very sophisticated, very able people on the kind of claimant bar side. So that's a change. I think probably the third thing is really just ESG. [00:11:00] Everyone's focused on ESG. And in particular, if you're an institutional investor, if you're a trustee of a pension fund or you're a kind of portfolio manager, a big asset manager running other people's money, I think there is just a real pressure on you nowadays to have thought very carefully about whether or not this is a potential asset, this kind of claim and whether or not, therefore you should be looking at bringing these kind of claims. And also, in terms of just holding companies to account and where there is a clear case of underlying wrongdoing, is it right to bring a claim to address those kinds of issues?

So, I think, subject to anything that James and Greig might want to add, those are probably the main drivers.

James Wickes: Yeah, just one thing to add, Chris, a lot of these claims, in fact, pretty much all of them follow on from a regulatory or criminal investigation or prosecution.

So I think the trend, [00:12:00] probably also follows those regulators and prosecutors being more, proactively more active, the more investigations and prosecutions that are successful the more follow on shareholder claims we're probably going to see and we've obviously seen, the likes of the SFO and the FCA post financial crisis kind of ramping up the aggressive nature of how they pursue corporates and individuals, I think.

Chris Bushell: Yeah, I guess the other point around that you've mentioned, this sort of proven wrongdoing, there's, I think there's a bit more of a road map now. All of those cases that I've reeled off, again, I think, without going back to check, they will all have that kind of platform in there.

There's a regulatory decision, or there's been an investigation by a case, or there's a deferred prosecution agreement, something like that. So, they have that kind of base platform and people have seen it work as being a basis to get claims off the ground. And also again, as we may come on to talk about a little bit [00:13:00] later, there's just a little bit more of a roadmap now about how these cases are run, and how is the court going to try and manage them.

How do you approach things on that front? So, I think people probably feel a little bit more comfortable in terms of bringing these claims and what they might look like.

Greig Anderson: And there's probably a general level of additional awareness amongst the community, whether it's lawyers or otherwise, if you read enough about them in the press, they'll be more front of mind.

Now, inherited structurally from the States, albeit they look different over here, there's been the rise of class actions in Australia. And my sense over the last few years, with 90A really being the vehicle, is that the UK is catching up with other class action jurisdictions and is probably number three now.

Owen Dacey: Yeah, it's fascinating. And the other thing I was just thinking about when you were talking about that regulatory piece is that the key difference I see here, what seems to come out here is that in the US that the shareholder claim follows an event a lot of the [00:14:00] time, like a negative event of some kind causing a stock drop.

You see it filed the next day. You might see it filed the next week, whereas over here it seems to be very much, and this is important for underwriters and insurers and clients of course as well, but there seems to be this lag from when the original conduct or the original event happens.

James Wickes: It takes some time too, to build that investor base to bring the flame.

Chris Bushell: I think that's one of the main reasons, the fact that it's not opt out here, you have to go and up build and make sure that it's a viable claim here, whereas in the US, ping it in and start the process and go from there.

Owen Dacey: Okay, and just on the final thing on that legal framework then, is there anything particularly on the horizon in terms of the legal framework for these claims that people should be aware of?

Chris Bushell: I think as I mentioned we still don't have any judgments yet, really. There are some trials coming up. I think the Barclays one is say coming up still, a year or a bit away. I think that it's listed trial in October next year.[00:15:00]

There's a couple, I think, the following year. There have been a few kinds of more recent decisions around the sort of process of running things. As I mentioned, there is this sort of split trial format now. Where I think it's relatively established that the way the courts want to run these things is deal with defendant liability issues first, and then questions around claimant reliance causation and quantum will all be dealt with in a second trial, although there are some sort of procedural tweaks around that to try and ensure that there is a sort of fair balance in terms of the burden of litigation.

So again, I think there's a relatively well established practice now of trying to ensure that claimants at least do some disclosure or put in some evidence around their position on reliance so that it's not all reverse engineered depending upon what [00:16:00] a liability award might, I'd say um, I think the other kind of horizon scanning or, or area to keep an arm might be around representative claims. So, there is this mechanism under the CPR 19.8 about, bringing a representative action, representative claim. People will be familiar, not in a securities class action context, but the Lloyd and Google decision.

And then it has been tried in a securities context on a couple of occasions recently. So far without success, but still subject to appeal. In the interest of balance, I'm usually on the defense side, but you can see how a starting point is that kind of mechanism, which is more akin to a sort of US opt out, potentially from a claimant point of view. It's quite attractive for dealing with defendant liability issues, and you can see a kind of argument that, potentially you could deal with those kinds of issues early on, and then depending on what the court's answer is to [00:17:00] those, you then deal on a more individual basis with causation and quantum later on.

And I think the only other sort of horizon scanning point is just, we are seeing more and more of these, coming across our desks. I think it is an increasing trend rather than something that's likely to go away.

Greig Anderson: I wonder, Chris, actually, whether it's worthwhile you picking up briefly on what the end of the process looks like, because it does flow into coverage and establishment of individual liabilities, and so it's very different from a US class action on a opt out basis. And at the end of the process albeit we're not seeing cases really get there what would the dynamic be like if you're asking the question if there's been a successful, you got to the end of a trial on quantum, what next in terms of an individual actually being able to enforce that kind of outcome against the company?

Chris Bushell: Yeah, I guess in what sense do you mean on the enforcement side?

Greig Anderson: In the sense that what you're going to get is [00:18:00] a judgment in relation to those who have opted in to the class action, which might be a reasonably small pool in the scheme of things. Yeah. And then you will have many that haven't.

Chris Bushell: No, of course.

And there's all sorts of reasons around that, or issues around that, isn't there? Yeah, it's often Sometimes people do just want to sit back and see how an initial group might fare subject to keeping an eye on limitations, for example. It's also one of the real difficulties in terms of trying to resolve these matters without going to trial.

I've mentioned that practically all of them have managed to settle so far, but they've tended to settle very late in the day. And these matters are not straightforward to settle, particularly when you're still within a limitation period, for exactly that point break, that there's all sorts of other people who could potentially come out of the woodwork, and we've seen that, already, Tesco, I think, is an example where it was initial settlement and then very soon afterwards, more people came out of the woodwork.

Owen Dacey: I [00:19:00] want to bring this back into real life as well and then hear about the perspective on the ground. Chris, one of these instructions' lands on your desk, could you walk me through what those initial first steps look like? What are you looking at?

What are you thinking about? What are the steps you're taking?

Chris Bushell: Yep. First things first, there's all the usual things that one ought to be doing when a potentially significant piece of litigation arrives, not

securities class action specific. The document preservation side of things, the engagement with insurers early on side of things, which again, no doubt we will return to later.

But I think one of the main initial things that we spend quite a lot of time on is just making sure that people do investigate the underlying allegation at an early stage, and is there anything in this case. And if there is, or if there isn't, who knew what, when, and that can be quite a difficult exercise sometimes if say the underlying issue that has been incorrectly dealt with or omitted from market statements is something like [00:20:00] a hole in the accounts of a subsidiary or something, potentially that might be relatively straightforward in terms of identifying in time when or, when they didn't know something.

But often it can be quite grey in terms of what's being alleged in relation to the statements or what information was missing. It might be an issue that is evolving over a considerable period of time. And particularly if you're in that latter category where it's not necessarily going to be quite difficult to pinpoint, I think it is important to try and do some thinking and speak to factual witnesses pretty early on. The other thing I would say, which is probably less of something I have to do these days, but probably when I started doing these claims, is actually just really getting people to take them seriously. There was definitely this corporate ambulance chasing mentality where I think a lot of people just went, it's rubbish, it's a try on, its obviously nonsense, and were quite dismissive of these kind of claims.

And even if that is where [00:21:00] you ultimately end up, that it is a try on and there really isn't anything to it, it is making sure that everyone within the company and the wider team gives it due care and consideration and takes it seriously.

James Wickes: I guess Chris as well, the question assumes that it just lands in a vacuum, but I guess the reality is the reality on all of these would have been, there's been a previous investigation that the company and various individuals would have had to have, grappled with.

And I guess you've got to, I guess it's thinking about when you're in that investigation, having the thought process of could we be receiving a follow-on claim from shareholders? It's a different mindset, isn't it, these days?

Greig Anderson: It is, and you get that a bit as well.

If the first few of those claims obviously are spurious and don't make a great deal of sense, looking down the line and thinking, is there actually a potentially good claim here or a more troublesome one or potential [00:22:00] shareholders who might wake up at some point and then bring the real meat of the claims?

And as Chris says, starting to identify that very early in the process, so you're on the front foot when the stronger claim does come in, having had sight of the weaker claims or the smaller claims or whatever they might be at the beginning of the process, which, and that may be years beforehand, sometimes.

Chris Bushell: Yeah, just think about, I guess the other area, maybe briefly to mention in terms of things to think about early on the stuff like, is there a limitation period issue here?

Because there might be, a lot of the things often are quite historic. Think about that, and obviously if you are going to run that, you need to do it early. Sometimes, do these people even have standing to sue? Are they even shareholders? You get a long list of names.

You do need to actually spend the time to go through them all, check, were they shareholders? Were they shareholders at the relevant time? Are they legal owners or at least ultimate beneficial owners of the shares, that kind of [00:23:00] stuff. And I think also just look at whether or not there is any angle for strikeout or summary judgment.

Although increasingly I think it's quite difficult to get rid of these claims at an early stage. I think the courts are quite sympathetic to the fact that there is a bit of an information imbalance. So long as something has been pleaded relatively well, I think the courts tend to give. claimants a sort of fair wind, at least at the early stage, knowing that, particularly around things like knowledge for PDMR, that may be quite limited, the best that they might have to go on is, findings from an investigation or something like that and referring to what findings a leading case or retired judge may have made in the past.

Owen Dacey: That takes me on to, I'm very interested to know in these types of cases too, we've talked about some being spurious or whether there's a bit more. What are those key battlegrounds, if you like as the claim progresses, if you aren't able to see it off early? [00:24:00]

Chris Bushell: Yeah. So, I think very broadly there's this issue of standing, are these people entitled to bring in the first place?

Although that's probably been settled a little bit more by some of the interim decisions in cases like Tesco and G4S. They're really big battlegrounds. That have not really been answered so much at the moment are really, who falls within a PDMR? You know who, who is that? I think it's relatively, it is clear that a director or a non-executive director is going to be a PDMR. But then you've got things like, shadow directors, de facto directors, if you are a senior individual, on a subsidiary immediately below the board, might you be the kind of person who could fall within PDMR? I think that's still an area that there are a lot of battles and skirmishes on. And then this whole area of reliance, we haven't got anywhere near a trial on reliance yet. It's clearly an important [00:25:00] part of the course of action for a 90A.

It's probably not relevant for a 90 claim. But you've got this debate about how far can you take these analogies to the tools of deceit, presumptions of inducement. To what extent can you import theories from the US about fraud on the market, do you need to be aware of what was and was not in the relevant document, does there need to be some conscious awareness, or can you have this sort of more indirect reliance?

Which I guess it is a very important debate. If you think about the fact that I don't know what the data is, but it's probably around 50 percent of investments in listed companies are tracker funds and computer algorithms making these decisions. There is an interesting debate, I think, around that.

And so that is probably the main battleground, I think, that, that hasn't been sorted yet. Quite apart from questions on loss, because the statute says very little about how you [00:26:00] begin to calculate loss. And again, we have not got to that stage in, in any of the cases that I've mentioned so far.

Again, James, Greig, anything you want to add on that?

James Wickes: No, I think those have been the key battlegrounds. I guess materiality comes in a bit, doesn't it, around certain of the statements, but tends to be wrapped up in the sort of causation and reliance type.

Chris Bushell: Yeah, but that is an interesting point, because materiality is expressly mentioned in the statute around omissions.

You've got a debate around materiality, on statements that are actually there and misleading statements and then usual debates around what does materiality really mean? Is that material impact on share price? Does it mean something else? So, I think that's I think that's fair. That's another battleground area.

Owen Dacey: It Sounds like there's a lot of issues to go to work through and I can imagine these claims do take quite some time to get to a resolution be it at trial or be it settlement or otherwise, but so really interesting issues coming up [00:27:00] there.

So, I'm going to move on to the perspectives of the defendant now themselves. So, we're talking about the insured, company representative, whoever it is. I'm going to come to you, Greig, and please guys, James and Chris chip in. But Greig, the shareholder class action claim lands on the desk of the company from your perspective in your role, what are those immediate steps they should be taking and what are the critical actions they need to prioritize to make sure they're protected when that claim comes in?

Greig Anderson: Yeah. I think in a general sense we covered that in relation to the fact that there's nothing particularly unusual about a class action saved to the extent that one needs to take it seriously early and do all the usual things you do with any potential litigation in respect of which you might have a letter before action.

Where it gets a little bit more interesting probably is on the insurance side because there's a short and a long answer to that. The short answer is pick up the D&O policy and see what coverage you've got. If it's [00:28:00] a section 90A, what you'd be looking for is the side C coverage and that's the coverage for the company.

In relation to securities claims, if it was a section 90 claim, you'd be looking at the side B and C D&O coverage, which again is the company coverage. And the director's coverage under side B for section 90, also thinking about as well, has the company bought public or public offering of securities insurance or POSI insurance, which sometimes goes together with, or as an alternative to D&O for particular offerings.

So, you work out what you've got in the box back in the first instance, and what its relevance might be, there is one slightly wider point, which is that it's possible, and we've seen this perhaps more frequently in the states, that there are other coverage lines that are implicated as well, depending on what the nature of the event is.

So, if you have a big cyber event that's resulted in a securities claim. You'd be looking at D&O or POSI in relation to the securities claim, but you might have [00:29:00] other insurance policies in play as well. That's outside the scope of

really what we're looking to cover, I think, on this podcast, but it is part of the think widely at the beginning to work out what potential policies are relevant.

There's also a timing point in relation to that, which intersects with the point that we've been discussing earlier, which is that these things can develop over time. Which is to say that the first thing you're going to want to do is to notify the insurers, and that sounds easy in principle, if you get a neatly backed up letter before action land on your desk, you pick up that D&O policy and off you go.

But what if the way that this has evolved and started with some small claims that haven't really been escalated far up the company, in the first year, they get bigger. In year two, you maybe get a couple more of them. More senior knowledge. Year three, you get a regulatory investigation. And year four, you get a securities claim.

So, you've got an evolution over time of things that might [00:30:00] engage insurance. And at each stage of that process, it might be known to different people within the business. So, uh, there is a um, um, an important actually when these things come in to making sure that the right people know about them. And then insurers are given the right kind of notification.

And that's not just necessarily notification of a claim or a regulatory matter to your D&O insurers. It might be notification of potential claims, and potential circumstance. And it will be highly relevant for policy coverage because the question as to which policy year all of this goes into will be a fundamental one to determine, and it can end up being really rather complex.

So that's the first point. As soon as I start to get something that could ultimately turn into a securities claim, I need to be thinking about insurance and notifications at that point and opening the covers at that point to look at the potential policies [00:31:00] that I might have in the cupboard. The second easy part of the answer is, it's important that there is a good and strong dialogue between the insured and the insurers.

Again, starting right back at the beginning of the process, a two-way dialogue is really important I think, and you're always going to get a better quality of process where that dialogue is happening. And it's both in the narrow sense that there'll be policy obligations in relation to obtaining consent to the incurring of costs at the beginning of the process or obtaining consent to any potential admissions of liability or facts.

And it's very difficult if you're in insurer issues to give consent to an admission of liability if you don't know what the substance of the claim is or say far as it's available, what the merits of the claim are at that point in time. So, starting the process early and starting those conversations [00:32:00] early is important.

But the flip side of that, of course, is that one of the features of class actions is that it's very often very difficult. to give meaningful views on merits in the early days because they're big complex beasts. The evidence isn't necessarily available yet. Indeed, the claims might not have been fully or adequately articulated at that point in time.

And you may get a split between looking at some of the liability issues as Chris touched on earlier in the first phase and then you're coming on to reliance and causation and quantum further down the line. So, there's an evolving piece, but it's not as simple as a lawyer writing down and writing in their it's opinion and saying, there you go.

There's a significant degree of complexity to it in that sense, but it's still part of the journey. If one's explaining that and dealing with it, it's important because when one comes to actually dealing with coverage, because so many of these claims end up [00:33:00] settling, one of the important things when it comes to settlement is being able to measure, ultimately and in layperson speak, is this a good and reasonable deal to be done.

There's an expectation under English law, a requirement under English law, that the liability is established, and that can be done by way of settlement, but you need to look at, in that context, what is the liability, and it can be harder in those earlier days for the reasons I've just mentioned. And the same point applies in relation to quantum.

And we, again, we touched on this earlier, which is to say, because these are cases that involve a very significant number of potential claimants, at what point in time can you say what I'm paying or proposing to pay, absolutely nice clean judgments on the point, to this particular individual is reflective of a liability to them?

And it might be far earlier in the process that settlement is happening, which is to say there's lots of [00:34:00] detail around these kinds of points, but if there can be a collaboration between the policyholder and insurers to understand all of this so that the insurer can then take an informed view on whether this is an appropriate deal to be funded under the policy.

That's the quickest and best way through it. I think that is true for all sides as well. Where you don't want to end up, is it a position if you are the policy holder where you are going to the insurer saying, can I have consent for something? And they say, I don't know, after prudent uninsured, I've had three days' notice in relation to this and I need three months.

Which is the reality that sometimes to get on top of it. And on the notification point, where that can give rise to issues is disputes over which policy year you might be in. So, it can all get a little bit messy. But the other point I think to have in mind is that it's not even just about which policies and which policy years.

And these kinds of coverages, D&O or POSI, can have complex structures themselves, [00:35:00] multiple layers. If you're dealing with a big class action, you might have towers that go well north of 100 million. And you're looking at lots of different insurers. You may, in my experience, appoint different lawyers. In a perfect world, everyone appoints one set of lawyers, but that's not just the way it necessarily works.

And equally, there may be different lawyers engaging as monitoring counsel, as are instructed as coverage counsel. So, you need to know who you're talking to in that context. And of course, at all stages, making sure if you're the policyholder that you're complying with your policy obligations with the right insurers, so engaging with the right people in the right way. And sometimes that will mean, if you've got different claims under different policy years, and it's not clear, engage you with multiple people across multiple years. In an ideal world, you have a pretty clear view, and there'll be one year, one law firm, happy days in that sense.

But sometimes it can be far more complex than that in reality.

James Wickes: Yeah, and [00:36:00] just to build on that, if it makes sense, Owen, around, from the other side but really, just echoing points Greig's made, just to add another layer of complexity to that early stage.

Obviously, what we'll be dealing with these types of claims is allegations of fraud and dishonesty, right? So naturally, insurers are always going to be having to look carefully at, the nature of those allegations, whether there's been any previous admissions or findings in relation to those particular alleged wrongdoing on the part of the PDMRs, as Chris mentioned earlier.

So, there's that issue to get past right at the outset and I think that's something that you would as a policyholder and insurer want to get to grips with as quickly as you can so that you can move forward and in that collaborative way as Greig outlined. I guess the point is don't you wouldn't be surprised that insurers are looking at issues around risk presentation if there are allegations of dishonesty, albeit in most cases they are just allegations. There aren't, in most cases there [00:37:00] are no actual findings in relation to the individuals. But we've seen a couple where there have been, and it does have an impact on their policy. And likewise, typically the D&O policies will have conduct exclusions, which will need to be looked at carefully by insurers.

And again, more often than not it is something that insurers just shouldn't be surprised that maybe rights are reserved on those because, there's no final adjudication or admission, but it is something that, for obvious reasons, insurers need to look carefully at and, and kind of linked to that is issues around attribution of knowledge to the company and whose knowledge is going to be attributable to the company. There are common law positions in relation to that. And we have jurisprudence on that in England but often the policy will amend that or make it very specific around whose knowledge is going to be attributable to the entity for the purposes of society cover.

So, things like that. And because of the nature of the [00:38:00] allegations that are involved in the claim can add a little bit of complexity to the coverage analysis that ideally the insured and the insurers would grapple with at the start so that they can get clarity on it early on.

Owen Dacey: Yeah. That's coming out and from both of you there.

And I think that just to add my piece to it, I think where we have worked successfully is by having the early open dialogue on the phone or in face to face. And not shying away from some of these issues but talking about them and doing it with empathy or a sort of level of understanding that this is what we go through.

And then we all have expectations set as it's going to go. Yeah, it makes a lot of sense what you guys are saying. What about I'm going to maybe just throw this out to everyone, but I think you've all had involvement in these types of claims in the market and what would be, just feel free to write them out, I'm just interested in some of the key lessons or learnings from that experience you've had of handling these claims that, that might be helpful to anyone that would be involved in, be on the insurer side, be [00:39:00] on the insured side any key lessons or learnings, takeaways for you?

James Wickes: Yeah, just one thing that's quite an interesting dynamic is, in most cases that we deal with you know who's on the other side of the table and who the key decision maker is. I think in these cases, that's a little bit less obvious sometimes. Is it the institutional investors? Is it the funders? What's the real driver? That can be quite an interesting dynamic to these claims, which is not often the case in other UK D&O claims. So that point is something I would just mention that you do have various stakeholders in these claims that can change the kind of potential dynamics of you know, how far they go if there's a settlement potential or not.

Greig Anderson: I'll raise two practical points, if I may. The first is, when in advance, what coverage are you buying? Probably about half of the time where I come across section 90As, the first question is, do I [00:40:00] have side C?

And the answer is no. But in the other half, the answer is yes. And sometimes that can come as a surprise to some within the business and sometimes not. But it is important that risks understood, but not least given that we've now come out of the hard market, D&O market, and POSI market, it may be that some businesses stop buying side C for all sorts of reasons during the hard market and it's now available to them again at a cost that they're prepared to pay. So, there's a renewal point to be mindful of. But the other practical point is getting it set up right and protocols right at the beginning of the process. Because to have the right quality of engagement in relation to coverage, you need a team to do it.

And that means a defense team. It means coverage teams. And that is both external advisors, but also internally the insurance team and the legal team and any internal execs with responsibility for it. [00:41:00] And likewise with the broker. So that there's joined up messaging and left hand knows what right hand is doing.

But and all the more so if it's a bigger and more complex action than just the class action, because then you may need the regulatory team and litigation team and the insurance team all speaking to one another and getting that leads to a far better process and outcome generally. And there are all sorts of risks inherent in getting it wrong. And related to that actually just corporate indemnification and who's the defense team at the beginning of the process.

If you're dealing with a section 90, are the retainers set up in the right way? Do you need independent legal advice for particular individuals? If you need that, are you doing it in a reasonable and proportionate way? And do you have consent from the market in relation to how you're looking to structure that

defense model and who the firms are going to be and their appropriateness to the kind of action that you're dealing with?

Chris Bushell: Just two very quick points from me. There is this point [00:42:00] about competing things that are going on that Greig mentioned. So I think, this has come out of a few of the cases that have taken place so far, that whilst there's often a kind of proven wrongdoing platform for bringing these cases, often there are still regulatory matters going on, there are still maybe criminal proceedings going on. And this kind of recurring theme of everyone being joined up and just thinking about potential interplay between various different tracks that are going on, it's not only about the litigation. And another thing to just add to the list, I think, when I mentioned, earlier on about expanding and limitation and all that kind of stuff, think very carefully around privilege. In terms of, particularly on a section 90 claim, this kind of, honestly, often one of the large planks of the defense is they will be relying on legal advice that the board took, for example. Just thinking carefully about waivers of privilege and, bottoming out all of the factual position when an appropriate moment is to do that.

There's all [00:43:00] sorts of other messy points around these kind of claims on privilege and, what you can and can't withhold from shareholders, but that's probably for another day. But yeah, thinking very carefully about privilege early on and not waving without thinking about the limits on it, it's quite an important point, I think.

Greig Anderson: And that's also true in the insurance context that we've been discussing earlier. Flow of information is important, but conducted in such a way that there isn't a risk of loss or waiver of privilege as against the outside world in the way that's done. But that also includes working with the broker so that that element of the dynamic isn't understood, given that they're not going to be providing legal advice, you're not going to get legal advice privilege in that context.

And privilege in the UK, in England has been drawn pretty tightly, narrowed down in recent years. If there are US angles to the case, you need to be mindful of the risk of disclosure in the US. If, say, you have a claim for [00:44:00] the US and in the UK, which is to say all of this is fixable and doable, but a forethought's important, and then putting in practical protections to get the flow operating in a right way to protect both the insured and the insurers in doing that.

Owen Dacey: Yeah, really important for the insurance side I think to understand that's going to be part of the dynamic, because they're always keen for information.

Okay. I think we're going to wrap it up there. I think you have answered my question. I do believe this is leaving increasing threat for D&O insurers and for corporates in the UK. Thank you all for your time going around the room Chris, Greig, James, thank you so much for your time and for bringing us your expertise on this topic, I've learned loads.

James Wickes: Thanks. Thanks very much.

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