

Solicitors' Professional Indemnity Insurance Changes to Irish Minimum Terms By Stephen Chessher and Michelle Kilroy

The end of the Irish property boom has resulted in an unprecedented rise in both the number and size of negligence claims against solicitors arising out of property transactions. This has coincided with a reduction in insurers' investment returns and is expected to result in very substantially higher premiums for solicitors across the board when policies are renewed on 1 December 2009.

Against this background, a special Law Society of Ireland Task Force was set up earlier this year to consider how best to ensure that professional indemnity insurance cover remains generally available to solicitors at rates that are not ruinous. In order to contain premium rises as far as possible, the Task Force proposed changes both to reduce the level of compulsory cover and to enable insurers to impose additional exclusions. Those changes have now been approved by the Council of the Law Society and have been brought into force by the Solicitors Acts 1954 to 2008 (Professional Indemnity Insurance) (Amendment) Regulations 2009 ('the Regulations') and the Minimum Terms and Conditions prescribed by the Regulations. Unless otherwise stated, the changes will apply as from renewal on 1 December 2009.

MINIMUM COVER

The headline change is a reduction in the level of compulsory cover from €2.5m to €1.5m.

Solicitors of course remain free to insure for higher sums. Before reducing cover, practitioners would be well advised to review the maximum value of transactions on which they have acted (information which will normally be sought by insurers in any event) and thus the likely level of claims to which they may be exposed. Practitioners should also bear in mind that the Minimum Terms and Conditions do not apply to 'top-up' cover which may be arranged with qualified or non-qualified insurers.

POLICY EXCLUSIONS AND RESTRICTIONS

Other changes to Minimum Terms generally have the effect of allowing insurers to exclude cover in specified circumstances where they would previously have been unable to do so. They also bolster the rights of insurers to seek reimbursement from the insured of claim payments made solely by virtue of the Minimum Terms and provide insurers with a new (limited) right to obtain reimbursement from the Assigned Risks Pool if they are unable to enforce rights of reimbursement against the insured.

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Fraud

Currently, insurers are entitled to exclude their liability to indemnify a particular insured to the extent that a claim results from the dishonesty or fraud of that individual but must indemnify *other* insureds who are not party to the fraud or dishonesty. In future, insurers will be able to refuse to indemnify *all* insureds on the ground of the fraud or dishonesty of any one of them. This will mean that honest partners of a practice will no longer enjoy protection against claims arising from the dishonesty of one of their number.

Fraudulent Non-disclosure and Misrepresentation

Currently, insurers are not able to avoid the policy on any grounds whatsoever, even if there has been fraudulent non-disclosure or misrepresentation by the insured. In future, whilst the insurer will not be able to avoid the policy, it will be able to exclude liability for claims from Financial Institutions (ie lenders) where the insurer can demonstrate that there has been fraudulent non-disclosure or misrepresentation by any insured in placing the cover. There has been little publicity given to this change and the response of the banks remains to be seen.

Undertakings to Financial Institutions in respect of commercial property transactions

In another surprising move which is clearly a further attempt to curb the cost of claims made by lenders, insurers will be able to exclude cover for claims arising from undertakings given to Financial Institutions in certain circumstances. The scope of the exclusion depends on whether the undertaking was given before or after 1 December 2009:

- a) Undertakings given to Financial Institutions in respect of commercial property transactions *before* 1 December 2009:

Insurers will be able to exclude liability in respect of claims arising out of an undertaking given to a Financial Institution in the course of a commercial property transaction where:

- the undertaking was given by the insured (acting for a client borrower alone or jointly for the borrower and the lender);
- the claim is made by the lender; and
- the liability arises from a dishonest, fraudulent, criminal or malicious act or omission on the part of the insured.

Any such exclusion cannot apply to claims made by a lender where the lender is the sole client.

Claims made in respect of undertakings by persons other than Financial Institutions cannot be excluded but the insurer is able to seek reimbursement

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of amounts paid from the insured. If it is unable to recover from the insured, the insurer will now be able to seek reimbursement from the Assigned Risks Pool. The costs of this will in turn be passed on to the profession as a whole by way of a compulsory levy (see below).

- b) Undertakings given to Financial Institutions in respect of commercial property transactions *on or after 1 December 2009*:

Insurers will be able to exclude liability in respect of claims arising out of an undertaking given to a Financial Institution in the course of a commercial property transaction where the undertaking was given by the insured (acting for a client borrower alone or jointly for the borrower and the lender).

Any such exclusion cannot apply to claims made by a lender where the lender is the sole client.

The exclusion allowed for undertakings given after 1 December 2009 is far wider in scope than that allowed for undertakings given before 1 December 2009 since it applies to claims arising from any relevant undertaking, not simply to claims arising from dishonest or fraudulent undertakings. Further, the exclusion can apply whether the claim is made by the lender or by any other person.

Whether these changes will result in changes to lenders' procedures remains to be seen. In the meantime, practitioners would be well advised to consider their own procedures for the giving of undertakings, particularly after 1 December 2009.

Notification

Professional indemnity insurance operates on a 'claims made' basis, ie cover applies in respect of claims made against the insured during the relevant period of insurance regardless of when the negligent act giving rise to the claim was committed. Policies also contain a 'deeming provision' to the effect that once a circumstance that may give rise to a claim has been notified to the insurer, any subsequent claim arising out of that circumstance will be deemed to have been made in the period of insurance when the circumstance was notified.

The new Minimum Terms provide that cover must apply to claims first made against the insured *and notified to the insurer* (our emphasis) during the period of insurance.

The astute practitioner will put office procedures in place to ensure that all claims and circumstances that may give rise to claims have been notified to insurers before the year end. This may mean that in future insurers will see an increase in the number of claims and circumstances notified towards the end of the period of insurance.

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OTHER CHANGES

Other changes introduced by the Regulations mainly affect the operation of the Assigned Risks Pool ('ARP'). The ARP is a pooling arrangement whereby qualified insurers are obliged to provide cover in specified circumstances to firms that would not otherwise be able to obtain cover on the open market or fail to do so.

- As from 1 December 2010 there will be a 2% levy on premiums as a compulsory contribution to the costs of the Assigned Risk Pool. It will be the responsibility of insurers to collect this levy from insured solicitors and pay it to the Law Society. Presumably the levy is intended to cover, inter alia, the costs of reimbursing insurers those claims paid as a result of fraudulent undertakings which are only covered by virtue of the Minimum Terms and where the insurer is unable to obtain reimbursement from the insured (see above);
- ARP premiums will be calculated by reference to a formal rating schedule determined by the Law Society PII committee;
- Firms that do not pay the ARP premium within 3 days will be regarded as 'defaulting' and subject to the penalty rates that may be charged to defaulting firms.
- The Law Society may establish an information service to disclose information to qualified insurers on request regarding the status of a particular solicitor and provide details of run-off cover.

And finally ...

In the event of insolvency of a qualified insurer, solicitors are required to obtain alternative cover from another qualified insurer or in the ARP. Solicitors will now have 30 days rather than 20 days in which to obtain such cover.

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