

Legal costs insurance

Legal expenses insurance is often added to an insurance policy or mortgage and generally covers employment disputes. Camilla Palmer and Joanna Wade look at common policies, their terms and potential problems and offer advice on how to deal with them

Solicitors have a legal obligation to advise their clients to check whether they have insurance. In particular, the Conditional Fee Agreement Regulations (reg 4(2)(c)) provides that the legal representative must inform the client about legal expenses insurance.

In *Andrea Culshaw v Mark Goodliffe (Liverpool County Court 24.11.03)* the court held that it was not enough for a solicitor simply to ask his or her client whether they had insurance and in most cases further enquiry had to be made.

Where can legal expenses insurance be found?

Many mortgages and insurance policies, such as buildings, contents, car insurance, provide legal expenses insurance. Some credit cards entitle the insured to free legal advice from the insurer's solicitors. Individuals should:

- take out legal costs insurance *before* a claim arises
- check all insurance policies and mortgage
- find out if their partner or parents have insurance for the whole family
- telephone the insurance company if in doubt
- check the terms of the policy; many require the insured to report a claim to them immediately).

What does it cover?

Most policies cover employment disputes. Common conditions are:

- the claim being proportionate to the benefit to be gained
- a limit on the legal costs; for example, £25,000, £50,000 or £100,000 including VAT
- a waiting period of about 90 days to ensure the policy is not taken out to cover an existing claim
- an initial reserve of about £3,000 so that permission has to be obtained to increase it each time the reserve is reached.

Common exclusions

These include:

- legal costs incurred before the insurer has agreed to support the claim and reached agreement with the solicitor

Camilla Palmer and Joanna Wade: Palmer Wade

- certain types of claims; for example, some policies exclude equal pay
- advice or representation at an internal grievance/disciplinary procedure; cover does not usually commence until these procedures have been completed
- mediation, but this varies between insurance companies
- breach of contract and negotiating and settling compromise agreements where the employment has not yet been terminated.

Does it cover tribunal proceedings?

If the insurance company says that tribunals are not "proceedings" that is wrong. The legal costs insurance expert at the Insurance Ombudsman's Office takes the view that employment tribunal proceedings are covered.

Are costs recoverable from compensation?

Many policies state that all attempts must be made to recover costs. This is unlikely to happen in tribunal proceedings, because costs are not often awarded. If they are awarded, the policy may cover them up to the limit of the reserve.

What if costs are likely to exceed the compensation?

Some insurers may want to be sure that it is economical to fund the proceedings. Others will provide cover even if the costs are likely to exceed the compensation.

Usually, insurers will want to know about any offers and will not extend their cover so that the policy holder can simply "have their day in court" without the prospect of recovering more than is on offer.

The insured will be expected to accept any reasonable offer of settlement and refusal to do so will generally lead to the insurance cover being withdrawn

Obligation to inform an insurance company

There is usually an obligation on the insured to inform the company of potential claims within a specified time. However, even if the deadline has passed, it is still worth making a claim.

Duties to consult or inform insurer

Policies vary enormously but the following often require approval:

- instruction of counsel and their fees: many have special agreements with chambers and will ask that they are used unless a cheaper deal is available elsewhere. The exact fees must be agreed with the insurers
- offers of settlement: most insurance companies will want to be told of any offers of settlement. If the solicitor advises it is a good offer insurance will not be continued
- before lodging the claim: some policies require prior authority to lodge the claim and will want to be assured that the prospects are over 50 per cent.

Duty to advise on prospects, costs and value

Many insurers want an initial report (often within 14 days) on prospects and estimated costs and regular updates on:

- prospects, say, every three months
- costs estimates
- value of the claim
- steps taken towards settlement
- any settlement.

If there is a dispute about prospects, this may be resolved by getting counsel's opinion. The insured will be expected to accept any reasonable offer of settlement and refusal to do so will generally lead to the insurance cover being withdrawn.

Is there a right to choose your solicitor?

The Insurance Companies (Legal Expenses Insurance) Regulations 1990 provide that:

"Where under a legal expenses insurance contract recourse is had to a lawyer) or other person having such qualifications as may be necessary) to defend, represent or serve the interests of the insured in any inquiry or proceedings, the insured shall be free to choose that lawyer (or other person)." This right should be expressly recognised in the policy (reg 6).

It is an offence for an insurance company to insist on using their in-house solicitor or their panel solicitor.

The Financial Ombudsman Service

The service says that one of the most common complaints about legal expenses insurance concerns who chooses the policyholder's legal representatives.

Both parties feel strongly about this. Insurers consider that their panel of solicitors has the relevant expertise to deal with any type of legal proceedings, and that these solicitors' costs are properly controlled.

Policyholders take the view that only someone they have chosen will represent their interests vigorously and impartially.

In many cases, they are unsure whether a solicitor chosen by the insurer will represent their interests, or the insurer's. And they frequently complain that the firm of solicitors chosen by the insurer is in a less convenient location than their preferred firm.

The Insurance Companies (Legal Expenses Insurance) Regulations 1990 give policyholders the right to choose a lawyer. However, they can only exercise this right after administrative or legal proceedings have started. The effect of this qualification is to dilute the policyholders' right.

Policyholders may – with some justification – feel reluctant to exercise their right when it means they will be appointing solicitors to take over mid-stream. Indeed, they may not always be able to afford to choose new solicitors.

This is because some insurers require policyholders to meet the new solicitors' costs for updating themselves with the work done by the previous firm.

The converse also gives rise to disputes. Where policyholders have paid for legal advice before notifying the insurer of a claim, they will not unnaturally wish that same firm to continue with their case. However, their insurer may prefer to insist that a solicitor from its own panel takes over the action.

We do not always support insurers in this position, despite the fact that, legally, they are entitled to make a new appointment.

This is for two reasons. First, the current firm will already be familiar with progress to date and appointing a new firm will require duplication of effort and expense. Second, the replacement of the original firm may only be temporary, since it is highly likely the policyholder will insist on returning the case to them as soon as possible.

We consider that insurers should take a pragmatic approach. Where one firm is already familiar with all the background and

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is dealing satisfactorily with the case, it will generally not be sensible for the insurer to involve another firm unless, for example, the new firm has superior expertise. Otherwise, insurers risk alienating their policyholders to little or no advantage.

Hourly rate

This varies and is essentially a matter for negotiation with the insurer. The insurer's standard rate for panel firms is usually very low at £90-£125 an hour; some insurers will agree the appropriate county court rate but often will not allow more than £200 an hour for a partner (if they agree for a partner to act at all). It may be possible to challenge a very low hourly rate, such as £125 an hour, as being a denial of the right for the client to choose his or her solicitor.

Recovering costs

Some insurance companies make interim payments. Usually, the solicitor's file will be sent to a costs draughtsman to assess, a process that often involves checking every minute recorded in order to try and reduce the bill. And usually, a compromise can be reached by some hard bargaining but a 10 per cent reduction is not uncommon even when every minute is recorded on the file. In most cases disbursements will be paid in full provided they have been authorised in advance. This is a lengthy and time consuming business.

Disputes

If there is a dispute, a complaint can be made to the insurance ombudsman (see www.financial-ombudsman.org.uk).

Camilla Palmer and Joanna Wade, Palmer Wade