

Risk Update



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The Renewal

Many firms are having difficulty obtaining cover, particularly small to medium sized firms, even those who have not had a serious claims issue. We have been helping some of these firms – and insurers - find solutions.

For example:

1. A number of firms have unknowingly harboured a dishonest solicitor/conveyancing clerk who was part of a mortgage fraud ring. We have been advising such firms on a 'laundry list' notification, to ring-fence claims within the current policy year. That will give prospective new insurers on the renewal confidence that the firm comes to it with a clean sheet – even if not all the mortgage fraud claims have yet materialised.
2. One insurer is asking us to review a firm's conveyancing files, where there was a mortgage fraud, before considering whether to renew.
2. Firms who have notified large claims – whether or not mortgage fraud related – need to demonstrate to insurers that they are addressing the root cause. Insurers will not necessarily accept that large claims are 'one-offs' attributable to 'human error': they expect to see an error-resistant system. We have provided 'professional risk reports' identifying what risk management steps the firms have already taken, and what steps they need to take.
3. Firms are naturally reluctant to alarm insurers by notifying problems which they do not have to. We have advised one firm on whether a problem amounted to 'circumstances', and whether their duty of disclosure (insurance is a contract uberrimae fidei) requires them to notify it on their proposal form.
4. Even if a firm does not have a bad claims history, insurers are demanding much higher premiums if they perceive an exposure to future claims. Our 'professional risk report' enables a firm to demonstrate that they are addressing their exposures.
5. We are advising firms who are looking to take on teams from practices which are not expected to obtain cover and will therefore fail because of the punitive cost of entering the Assigned Risks Pool. In such cases, we have been dealing with due diligence and successor practice liability.

We expect the problem of firms renewing late will be even more acute than in previous years. Those who are unable to complete the renewal before 1 October 2009 will be throwing themselves at the mercy of the insurance market, and even if they find cover after 30 September are likely to pay much the same as if they were in the Assigned Risks Pool, for which the precise amount varies with fees on a sliding scale but for many firms will be about 25 per cent of fee income, as against a typical figure of around 3 per cent. The effect of that will mean the inevitable demise of many.

Two new entrants to the market, Hannover and XL, may be expected to make a significant impact on the cost and availability of cover, but there are still fears that firms with no adverse history may nonetheless face significant increases in premiums. We do not expect any significant problems to be encountered by top 100 firms though.

The approach of new entrants to claims handling in an unfamiliar environment remains to be seen. We see marked differences in the competencies of insurers' panel solicitors, with some apparently unfamiliar with the Minimum Terms and Conditions, failures properly to appreciate and deal with conflict issues between insurer and insured, and also some who appear to be inadequately versed in solicitors' professional liability.

Continued

The Renewal (continued)...

Information on the renewal can be found on our dedicated web page www.path.to/solicitors2009 covering -

- Adverse claims history
- Current year notifications/laundry listing
- Mortgage fraud/lender claims
- Dishonesty issues
- Sham partnerships
- Perceived exposure to future claims
- Extent of duty of disclosure
- Risk management
- SRA investigations and inspections
- Successor practices
- Insurer insolvency
- Personal liability of LLP members for premiums and excesses
- Links to other resources

The Law Society has published a guide to buying professional indemnity insurance - www.lawsociety.org.uk/new/documents/2009/pii_buyers_guide09.pdf.

For help with renewal issues, contact frank.maher@legalrisk.co.uk

Lender claims: high level of repossessions in sub-prime market

In the lender market as a whole, repossessions have been lower than anticipated: this has partly been attributed to the success of the mortgage pre-action protocol.

But repossessions by sub prime lenders are on the rise, causing concern to the Treasury Committee. 'The committee was extremely concerned by evidence that many sub prime, specialist and second charge lenders are using repossession not as a tool of last resort, but instead of first resort.' Insurers will also be concerned, and solicitors should be too. For the Treasury Committee report see www.parliament.uk/parliamentary_committees/treasury_committee/tc0809pn080809.cfm

We have been advising firms with lender claim issues, including making "laundry listing" notifications to insurers, which may help obtain cover on renewal, Solicitors Regulation Authority (SRA) investigations, anti-money laundering (reporting obligations, privilege, production orders, and policies and procedures), and aggregation and other insurance coverage issues.

For help with lender claim problems contact francis.dingwall@legalrisk.co.uk and for assistance with money laundering issues contact sue.mawdsley@legalrisk.co.uk.

Private client work

The Law Society published the Making Gifts of Assets Practice Note on 16 July 2009. www.lawsociety.org.uk/productsandservices/practicenotes/giftsofassets.page

This is a long and detailed practice note, and it should be studied carefully by those engaged in private client work as its implications may extend beyond gifts. It is a helpful document, but we are slightly concerned that it may represent 'best practice' rather than simply 'good practice' and may assist claimants with post-gift remorse; it will have near-statutory significance having regard to the status of Law Society guidance under the Solicitors' Code of Conduct 2007 – see guidance note 5 (a) to Rule 5 – www.sra.org.uk/rule5.

The duties are wide and onerous, and solicitors should give particular thought if their instructions come through third parties, not only beneficiaries but also accountants. While the note does not go so far as to say a face to face meeting is obligatory, the extent of the duty to ascertain the motivation behind the gift and the apparent duty to explain almost every foreseeable outcome of making it will require detailed discussion. The Practice Note, if followed to the letter, affords little opportunity to distinguish between types of clients. Not all will be 'elderly and vulnerable' (to use current SRA parlance): some will be wealthy, successful, erudite and will not require to have the obvious explained to them.

The following point from paragraph 3 illustrate the flavour of the note.

'Your role is more than just drawing up and registering the necessary deeds and documents to effect the making of a gift. You must ensure that the client fully understands the nature, effect, benefits, risks and foreseeable consequences of making the gift, in order to enable them to form a view as to the wisdom of the proposed transaction.'

There are important reminders on conflict issues, and that 'there is an automatic presumption of undue influence in the making of life-time gifts where the donor and donee are parent and child. This will necessitate separate advice for the donor(s) and the donee as a means of rebutting such a presumption.' (Paragraph 4.1.1)

The Practice Note may also be relevant to those advising on Equity Release Mortgages, on which we comment below. We have advised firms on the implications of the Practice Note and steps they should take to comply and to reduce their risk exposure.

For advice on managing risk in private client work contact info@legalrisk.co.uk

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Equity Release Mortgages

We have commented on the high risks relating to these before in the January 2004, January 2007 and May 2008 editions of Risk Update. We remain concerned that, at least so far as solicitors advising on them are concerned, they may be toxic for a number of reasons.

They are a high risk product and we strongly suspect they are being sold as a solution of first resort rather than last resort. The industry maintains that it has cleaned up its act since the problems of the 1990s, particularly through the establishment of the Safe Home Income Plan (SHIP) scheme.

The duties of solicitors under the SHIP scheme are onerous and are unsuited to the low cost, high volume processes which might suffice for routine sale and purchase or remortgage work by conveyancers. See also our comments in relation to The Law Society's Making Gifts of Assets Practice Note

It may therefore be said that the successful defence of solicitors against the thousands of equity release claims in the 1990s affords little if any comfort to solicitors advising under the new regime. The solicitors' duties under SHIP schemes are radically different from the limited retainers found to exist in the case of **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1999] Lloyd's Rep P.N 496, in which Legal Risk LLP partner Frank Maher acted for many of the solicitor defendants, and are significantly more onerous.

The Making Gifts of Assets Practice Note, on which we comment above, is also relevant here: for example, the borrower may be raising money to help finance a grandchild's university education or wedding.

It is little wonder insurers have been asking about equity release work on proposal forms for this year's renewal. Be afraid!

For advice on managing the risk of advising on equity release mortgages contact frank.maher@legalrisk.co.uk

Repeal of Remuneration certificates

Solicitors will have been taken by surprise by the short notice in August of the repeal of legislation relating to remuneration certificates. The Law Society's Practice Note www.lawsociety.org.uk/productsandservices/practicenotes/remunerationorder/3331.article was released on Thursday 6 August 2009 and The Solicitors' (Non-Contentious Business) Remuneration Order 2009 came into force on Tuesday 11 August, abolishing the remuneration certificate procedure. An emergency amendment was made to rule 2 of the Code of Conduct and rule 2.08 www.sra.org.uk/rule2 was placed on the SRA website during the course of the day on 11 August 2009. This set out the information solicitors need to provide on challenging a non-contentious bill, pending further amendment of the rule expected in October.

The need to amend billing templates at short notice (or, for some firms, decide whether to scrap thousands of printed bills) during peak holiday season caused some surprise.

For advice on the costs information and rule 2.08 contact francis.dingwall@legalrisk.co.uk

Legal Disciplinary Practice

Since 31 March 2009, firms have been able to become 'legal disciplinary practices' and to appoint non-solicitor lawyers and non-lawyer managers. The Law Society updated its Practice Note on 27 August 2009, updated in section 8.3 to acknowledge the anticipated launch date of 2011 for alternative business structures (ABSs). See www.lawsociety.org.uk/productsandservices/practicenotes/ldp/3540.article

The note contains the warning 'You should therefore ensure that any structural changes you make to become an LDP do not breach existing rules by anticipating the emergence of ABSs. The Solicitors Regulation Authority has provided further guidance on preparing for ABSs.' It contains a link to the SRA's guidance; however at the date of going to press the link is to the January 2009 guidance archived on 20 July 2009. The current, July guidance is at www.sra.org.uk/solicitors/code-of-conduct/guidance/1883.article.

Amid SRA concerns of law firms 'jumping the gun' in their arrangements with future ABS business partners, the July guidance sets out what you can and cannot do and must be read against the background of the amended guidance note 7 on rule 1.03 of the Code of Conduct www.sra.org.uk/rule1 which were introduced on 31 March 2009.

We are advising on ABSs and also advising firms under investigation for alleged breach of the current restrictions.

For advice on new forms of practice and SRA investigations contact frank.maher@legalrisk.co.uk

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