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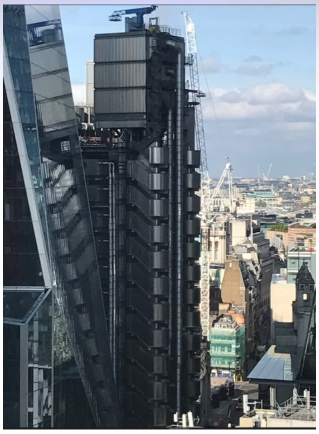
SOLICITORS

Protecting partner assets: insurance is not enough (Part 5)



Previous articles in this series identified gaps in the insurance cover for solicitors in England & Wales. In recognition of that risk, it is common for solicitors to limit liability through their terms of business, and many firms are now incorporated, either as limited liability partnerships (LLPs) or limited companies. Yet even these measures do not provide complete protection: that is important against the background that nine insurers of solicitors became insolvent between 2010 and 2018, having sold approximately 5,000 policies to solicitors. This part will look at terms limiting liability.

The concept of limiting liability dates back to Babylonian times, with a bottomry bond which was a loan secured on the bottom of a ship which was not repayable if the ship sank. It was also used by the ancient Greeks.

Several critical points of failure potentially apply to liability caps. First, as a matter of contract law they must be incorporated into the retainer. Secondly, they must satisfy the legislative restrictions on limiting liability, in particular the Unfair Contract Terms Act 1977 and Consumer Rights Act 2015. Thirdly, note that the limit of indemnity in the insurance policy will include interest *and claimants' costs*, and if the liability exceeds your limit of indemnity, defence costs will usually be reduced proportionately.

Rule 3.2 of the SRA Indemnity Insurance Rules prohibits solicitors from limiting liability below the minimum compulsory cover - £3m for incorporated practices and licensed bodies (Alternative Business Structures or ABSs), £2m for sole practitioners and partnerships.

Some firms try and exclude claims for consequential loss, but this may be a problem, particularly if the sole purpose of the transaction was for the investment opportunity, whether a private buy to let or a commercial investment.

Aggregation, under which multiple related claims may be subject to one policy limit (see Part 1), raises its ugly head here too, because it is all but impossible to limit liability effectively across multiple claimants.

As mentioned above, it is critical that a term limiting liability is agreed by the client as a matter of contract law, and it is strongly advisable to obtain signed copies of terms in every case. But claimants and judges will inevitably try and find ways round a liability cap, and history shows that it is more difficult with consumers. It may be difficult to limit liability to third party claimants such as directors and shareholders of a client company, or beneficiaries of a will.

Commercial clients may try and impose their own terms instead, either refusing to accept a limitation at all, or circumventing them through online billing procedures by which a box has to be ticked when uploading a bill, confirming that the clients' terms apply in priority.

The next part of this series of articles will look at incorporation as a means of protecting partner assets.

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Further information

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