

The background features a dark blue gradient with several concentric, glowing circles in shades of blue and green. Two hands are shown in a similar color palette, one reaching towards the other, symbolizing global reach and support.

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In the following pages we showcase the depth of professional indemnity expertise across the Global Access platform.

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GETTING TO KNOW... KENNEDY VAN DER LAAN

WHICH AREAS OF PROFESSIONAL INDEMNITY TO YOU SPECIALISE IN?

Our PI team has a broad experience in assisting professionals in all kind of fields. These professionals vary from the 'old' professions like lawyers, civil notaries, accountants and doctors to specific groups like insurance brokers, architects and engineers and real estate agents. Keeping strong the roots of our firm in ICT, we have a valuable connection with our IT team for assisting IT companies in PI claims.

With short lines in communication and in-depth knowledge of the specific markets we assist our clients in both civil litigation and in disciplinary proceedings.

PLEASE EXPLAIN ONE SIGNIFICANT DEVELOPMENT OF 2023

One key development in 2023 was the emergence of AI. Professionals in all sectors are increasingly using AI (or considering whether they should not) to provide services to their clients. This is raising all sorts of questions. Should these clients contract directly with AI providers or are the professionals themselves incorporating AI into their services? If professionals are incorporating AI themselves, are they open about it with their clients? Will the professional be liable for any flaws in the AI products? And will insurers cover such flaws? Challenging questions that have kept the market busy in 2023 and will for the years to come.

WHAT PRESENTED THE BIGGEST CLAIMS RISKS IN 2023?

2023 has been a relatively calm year and has not surprised the market with new (unexpected) claims risks. That doesn't mean there aren't all kind of developments.

Silent cyber and increasing bankruptcies are known threats for increasing claims. And AI (see under 3) and CSRD (see under 5) are keeping the market busy by casting their shadow forward.

WHAT DO YOU SEE AS BEING THE BIGGEST CHALLENGE FOR 2024?

In the coming period, the Corporate Sustainability Reporting Directive (CSRD) will impose a major new task on professionals like accountants and consultants. This is being looked forward to with both hope (for a fairer and more responsible world) and fear (for the increasing workload and challenging implications it brings).

From 1 January 2024, the CSRD will apply to the largest companies, and its scope will expand over the coming years. The directive requires companies to identify how the company and its entire supply chain are performing in terms of sustainability and to describe plans to reduce this impact. These requirements will have a huge impact not only on companies but also on auditors. There are concerns that companies will not have the relevant data and impact assessments in place in time to comply with the CSRD, and that auditors will not be able to adequately audit sustainability reports, which could lead to liability risks.

WHO IS YOUR MAIN CONTACT(S)?

Erik van Orsouw is heading our PI team and assists lawyers, accountants, insurance brokers and insurance intermediaries, IT companies, architects and engineers, tax specialists and their insurers in complex claims.

Peter Kramer is counsel in our team and mainly acts for civil notaries, but also for lawyers, accountants, insurance brokers and real estate agents.

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GETTING TO KNOW... RPC

WHICH AREAS OF PROFESSIONAL INDEMNITY TO YOU SPECIALISE IN?

RPC are widely considered to have one of the largest and most well-respected PI practices in the UK and Asia, with extensive experience in defending all professions, advising on significant and complex claims whether dealing with claims in negligence or breach of contract, breach of fiduciary duty, misrepresentation or involving regulatory/disciplinary issues.

We provide advice and representation on PI claims on both the coverage and defence side across the full range of professions – including solicitors, accountants, auditors, actuaries, architects, barristers, brokers, construction professionals, contractors, corporate service providers, education establishments, engineers, emerging professions, estate agents, financial professionals/institutions, IFAs, media, offshore trustees, onshore trustees, pensions advisors and trustees, surveyors, quantity surveyors, technology companies, as well as miscellaneous professions ranging from recruitment consultants to funeral practices.

We have a track record of achieving competitive and commercial outcomes for insurers and their clients at every stage of the litigation process, from pre-action through to judgment.

PLEASE EXPLAIN ONE SIGNIFICANT DEVELOPMENT OF 2023

The final civil costs reform recommended by Lord Justice Jackson in his 2017 report was implemented in 2023: the extension of fixed recoverable costs (FRC). The new FRC rules are now in force for most claims for between £25,000 and £100,000 issued on or after 1 October 2023.

Parties to simpler claims allocated to the fast or newly created intermediate track will now have their costs recovery fixed by the Ministry of Justice in the event that a costs order is made in their favour. While it remains open to parties to settle on whatever basis they wish, it is likely that parties will only offer FRC in most cases that fall within the scope of the regime.

Once allocated to the fast or intermediate track, each case will be assigned a complexity band which determines the level of costs recovery; the higher the complexity, the higher the band, and the higher the recoverable costs, which are typically a fixed sum plus a percentage of the damages awarded or agreed. The fixed sums have been increased to reflect inflation since first recommended by Jackson LJ in 2017 and will be increased again in April 2024 in line with the Services Producers Prices Index.

These new rules will have a very significant impact on insurers as they are bring more certainty and potentially lower costs in the long term; however, they will force a change in tactics to reflect the commercial reality that the fixed sums are, in most cases, much less than the actual cost of litigation. In addition, the rules are unhelpfully vague and imprecise in places, which will lead to satellite litigation over allocation decisions and assignment of a complexity band in particular. However, once a body of case law builds up, insurers can expect to be able to forecast costs exposure more accurately at an earlier stage and can hope for more efficient resolution of lower value disputes.

WHAT PRESENTED THE BIGGEST CLAIMS RISKS IN 2023?

The focus of regulators across the spectrum of professions has taken an increasingly inwards glance, looking at conduct taking place both in and outside of the workplace, with honesty, integrity and competence at the heart of decisions.

In the construction industry, the number of ARB (Architect's Registration Board) complaints proceeding to the professional conduct committee has increased over the last four years from 4 to 44. In respect of auditors, the long-awaited reforms are on the cards, which will bring with it a new regulator.

The Solicitors Regulation Authority has been on a mission to increase its powers to levy financial penalties – including unlimited fining powers relating to financial crime and SLAPPS and has now proposed unlimited fines for cases of serious misconduct.

The Financial Conduct Authority (FCA) is currently on a mission to collect data on non-financial misconduct – highlighting non-financial misconduct is misconduct and not an additional principle. This conduct includes



bullying, sexual harassment, and discrimination. Currently, the FCA is not seeking data on private events amongst staff members with no other connection to work, however, it is not a big step to see this extending.

With more regulatory investigations and decisions taking place, claims have increased with civil claims being more likely to succeed if a decision has already been found against the professional by their regulator.

In all cases, understanding what cover policies afford, including whether disciplinary defence costs are funded will be key.

WHAT DO YOU SEE AS BEING THE BIGGEST CHALLENGE FOR 2024?

One of the biggest challenges we will all have to face is the ever changing and fast-paced development in generative AI. Whilst we will be leveraging generative AI to streamline everyday tasks, where the tech develops and becomes more sophisticated, so becomes the fraud. There have been instances where only 3 seconds of audio has been used to generate whole conversations for 'deep fakes'. Whilst these may not be as good as those based on a large amount of data, it will not be long until a few seconds is all that is needed. This will also be the case with generating image AI, for example in creating photographs of car damage following accidents or of property damage accompanying claims on homeowners' insurance policies.

Cyber criminals will undoubtedly use these deep fakes to try to bypass security measures and generate insurance fraud. The 'Friday afternoon frauds' of yesterday may soon re-ignite with undetectable deepfakes.

Carrying out risk assessments, implementing risk management strategies and fraud detection measures, including raising awareness of employees/clients/professionals will be essential in preventing cyber fraud. As the technology develops, so will the applicable regulation. It will be paramount to staying on top of all new regulations so as to avoid disciplinary/regulations investigations – this in turn will increase professionals relying on their insurance policies to recover any costs arising out of cyber-attacks/investigations or third-party claims brought by victims.

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A specialist construction and engineering lawyer, Alan Stone assists all major insurers.

Alan's practice sees him acting for clients involved in disputes against all classes of construction professionals, including architects, surveyors, engineers, and design and build contractors.



RHIAN HOWELL
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Rhian Howell heads up our Bristol practice and is a leading professional negligence expert with significant experience dealing with claims against lawyers and construction professionals.

She also handles disciplinary and regulatory matters on behalf of professionals and has a particular reputation for dealing with fraud and dishonest assistance claims against solicitors.



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Antony is the Managing Partner of our Asia Practice. Antony has a particular focus on defending financial professionals and D&Os in respect of a myriad of tortious and contractual claims. He has handled some of the largest claims in Asia over the last few years against various professionals, including lawyers (solicitors and barristers), accountants, property agents, architects and other construction professionals.

GETTING TO KNOW... HINSHAW & CULBERTSON LLP

WHICH AREAS OF PROFESSIONAL INDEMNITY TO YOU SPECIALISE IN?

Domestic and foreign insurance companies have been turning to Hinshaw for advice and representation for over 90 years. We represent insurers in state and federal courts across the United States and beyond at the claims phase and at trial and appellate court levels. Hinshaw attorneys defend policyholders in litigation and claims, including construction defect and water intrusion, medical malpractice and health care, wrongful death, personal injury, mass tort, multi-district liability, and property damage, aviation, aerospace, and transportation, professional liability, directors' and officers', product liability, labor and employment, life, health and disability, intellectual property, and cyber and privacy among other substantive professional indemnity matters.

PLEASE EXPLAIN ONE SIGNIFICANT DEVELOPMENT OF 2023

The U.S. lacks an encompassing federal law comparable to the European Union's General Data Protection Regulations. Data breach notification laws, however, are in place in all 50 states (which have varying rules and definitions, including the definition of breach, the extent of any exemptions, and the timelines for providing notice to affected individuals). There are now nine different comprehensive state privacy laws along with at least 25 other state data security laws in the U.S. At least 16 states introduced privacy bills in the 2022-2023 legislative cycle.

Privacy acts in Connecticut and Colorado became effective in 2023, and the comprehensive California Privacy Rights Act of 2020 (CPRA) became fully effective. Beyond the CPRA, California Governor Gavin Newsom signed the Delete Act into law, which will enable residents to request that their personal information be deleted from the coffers of all the data brokers in the state. The law requires filing a request with each company and will be implemented by 2026.

WHAT PRESENTED THE BIGGEST CLAIMS RISKS IN 2023?

Virtually all areas of professional indemnity are subject to potentially large losses and claims. Climate change, ESG/sustainability, diversity and inclusion, cyber/privacy have resulted in new claim types and a resurgence of claims such as environmental, employment, and social inflation has magnified the costs of defending and resolving most claim types asserted against professionals and directors and officers. We track claims developments and litigation trends for our clients and regularly and our trial lawyers are skilled at countering plaintiffs' reptilian trial tactics.

WHAT DO YOU SEE AS BEING THE BIGGEST CHALLENGE FOR 2024?

Insurers are using artificial intelligence (AI) in a variety of ways with respect to underwriting, pricing, fraud investigation, claims evaluation and handling, and other activities. Artificial intelligence and algorithms may create or amplify biases, resulting in discrimination toward members of protected classes and infringement on intellectual property rights.

Artificial intelligence systems may malfunction and create or magnify errors resulting in financial losses, property damage, bodily injury, personal injury, and advertising injury (including appropriation of 'another's name or likeness, unreasonable publicity, portrayal in a false light, defamation, violation of privacy rights, etc.). AI claims may implicate a variety of insurance coverages, including general liability (particularly Coverage B), cyber, errors and omissions, directors and officers, crime, intellectual property, product liability, employment practices, and media liability policies.

There are no insurance industry-wide AI standards or regulations, but state insurance regulators, the National Association of Insurance Commissioners, and various organizations are formulating regulations, guidelines, and best practices for the use of artificial intelligence and algorithms by insurers, and artificial intelligence may be subject to otherwise applicable existing regulatory requirements.

Effective use of AI will be an important determinant of insurer success going forward. AI has already produced claims, and it is expected to produce and amplify a large volume of claims activity in the future.

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Scott Seaman is a commercial litigator and trial lawyer with more than 36 years of experience. Scott is widely regarded as one of the leading attorneys in the United States representing insurers and reinsurers in property and casualty matters. He is known for employing his deep knowledge of the law and insurance industry, strategic thinking, and honed trial and appellate advocacy to produce creative solutions and outstanding results for clients. Clients regularly turn to Scott and his team for counsel and representation in challenging and high-stakes insurance and business matters.



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Pedro Hernandez focuses his litigation practice in the areas of insurance coverage, commercial disputes, real estate/construction deals, and trademark/trade secrets. Pedro represents domestic and international insurers in high-profile coverage litigation and bad faith matters throughout the United States. His practice focuses on commercial general liability, errors and omissions, and first-party claims involving high-exposure property damage. In addition, he represents insurers in commercial class actions in multidistrict litigation courts throughout the country.

GETTING TO KNOW... MILLER THOMSON LLP

WHICH AREAS OF PROFESSIONAL INDEMNITY TO YOU SPECIALISE IN?

Miller Thomson LLP is a Canadian national law firm which maintains a specialised professional indemnity practice involving architects and engineers, brokers and real estate professionals, accountancies, insurance brokers, adjusters, and medical and non-physician professional practitioners. Our core speciality is construction-related professionals.

PLEASE EXPLAIN ONE SIGNIFICANT DEVELOPMENT OF 2023

The most significant issue in Canadian litigation continues to be a backlog that has worsened since the advent of Covid-19. Obtaining motion or trial dates has become very difficult in most Canadian jurisdictions. It can now take up to 7 years to get a major case into trial. This has heightened the demand for mediation and ADR processes as litigants attempt to work out resolution outside of the court system. We see this in the number of lengthy mediations and the desire for mediators to take on more investigative functions to help the parties move forward on complicated disputes.

WHAT PRESENTED THE BIGGEST CLAIMS RISKS IN 2023?

We believe that combined infrastructure claims represent some of the biggest risks in the marketplace given their complexity and the imperative applied that all be constructed to fixed budgets. This in our view encourages litigation against professionals to have their insurance limits secure construction budget deficits as there is little other place for contractors to recoup funds if owners do not adjust budget parameters. This is heightened by the rise in the cost of materials and the increase in financing costs and shortages of labour. This will make claims in construction continually challenging.

WHAT DO YOU SEE AS BEING THE BIGGEST CHALLENGE FOR 2024?

There are several challenges facing the Canadian market:

- Uncertain economy – this will lead to further pressures on public infrastructure projects to be even more tightly fixed in budget, meaning greater likelihood of professional indemnity claims
- Retirement of the Baby boom generation, meaning the most experienced professionals will all be leaving en-mass in the next 3-5 years, leaving less experienced people to proceed with practice
- Lack of skilled mediators – getting the best mediators now sees backlogs of several months
- Less court judgments – using court less means fewer precedents or new approaches to issues.



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Mark Frederick leads the practice. With over 35 years' experience in defending architects and engineers, Mark has dealt with some of the largest construction claims in Canada, specialising in complex infrastructure claims. Mark is frequently sought out by Lloyd's and other insurers for resolving difficult claim scenarios, including defence and coverage assignment. A team of 30 other solicitors supports the practice.

GETTING TO KNOW...

COLIN BIGGERS & PAISLEY

WHICH AREAS OF PROFESSIONAL INDEMNITY TO YOU SPECIALISE IN?

We have a large market-leading professional indemnity team, with a reputation for being practical, commercial and responsive in our handling of the most complex disputes.

We have extensive experience acting as coverage and defence counsel in claims and investigations (disciplinary, criminal and regulatory) involving a wide range of professionals, including leading law firms and barristers, financial institutions and financial advisors, accountants and insolvency practitioners, as well as those in the real estate, IT and education professions.

We are particularly well-known for our expertise in construction profession claims, both against annual and single project policies and both defence and complex coverage. Our experience extends to construction and design joint ventures, as well as across all the professions within that sector.

PLEASE EXPLAIN ONE SIGNIFICANT DEVELOPMENT OF 2023

Closing out 2023, the *NSW Court of Appeal's landmark ruling in The Owners – Strata Plan No 84674 v Pafburn Pty Ltd [2023] NSWCA 301* ruled that building actions within that state based on recently enacted legislation (the Design & Building Practitioners Act) are not apportionable ie it reinstated joint and several liability which had been largely jettisoned from claims in 2004.

While this matter is now subject of a reserved appeal decision in the High Court of Australia, until judgment is delivered the building and construction industry and insurers will be mindful that previous strategies employed prior to the legislative changes in 2004 will have to be dusted off.

Building claims had settled into an environment where very few actions did not involve apportionable claims ie ones where a party could only be liable for its own share of any loss caused. The current inability to rely on

proportionate liability defences in NSW for D&BP Act claims (to date mostly high frequency residential claims) means a return to cross claims inter-defendant parties and the every present concern about solvency risk as between defendants.

The decision has less impact on commercial and infrastructure claims. NSW is a jurisdiction which permits contracting out of proportionate liability and it is a rare contract that does not require this on the major projects.

WHAT PRESENTED THE BIGGEST CLAIMS RISKS IN 2023?

Like many countries, Australia was subject to continued economic pressures during 2023, with ASIC reporting close to 50% increased in insolvencies year on year in October 2023.

This is being driven predominantly by high inflation and to a lesser extent a drop in consumer demand. Massive cost of input hikes have hit the construction industry particularly hard, with a number of high profile companies leaving projects only part completed and owners and sub-contractors in limbo. While the true impact of this from a professional indemnity perspective is likely to be seen down the line, there has already been an impact where claims were already on foot.

Economic challenges also present risks for other professions. With the increase in insolvencies, there will be an increase in claims against business advisors, accountants and lawyers as directors, shareholders and creditors try to recoup losses and join others to proceedings.

Cyber crime remains one of the largest risks facing businesses and individuals, with an 18.5% increase reported in Australia in 2023. While most businesses are highly aware of the typical methods used in phishing attempts, this hasn't eliminated the instances of funds being fraudulently obtained. For professions where significant fund transfers are commonplace – legal and real estate in particular – this has been a risk that can lead to claims on professional indemnity cover.

The expansion of the allied health and wellness industries has also resulted in emerging claims risks and increased claims, but in particular in segments

where regulators are playing catch up or naming of the professions can allude to a high level of qualification than in fact exists. For example, a rise in the number of claims against podiatric surgeons, is driving up the cost of insurance and placing doubts on the future insurability of the profession. The insurers of cosmetic surgeons, as distinct from plastic surgeons, are likely to face a similar issue.

WHAT DO YOU SEE AS BEING THE BIGGEST CHALLENGE FOR 2024?

There is certainly more positivity about Australia as an insurable market, with a rush of new capacity seeking to take advantage of higher premiums established during the recent hard market. Given the abrupt withdrawal of many carriers in markets around 2019/2020, new entrants are being challenged to demonstrate commitment to the Australian market.

Ensuring sustainable pricing across the professions will remain an enduring challenge, with the all too familiar resurgence of top line underwriting/pursuit of market share. The financial services sector remains closely scrutinised, yet memories of conduct uncovered during the Banking Royal Commission already seem to be fading, with many prominent financial institutions starting to unwind their governance reforms enacted at the time.

The construction sector is coming under increasing regulatory scrutiny (and regulation) which is starting to yield positive changes in practices, but picking the 'tipping point' as to when those cultural changes have become enmeshed will be the biggest challenge.

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Jonathan Newby acts on claims (coverage and defence) involving construction professionals and contractors under project and annual policies, as well as large/complex claims against professionals and directors. He has significant expertise in large law and accounting firm class action claims.



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