Legal Indemnities

Regulation
Disclosure
&
Non
Invalidation

JANUARY 2025

J W Lear LTD
Authored by: Adrian Fisher

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WHERE THE EXPERIENCE MATTERS

We have seen it suggested that law firms arranging title insurance might be better off 'going direct' to insurance providers (insurance companies or underwriting agents) in order to ensure nothing is omitted by way of disclosure. Let's think about that for a moment.

Regulation

When carrying out insurance distribution law firms will be Exempt Professional Firms and thus regulated by the SRA. As such you will be able to procure title insurance for your clients, making a personal recommendation or otherwise. In our experience firms will often engage with a broker even if they do not make a personal recommendation. Ordinarily we, as a broker, will make a personal recommendation which can be presented to your clients.

Disclosure

One of the biggest challenges we face when arranging insurance is ensuring all quotes are obtained on the basis of a fair presentation of the risk. We may approach several providers, each of whom could make further inquiries. The challenge is to keep all providers updated when further material information is disclosed as a result of inquiries of one provider but where others have not raised such inquiries. Some brokers may send all replies to all insurers, but that has some downsides, not least the volume of work involved and potential delays.

If a law firm goes direct to more than one provider or operates on a 'hybrid' basis by going direct and using a broker, then the law firm has the problem of deciding what to disclose to any provider with whom it is dealing directly should another raise additional inquiries.

> **"**Non invalidation clauses should give firms sufficient comfort to know that there really isn't a risk around non-disclosure to the insured when engaging with a broker or going direct.**"**

Non-Invalidation

All title insurance policies contain non invalidation clauses which should give an insured some protection against the risk of non-disclosure. Here is an example:

The interest in this policy of any Insured will not be invalidated by a breach of the policy terms or conditions by any other party, unless
a. Such party acted on the Insured's behalf or with the Insured's knowledge and consent
b. Where the Insured is a successor in title, they had knowledge of a breach of the policy terms or conditions or of previous nondisclosure or misrepresentation to the Insurer.

Thus, the insurer is likely to indemnify the insured, but having done so may consider its options for a recovery in terms of how the insurance was brought about by whom and the nature of the non-disclosure.

Non invalidation clauses should give firms sufficient comfort to know that there really isn't a risk around non-disclosure to the insured when engaging with a broker or going direct. But the question perhaps ought to be who might be considered responsible for a non-disclosure and how will an insurer react? We know claims do happen.

Conclusion

Regulation of law firms by the SRA does not preclude firms dealing directly with insurance providers. However, if a firm goes directly to one or more providers, it should carefully consider the need to keep all providers updated with disclosures arising out of the inquiries of one or more of them.

Should you wish to discuss any potential risk please contact Adrian Fisher ACII, Director, at JWL.
adrian@jwlear.co.uk

Mobile: 07913367534