

PII renewal: Life and death

Aggregation issues, the impact of the Insurance Act 2015, and the risks associated with cybercrime are just some of the things lawyers should be considering during PII renewal season, writes **Frank Maher**



Frank Maher is a partner at Legal Risk LLP Solicitors
www.legalrisk.co.uk

Being sentenced to death would be regarded by many as disappointing, and it happened to one hapless claimant in a lawyer's professional indemnity claim which the writer defended. Of that, more anon. Renewing one's professional indemnity insurance (PII) may seem rather insipid by comparison, but there are a few traps for the unwary, and it can be a life and death issue for law firms as we cannot practise without it.

Many firms will be contemplating renewal of their PII. Although we are no longer tied to a 1 October renewal, the majority of firms still adopt it through inertia.

For most firms, this should be a relatively straightforward affair, as indeed it was last year, with a reasonable choice of insurers and rates (as a proportion of gross fees) expected to be around the same as previously seen. There will always be a handful of firms with problems, which are usually down to claims experience. In some cases there may be other factors involved, and insurers may have a close eye on finances, because of the risk of the firm failing without paying for the six years' run-off cover which applies if there is no 'successor practice'.

The Law Society's 2015/16 PII survey reported

that 61 per cent of respondents renewed with the same insurer last year. However, some firms may have to find a new insurer, as Elite has pulled out of the solicitor market, citing concerns about pricing and the levels of fraud on client accounts.

Of the firms responding to the survey, the number buying top-up cover was down to 19 per cent, from 24 per cent the previous year. Top-up cover is relatively inexpensive, but firms should consider the need for this carefully, as outcome 7.13 in the Solicitors Regulation Authority (SRA) Code of Conduct 2011 requires consideration of the appropriate level of cover.

Aggregation of claims

One particular consideration when assessing levels of cover is the question of aggregation, which has been a hot topic for insurance lawyers over the past years and continues to be so. This refers to the provision in the policy which, in outline, entitles insurers to treat multiple claims arising from a series of related acts or omissions as one claim with only one limit of indemnity.

The point was addressed recently by the Court of Appeal in *AIG Europe Ltd v OC320301 LLP and others* [2016] EWCA Civ 367. This arose from two property developments in Turkey and >>

>> Morocco, which had attracted more than 200 investors.

The developments failed when the local companies were unable to complete the land purchases. The investors sued the solicitors for allegedly wrongful release of the money from an escrow account. The issue turned on whether the claims should be treated as one or as more than one. The Court of Appeal set out the test for determining the issue and remitted the case back to the judge to apply it.

Further developments in *AIG* are awaited keenly, and the writer has several cases pending which turn on this, including rogue partner dishonesty cases and failed investment schemes. But in the meantime, those renewing their cover should give careful thought to whether claims exposure from their work may give rise to aggregation issues. It might also apply, for example, in cases where there is a systemic failure in compliance with one particular lender's instructions giving rise to a series of claims, or perhaps a flaw in a computer program used for valuing personal injury claims.

Insurance Act 2015

A change in policy wordings has been required because of the Insurance Act 2015. The change will increase the standard of disclosure for commercial policies. It requires a proposer to make a 'fair presentation' of the risk in a 'manner which is reasonably clear and accessible to a prudent insurer'. It is intended to discourage 'data dumping'.

Of particular note in the writer's view are the provisions in section 4, which 'provides for what an insured knows or ought to know'. This includes knowledge of senior management and of the person responsible for arranging the insurance. It will be important to maintain an audit trail.

It is critical to ensure that all staff are asked to complete a declaration before completing the proposal, and this should include all support staff as well. Asking only the fee earners is not enough – claims can arise from administrative failures of which they may be unaware, such as a letter going into the wrong envelope, and support staff may help identify cases where a fee earner is sitting on a problem. They must also be reminded of the continuing need to make disclosures.

The writer recommends a quarterly declaration to help avoid cases slipping through the net, and firms should note that the Insurance Act applies to all of the firm's insurance, not just PII.

The consequences of failing to make proper disclosure can be severe, and the writer's firm is acting in a number of cases where insurers are seeking reimbursement from the insured firms as a result. Some of these cases involve hundreds of thousands of pounds.

Fraud protection

Frauds on law firms have become endemic, either through fraudsters ringing up and claiming to be the bank – known as 'vishing' – or the hacking of emails between solicitors and clients and changing of bank account details in payment requests. At present, theft of client money is generally covered under the compulsory PII terms, though that might change if insurers start applying pressure. In the meantime, expect to be questioned about what measures your firm has put in place.

Protection against fraud and cyber-attacks should include technical measures (such as firewalls and anti-virus software) and training of all members of the firm at every level, without exception. Most of the problems are caused by people rather than technology, though that is not to exclude the risk of hacking, including ransomware such as CryptoLocker, which may prevent you from accessing your data unless you either pay the ransom or can restore it from a clean backup.

Successor practices

Some firms may be thinking of merging or acquiring other practices. Remember the need to address the successor practice provisions in the policy well in advance. These may make the firm liable to insure the firm it has acquired. In one case the writer is involved in, the firm had done due diligence on the firm it was buying and thought there was no problem in being a successor practice. After acquisition, it was alleged that there was a chain of earlier firms to which it was a successor practice, and a raft of potential claims is giving rise to huge exposure.

In another case, a fairly small firm bought another practice and ended up with a £1m premium and a £1m excess. Had they sought advice before they did the deal, that could easily have been avoided and the deal could still have gone ahead.

And finally – what of the writer's death sentence case? The murder conviction was appealed to the Privy Council and the claimant ended up with a manslaughter conviction and a jail sentence. He was freed immediately, taking account of time already served. **SJ**



Give careful thought to whether claims exposure from your work may give rise to aggregation issues