



COMING TO GRIPS WITH THE BERMUDA FORM

What is the Bermuda Form? And why is it important that you know? **Matthew Smith** and **John Sylvester** explain

A large number of European corporate insurance policyholders are now buying excess liability cover on the basis of what has become known as the 'Bermuda Form'. If your programme includes this type of cover, you need to be aware of some of the idiosyncrasies.

How it started

The standard Bermuda Form policy was developed in response to the collapse of the US excess liability insurance market in the mid-1980s. A number of excess liability insurers (including ACE and XL) were subsequently established in Bermuda, funded to continue to write this form of insurance. Some of the main forms currently in use are the XL-004, ACE 005 and SELIC-02.

What it covers

A typical Bermuda Form policy is quite broad in its wording. The insuring clause provides that it covers a policyholder's liability for damages 'on account of personal injury, property damage and/or advertis-

ing liability'.

The typical Bermuda Form policy is an umbrella policy, covering a global corporate policyholder and its subsidiaries. It covers, for example, claims against a manufacturer arising from a defective product. However, it is not confined to product liability claims and may also provide excess liability cover for risks of personal injury and property damage covered by such underlying insurances as employer's liability and public liability. The policy may also cover advertising liability and may, in certain circumstances, be extended to cover other types of liability such as marine liability.

The Bermuda Form policies operate above the primary layers in the insurance programme. They do not follow the underlying insurance wording and have a number of unique features that are not typically found in a primary general liability policy. A notice on the front page of the XL-004 form makes it clear that it is a stand-alone policy and does not follow any other insurance policy.

The self-insured retention on these forms of insurance is significant, often at least \$50m (£28m).

Nevertheless, they are often an essential part of the insurance programme for large corporate policyholders seeking to protect themselves against significant claims.

Triggering cover

The Bermuda Form policy contains a unique trigger of coverage. The trigger used in many forms of insurance (for example, public or product liability) is an occurrence-based trigger, ie the cover provided by the policy is triggered by the occurrence of an injury or damage within the policy period. In contrast, other forms of insurance such as professional indemnity cover, may use a claims-made trigger. This means that the crucial date is not necessarily the date when the loss occurs, but rather the date the claim is made against the policyholder.

The trigger specified under the Bermuda Form is neither occurrence-based nor claims-made. Rather, in order to trigger the cover under a Bermuda Form policy, the injury or damage typically must have taken place after the specified retroactive date of the policy and the occurrence must have been notified to the insurer within the policy period (or any extended notification period, if purchased).

This trigger was designed to reduce the long tail liabilities that often gave rise to claims under occurrence-based policies, particularly in relation to

asbestos-related claims, where the claim might manifest itself years after the date the injury occurred, and long after the policy period had ended.

Under the Bermuda Form, the policy period may extend for many years during, which the policyholder maintains the cover on a renewable basis. The policyholder must notify any occurrence during that period or, where this is provided for in the policy, any extended notification period after the policy period comes to an end.

There are some fairly detailed provisions in relation to notification, which you need to bear in mind to avoid any potential late notification defence on the part of insurers. For example, notice of an occurrence should be given 'as soon as practicable' to the department specified in the policy and should be 'explicitly designated as such'.

Because the injury or damage must take place after the retroactive date of the policy, you would be well advised to consider purchasing an early retroactive start date for the policy, which can greatly increase the scope of coverage provided. This is particularly important in relation to product liability risks, where injury or damage may not become apparent immediately.

Integration of occurrences

Another key feature of the Bermuda Form policy is that it allows the policyholder to integrate related occurrences. This is particularly valuable if your company is faced with numerous small product liability claims of the same type.

As mentioned, the per-occurrence self-insured retention on the excess liability policy is likely to be significant. It is quite possible that you could be faced with a large number of claims, none of which individually may be large enough to trigger the policy but which, together, may run to many millions of pounds.

For example, a very significant category of claims received by the Bermuda excess liability market related to defective breast implants which leaked silicone and allegedly caused injuries to women. The individual claims were considerably below the retention on the policy. However, because they were able to integrate these claims into a single occurrence, the manufacturers of the implants could exceed the self-insured retention amount and obtain coverage for a large share of their liabilities.

Under the XL-004 form, the policyholder is entitled to (but is not obliged to) give notice of an integrated occurrence where there have been several incidents of personal injury, property damage or advertising liability attributable to the same event, defect, or failure to warn. If you give such notice, any claims that have been received or may be

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received in the future attributable to that cause will be encompassed within that integrated occurrence and be treated as one claim under the policy. The policy limits at the time of the notification apply to the whole integrated occurrence, regardless of when claims are subsequently received.

An important point to bear in mind is that the notice of an integrated occurrence may carry greater significance than a traditional claims notification under a claims-made policy. The notice should be designated as a notice of integrated occurrence and should define the occurrence in sufficiently clear terms to avoid dispute as to whether or not a subsequent claim falls within its scope. The decision to notify an integrated occurrence should be based upon a risk analysis of potential future claims arising from the same occurrence.

The maintenance deductible

Both the XL-004 and ACE 005 forms exclude claims that were expected by the policyholder. This is because insurance is not intended to cover losses that are not fortuitous. Many manufacturers have a difficulty with this exclusion, in that a certain level of claims may be anticipated to arise from the use of a particular product. A pharmaceutical company, for example, might expect that one in every 100,000 consumers might have an adverse reaction to a drug. It would be unreasonable if a policyholder were unable to claim under the policy in circumstances where reaction to the drug caused a much larger than expected number of claims.

For this reason, the 'expected or intended' exclusion has itself an exception – the 'maintenance deductible' – in relation to personal injury or property damage which is 'fundamentally different in nature' or 'at a level or rate vastly greater in order of magnitude' to the normal level of claims expected or intended for a particular product.

The precise effect of the expected or intended exclusion and the maintenance deductible is, however, uncertain, and this issue may well generate considerable basis for dispute if an insurer seeks to rely upon the general exclusion as a defence to a claim. Examples of issues that might be raised include where the burden of proof lies in establishing expectation, whether the injury in question is fundamentally different, and what is a vastly greater level or rate of injury or damage.

Disputes under the Bermuda Form

The standard XL-004 and ACE 005 forms provide for arbitration in London by a panel of three arbitrators in accordance with English procedural law, but applying a modified version of New York law (the substantive law) to the interpretation of the policy.

Examples of the modifications made to the application of New York law to the (XL-004) policy include:

- a provision to allow an indemnity in relation to punitive damages (which some insurers argue are uninsurable as a matter of public policy)
- a modification to the rules of interpretation to provide that provisions, exclusions and conditions of the policy are to be construed in an 'even handed' fashion between the policyholder and the insurers (which, it has been argued, may mean departing from the usual *contra proferentem* rule, whereby a

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clause is construed against the party who drafted it – typically the insurer).

Bear in mind that the application of New York law to the interpretation of the policy may have the effect of providing broader coverage for certain liabilities than would exist under a similar insuring clause in a policy governed by English law. For example, there have been a number of cases on both sides of the Atlantic as to what constitutes damage or physical damage to property.

In the UK, it has been decided in some cases that incorporating a defective product or commodity within another product or building may not, itself, amount to physical damage. Such decisions, however, may be contrary to New York law.

Consequently, you need to obtain advice on the application of New York law to the interpretation of the policy wording in the event of a denial of a claim under one of these policies.

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PRACTICAL TIPS ON DEALING WITH THE BERMUDA FORM

The Bermuda Form can be a very important part of a corporate policyholder's insurance programme. However, because of its relative complexity, it is important that you understand how the form works and manage the claims process in order to achieve maximum coverage. In particular, you should:

- pay close attention to the notification provisions and ensure that you give notice to the correct department and in the correct manner. The notice provisions are quite detailed and can be a significant potential pitfall
- consider when to give notice of an integrated occurrence on the basis of a proper risk analysis and ensure that you draft the notice carefully to describe accurately the integrated occurrence
- remember that the policy is governed by New York law and the effect this may have on the coverage provided by the policy
- in the event of a dispute over coverage for a claim, ensure that your legal advisers can provide advice on both New York law (the substantive law of the policy) and English law (the procedural law).