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Between The Rock and a hard place

The five years since the collapse of Lehman have been a torrid time for solicitors in England and Wales, let down in one way or another by a succession of insurers from Gibraltar (Lemma), Latvia (Balva) and now Germany (Berliner), not to mention Irish insurer Quinn, though the problems caused by Quinn were largely confined to initial uncertainty and one less insurer on renewal.

The liquidator of Lemma Europe insurance Company Limited has published his [First Progress Report](#).

The withdrawal of Berliner from the market will cause more than a little disruption and may affect 1,200-1,300 firms. It came less than three weeks before renewal, and after many firms had already paid their premiums and thought they had put the renewal to bed for another year, but action by the Financial Conduct Authority has forced them to look elsewhere. While the Law Society's scheme with rated insurers, Chancery PII, is welcomed, it is unlikely to be the saviour of many firms who were relying on Berliner.

We predict many small firms will close because they are unable to obtain insurance. Of these, many transferred their cover from Balva to Berliner in June. There are now doubts as to whether that transfer was effective. If the firms close, they will have six years' run-off cover with one or other insurer, and it is debatable whether they are better off with an insurer which had its licence revoked by the Latvian authorities, or one prevented from offering solicitors' cover by the UK authorities. Those relying on the extended indemnity period, which allows an orderly wind down of the practice, must observe the requirements strictly, including notices to the Solicitors Regulation Authority (SRA).

As we have said before, the cover is too broad for there to be a sustainable market for many small firms. What appears to be in the consumer interest will now force many firms to close and operate to their detriment. A critical review of the Minimum Terms and Conditions is now seriously overdue. Nor is this just a concern for consumers and small firms: the inevitable cost of interventions will fall on the profession as a whole.

We have had a number of significant successes in assisting firms with specific insurance-related problems in obtaining favourable renewal terms, working in conjunction with their brokers, with block notifications of problem files and reviews of their risk management.

Block notifications

We have advised many firms on making block notifications (or 'laundry lists') to insurers arising from problems such as right to buy claims, rogue partners and undervalue settlement of coal health claims. We have recently seen a significant failure arising from a failed attempt at DIY notifications by a firm, which was taken over by another practice. The acquiring practice now has serious difficulty obtaining renewal. This could have been avoided by effective notification, or by taking steps to avoid successor practice liability. (See next item.)

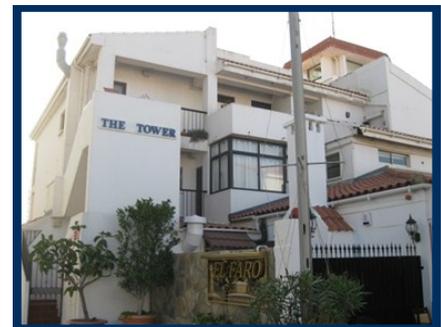


Picture: Gibraltar



Picture: The Berlin Wall

Picture: Former office of Lemma in Gibraltar (above the restaurant)



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Picking over the ashes

Many firms are acquiring the whole or parts of failed firms, or their clients. Great care is needed. We have advised many firms on a range of issues, including conduct issues, avoidance of successor practice liability for insurance purposes under the SRA Minimum Terms and Conditions, block notifications to insurers of the closing firm, and – a new issue arising from the Jackson costs reforms – assignment of Conditional Funding Agreements (CFAs) in litigation: we understand some insurers are targeting assignments of CFAs for attack.

Acquiring client files and wills also involves careful attention from a compliance perspective, due to confidentiality issues. Lawyers and insolvency practitioners talk freely of acquiring will banks – but they are confidential client property.

We provide legal advice on the conduct and insurance aspects of acquisitions. We also advise insurers and law firms on successor practice disputes post-acquisition.



Picture: Law courts in London—settling disputes.

Event

Frank Maher will chair Managing Partner's 10th Annual Risk Management for Law Firms conference in London on 3-4 December 2013. Sue Mawdsley will speak on new developments in Anti-Money Laundering. For further details see [here](#).

Coverage problems and the proposal form

We continue to be instructed on a variety of coverage problems, often arising from (allegedly) inadequate disclosure and incorrect warranties on proposal forms. Those charged with signing proposal forms should ensure that what they are signing is in fact true, particularly as to the extent of enquiry they have made. We frequently find that firms have made significantly less enquiries than the proposer warrants, for example only asking partners, or only asking fee earners.

Significantly, the person signing the proposal form should consider carefully whether they may assume personal liability. This may be a particular concern in a failing practice, where insurers may also contend that individual members are liable for premiums (including run-off) or excesses. They may do so even in the case of incorporated practices. We have defended significant claims of this type.

We can advise on issues arising from completion of proposal forms, coverage and disputes with insurers over liability for excesses and premiums.

Review of panel solicitors' claims handling

We have been instructed by insurers, insured firms and panel solicitors to review handling of professional indemnity claims where there have been concerns about excessive cost and lack of strategic focus. Apart from the obvious concerns, significant defence costs can adversely affect a firm's claims record and future premiums.

All defence solicitors are not created equal. We have undertaken reviews of claims handled in both the UK and Australia. We have many years' experience of defending claims and advising on policy coverage for insurers and insureds covering thousands of claims, including many very substantial ones for City firms.

Anti-money laundering

The Financial Conduct Authority published its [Anti-Money Laundering Annual Report 2012/13](#) shortly after our last newsletter was published.

As well as advising law firms on procedures, reporting, privilege, production orders and training, we are advising in relation to a penalty notice imposed on a firm regulated by HM Revenue & Customs.

DBAs: a loose end of the Jackson Reforms

The consensus is that the Damages-Based Agreements Regulations 2013 are unsatisfactory. If the Ministry of Justice amends them at all, it is unlikely to be until next Spring. In the meantime, we are drafting DBAs for firms who want them, spelling out the risks and gaps. We are seeing other versions circulating which are unenforceable.



Picture: Laundering money

RISK UPDATE

For further information on any of the above, please contact info@legalrisk.co.uk