

**IRISH SOLICITORS' PROFESSIONAL INDEMNITY INSURANCE**  
**CHANGES TO REGULATIONS AND MINIMUM TERMS**

**August 2011**

**By Stephen Chessher and Michelle Kilroy**

We last issued a bulletin on the Irish solicitors' professional indemnity insurance market in June this year. The future of the Solicitors Mutual Defence Fund was then unclear (other than that it had already announced that it would not be writing new business) and a master policy was being considered by the Law Society.

Since then the members of the Law Society have agreed in a postal ballot to provide financial support to the SMDF up to €16m over a period of 10 years in order to allow an orderly wind-down. And the Law Society has ruled out a master policy, at least for the next period of insurance.

The issues which led both to the near insolvency of the SMDF and to consideration of a master policy have not gone away and the Law Society has attempted to address some of those issues by way of changes to the Solicitors PII Regulations, the Minimum Terms and Conditions and the Qualified Insurers' Agreement which will have effect from next renewal 1 December 2011.

We comment on the most significant changes below.

**SPECIAL PURPOSE FUND**

The most far reaching changes concern run-off cover and the Assigned Risks Pool ('ARP'). As from 1 December 2011 there will be a Special Purpose Fund ('SPF') run by an SPF Manager which will be responsible for both operation of the ARP and operation of a new Run-off Fund. The SPF Manager will in turn be overseen by an SPF Management Committee which will include minority representation from qualified insurers.

**Assigned Risks Pool**

The current ARP arrangements are expected to remain unchanged except that new entrants to the ARP will be allowed to remain in the ARP for no more than 12 months and start-up firms will not be allowed to enter the ARP.

The Law Society will have the power to introduce specified amendments to ARP cover at the discretion of the PII Committee including the removal of the aggregate limit but the Society has said that it does not expect to introduce such amendments in the next indemnity period.

**Run-off Fund**

Run-off arrangements have been radically changed.

Currently run-off cover, if required, must be provided by qualified insurers for two years following cessation of practise at rates notified to the insured at the time that the cover is taken out. Previously the obligation was to provide cover for six years.

In future, qualified insurers will not be required to provide run-off cover. Instead, run-off cover will be provided by a new run-off fund which will be administered by the SPF Manager. The Law Society has indicated (but not undertaken) that the SPF Manager's appointment will be tendered. It is envisaged that the SPF Manager will delegate its claims management functions to one or more qualified insurers.

The principle features of the new Run-off Fund will be:

- Run-off cover will be provided free of charge to eligible practitioners;
- Run-off cover will be of unlimited duration (and provided indefinitely so long as the current open-market PII arrangements continue);
- Run-off cover will be subject to the same excess that applied during the previous coverage period (ie under a policy issued by a qualified insured);
- Other than for claims made against the insured by financial institutions, the SPF will be required to pay the excess but will be entitled to seek recovery of the excess from the insured;
- Firms ceasing practice will be required to adhere to guidelines for closure etc otherwise additional excesses may be imposed by the SPF Manager on a discretionary basis;
- Run-off cover will commence on expiry of the coverage period rather than at the date of cessation of practice. An existing qualified insurer will be obliged to maintain cover in force for a firm that has ceased practice until the policy expires;
- There are to be anti-abuse provisions intended to prevent a firm going into run-off and re-starting as a so-called 'phoenix' firm leaving claims against the original firm with the Run-off Fund. The extent (and likely effectiveness) of these provisions is as yet unknown.
- There are changes to the succeeding practice rule. The changes are technical but the outcome is likely to be that not all firms deemed to be succeeding practices under the current rule will be so deemed in future and therefore that some claims which would currently fall to be dealt with under the PII of the succeeding practice will in future fall to the Run-off Fund.

Insurers' exposure to the Run-off Fund is to be in proportion to market share based on the premium income of each qualified insurer as a proportion of the total market premium income.

The cumulative effect of these changes will be to benefit those practitioners ceasing practice as they will be entitled to 'free' cover for an unlimited period. Practitioners intending to cease practice before the end of the next coverage period can be expected to seek a low excess which will be carried over to the run-off cover and may also seek short-term cover (ie for less than 12 months).

The cost of run-off cover will ultimately be spread across the profession as a whole by way of increased premia. How underwriters will price their exposure to the Run-off Fund remains to be seen.

## CHANGES TO RENEWAL PROCEDURES

### Variable Renewal Dates

At present there is a common renewal date of 1 December.

In future insurers will be able (though not obliged) to offer different renewal dates. The way in which this will work is that the next common renewal date remains 1 December 2011 but insurers will be able to offer cover for any period they choose (subject to a maximum of 24 months). So if a six month policy were to be issued the next renewal date would be 1 June 2012 rather than 1 December 2012.

It remains to be seen whether either insurers or insureds will embrace this freedom with any degree of enthusiasm. In considering whether to offer short term policies, insurers will doubtless wish to bear in mind that the firms most likely to seek those policies may well be those firms that are considering ceasing practice and would particularly benefit from the combination of short term cover and 'free' run-off cover.

## **Common Proposal Form**

A common proposal form is to be introduced by the Law Society use of which will be mandatory by all qualified insurers. We understand that the form has now been finalised and qualified insurers are encouraged by the Law Society to issue it (and solicitors to apply for cover) as soon as possible.

Insurers should be aware that they will be obliged to issue quotations within 10 working days of receipt of a fully completed proposal form. They will also be obliged to hold quotations open for at least 10 days.

## **Financial Rating**

Insurers will be obliged to disclose their financial rating (or absence thereof) when issuing quotations.

## **REPORTING CLAIMS OR CIRCUMSTANCES – THE DOUBLE TRIGGER**

The insuring clause allowed by the current Minimum Terms operates on the basis of a so-called 'double trigger', that is that claims must be first made against the insured AND notified to the insurer within the coverage period or alternatively that the claim must arise from circumstances first notified to the insurer during the coverage period.

Most if not all insurers in recent years have experienced a marked increase in claims being made at the very end of the coverage period as claimants and their advisers have become increasingly aware of PII issues. Operation of the double trigger could then give rise to difficulty. If, for example, a claim was first made against the insured on 30 November, the double trigger would require notification of the claim to insurers to be made on the same day which might be well-nigh impossible. If the claim was notified to insurers on 1 December or later, the claim would have been made against the insured in one coverage period but notified to insurers in another coverage period with the result that it would be covered under neither policy.

Some insurers have taken the view that strict operation of the double trigger in these circumstances leaving an insured without cover is harsh and unfair and therefore allow 'days of grace' after the renewal date within which a claim may still be notified and deemed to attach to the previous coverage period. In our view insurers are not obliged to do so and it is uncertain whether an arbitrator or the Courts would imply days of grace into the policy of insurance in order to give the contract commercial efficacy.

The solution that the Law Society has imposed under the new Minimum Terms is that three days will be allowed after expiry of the cover for insureds to notify claims made or circumstances of which they became aware during the coverage period.

This new provision is clearly open to abuse. If an insured is aware of a claim or circumstances when completing its proposal but does not disclose it, terms may be offered which are more favourable than would otherwise be the case. If the claim is then reported not more than 3 days after renewal (to the insurer for the previous coverage period), that insurer will be obliged to deal with the claim. Insurers for both coverage periods will be disadvantaged and neither will have any effective remedy as against the insured. The Law Society has said that it is open to considering anti-abuse provisions but it is not clear what they might be.

## MISCELLANEOUS PROVISIONS

- Insurers are to be asked by the Law Society voluntarily to provide both insureds and the Society with guidance on risk management and loss mitigation at least half-yearly. This would presumably be satisfied by the provision of six monthly generic newsletters/updates rather than advice tailored to individual insureds.
- The Law Society considered but decided against requiring qualified insurers to provide cover for costs of defending disciplinary and regulatory complaints. It will of course be open to insurers to provide such cover if they choose to do so.

## CONCLUSION

Changes to the PII Regulations and Minimum Terms have been introduced rather earlier this year than last year and it is to be hoped that there will be no last minute changes before renewal as happened last year.

In considering changes to the PII Regulations and Minimum Terms the Law Society has had the objectives of making the market more attractive to existing and potential new qualified insurers whilst at the same time improving cover for solicitors (particularly those closing their practices), minimising or eliminating further substantial rises in premium and smoothing the renewal process. It may be thought that these objectives are mutually irreconcilable. The proof of the pudding will be in the eating.

**For further information contact Stephen Chessher (partner) or Michelle Kilroy (solicitor) on +353 1 775 9505 or at [S.Chessher@beale-law.com](mailto:S.Chessher@beale-law.com) or [M.Kilroy@beale-law.com](mailto:M.Kilroy@beale-law.com).**

*Beale and Company acts for solicitors and their professional indemnity insurers in Ireland and in England and Wales.*