EXPERTISE

The Newsletter of GBRW Expert Witness

GBRW Expert Witness

This edition of our Newsletter has a new title and a new design. Our choice of "Expertise" as our new title reflects the merger of the expert activities of GBRW, Associated Insurance Experts and Intrabank Expert Witness into a new identity, GBRW Expert Witness. All three practices have been active since the early 1990s and we believe that they represent an unrivalled combination of UK-based financial sector experience.

After the Financial Tsunami

I have often thought that the banking and shipping industries have much in common. Like ships, banks come in a variety of shapes and sizes - following the recent financial tsunami, some have capsized, some are in the dry-dock for major repairs and some have come through unscathed. The crews of these institutions have also been tested in these extreme conditions. Some should clearly never have been allowed to put to sea; many have been swept overboard; and some of the senior ranks have been forced by the owners to walk the plank (although for many this has been a happier experience than the maritime equivalent!).

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As in the world of shipping, disasters lead to litigation and litigation sooner or later leads to the need for expert evidence. In many higher value cases, legal teams are weighing up the pros and cons of established experts against newcomers who have current industry experience but have not been tested in an experts' meeting or in the witness box. Current upheavals have created a substantial new supply of potential experts, but these have to be treated with a degree of caution:

- Recent career paths mean that many individuals in senior positions have an in-depth knowledge of their specific area, but at the expense of a wider understanding of its context. They may be able to explain the "what", but not necessarily the "why" – a major difficulty when communicating to a non-financial audience.
- Many senior managers are still trying to come to terms with the magnitude of the upheavals they have experienced. They may not yet be fully prepared to give robust expert evidence on industry practice, either in reports or during cross-examination.
- As so many major institutions have suffered major losses, the track records of individuals and their employers may be cited as a way of discrediting their views on industry practice.

At a time when financial market litigation has created an increasing demand for expert support, we at GBRW Expert Witness are working with a number of new experts who need a significant amount of "hand-holding" for their first reports to ensure that they understand the responsibilities of an expert, the nature of their relationship with the instructing law firm and what is required to produce a clear and coherent report.

Paul Rex

Managing Director
GBRW Expert Witness

Areas of Expertise include:

BANKING & FINANCIAL:
- Corporate Lending
- Personal Lending
- Risk Management
- Investment Banking
- Corporate Finance
- International Banking
- Correspondent Relationships
- Commercial Property
- Residential Mortgages
- Syndicated lending
- Loan Workouts
- Recoveries and Realisations
- Back Office Procedures
- Trade Finance
- Letters of Credit
- Leasing
- Credit and Debit Cards
- Know Your Customer
- Anti Money Laundering
- Anti Terrorist Financing

INVESTMENT MANAGEMENT
- Investment Services
- Investment Advice
- Fund Management
- Structured Investment Funds
- Stockbroking
- Hedge Funds
- Options, Swaps, Derivatives
- Treating Customers Fairly
- Pensions

FINANCIAL MARKETS:
- Money Markets
- Commodities Markets
- Securities Trading
- Financial Instruments

INSURANCE:
- Property Insurance
- Professional Indemnity
- Life Assurance
- Broking
- Underwriting
- Reinsurance
- Regulation
- Actuarial issues
- Loss Adjustment
- Treating Customers Fairly

BUSINESS FINANCE:
- Limited Companies
- Partnerships
- Private Companies
- Sole Traders
- Mergers & Acquisitions
- Treasury Management
- Sales of businesses
- Property Finance
- Business Planning
- Company Valuation
- Venture Capital

OTHER AREAS:
- Employment Disputes
- Loss of Earnings
- Compensation Calculations
- Arbitration and Mediation

Enquiries:
Paul Rex,
Jeremy Denton-Clark
or David Croft
T: 020 7382 9900
F: 020 7382 9988
E: experts@gbrw.com

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GBRW Limited Registered in England No. 3041652; Registered Office: 27 Throgmorton Street, London EC2N 2AQ

Regulatory Compliance and its implications for PI cover

Simon Medwin is Technical Manager at Insurance Compliance Services Limited, a leading General Insurance Compliance Consultancy

Whether negligence has occurred in a particular case will involve an assessment of whether there has been a breach of duty of a person to take reasonable care which has resulted in damage to a complainant. In the context of professional activities such as insurance broking, the level of skill and care required will be that of a reasonably competent professional.

Of course, it is not always clear-cut as to whether such a breach has occurred. The yardstick against which a "reasonably competent professional" can be measured is the professional conduct and standard generally expected at the time the cause of action arose.

There are several sources for determining what appropriate conduct and standards are: case law, statute law, Financial Ombudsman decisions, prevailing "best" practice, Industry Guidance and Codes of Conduct and – relevantly for this article – the Financial Services Authority (FSA) Rules (or, for older cases, the General Insurance Standards Council/Insurance Brokers Registration Council Codes).

The regulation of Insurance Mediation came under the responsibility of the FSA in January 2005; however, the rules under which those conducting Insurance Mediation are governed have not simply stood still since then.

Most notably, the rules surrounding the interface between the firm and its customer were transformed in January 2008. The rules, which were previously known as ICOB (Insurance Conduct of Business) became ICOBS!

This change was actually quite significant, representing - as it did – a move towards "Principle Based Regulation". This reflected a move away from detailed and prescriptive rules to high-level standards, where the FSA was able to do so. A classic example of this is the new high-level rule regarding disclosure of product information (ICOBS 6.1.5): "A firm must take reasonable steps to ensure a customer is given appropriate information about a policy in good time and in a comprehensible form so that the customer can make an informed decision about the arrangements proposed."

Previously there were detailed rules about which documents should be provided to customers and the timing of that provision. Those rules varied depending upon whether the customer was a consumer or a commercial customer, and were dependent upon the means of communication with the customer. Clearly, the new high-level rule gives more discretion to the firm as to how the objective of clarity of disclosure is achieved.

Section 150 of the Financial Services and Markets Act 2000 specifies that a contravention by an authorised person of certain rules is actionable at the suit of a private person (or in certain cases, also to a person who is not a private person) who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty.

PI underwriters may increasingly seek to repudiate claims where a breach of the FSA Rules is alleged

Areas of the FSA rules covered by s150 are:

- General Provisions (GEN)
- Insurance Conduct of Business (ICOBS)
- Client Money (CASS)
- Some rules in Supervision (SUP)
- Complaints (DISP)
- Some rules in Compensation (COMP)

The move to more Principle Based Regulation therefore can potentially extend the arguments that may be put forward as to whether an intermediary firm has exercised reasonable care.

Some detailed rules do remain, usually where required by European legislation. An example of this is the requirement for intermediaries to have assessed customers' Demands and Needs and to have adequately recorded and disclosed these in a written Demands and Needs Statement. This applies for all types of customer at both inception and renewal. Experience shows that many intermediaries are unable to demonstrate that this process is more than just a superficial exercise. In determining what customers' requirements are, something more than that is expected.

The implication of these changes is that it may increasingly be the case that Professional Indemnity underwriters seek to repudiate claims where a breach of the FSA Rules is alleged. It follows that access to specialist regulatory knowledge may be important in order to assess the appropriateness and compliance of a firm's actions, which – in turn – will inform the view as to whether "reasonable care" has been exercised.

In our next edition:

Micro-insurance

In our next edition, we report on developments in the micro-insurance sector, which has emerged in the past five years as a new component of the broader microfinance sector. GBRW's Director John Pott has been heavily involved since mid-2005 in providing consultancy advice to the Aga Khan Agency for Microfinance in this innovative field.