TLO Risk Services

TOP UP INSURANCE
LARGE CASE ADVICE

Purchasing cover for a particular or unusually large case

TLO are often approached for Top up cover for one off cases, be it at a level above a usual limit of Top up, or at a very significant level based on a large case quantum.

Due to the pricing structure of catastrophe cover, there is no discount available through choosing to isolate an increased level of Top up cover to just one case. Any increased level of cover would apply to a Barristers entire practice. It is also worth noting that the cover does not have any retroactive date – so provided no circumstances are known which may give rise to a claim, then any future claim arising from past work would also have the benefit of a higher level of cover.

The basis upon which Professional Indemnity Insurance is underwritten is quite often misunderstood, but is an important factor to consider when looking at taking cover out for a particular piece of work, as there are implications for a period of time into the future.

Professional Indemnity insurance is underwritten on a Claims Made basis, meaning it is the policy in place at the time of a claim that would respond – not necessarily the policy in place at the time of the work or alleged negligence.

The implication of this is that in order to remain fully protected, it does create an ongoing requirement/obligation to continue to purchase (depending potentially on the outcome of the case). A barrister would need to consider retaining cover for the duration of any applicable limitation period – typically 6 years, but potentially longer for certain types of work having regard to the latent damage provisions of section 14A of the Limitation Act 1980 and the two-year limitation period on contribution claims, which begins to run after the original claim against the contribution claimant has been resolved, whether by judgment or compromise If choosing to "price in" the cost of higher insurance into the fees charged, this ongoing obligation should also be considered.

A barrister could elect to take out the higher level of cover at the commencement of the work, and if the case settles to everyone's satisfaction and after assessment there appears to be no prospect of a future claim – then the barrister could choose not to continue to purchase at that level; however should a claim actually arise, the barrister would only have the protection of their current level of cover in place at the time of the claim.

For cases with a large quantum, the most cautious approach would be to purchase to the full value of the case – but it does not necessarily reflect how any negligence claim may in reality be brought and indeed whether any amount claimed is likely to be as binary as "all or nothing" or whether there also other parties involved such as co-counsel or the instructing firm.

It may be possible through the use of the COMBAR terms (or similar) to limit liability to a certain figure (which would remain subject to any reasonableness test) and similarly it may be worth establishing any liability cap an instructing solicitor may have with the lay client.

Lastly for an unusually large and "one off" piece of work, there is a potential option to utilise the mechanism TLO offer for retiring barristers, where a "run off" cover could be purchased for a six year period at the conclusion of the work – which costs 320% of the in full premium.

If you would like to discuss the content of this paper further please contact us on 020 7183 4925 or by email at barristers@tlorisk.com