OPDU and **Linklaters** recently co-hosted a webinar in which we discussed the risks faced by Trustees when navigating the wind-up of a Scheme, and what protections and insurance options are available. During the webinar a number of questions were raised, and so **Martin Kellaway, (***Executive Director, OPDU)* and **John Sheppard,** *(Partner, Linklaters)* have provided responses to these questions below.

Question	Answer

Q1. Why do some insurers not want to provide cover to Professional Trustees?

There are a number of reasons for this, but many Insurers view such cover as falling more within the Professional Indemnity ('PI') bracket rather than Pension Trustee Liability ('PTL') cover. These insurances are completely separate lines of business and are underwritten and managed in very different ways. Insurers want to avoid having any hidden PI risk in their PTL book and many will therefore exclude professional trustees from any PTL cover.

Another factor is the amount of schemes Professional Trustees can cover. Some Professional Trustees have hundreds of appointments across a range of schemes sizes, from low £1Ms to several £BNs. This represents an aggregate risk for insurers and is deemed best insured via the PI route rather than PTL.

That said, the reality is that a claim made under a PTL policy will typically be made for the whole Trustee board of a scheme, and unless there is a particular culpability on a professional trustees actions, insurers will normally pay out without seeking to allocate loss to the Professional Trustees PI insurance.

Q2. Does the PSA2021 increase risk e.g. increased powers of Regulator?

The Regulator has the power to impose much bigger fines, thus posing an increased risk for loss from cover for Civil Fines and Penalties. There is also the new risk of criminal prosecutions. It is illegal to insure someone for their own criminal acts but it is possible to insure someone to defend themselves against such an allegation.

In practice, where a scheme is being wound up with member benefits having been secured in full, or following a transfer to a master trust or super fund, the risk of Regulator action against trustees is likely to remain low.

Q3. Who holds all relevant data following wind up, e.g. how can unknown beneficiary claims be investigated?

Benefit data is normally transferred to and held by the receiving entity (i.e. the insurer or receiving scheme trustees). Other material such as minutes of meetings etc., is not transferred normally. It is usually held by the Sponsor in electronic format (if the corporate trustee was a subsidiary) or by the administrator/advisers if the corporate trustee is owned by its directors or if there are individual trustees. In the latter case, a fee is normally charged for this service. Missing Beneficiary claims are normally made to the Employer or sometimes to the receiving scheme or arrangement.

Q4. Please can John expand on his point about "unless a corporate trustee is a trustee of another pension scheme" when answering the question what can a corporate trustee be liable for on wind up?

It is becoming more common for a sole trustee company to act as trustee across multiple pension schemes within the same sponsor group, particularly where there are obstacles to scheme merger. Where this is the case, if only one scheme winds up, the trustee will continue to act as trustee for the other group schemes.

Q5. Please comment on approach to 12 – 15 year liability term

Applying limitation periods to pension schemes is not straightforward and trustees will want to be satisfied that the cover they put in place provides them with an appropriate level of protection. Although the standard limitation period for a breach of trust is six years, longer periods of 12 years can apply for claims on a “specialty”(such as a deed) and up to 15 years for negligence claims in some circumstances. Even if a limitation period defence is available to trustees, they may still incur costs dealing with a claim brought after the expiry of the limitation period.

Q6. Have you a flyer that can be shared with Trustees / can this include examples of premium amounts that can be expected for different scheme types as an example?

OPDU have a brochure which can be accessed here:

https://www.opdu.com/fileadmin/uploads/opdu/Documents/OPDU-Wind_UP.pdf

The insurance market for this type of insurance (together with Director and Officers and Professional Indemnity) is a very hard one at the moment and it’s not possible to indicate premium amounts without receipt and review of the base info of the Scheme. Premiums are calculated on a scheme by scheme basis but OPDU can offer a fast track non-binding indication.

Q7. After a plan winding-up, what usually happens to the trustee company? Doesn't it wind up also and what if there are no directors to receive a claim?

OPDU usually recommend that the trustee company remains in existence for a short while after the scheme has formally wound up. Insurance cover will be placed in the name of the Trustee Company and any claim will cover that entity, its ex-directors and the Sponsor in respect of any indemnity it gives to them.

If no insurance cover is in place then the claim will fail as there are no assets in the Trustee Company to fulfil any loss, but if the Sponsor has given any form of intercompany guarantee or indemnity, any loss may effectively be transferred to that entity. Even where a claim will ultimately fail, there will still be a need to respond to any allegation of wrongful act and the costs involved in this may fall to the ex-trustee directors.

Q8. What is the position of previous trustees, i.e. those who are not the trustees at the time of the winding up?

Former trustees remain responsible for the actions taken whilst they were trustees (but not actions taken after they ceased to be trustees) and potentially could still be subject to claims made after winding up. Insurance Cover is set up on a Claims Made basis, so it will respond to any Claim made during the Policy Period irrespective of when the matter originally arose. This could hypothetically be many years before the Policy was incepted, providing that full disclosure of any known circumstances was made when applying for the insurance. This essentially means that all Trustees of the Scheme, whether in position at the time of wind-up or those who have previously retired will still benefit from the insurance put in place.

If no insurance cover in place then the comments under Q7 will apply.

Q9. Corporate trustee companies do not usually have any assets so how does any successful claim against a corporate trustee get settled, i.e. who pays in practice?

If there is insurance in place, then the insurer will pick up the loss either through PTL or perhaps a Directors & Officers policy or a mix of the two. If there is no insurance, the Sponsor will pick up the Loss if it has given any indemnity or intercompany guarantee to the Corporate Trustee entity, or in the absence of such a guarantee, the comments under Q7 will apply

Q10. Where does the insurable interest lie in residual Risk cover. The Residual Risk Policy is taken out by the Trustee with the insurer, but the member needs to makes the claim on the insurer?

Members are not normally able to claim directly from the insurer under a residual risk policy. Instead, the residual risk cover provides protection to the trustees in the event of a claim being made by a member against the trustees.

This publication is intended merely to highlight issues and not to be comprehensive, nor to provide legal advice. We hope that you find these answers useful, but if you do have any further questions for either of our Presenters, please contact us at enquiries@opdu.com and we will forward your enquiry to the relevant party.

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