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Insurance coverage disputes and the waiver of privilege

Insurance coverage disputes are on the increase and we are advising in an increasing number of cases. We have had a significant success in one recent case in contending that an eight-figure claim fell to be dealt with under an earlier year of insurance, a year when the firm had substantially more cover.

Coverage issues include late notification, questions over whether a claim falls within a prior year notification and aggregation (i.e. whether a single policy limit applies to two or more claims), not to mention sometimes misconceived allegations of dishonesty against upstanding members of the profession.

Many have been awaiting the decision on aggregation in **Godiva Mortgages Ltd v Travelers Insurance Company Ltd**, the trial of which was expected to take place this month. They will however be disappointed, as the proceedings have been stayed. The issue remains very much alive, and features in a number of coverage disputes in which we are acting.

A particular issue concerns privilege. The insured firm may wish to advance a positive case to insurers which would be detrimental to the defence of the claim, treading a tightrope in the process. An Australian case, **Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Limited (No 2)** [2014] FCA 481, held that the insured had waived privilege when seeking indemnity. It is but one of the risks in adopting a DIY approach to coverage disputes.

We have sought to address this issue on behalf of clients.

Anti-Money Laundering and Financial Crime

We focused on the forthcoming Solicitors Regulation Authority (SRA) thematic review in our September Special Edition of Risk Update. We understand that the SRA intends to inspect around 500 firms, including those in Relationship Management.

The visits will include interviews with fee earners, picked on the day. How will your fee earners respond? We can provide testing using *Desktop*, our online risk diagnostic tool, for £20 per head (plus VAT). Terms apply. We expect that the SRA will be checking that training is up to date firm wide; we can provide training tailored to firms' needs, taking account of a wide spectrum of practice areas, including for example, aviation, corporate, energy and real estate, not to mention the more routine areas of practice such as residential conveyancing.

We are also seeing more disclosure orders and production orders and are advising firms on complex issues of legal professional privilege.

The SRA has published guidance, *Cleaning up: Law firms and the risk of money laundering*. It contains warnings in relation to litigation, misuse of client account (an issue which is not confined to small firms in our experience), and infiltration of law firms. The SRA has also published *In the shadows: Risks associated with bogus firms*.

Meanwhile, the International Bar Association, American Bar Association and the Council of Bars and Law Societies of Europe (CCBE) have published 'A Lawyer's Guide to Detecting and Preventing Money Laundering' which is particularly notable for the case studies which may resonate with a wide cross-section of practices, including larger firms.

Tools for AML compliance

Outcome 7.5 in the SRA Code of Conduct 2011 requires that 'you comply with legislation applicable to your business, including anti-money laundering and data protection legislation;'

That nothing has gone wrong – yet – is not enough: firms must be able to *demonstrate* compliance. Where is your evidence? Evidence may come in the form of (a) a risk assessment, and (b) an annual report by the MLRO to the firm's management.

We can advise firms on the preparation of both these.

Publications

The Compliance Calendar Toolkit for Law Firms



This is a practical guide which will help any SRA-regulated law firm with its compliance.

It is designed to spread the tasks of monitoring compliance around the year, and contains a series of articles providing insight into a variety of topics; these include client engagement, 'honest rogues', use of client account as a banking facility (not just a small firm issue, as noted above), reporting to the SRA, and confidentiality. <http://www.wlrstore.com/ark/the-compliance-calendar-toolkkit-for-law-firms.aspx>

Risk Management in Law Firms: Strategies for Safeguarding the Future



Frank Maher and Sue Mawdsley contributed to seven chapters in this work, jointly written and published

on behalf of the International Bar Association, including conflicts, confidentiality and anti-money laundering. The book covers the spectrum of law firm risk. For a sample chapter and the table of contents see <http://www.globelawandbusiness.com/RML/>

SRA Accounts Rules 2011 amendments

Revised rules published on 31 October 2014 implement four changes—

- An increase in the amount of client balances, from £50 to £500, which firms can pay to charity under rule 20.2 – but note the (unchanged) provisions which must first be satisfied;
- Only qualified accountants' reports now require to be delivered to the SRA (Rule 32);
- Rule 32.1A provides that 'Subject to rule 32.2, you are not required to obtain or deliver an accountant's report if all of the client money held or received during an accounting period is money held or received from the Legal Aid Agency or in the circumstances set out in rule 19.3' (the latter also being Legal Aid-related);
- The Accountant's Report form in Appendix 5 has been revised.

Capital Gains Tax on damages

Changes have been proposed on the taxation of damages with a [consultation](#) about introducing legislation to replace the long standing Extra Statutory Concession (ESC) D33. It is anticipated that Compensation over £1 million awarded/agreed since January 2014 will be subject to CGT, using a nil base cost.

Wills and lifetime gifts

We have seen an increasing number of firms asking us for advice where they have discovered that a private client partner has received loans and gifts from clients. These may give rise to a variety of issues, including conduct, SRA-reporting, professional indemnity insurance and anti-money laundering.

The Law Society has published a Practice Note: [Preparing a will when your client is leaving a gift for you, your family or colleagues.](#)

Consumer Credit Act (CCA) regulation

Changes in the way CCA regulation affects law firms continue to lack final resolution. See the SRA press release: [SRA proposes consumer credit firms seek FCA authorisation.](#)

The Law Society has published a revised Practice Note: [Consumer credit regulation.](#)

Employers' Liability (EL) Insurance

LLPs and their members may not be covered against a claim by an LLP member who is injured. This may not seem surprising in the context of a small partner-owned practice, but for a large corporate-style firm this may be a concern.

Insolvent insurers: Protection for policyholders

The Prudential Regulation Authority is proposing that the 90 per cent cap on compensation which applies where eligible claimants suffer insurer insolvency should be removed for professional indemnity insurance. This would be a welcome change, though little consolation for the firms whom we are advising on claims arising from the collapse of insurers such as Lemma and Balva.

Chambers and Legal 500

We are pleased to be recommended in both guides for our work in professional indemnity and professional discipline.

Events

Frank Maher will be chairing Managing Partner's 11th annual Risk Management for Law Firms (3 December 2014).

Sue Mawdsley will be speaking at the LMRM Conference in Chicago (26 February 2015).

For more details see our [website](#).

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

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