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Sleep easy with blanket notifications

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Mark Jenkyn-Jones, Partner at solicitor practice Robin Simon LLP, considers the extent to which professional indemnity insureds can validly notify circumstances in light of the line of authorities leading to the most recent case of McManus & Others v European Risk Insurance Company [2013] EWHC 18 (Ch).

Claims made policies are now standard in the world of professional indemnity insurance ("PII"). They provide an indemnity against losses arising from claims made against them, as opposed to events occurring, during the policy period: i.e. the insurer on cover at the time the claim is made is on risk. It is also standard for cover to extend to losses arising from circumstances that may give rise to a claim, provided they have been notified to underwriters during the period of cover. Usually claims or circumstances are notified individually as and when a problem arises with a particular file. But what happens when it is discovered that many claims may arise from an underlying problem and the insured seeks to make a blanket notification?

The nightmare uncovered

The Claimants in *McManus & Others v European Risk Insurance Company* were partners in a firm of solicitors called McManus Seddon Runhams ("MSR"), a busy high-street practice in Bradford. McManus Seddons had acquired Runhams in 2011 and Runhams itself had previously acquired Sekhon Firth in 2010. MSR was successor practice to all these entities.

In November 2011, MSR received a single claim from a former lender client of Sekhon Firth.

They notified it to MSR's professional indemnity insurers, European Risk Insurance Company ("ERIC"). Further claims followed in early 2012 that also related to Sekhon Firth files. By mid-May 2012, 17 claims had been directed to MSR as the successor practice.

Unfortunately, MSR did not turn its attention to the underlying causes of these claims until the PII renewal period began in earnest in August 2012. At that stage, it became clear that there were a number of similarities between all of the claims that derived from Sekhon Firth's conveyancing work.

MSR appointed a legal consultant to carry out an urgent review of the claim files and a number of Sekhon Firth conveyancing files. He reported a consistent pattern of breaches which related to failures to report key 'red flag' information (such as back to back/sub-sale transactions, uplifts in purchase prices, incentives, discounts, deposits and monies being paid to third parties) to lender clients.

As a result, MSR sent a notification letter headed *'Blanket Notification of Circumstances which may give rise to claims'* on 21 September 2012 – only five working days before the renewal deadline. The notification highlighted the similarities in the allegations arising from the claims notified to date and from the findings in disciplinary proceedings taken against former members of Sekhon Firth. Having then referred to the outcome of the file review, it concluded *" every file conducted by Sekhon & Firth... is more likely than not to contain examples of malpractice, negligence and breach of contract and so each and every file of the predecessor firms should properly be notified to you as individually containing shortcomings on which claimants will rely for the purposes of bringing claims against this firm as a successor practice".*

The notification letter estimated there were approximately 5000 files, but could not rule out there may be many more. It also attached a list of all the Sekhon Firth files.

Sleepless nights at renewal

Having received the notification, ERIC concluded that the list of matters *"do not amount to a valid Circumstance as you have not [identified] the specific incident, occurrence, fact, matter, act or omission which would give rise to a Claim on each individual file. Simply stating that Sekhon & Firth worked on the files in the list...does not constitute a valid notification".* The notification was therefore rejected.

Following ERIC's rejection, and now under extreme time pressure, MSR could not obtain insurance for the 2012/13 policy year from a qualifying insurer and was forced into the Assigned Risks Pool ("ARP") – the insurer of last resort for solicitors who are uninsurable in the general market. This caused a significant financial drain, as the premium for six months' cover in the ARP cost more than double the amount that MSR had previously paid for a full year's premium. MSR therefore took an action against ERIC seeking a declaration that the blanket notification was valid so that the firm could increase its chances of obtaining cover in the insurance market.

Safe under the blanket

The leading case on blanket notifications is *J Rothschild Assurance plc & Others v Collyear & Others* [1998] C.L.C 1697 ("Rothschilds"). In that case, the claimant sought to notify its insurer of possible future claims for pensions mis-selling. The letter of notification referred to bulletins issued by the relevant regulatory authority and a market report describing wrong advice given to investors to transfer out of occupational pension schemes and into personal pension plans. The claimant's notification attached 2,500 pension transfer policies that could give rise to claims.

The insurer in *Rothschilds* rejected the blanket notification on the basis that no

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cause for concern specific to any transfer case had been mentioned nor had the regulator's bulletin directed any criticism against the claimant. Claims were subsequently made against the claimant by former clients alleging that they had been mis-sold pensions. The court held that the prevalence of mis-selling by other providers, as evidenced by the market report, meant that it was at least possible that equivalent non-compliance would give rise to claims against the claimant. The court therefore upheld the blanket notification.

HLB Kidsons (a firm) v Lloyd's Underwriters [2008] EWCA Civ 1206 ("Kidsons") is the other leading case in this area. The case related to a notification made by a firm of chartered accountants who had concerns about the efficacy of various tax avoidance products that they had provided to clients. A tax manager in the firm had vociferously expressed concern about the products and Counsel's opinion had re-enforced this.

At first instance, Gloster J found that the letter did not amount to a notification because it was vague and nebulous; it contained no identification of any error, act or omission or possibility of any claim and did not identify the products or procedures that gave rise to concern. However, the Court of Appeal rejected this test as too stringent and held that the letter had been a notification of circumstances that could give rise to a claim. Those circumstances being the tax manager's view that implementation of certain products might be criticised and might give rise to possible claims or losses.

Deputy Judge Rose, in *McManus*, considered these authorities and observed that a blanket notification of circumstances can be held valid, even though the notification does not specifically refer to the transaction from which a claim may arise, or identify a defect in relation to the handling of a particular client that is likely to give rise to a claim by that client. In *Rothschilds*, the Court, having found that there was a sufficient factual basis to amount to a circumstance, held that the notification covered advice, despite the fact that the claimant had not even been able to list the clients to whom such advice had been given.

Similarly in *Kidsons*, there was no suggestion either in the judgment of Gloster J or the Court of Appeal that the notification was ineffective because it failed to identify particular clients to whom the tax avoidance products had been sold or to examine whether the particular client might have a claim.

Provided circumstances exist which may give rise to a claim, and provided those circumstances are notified, then any future claim arising out of those circumstances must be indemnified by the Insurer at risk at the time of notification. This applies whether or not the particular transaction or possible claimant has been identified at the time of the notification. Deputy Judge Rose therefore held that the position adopted by ERIC was wrong, and upheld the blanket notification.

Conclusion

McManus is a good reminder that multiple claims arising from one area of an insured's business need to be investigated as soon as possible. From an insured's point of view, early file reviews are essential to understand the size of the problem and the size of any subsequent notification to insurers. From an insurer's perspective, they need time to consider and raise any queries about the notification. Seeking insurers' acceptance of a blanket notification just prior to renewal is unlikely to result in a happy ending for either party.

There must be an underlying factual basis to the notification that gives the Insured the necessary knowledge and/or foresight to notify a circumstance that may give rise to a claim in due course. However, *McManus* confirms that a blanket notification is likely to be valid, even though it does not specifically identify individual transactions, clients and/or defects from which claims may arise in due course. Whether this type of notification will ever allow insureds and/or their insurers to sleep easy is a different matter.

This document does not present a complete or comprehensive statement of the law, nor does it constitute legal advice. It is intended only to highlight issues that may be of interest to clients of Robin Simon LLP and MFL Professional. Specialist legal advice should always be sought in any particular case.© Robin Simon LLP 2013.

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