

Lifting the Fog?

Jonathan Henney, a solicitor in the Manchester office of Robin Simon LLP, considers the recently announced changes to the ICAEW minimum terms of insurance and whether or not some of the uncertainty regarding the notification of claims and circumstances, which arose in light of the HLB Kidsons decision, may now have been removed.

Introduction

From time to time the Institute of Chartered Accountants in England and Wales revises the professional indemnity insurance minimum policy wording. The last such changes were made in January 2009.

The ICAEW has recently agreed to revisions being made to the minimum wording, which has been in use since then. The new wording will be effective for any policy which commences or renews on or after 1 September 2010.

Professional indemnity insurance is compulsory for all ICAEW members. As with other professions (most notably solicitors) the requirement to have insurance on certain minimum terms is driven by a desire to protect consumers, to ensure that (to the extent possible) an ICAEW member will be backed by an insurer, in the event a claim is made against them.

It is therefore important that ICAEW members – as well as the participating insurers (who are bound to issue policies either in the form of the minimum wording, or equivalent to it) – are aware of the changes and the impact they have on the scope of their professional indemnity insurance cover.

Notification Provisions

The most significant changes relate to the provisions for notifying claims to insurers and circumstances which may give rise to claims.

In the recent seminal case of HLB Kidsons v Lloyds Underwriters and Others [2008] EWCA Civ 1206 the Court of Appeal examined very carefully the ICAEW minimum terms relating to the notification of claims and circumstances which may give rise to claims. It is likely that, to a degree, the recent changes which have been announced are as a result of some of the comments and observations the Court of Appeal made in this area.

In summary, from 1 September 2010:

- Notifying a claim to insurers as soon as practicable is no longer a condition precedent to insurers' liability under the policy. Insurers will therefore not be entitled to automatically decline cover, in the event of a claims late notification.

- There is a seven day grace period at the expiry of the policy, in which claims can still be notified to insurers. In practice, it is anticipated that this will only apply where a claim has been made within the policy period – but very close to expiry – and the insured has gone on to notify it as soon as reasonably practicable. It will not apply to claims made after the expiry of the policy period. Equally, it is not likely to apply to claims that were made significantly in advance of the policy's expiry, but were not notified within the policy period due to some unreasonable delay on the part of the insured.
- Previously, pursuant to the HLB Kidsons decision, the requirement to notify circumstances which may give rise to a claim as soon as practicable was, as with claims themselves, deemed a condition precedent to insurers' liability. Because it is no longer a condition precedent that claims must be notified as soon as practicable, it will likewise no longer be deemed a condition precedent that circumstances should be notified as soon as practicable.
- The wording has been clarified, to make it clear that a circumstance which may give rise to a claim must be notified prior to the expiry of the policy period. Previous wordings had been silent on this point. This gave rise to some discussion in the HLB Kidsons case as to whether a circumstance could potentially be notified after the expiry of the policy period. Any such ambiguity has now been put to bed.
- Unlike with claims, there is no seven day grace period to notify circumstances, on expiry of the policy.

Other Changes

Aside from the notification provisions, other changes of note include:

- The allowance of a costs inclusive excess, in relation to claims arising out of work requiring FSA authorisation. Previously, costs inclusive excesses were not permissible in respect of any area of work.
- Where there is concern that a fraud has been committed by an insured, insurers will now be obliged to continue funding the defence of the claim until the fraud has either been admitted by that insured, or the fraud has been proven in Court.
- If there is a dispute between the current insurers and the insurers of a previous policy year as to who should deal with a claim, it will now be incumbent on the current insurers to deal with it, until the dispute is resolved.

Summary

In light of the HLB Kidsons decision, the revised minimum terms do provide some helpful clarification.

The notification provisions are, generally, more favourable to insureds. That said, insureds should still continue to ensure that claims and circumstances are notified as soon as practicable, so as to avoid any prejudice being suffered in the handling of the claim (for which insurers will still be able to seek redress).

There is also more of an emphasis on insurers being obliged to continue to deal with claims, despite the fact there may be an underlying suspicion of fraud and/or a background dispute between insurers as to who should be dealing with it.

Full information regarding the revised minimum terms is available on the ICAEW's website, at: <http://www.icaew.com/>

If there are any points you wish to discuss regarding this article, please contact Jonathan Henney, or any other member of our Financial Professions Team:

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We can put together a seminar/talk or panel discussion on the issue above, or any of the issues featured in our publications to be held at any of our offices, or yours.

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