

Block notifications - the Solicitors' PII renewal 2023

The problem

Insurers may be wary of renewing – or taking on a new firm – if the Insured faces the prospect of multiple claims arising from repeat work. Examples include property investment schemes, tax schemes, and undervalue settlements involving repeated mistakes. Or there may have been rogue staff misusing client money or involved in mortgage fraud.

Even though extensive efforts have been made to identify the extent of the problem, it is important to notify insurers as fully as possible in order to minimise the risk of undiscovered matters giving rise to claims in a future insurance year. It is also critical in relation to excess layer policies which are not subject to the SRA Minimum Terms and Conditions (MTC).

A comprehensive notification of circumstances may assist in changing insurers and minimise the firm's exposure to excesses. It may also be critical if the firm is merging with another practice (and we have considerable experience of advising on successor practice and other insurance aspects of mergers).

Sometimes firms have notified circumstances already, but the notification may be open to challenge as being inadequate, so it may still be strongly advisable to make a further notification. We have considerable experience in drafting and dispute resolution in this field.

Notifiable circumstance

There have been several decided cases on this topic, but because notifications tend to be fact-specific, they can be tricky to apply. Broadly, for a set of facts to qualify as a circumstance capable of notification, a claim must be "at least possible" on an objective measure. There has to be a possibility of a claim which is more than just some fanciful or speculative chance of a claim. How material does the possibility have to be? The Courts have indicated that the "test of materiality for notice is a weak one".

In *Kajima UK Engineering Ltd v. The Underwriter Insurance Co Ltd* [2008] EWHC 83 (TCC), Akenhead J held: "There must be some causal, as opposed to some coincidental, link between the notified circumstances and the later claim." The Court of Appeal, in *Euro Pools Plc v. Royal & Sun Alliance Plc* [2019] EWCA Civ 808, agreed.

Making an effective block notification

In order to make an effective block notification of circumstances, it is critical to –

- Understand the law relating to notifications and coverage;
- Analyse the requirements in the policy; and
- Have an in-depth knowledge of professional liability claims, so as to understand the possible source and nature of future claims.

Maximising the prospects of success requires not only drafting skills but the exercise of judgment: too wide, and it's ineffective; too narrow, and it's ineffectual.

Care is also needed when notifying a claim to insurers, particularly where the policy is written under the MTC, because the SRA Participating Insurer's Agreement (PIA) provides that the insurer first notified should conduct the claim.

Dealing with challenges by insurers

Insurers may try and reject the notification. However, any determination should wait until the claim is made: *McManus v European Risk Insurance Co HF* [2013] EWHC 18 (Ch) (approved by Court of Appeal in [2013] EWCA Civ 1545).

If they continue to dispute the effect of a notification, it may be necessary to invoke the dispute resolution procedure under the policy, or there may be an arbitration between insurers under the PIA. We have experience of dispute resolution in many such cases, which frequently run to tens of millions of pounds and may involve other coverage issues too, such as aggregation.

Further information

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