



# Products Liability and Financial Loss

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The Insurance  
Institute of  
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Chartered Insurance Institute

# Introduction / housekeeping

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Welcome and thank you!

Webinar format – muted and video off. Interactive features – polls, Q&A

60 minutes including short period of Q&A



Diane Jenkins

- Background in Insurance Broking Sector – technical programme design, M&A due diligence, BI reviews
- Former chair and education secretary of London Business Interruption Association

Nick Thomas & Associates

- Specialist training, coaching and consulting to the UK Insurance Sector
- Technical insurance, sales, business and soft skills, compliance training

# Objectives

- How standard financial loss exclusions apply in PL/Products policies
- Understand why separate financial loss cover is needed
- Be aware of the various options for buying financial loss extensions and the different wordings that are available
- Recognise the different businesses that need to consider financial loss

# Financial loss – key definitions

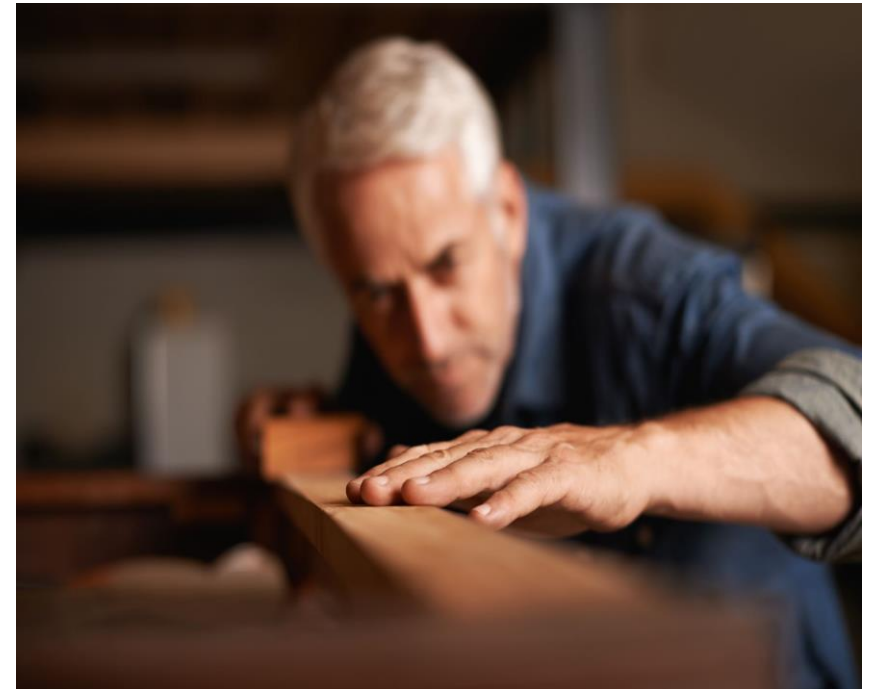
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**Economic loss:** pecuniary loss consequential on injury or damage.

**Pure economic loss:** pecuniary loss not consequential on injury or damage.

**Consequential loss:** often used to mean economic loss.

**‘Financial loss’:** a term usually used by insurers to mean pure economic loss, but often loosely used to mean any of the above.



# Financial loss

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Pure economic loss can be recovered for:

Torts other than negligence e.g.

- Nuisance
- Trespass
- Defamation
- Interference with intellectual property rights

Breach of a contract

Various statutes



# Financial loss

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English law divides situations into two

- Situations where there has been physical injury or damage
- Situations where there has not

Only the **reasonably foreseeable** economic losses consequent upon the injury or damage recoverable in tort of negligence

- E.g., lost earnings

Where there is no injury or damage, need ‘a special relationship’ between the claimant and defendant for a financial loss claim in tort of negligence to succeed – basis for PI claims



# Financial loss – key case law

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## Murphy v Brentwood (1991): House of Lords

- Murphy: bought a new house (£65,000) but due to defective foundations cracks appeared. Murphy sold the house. Got £30,000.
- Insurers (household policy) paid the difference
- Insurers sought recovery from Brentwood District Council (negligently approved the foundations)
- House of Lords: decided the council was not liable as cost of repairing the defective building was pure economic loss.
- The building was merely defective in quality – no damage
- The loss to the owner purely economic



Reaffirmed that pure economic loss is not recoverable in tort of negligence



# Financial Loss – contract liability

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## Hadley v Baxendale (1854)

- Hadley owned a steam powered mill in Gloucester
- Crankshaft broke
- Ordered a new crankshaft from W Joyce & Co. in Greenwich
- Pickfords were used as hauliers (Pickfords owned by Baxendale)
  - told it was urgent
- Pickfords took longer than expected to deliver the crankshaft back to Hadley
- Hadley lost profits in the interim
- Hadley sued Baxendale and won £25

Judge said that pure economic loss can be recovered in contract





# Contract

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You can claim for the pure economic loss that you incur for something, if:

It is not of the stated quality

or

It is not fit for the needed purpose



# Financial loss – statutory liability

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Some statutes create liability for economic loss:

## Defective Premises Act 1972

- Liability to rectify defects
- No need for damage

## Data Protection Act 2018

- Data subjects can claim for economic loss suffered as a result of breach

## Package Travel, Package Holiday and Package Tours Regulations 1992

- Enables customers to pursue seller of holiday not hotel
- Liability without damage



# Financial loss – standard policy cover

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Public liability

Products liability

Professional indemnity

D&O

EIL

EPL



# Public/ Products Liability

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Many policies do not have financial loss exclusion so how much cover is there?

Operative clauses respond to claims following injury/damage but also torts such as :

- Trespass
- Nuisance
- Obstruction/interference with rights of way, air, light, water
- Invasion of right of privacy
- Libel/slander
- Wrongful arrest/false imprisonment

These torts involve economic loss - so some cover will apply UNLESS financial loss exclusion



# Public/ Products Liability

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## Key cases

AS Screenprint Limited v British Reserve Insurance Co Limited 1999

Tesco v DAC 2008

- Policy extensions subject to terms, conditions and exclusions
- Policy with operative clause that covers tort would not cover non-tort claims i.e. financial loss

Bartoline Limited v Royal Sun Alliance plc 2007



# Public / Products Liability

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## Wording is key

‘In respect of’ or ‘arising from’

Specific exclusions - may only be to products liability

- Financial loss
- Contractual liability

## To ensure there is cover for financial losses

Ensure operative clause is ‘arising from’ or directly or indirectly from not ‘in respect of’

Financial loss extension (that is correctly worded...)





# Financial loss – wording issues

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## Usual wording

Claims made extension/section with retroactive date

- Always consider claims made issues when changing insurer
- Run off?
- Definition of circumstances
- What is retroactive date?

Will have a significant deductible – higher than the standard policy excess.

The limit will be in the aggregate for the policy period and will frequently be on a costs inclusive basis

Claims brought in North America will usually be excluded





# Financial loss - issues

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## What is damage?

Must be 'damage' for negligence claim – no damage  
= financial loss claim

Bacardi-Martini Beverages Ltd v Thomas Hardy  
Packaging Ltd 2002

- Useless – or defective – but not damaged
- “a worthless end product that had been defective from the moment of its creation”



# Financial loss – wording issues

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The real value of a financial loss extension is the extent of cover for contractual liabilities

Policy wordings can generally be divided into three types:

- A complete contractual liability exclusion.
- Restricted cover e.g., excluding liability under contract except to the extent that liability would have attached in the absence of a contract or agreement
- Full contractual cover but subject to specific exclusions



# Financial loss – wording issues

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A complete contractual liability exclusion

No cover for liability for financial loss assumed under any contract or agreement

If financial loss claims that arise in contract excluded - very little cover



# Financial loss - issues

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## Restricted cover

Excluding liability under contract except to the extent that liability would have attached in the absence of a contract or agreement - concurrent liability

- If claim could be made in tort but claimant chose to claim in contract instead would be covered (only for what would be recovered in tort)





# Financial Loss - issues

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## Contractual liability cover

### Various examples

Other than liability arising out of a condition or warranty of goods implied by law

- Only excludes claims arising from express contract terms

Excluding legal liability which attaches by virtue of an express warranty indemnity or guarantee entered into by the insured and which would not have attached in the absence of such warranty indemnity or guarantee

- Some express conditions included but not warranties, indemnities or guarantees e.g. delivery time, non-compliance with specification



# Financial loss – wording issues

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Efficacy exclusion – failure to perform intended purpose

Nittan (UK) Limited v Solent Steel Fabrication Limited and Cornhill 1981

- How much cover is left if this exclusion applied?

Unacceptable exclusion in many industries e.g. alarm manufacturers,

May need to purchase a specific product guarantee policy



# Financial loss – wording issues

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Costs of rectification, recall, repair etc  
exclusion

Recall costs are economic loss - can be covered  
under separate policy

What about clients that supply product that is  
incorporated into another product?

- Rip and tear cover needed
- Example - cost of tearing out a contractor's bad work  
due to defects that make its inclusion in the project  
unsafe





# Financial loss – wording issues

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## Exclusions

- Fines, penalties, punitive damages
- Late delivery
- Professional liability
- Pollution - 'Bartoline' extension provides some cover
- Cyber
- Intellectual property
- Defamation

If extension rather than separate section – terms and conditions of PL/Prods policy will apply – check these



# Financial loss - issues

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## Aggregate limit

### How to assess adequacy

- Contract limitations (but check if insured prepared to enforce)
- Potential losses

### How does deductible apply?

- % of each claim
- Aggregate deductible?
- Each and every claim or occurrence?



# Financial loss - risk exposures

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## Typical financial loss scenarios

A third-party incurring costs in recalling or recovering the Insured's products

Undamaged but otherwise defective products such as discolouring to finishes or adhesive surfaces which fail to stick

Failure of work or a product to perform its intended purpose

Products which cannot be used because of imminent danger to persons or property



# Financial loss - risk exposures

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The nature of the Insured's products or services and the markets the insured supply to

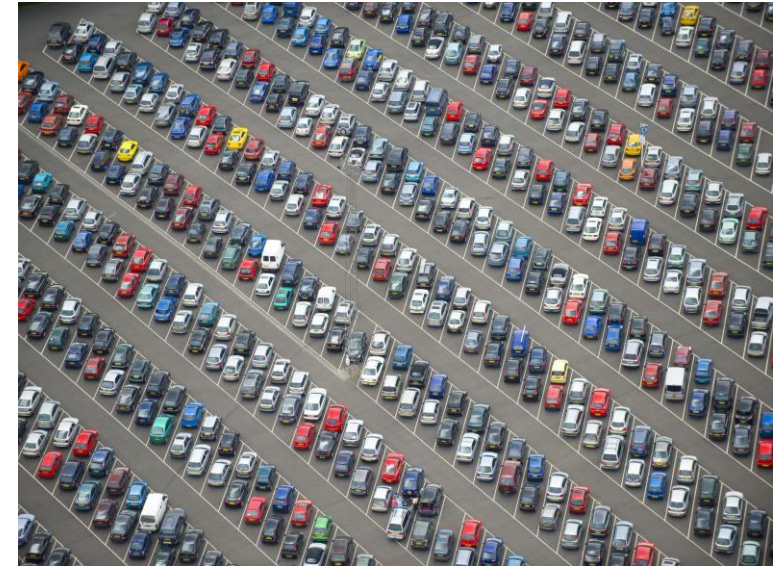
Do they supply to the construction or automotive industries?

Does insured supply components which are integrated into other parties' products

Copies of the Insured's standard trading conditions and details of any non-standard contracts

Details of any past claims or contractual disputes

Check client understand limitations of existing cover and need to pay for extra cover



# Contact

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