LEGAL RISK LLP
SOLICITORS

When do solicitors need to notify their insurers of problems?

As the majority of solicitors' firms in England & Wales prepare to renew their professional indemnity insurance on 1 October 2023, minds will be turning to the notification obligations which arise in respect of circumstances which may give rise to claims. However, the issue is more extensive than may appear, and we have acted for many firms in coverage issues over the years where things have slipped through the net either accidentally, or due to failure to understand what is required.

The Cheesegrater and The Gherkin , London, after Picasso

First, it is important to emphasise that the starting point is the wording of the current policy or policies, and the proposal form for renewal.

There are several reasons to notify circumstances to your current insurer and to do so promptly, not least because you may be obliged to do so under the policy, and failure to do so may have a number of consequences which in broad terms include the following –

- If a claim which arises out of those circumstances is made after the policy expires, it will be treated as falling within the policy period in which the circumstances were notified;
- Failure to notify may result in a future insurer, obliged to deal with the claim under the Solicitors Regulation Authority (SRA) Minimum Terms and Conditions of Professional Indemnity Insurance (MTC), claiming that it has been prejudiced by failure to notify circumstances to the prior insurer and seeking reimbursement of its outlay from individuals responsible, or in some circumstances, the firm;
- A future insurer may also claim an additional premium or apply a larger excess in some circumstances;
- Failure to notify circumstances may also result in future excess layer insurers, whose policies are not subject to the MTC, declining cover; and
- A late notification dispute with insurers may make it harder to obtain cover in future.

What constitutes a circumstance requiring notification to your current insurers? The policy wording is critical, but primary policies will generally follow the definition in the SRA Glossary, which provides that it 'means an incident, occurrence, fact, matter, act or omission which may give rise to a claim in respect of civil liability'.

'Claim' is also a defined term. Again it is necessary to look at the policy, but the primary policy will in broad terms follow the SRA Glossary, which provides that it 'means a demand for, or an assertion of a right to, civil compensation or civil damages or an intimation of an intention to seek such compensation or damages. For these purposes, an obligation on an insured firm and/or any insured to remedy a breach of the SRA Accounts Rules, or any rules which replace them in whole or in part, shall be treated as a claim…'

The cover for Accounts Rules breaches is potentially a valuable additional protection under the MTC; we say potentially, because it has historically caused its fair share of coverage disputes with insurers, though these may be fewer following the recent case of *Royal and Sun Alliance Insurance Ltd* [2023] EWCA Civ 999.

The definition of 'circumstance' sets a low bar for notification. Note too, that notification is not simply an annual event prior to renewal, but an obligation throughout the life of the policy which will probably require notification 'as soon as practicable' (or words to that effect) and may contain specific requirements as to whom notification should be made. Policies may contain further requirements as to the level of detailed information required. Make sure you obtain proof of notification.

Knowledge of a more widespread problem which could lead to numerous claims may necessitate a block notification, and these require particular care and an understanding of the liability and insurance coverage issues involved. We have advised many firms on these and represented them in dispute resolution with insurers. Further discussion of this aspect can be found in our recent article on the topic.

So far as the proposal form for renewal is concerned, the firm has an obligation under section 3 of the Insurance Act 2015 to make a fair presentation of the risk, which (subject to some exceptions) requires disclosure of every material circumstance which the insured knows or ought to know, or failing that, disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances. The exceptions include circumstances which the insurer knows or ought to know, so there is an additional burden when changing insurer.

The proposal form will probably also contain a declaration that every circumstance has been notified to the current insurers. Some also include a declaration that the proposer has asked all staff, while others are less onerous, but it is still sensible to ask all staff (not just fee earners). Ask them in plain English if they are aware of any mistakes or complaints, even unmeritorious ones, and keep a record to ensure everyone has responded. Check again before you finalise cover.

In conclusion therefore, check the wording of your current policy and the proposal form, make sure you have conducted full enquiries of all staff, notified your current insurers of anything which *may* give rise to a claim, and satisfied the requirement of fair presentation of the risk in the renewal proposal. As a general rule, if in doubt, you probably need to notify (current and proposed) insurers.

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For legal advice on your insurance renewal contact Frank Maher or Francis Dingwall on info@legalrisk.co.uk or 0345 330 6791.