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Risky business

Frank Maher outlines the areas of concern for PII

Most firms will be renewing their professional indemnity insurance (PII) on 1 October this year. This article looks at some of the issues they may face. While the conveyancing sector generally encounters the greatest problems when it comes to PII, personal injury lawyers are not immune - memories of The Accident Group litigation (and other similar actions) will still linger for many. But even as recently as last year's insurance renewal, we saw firms closing because of problems caused by personal injury work.

Level of cover

At the time of writing, the Legal Services Board had given itself an extended deadline to decide on the Solicitors Regulation Authority's proposal to reduce compulsory cover from its present level of £2m for partnerships and sole practitioners/£3m for incorporated practices. If cover is not reduced, the issue may remain on the agenda for the proposed further consultation on PII. There is an EU requirement for a minimum of €1,120,200 for insurance mediation - approximately £900,000 – which will apply to most personal injury firms, though we query how often that will apply.

Even for firms which only do low value claims, a reduction to the SRA's proposed £500,000 has serious implications for a number of reasons.

The writer has seen a PII claim of more than £1m, arising from a personal injury action which had settled for £2,000 – the firm failed to spot that the claimant had post-traumatic stress disorder. The facts were unusual, but it highlights a point. We look at undervalue settlement further below.

Even a specious claim is a concern when arranging the PII renewal

A further reason to be concerned about level of cover in relation to low-value claims is the risk of multiple similar claims being treated by insurers as one claim with one policy limit – 'aggregation'. This will not commonly be a major issue in practice with road traffic claims, though the risk cannot be excluded. But it could be a problem in employer's liability or public liability cases, where claims arise from a common cause, and one failure may cascade through the portfolio of claims.

An important decision is pending later this year in a conveyancing case, *Godiva Mortgages v Travelers Insurance Company Limited*, which may affect the position on this point.

Mitchell

The decision in *Mitchell v News Group Publishing* [2013] EWCA Civ 1537 and subsequent cases, showing a hardening in judicial approach to compliance with rules and directions, is a worry to many firms - claimant and defendant alike - and will have some impact on firms' exposure to claims. We have not seen too much evidence of claims arising from these decisions yet, but it may be a matter of time.

Undervalue settlement

Undervalue settlement claims are on the increase, and we have mentioned one example already. More recent examples include the actions arising from coalminers' claims for vibration white finger, where firms failed to include claims for loss of services. In *Procter* Lawtel 11/11/2013, it was held that the solicitors should have consulted their client directly, instead of relying solely on questionnaires and standardised letters. One may expect insurers to have given some thought as to whether volumes of these claims arising from a common process failure may fall within the

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aggregation point mentioned above, with a single policy limit.

There are firms advertising for undersettlement work, and routinely asking solicitors to provide their files for review. This will be worrying, and even a specious claim is a concern when arranging the PII renewal.

Be wary, though, of the risk of junior staff pressing for settlement to achieve targets, particularly after the Jackson costs reforms, which have piled the pressure on all firms. Watch out for the cases that are higher risk and need more senior review, such as cyclists and motor-cyclists who may have suffered very minor brain damage which has gone unnoticed.

ATE problems

There are many problems with after-the-event insurance, particularly for cases before the ban on recovery of insurance premiums introduced by section 46 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

Perhaps the most evident problem is that the willingness of insurers to take the opportunity to receive premiums in successful cases, is not matched by a willingness to pay claims in unsuccessful cases - with painstaking review of files to find reasons not to pay. This may lead to claims, and we have seen systemic problems, such as where solicitors had instructed counsel to advise that claims have X per cent prospects of success, but the policy requires '*greater than* X per cent'.

There may also be concerns about pre-April 2014 policies following the Supreme Court decision in *Coventry v Lawrence (No 2)* [2014] UKSC 46, which considered whether recovery of success fees and ATE premiums under the old regime might conflict with human rights. This is considered in more detail on page 12.

Non-disclosure

Many firms send a circular to all partners before renewal, asking whether they are aware of any circumstances which may give rise to a claim and may need notifying to insurers. Some firms ask all fee-earners. But even this may not be enough – indeed, it is most unlikely to suffice. The proposal form will usually contain a warranty to the effect that the person signing it has asked *all* staff, so merely asking fee-earners is not enough. The consequence of failing to pick up something requiring disclosure is that the person signing the form may become personally liable for the cost of a claim which was not notified to insurers promptly.

In one case the writer dealt with, the firm failed to ask a fee-earner who was unqualified, yet was handling a seven-figure clinical negligence claim without supervision. She had failed to serve a claim form before it expired in the September. But she thought, without any knowledge of the principles applicable, that she would apply to the court and obtain an extension. The request was refused in the October. At this point, the firm had not received the policy documentation from insurers. Insurers were refusing to provide it. The partners had to pay a substantial six figure sum personally to resolve the problem.

Had the partners in this example had a proper system for identifying potential claims, they would have notified, and been covered by, their insurers prior to the renewal.

The lesson is to make sure you ask all partners and staff and have them sign for the reply.

Finance

Insurers do not just assume the risk of claims when they insure a law firm, they assume credit risk too. This arises in connection with excesses and, if the firm closes, the run-off premium. Clause 7.4 of the SRA Minimum Terms and Conditions makes specific provision for anyone who was a principal during the policy year to be liable for the excess. Note that this purports to apply even to LLP members and, in the case of a company, company directors and the ultimate beneficial owners of shares.

The writer acted for partners in one of the larger law firm collapses, and insurers sued individual LLP members for both excesses and the run-off premium. The insurers relied on policy conditions and some cases which have the hallmarks of being ill-considered and wrong, but they are there, and are being relied on by insurers.

Unusual claims

Watch out for unusual claims. This is particularly an issue for claims arising overseas or which are travel-related, where unusual and shorter limitation periods may apply, trapping the unwary. Overseas claims may require expertise of foreign lawyers, though even then, the firm cannot abdicate all responsibility if it maintains a client relationship (see a conveyancing case, *Gregory v Shepherds* [2000] P.N.L.R. 769, on this point).

Be wary of the risk of junior staff pressing for settlement to achieve targets

In particular, watch out for accidents involving aeroplanes, ships, boats on the Norfolk Broads (and elsewhere), jet-skis and any other form of transport which is not a car or bike: you may be tested. Problems involving special limitation periods have been around for so long that it is really unforgiveable that people are still not checking them. The writer acted for the insurers of a well-known shipping firm in a claim involving a boat which moved suddenly at night when another vessel passed by – as there was no collision, the experienced partner failed to register that a two-year time limit may apply.

An unusual case the writer dealt with involved a football injury in what was then a first division match (pre-Premier League), in which a player in a major club sustained a significant injury which ended his career. His solicitor was waiting to see what would happen in another case, on the extent to which players could be liable. Meanwhile, he allowed the limitation period to pass without issuing proceedings. Inevitably, a claim followed.

Moving into clinical negligence

Some firms, facing too many challenges with the profitability of traditional personal injury work, are moving into clinical negligence, where they may have

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little or no expertise. Be wary of the consequences of flying blind!

The willingness of insurers to receive premiums in successful cases is not matched by their willingness to pay claims in unsuccessful cases

But we don't do conveyancing...

Many firms are only too well aware of the insurance problems faced by conveyancing practices and have stopped doing it; others may be thinking of doing so. But the claims can still keep coming for many years. Most of the claims related to the property crash in 2008 should have filtered through by now, but there may be many where for one reason or another (fraud, concealment etc.) time has yet to expire.

The lesson from this is that simply giving up conveyancing does not completely solve the problem, and if you are thinking of doing this, remember that you will still be paying a premium based on the fact that you have done it in the past, even though you may not have the fee-income from which to pay for the cover.

Successor practices

We cannot over-emphasise the need for care when taking over another practice, or taking partners or clients from another practice. The successor practice provisions are wide-reaching and can render a firm uninsurable, or at least expose it to vast claims. Often these issues can be addressed, but only before the deal goes through. So make sure you have had appropriate advice before everything is signed and sealed.

And finally...

We suspect the renewal will be relatively benign for most firms, as long as they do not have a particular claims problem, whether their own, or for a firm to which they are successor practice. If you do have problems in this respect, take advice, use a specialist PII broker – not the one round the corner who does your office insurance, but one with a deep understanding of this highly specialised market. By the time you read this, time is ticking, and if you have not received a quotation, you should be taking the initiative. Too often, the writer's firm has been instructed by solicitors who have said they are still waiting to hear from their broker with a quote, and before you know it, the time has gone.

Frank Maher is a partner in Legal Risk LLP, solicitors. He has defended solicitors' professional indemnity claims and advised firms and insurers on coverage issues since 1983, and has also provided expert evidence on compulsory schemes.

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