The calm before the storm?

There has been no rise in claims against brokers but, as Simon Fenn explains, the unstable conditions mean it could all change...

Although the insurance sector has emerged relatively unscathed from the current financial crisis, there is speculation insurance brokers could be adversely affected by errors and omissions (E&O) claims, as clients try to stay solvent by taking professional advisers to court.

This is clearly a treacherous time to be trading. The first quarter of 2009 saw 1,311 companies being placed into administration in England and Wales, according to recent statistics released by the Government’s Insolvency Service.

Lockton’s insolvency practice grew its business 25 per cent last year, so we have first-hand experience of what is happening out there. Yet the figures also mean 25 per cent more businesses went to the wall in that period and that will comprise clients and prospective clients who will no longer be paying insurance premiums.

However, all the signs as far as our own broker clients are concerned are that the number of claims (small and large) against insurance brokers remains fairly low. Naturally, we continue to monitor the environment closely, both as an insurance brokerage that is exposed to E&O risks itself and also as a placing broker in this market. So are we of the opinion that claims against brokers are still to manifest themselves? In short, the answer is probably not – but avoid complacency.

The relatively soft market of recent years, together with low interest rates, has resulted in insurer profits dipping sharply – an environment that has only been offset by the lack of any major E&O claims issues. We believe our clients are potentially exposed to:

- fraudulent claims by clients resulting in disputes with the original insurers and hence possible E&O claims against the broker
- possible disputes over legitimate claims which, for one reason or another, insurers suspect might be inflated or fraudulent or which they simply don’t want to pay.

In both scenarios, the strength of a broker’s documents will be a key aspect in their defence should any allegations be made against them, which is always a possibility in today’s environment, when individual companies’ livelihoods are at stake.

A recent example occurred when a property claim notified to a broker was disputed by the original insurer because it suspected it was fraudulent, despite the fact the broker involved had no reason to believe this was the case. Some ill-advised and clumsy comments by the loss adjuster had, unfortunately, drawn the broker into the dispute and given rise to an E&O notification. We have seen a number of such notifications over the years and, more recently, have also seen one or two claims against brokers which could be attributed to the economic downturn. But numerically no more than in an average year. Every year we would expect half a dozen or so financially significant notifications for larger brokers. That number has not changed.

The key message is that it would be unwise to be complacent and be rigorous with your own record keeping to mitigate the risks. The old rules still hold true: keep your documentation and files in good order, log conversations and ensure that both your clients and markets fully understand what is required of them and then put it down in writing. Keep in close and regular contact with any lawyer or loss adjuster that works for the insurer and (assuming your relationship with them allows for it) request sight of their draft report – if there are adverse comments in the report on a claim which might be seen to apportion a degree of blame in your direction, it might be worth asking the loss adjuster to have another look at the wording of their report.

Make sure you study the report in detail and if you feel you can offer constructive amendments then do so. Above all, be even more diligent at maintaining a well-documented file. The E&O claims environment is flat at present – but that could just be the calm before the storm.

Simon Fenn is a Director and Partner of Lockton, a BIBA-accredited PI broker

Initiative wins award

The BIBA PI initiative has won the 2009 Trade Association Forum Best Practice award (Commercial initiative). Judges said that the initiative took a problem for BIBA members and turned it into a commercial opportunity, providing benefits for members. Eric Galbraith, BIBA Chief Executive, commented: “This is an excellent example of how BIBA is helping members and we are delighted with this recognition.”