

The PII countdown begins (Pt 2)

Professional indemnity insurance:
Frank Maher reviews problems in practice



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This is the second of three articles on professional indemnity insurance (PII), which 90% of firms will be renewing on 1 October 2015. There will always be some firms which have a problem on renewal. They may not necessarily be bad firms, but claims have a larger impact on the economics of insuring small firms than they do larger ones.

Problems might be because of a poor claims history, or might be because you have discovered a significant issue which may cause claims in the future, but has not yet done so. The writer has acted for many firms in this position over the years and it is a sad fact of life that for no obvious reason, many of these problems emerge in the month before the insurance renewal.

Examples have included rogue partners who have engaged in mortgage-related or other fraud, and cases where firms have discovered that they may have made a series of errors on a large number of similar matters. Examples of the latter have included hotel schemes which may have constituted collective investment schemes but lacked the requisite authorisation under the Financial Services and Markets Act 2000.

Art or science?

So what do you do when you discover such a problem? The policy will generally require you to notify "circumstances" (a defined term) as soon as practicable or something to that effect. But you need to consider the position quite

carefully. The writer's firm has seen one case where a firm thought it had made an effective notification, and was then taken over by another firm which was a "successor practice". It turned out that the notification was not effective, and this meant the successor firm was exposed to the claims. Block notifications are an art form, and care is needed in drafting them, in particular to see where the claims may come from in the future.

“If you do have problems, it is advisable to engage a broker who specialises in solicitors’ PII; a good broker will save more than their fee”

But sometimes you do not have all the information to make an effective notification, and the question then is how far you should go "looking for the bodies". There can be a risk of discovering enough information (if you do not have it already) to constitute a "material fact", which may influence a future

insurer's decision to insure (or not), or the premium to be charged, without providing sufficient information to constitute a valid notification to your current insurers. So there can be a question of professional judgment to make, though if you have knowledge of "circumstances", as defined you have no choice but to notify. There can also be issues over requirements in some policy wordings which are more onerous than others.

Block notifications may be perceived by insurers as a hostile act, so you need to be willing to fare the storm which may ensue. Sometimes, there may be questions about whether you had knowledge of the circumstances before the previous renewal but failed to disclose them. You also know in good time whether there are going to be insurers who will accept your business.

Partly fuelled by premiums generally being low, the writer is seeing more coverage disputes than in the past—these may involve allegations of dishonesty, or whether the claim fell within a notification to prior insurers, or failure to disclose material facts to insurers of prior to inception. Arguing your case for cover may fuel a claimant's case by creating documents, so consideration should be given to obtaining legal representation to help preserve this.

Succession matters

Doubtless the changes in the profession will lead a number of firms to close or merge, and this means that many will need to give careful consideration to the successor practice provisions. It is not always the case that a firm should avoid being successor practice: there may be valid reasons why it is the right thing to become one, and there are potential downsides to not becoming successor. Equally, it should not be assumed that it is unavoidable that a firm which is acquiring another practice will become successor: in most cases the right way to go about it is to determine whether the acquiring firm intends to become successor or not, and then to determine how to achieve that objective.

If you do have problems, it is advisable to engage a broker who specialises in solicitors' PII; a good broker will save more than their fee.

Although problems do arise in practice, we have the most comprehensive cover of any profession in the world—for the present, at least. We look at how this may

Frank Maher is a partner in Legal Risk LLP, solicitors, specialising in advice to law firms on professional regulation and professional indemnity (www.legalrisk.co.uk)