

### **LEI and Freedom of choice**

Clients with Legal expenses insurance can appear to have very little flexibility in choosing a solicitor if they wish their LEI insurer to fund their legal costs. There is, however, limited choice in fatal claims. The Insurance Ombudsman has ruled, in clinical negligence cases involving death and where the claim is over £15,000, that the insured should be given freedom of choice. In all other cases an insurer may refuse to provide cover under the policy unless the client instructs one of its panel firms. However, there have been recent developments and it could now be argued that the interpretation of European Directive 87/344 (which provides that the insured person must be able to choose a lawyer in any enquiry or proceedings) in the UK is too restrictive.

### **Recent case Law**

The recent Austrian case **Erhard Eschig v UNIQA Sachversicherung AG (C-199/08)** (10 September 2009, Second Chamber) may have strengthened a clients freedom of choice, although it may be distinguished on its facts as it concerns a group action. However this case does emphasise that the European Directive was intended to ensure freedom of choice for insured litigants from the initial investigative stages of the claim.

This case arose after Mr Erhard Eschig the Claimant, entered into a contract for legal expenses insurance with UNIQA Sachversicherung AG (UNIQA). Eschig invested in investment services undertakings which became insolvent and instructed a lawyer of his choice. UNIQA, which insured around 180 victims of the insolvency, asserted that it was entitled to select a legal representative. The Austrian Law on Insurance Contracts 1958 provides that the insurance contract can prevent the insured from choosing a lawyer of his choice in certain circumstances. The general conditions on legal expenses insurance elaborated by the Austrian confederation of insurance enterprises allow the insurer, and not the insured, to choose the lawyer in certain circumstances. The Austrian court asked whether Article 4(1)(a) of Directive 87/344 on legal expenses insurance precludes a clause, which entitles the insurer to select a legal representative for insured parties with claims arising from the same event, thereby restricting the right of the individual insured person to choose his own lawyer.

#### *Judgment*

The Court held that Article 4(1)(a) must be interpreted as not permitting the legal expenses insurer to reserve the right, where a large number of insured persons suffer loss as a result of the same event, to select the legal representative of all the insured persons concerned.

In the wake of the case of Re: Eschig the compatibility of the UK legislation as to freedom of choice of solicitor with the EU legislation is being debated in all quarters. The FSA is currently considering the impact on legal expenses insurance contracts of the judgment of European Court of Justice in **Eschig**.

### **The present position in the UK**

In the mean time it remains that in the UK LEI insurers continue to deny their insured the right to choose their own solicitor (at least initially). In doing this they quote case law in

support of their contention that only after issue of proceedings may the insured choose his or her own solicitor.

However The Insurance Companies (LEI) Regulations 1990 reg 6, which gives effect to European Directive 87/344 supports the right of the insured to their own choice of lawyer in any enquiry or proceedings. It is the qualification of 'any enquiry or proceedings' that causes problems for the insured who wishes to instruct a solicitor of their own choice from the outset. However in Sarwar –v- Alam (2001) the Court of Appeal expressly found that this would include during the pre-action protocol. The wording of the individual insurance policy concerned may also be of help, most standard policies indemnify the insured against the costs of access to justice, not just litigation

### **Some practical suggestions**

In addition to considering arguments based on case law and the Directive there are practical arguments that a solicitor may employ. A solicitor can seek to persuade the insurer by pointing out a client's overwhelming wish to choose their own solicitors and how they are (perhaps because of specific knowledge of the subject or a previous case where the insurer has agreed to their instruction) the proper solicitors to act for their insured.

If solicitors are not on an insurers panel they are nearly always refused permission to act in the first instance and insurers seem to be more determined not to exercise discretion under the policy. However, some solicitors are successful in persuading the insurer to change their minds though usually because they have a track record of having worked together before or in situations where there are a number of similar claims and it makes economic sense for one solicitor to act for all claimants.

Often none of a solicitors arguments will prevail with an insurer who wishes panel solicitors to do the work, usually at no, or very low, cost to the insurer. In the absence of a specific legal challenges, brought by the insured as a test case, the client then has three choices

1. to ignore the insurer altogether and pay privately
2. accept the solicitors the insurer allocates to his or her case (perhaps later exercising the right to a solicitor of their choice)
3. to accept a CFA (if one is offered) from their solicitor of choice – in that case solicitors must carefully document the client's choice in the initial pre CFA advice and give reasons for the client's choice not to claim on the LEI policy in order to justify success fees at the end of the case (provided it is successful)