

## Notification Dilemmas

With the recession continuing, professional negligence claims are on the increase and expected to rise sharply over the coming months as financial institutions move on from focusing on their own survival to looking to recoup their losses. Advisers, with their professional indemnity cover, are an obvious target. It will therefore be more important than ever for advisers to ensure that they give proper and timely notification of any claim, or circumstance.

Notification has always been a thorny issue, as illustrated vividly by the case of *HLB Kidsons v Lloyd's Underwriters & Others* which went to the Court of Appeal last year. So what steps can professional advisers take to ensure they give full and proper notification? We asked our contributors: **David Robinson**, Partner, Holman Fenwick Willan LLP, who represented the insured in the *Kidsons* case, and **Andrew**

**Nickels**, Risk Manager, Zurich Professional & Financial Lines. Lastly, we spoke to **Hugh Wodehouse** for his thoughts. Hugh joined the TLO team earlier this year and was formerly Chairman of the UK Division of Thomas R Miller which manages Bar Mutual and other professional indemnity insurance companies.

### THE INSURED'S VIEW

*David Robinson, Holman Fenwick Willan LLP*

David Robinson is well placed to comment on notification issues. Having represented *Kidsons* from the outset in *HLB Kidsons v Lloyd's Underwriters & Others*, he has looked at the issue in some depth. As the partner responsible for arranging his own firm's professional indemnity insurance, he also deals with notification issues regularly and is fully acquainted with the dilemmas to which notification can give rise.

### Some words of warning

During a recession, there is a risk that firms – in their enthusiasm not to turn away much-needed work – will be less rigorous than they should be as regards their client care procedures, and even a danger that they may take on work which is not strictly within their expertise. This is to be avoided. The Solicitors Regulation Authority is sharpening its knives in relation to all client care and conduct issues and the profession

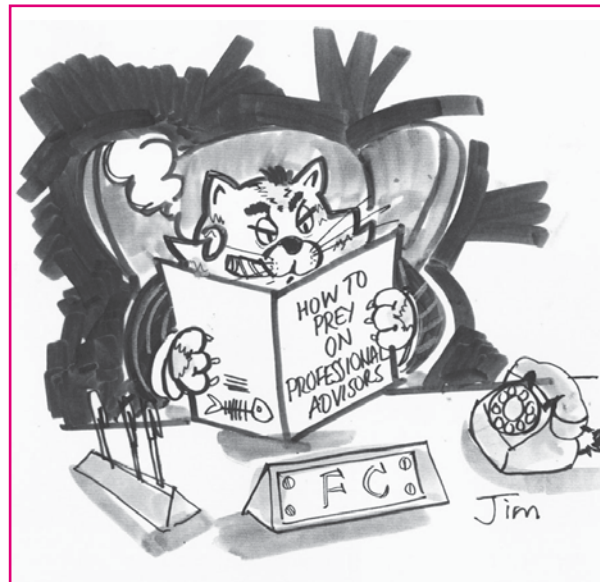
can expect substantial penalties for non-compliance.

Also to be avoided is any concern about not 'rocking the boat' with insurers for fear of increased premiums, which, in turn, can lead to firms making a less than full and frank notification. The instinct of some professionals that the situation might improve, that they might be able to resolve things or talk the client round is a dangerous one, particularly in the increasingly robust

regulatory climate in which we are now living. Professionals simply cannot afford to be economical with what they tell insurers. The closer they play their cards to their chest, the greater the risk they take with their cover: potential avoidance by the insurer or, in the case of solicitors, questions of recoupment. Ring your brokers, share the problem with them and do not hold things back.

### Notification – some pointers

Never rely on a telephone call to constitute notification. As to the content of a notification, insureds should be encouraged to comply with the four-limb test set out by Gloster J in *Kidsons*, and to bear in mind the overarching requirement endorsed by the Court of Appeal in that case, that the notification must be in "fair, comprehensive, and comprehensible terms". On a practical level, it is worth heading the notification letter *Notification of Circumstance*



or *Notification of Claim* to ensure there is no ambiguity about what is being notified. No insured wants to be in Kidsons' position - facing substantial legal fees plus the cost of apparently endless underlying claims.

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**“...Professionals simply cannot afford to be economical with what they tell insurers”**

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Another thing to watch out for is any clause in the policy which turns the timeliness of notification into a condition precedent to liability. Always assume that “*as soon as practicable*” means now. Professionals buy insurance cover so they can sleep soundly in bed at night and it is not worth jeopardizing that cover by notifying late. Finally, on whom to notify (another issue in the *Kidsons* case): follow to the letter any notification instructions in the policy.

### Managing risk

It is important for a firm to appoint somebody within the firm whom everybody knows is responsible for notification. Enquiries about potential claims (or circumstances which might give rise to a claim) should be addressed to all those engaged in the work of the practice: full-time and part-time staff from partners down to paralegals. Holman Fenwick Willan also extends its enquiries to the Cash Department and people responsible for chasing overdue fees on the basis that a telephone call to a client to chase late payment may reveal a client grievance.

### THE INSURER PERSPECTIVE

*Andrew Nickels, Zurich Professional & Financial Lines*

Solicitors have always been seen as an easy target for professional negligence claims, but valuers and surveyors will be in the firing line too. Accountants will also be at risk from allegations of inaccurate audits, and, in the context of their insolvency work, from disputed valuations of assets and holdings for disposal.

Zurich is expecting to see an increase in residential notifications, and these are likely to increase

substantially once lenders begin to focus on which claims to pursue (to date they have been preoccupied with their own survival). In addition, with the sharp increase in reported repossessions since the beginning of the year, any potential repossession is likely to result in an audit of the original purchase file.

### Make contact

With the tough economic climate and professionals being laid off, there is a danger that solicitors – as well as other professionals - may become more reluctant to notify. Zurich encourages its broker and direct solicitor clients to get in touch about notification issues, and provides a dedicated helpline for that purpose.

Deciding whether there is a notifiable circumstance can be a difficult judgment call. For example, with repossessions on the rise, a lot of lenders are now

requesting the original purchase file for the property to be repossessed (possibly on a ‘fishing expedition’ for potential claims to bring against the professional advisers involved in the event of a shortfall). In Zurich’s view, a simple lender request for the purchase file is not a notifiable circumstance; the purchase file (or, more specifically, their part of it) is the lender’s property and the lender is entitled to ask for it. However, if a solicitor were to audit the file before handing it

over to the lender and to identify that there had been a failure to disclose a discount, for example, to the lender at the time of the transaction, that would be a notifiable circumstance. Effectively, the insured would be aware that there was something which he should have done, and he would at that point be in possession of material facts which could lead to a possible action in the event that the lender suffered loss.

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**“...Always assume that ‘as soon as practicable’ means now”**

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### Provide full notification as soon as possible

Zurich requires all particulars to be notified, including the full facts, dates, parties, and reasons for anticipating that a claim might arise. Full notification is also in the



insured's interest: a claim can arise years after the expiry of the policy under which the circumstance giving rise to the claim was notified, and the insured will want the comfort that any claim arising out of those notified circumstances will be covered.

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***“...Reporting is healthy and demonstrates that a firm is fully committed to managing risk”***

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For Zurich, an insured cannot notify too soon. For example, its solicitor policies require insureds to notify immediately so that Zurich has time to remedy the situation or at least mitigate the chances of a claim arising. By way of illustration, if a missed limitation period is notified immediately, Zurich can consider mitigation by, where relevant, issuing an application under section 33 of the Limitation Act (where the court has discretion to disapply the time limit). Late notification will mean nothing can be done to remedy the situation.

### **Don't agonise – reporting is healthy**

There is often a risk of insureds confusing the merits of a potential claim (which is a matter for the insurers) with the obligation to notify (which is a matter for the insured).

Insureds will project themselves into the circumstances of the claim, think themselves into a defence and then – mistakenly – decide that they do not need to notify after all or notify late. This can lead to insurers not being notified until solicitors have been instructed, proceedings have been issued or, in extreme cases, where judgment has been entered. The insured will then have failed to notify in accordance with the notification requirements as notification will be too late. In the case of solicitors, insurers will as a result be entitled to claim reimbursement where prejudice has arisen (under the terms of the Qualifying Insurers' Agreement, insurers cannot avoid solicitor policies).

Reporting is healthy and, in Zurich's view, demonstrates that a firm is fully committed to managing risk; by contrast, firms which are reluctant to report can find

themselves subject to financial sanctions. A large number of reported circumstances, of which a significant number have been closed without payment or defence costs, indicate a firm which has a relationship with its broker, is acutely aware of its reporting obligations, and, importantly, has a culture that is aware of mistakes and so is abundantly cautious.

### **Improving risk management**

Firms will usually carry out an annual pre-renewal trawl asking staff to report anything which they think could give rise to a claim. However, this may bring to light things which should have been reported earlier. It is therefore good practice for firms to send out a monthly circular asking if anybody knows of anything which should be reported.

Firms should train all employees, including support staff, to report anything amiss and should be receptive to concerns reported by staff, whatever their position in the organisation. In one case, the employee responsible for the post had, in error, put all the firm's mail which was to be sent by DX in the post. The post included settlement cheques and so the matter was serious. It was, however, several days before the employee could gain access to somebody to whom he could report it.



Finally, economic downturns when work is less plentiful, are often a good opportunity for firms to review their risk management processes and address risk issues. Useful lessons can be learned from one recession which could prevent similar claims in future.

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***“...The message is loud and clear from the Kidsons judgement - there are no hard and fast rules as regards notification”***

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### **LAST WORD**

*Hugh Wodehouse, TLO*

Having had the experience of managing a mutual insurance company for leading firms of surveyors at the time of the collapse of the residential and commercial

property market in 1990, Hugh Wodehouse does not underestimate the volume of claims that will arise as a direct or indirect result of the recent fall in property values. Some of these claims will require a difficult exercise of judgment as to whether notification is appropriate. Many of the losses claimed will be legally too remote, but even hopeless cases can be expensive to defend – there have always been litigants whose vigour in pursuing a claim is in inverse proportion to its merits. Clearly, underwriters should not be notified of every complaint but the mentality of the complainant should be taken into consideration as well as the merits of the complaint.

The message that comes across loud and clear from the *Kidsons* judgment is that there are no hard and fast rules as regards notification (the judgment is less relevant to solicitors whose insurers are precluded from avoiding cover under the terms of the Qualifying Insurers' Agreement, but solicitors can still face financial sanctions and questions of recoupment). Two general comments can be made on the Court of Appeal judgments in *Kidsons*. First, in the event of a dispute on the validity and/or scope of a notification, the insured is in grave danger of losing the sympathy of the court if there is any question as to whether the notification has been less than full and frank. Second, in the case of a claims made policy, the onus is heavily on the insured to try to ensure that the notification to all underwriters is made before the end of the policy year.

Notification – and the dilemmas to which it gives rise – remains a very real issue for insureds. One of the most difficult areas is the tax avoidance field where there is almost invariably a potential battle with the Revenue, and a chance that the battle will be lost. On an extreme view, almost any tax avoidance scheme could be a potentially notifiable circumstance and the onus could then be transferred onto the underwriter to decide whether or not to accept the notification. Given the potential problems relating to notification, Hugh could not endorse more strongly the recommendations above that an insured contact his broker with any notification queries.

### PRACTICAL TIPS

- Ring your broker – they are there to guide and advise.
- Full and frank disclosure pays; anything less does not.
- Always notify in writing and ensure the notification is in 'fair, comprehensive and comprehensible' terms.
- Report promptly – do not agonise over the merits of the claim or circumstance.
- Involve all relevant staff in reporting and circulate regular report requests – do not rely solely on the pre-renewal trawl.



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