



Liberty Technical Update 3 - Civil Liability

How Broad is your Professional Indemnity Insurance Cover?

The purpose of professional indemnity (PI) liability insurance is clear. Whether you are within one of the traditionally recognised professional disciplines or you are a knowledge-based professional such as IT contractors, consultants, surveyors, architects or engineers, you would have in place a PI policy to cover the potential liabilities you may incur in the conduct of your professional business. But have you looked closely at your PI cover lately? If so, is it based on:

- a “negligent act, error or omission” wording,
- an “act, error or omission” wording,
- a “breach of professional duty” wording, or
- a “civil liability” wording?

What’s the difference between these wordings? Which one applies to your policy?

Negligent Act, Negligent Error and Negligent Omission

When professional indemnity liability wordings were first introduced into the insurance market, they were largely based on the concept of negligence. PI policies were devised to cover the costs incurred by the insured in compensating a third party for breaching his or her duty of care. A PI policy that provides coverage on this basis will generally only cover losses where it could be shown that (i) the insured owed a duty of care to the claimant, (ii) they breached that duty and (iii) their breach caused loss to the claimant. The standard of care expected of professionals is typically that of a competent person who meets the standard of practice accepted by professional peers in their relevant discipline.

Very often, claims are made against professionals under the tort of negligence and also under contract for negligent breach of professional duty. But what if a claim includes other legal grounds? For example, what if the claim was that something said during negotiations persuaded the claimant to enter into the contract and this statement turned out to be wrong?

The claim could be based on misrepresentation or misleading and deceptive conduct. Or there may be allegations of breaches of various statutory obligations. Some contractual terms are typically implied into contracts by both the common law and by statutes. An example of such an implied term is that goods or services supplied must be fit for the purpose for which they were supplied. If liability to the claimant did not arise out of negligence but on other legal grounds, an insured could be left without cover and could be at risk of personal financial liability.

A PI policy that covers only negligence therefore provides a significantly narrower coverage than other types of wordings available in the market.

Act, Error or Omission

A broader coverage is provided by policies that cover loss for which the insured is legally liable to pay in respect of an alleged act, error or omission in the performance of its professional services (as defined in the policy).

The act, error or omission basis of coverage is preferable to one based on negligence because it would cover not only liability based on negligence, but also contractual liability, statutory breaches (such as misleading or deceptive conduct or misrepresentation) and equitable breaches such as breaches of fiduciary duties and breaches of trust.

You should, however, read the wording of your policy carefully. Some of these kinds of breaches may be excluded. For instance, while the policy may cover contractual liability, most policies contain contractual liability exclusions in relation to liability that has been assumed by the insured. However, some policies provide “write-backs” to these exclusions by providing coverage for liability that would have existed in the absence of such contracts. Some even provide a specific extension of coverage to cover those liabilities that have been assumed by the insured.

“If you have incurred a civil liability, chances are that you would have engaged in some acts, errors or omissions for which you are liable”



Consider also whether the policy covers you for the acts, errors or omissions of your agents, contractors or sub-contractors. Whilst the liability of agents or sub-contractors are typically excluded, some policies do cover, by way of an automatic extension, a professional for liability it bears for professional services for which it is legally responsible. Note, however, that some policies may provide this cover only by way of an optional extension and such cover could also be sub-limited.

Breach of Professional Duty

Some PI policies cover one against loss for “breach of professional duty” in respect of professional services. One needs to consider very carefully what is covered within this insuring clause. What specific duties within the provision of services are regarded as “professional duties”? For instance, would incidental activities such as clerical duties that do not require particular expertise, skill or technical qualifications be regarded as being a “professional duty”? A professional with a “design and construct” contract with a principal who later makes a claim against him or her might have an issue as to whether the loss suffered by the principal was caused by a design failure or by a mistake in the construction process which does not necessarily require any particular professional expertise.

It is important to have a clear understanding of the full extent of PI coverage at the time of entering into the contract. An insurance policy that covers a professional's acts, errors or omissions or their civil liability (see discussions below) in the performance of professional services without the onus to prove a “breach of professional duty” would usually give a broader cover.

Civil Liability

It is becoming more common to see “civil liability” wordings in the PI insurance market. Such policies typically cover the insured for claims arising from their civil liability provided such liability is incurred in the course of performing their professional services. This is broader than one based on negligence or breach of professional duty, in that negligence is not the only basis of coverage and the insured does not have to show that the claim arose out of a breach of professional duty in order to fall within the scope of its insurance policy.

Civil liability, as the name suggests, is liability that arises out of civil law, as opposed to criminal law. Criminal liability or penalties that could be imposed by statutes, for instance, would not fall within this coverage. Civil liability can be said broadly to fall into four categories: (i) tort law such as the law of negligence, nuisance or defamation; (ii) contract law; (iii) statutory obligations such as consumer protection legislation; and (iv) equitable breaches which are based on principles of fairness and justice - including breaches of fiduciary duties or breaches of trust.

Civil liability wordings provide very similar cover to “act, error or omission” wordings. Some say that a civil liability wording is actually broader than an “act, error or omission” wording because it covers all civil liability, subject to exclusions. The fact of the matter is that both types of wordings provide broad coverage but the focus in respect of each type of wording is different. Civil liability focuses on the nature of the liability (civil v criminal) whereas the “act, error or omission” wording focuses on the actual conduct of the insured. If you have incurred a civil liability, chances are that you would have engaged in some acts, errors or omissions for which you are liable. More detail of the differences lies in the precise terms, conditions and exclusions of each policy.