

Pitfalls for professionals: gaps in local professional indemnity coverage

Justin Carroll - Senior Associate - Insurance / Sustainable Sourcing
- Dubai International Financial Centre



Introduction

Professionals like accountants, lawyers, architects and medical practitioners can be exposed to legal liability as a result of the way that they provide their professional advice or service. Because the financial impact of such a liability on the professional concerned can be potentially devastating, these professionals invariably carry professional indemnity insurance ('PI Insurance'). PI Insurance covers the professional for the legal liability that they may incur in the negligent practise of their professions.

In many jurisdictions these professionals are required by law to carry PI Insurance as a condition of their licence to practice. But even where holding PI Insurance is not required by law as a condition to practice, almost all professionals take out PI Insurance given the enormous financial risk of meeting a claim for professional negligence without it. Even then, the nature of PI Insurance can frequently result in serious gaps in coverage if and when a professional negligence claim is made against the professional. This is especially true in the GCC for the reasons explained below.

Nature of PI Insurance

Unlike general liability insurance which covers an insured person or entity for liability for negligently causing personal injury or physical damage, PI Insurance covers the insured only for negligent acts or omissions committed in the course of the insured's practice of his or her profession. That the negligent act or omission be committed in the course of the insured's practice of his or her profession is a precondition

for cover of a claim under a professional indemnity policy ('PI Policy').

By contrast, a claim against an insured professional that alleges, or is based on, circumstances that fall outside of the insured's practice of his or her profession will result in the insured not being covered for that claim. This is usually made clear in the insuring clause of the policy. A typical wording to this effect will provide:

"The Insurer will indemnify each insured against civil liability (including liability for a Claimant's costs and expenses) which arise from:

- *the Firm's Practice;*
- *any Prior Practice;*
- *any Successor Practice;*

provided that a Claim in respect of such liability is first made against an Insured during the Period of Insurance or is or could be made against an Insured during or after the Period of Insurance and that it arises from Circumstances first notified to the Insured during the Period of Insurance".

The reference to "*circumstances first notified to the Insured during the Period of Insurance*" imposes an important reporting obligation on an insured under a PI Policy.

Because the time between when the professional first provided the advice or service and when the professional's client may make a claim against the professional can be many years, the insurer of a PI Policy will always insist that the professional disclose all unresolved claims made against the professional along with all circumstances which could lead to a claim being made against the professional before the insurer agrees to insure the professional under a PI Policy.

Exactly what constitutes "*circumstances which could lead to a claim being made against the professional*" is often a matter of debate. Nevertheless, it is clear that such circumstances do not need to take the form of a formal claim against the professional before they need to be disclosed to a professional's insurer.

Where a professional was aware of a claim or of circumstances which later lead to a claim being made against the professional and the professional has failed to disclose to the insurer the claim or those circumstances prior to entering the policy, the insurer will usually have grounds to deny the claim and perhaps even to cancel the policy.

Only civil liability is covered

An equally important aspect to standard PI Insurance, particularly in the UAE and in the GCC, is that PI Insurance will only cover the insured for claims of "*civil liability*". PI Insurance will not cover the insured for criminal liability. At a broad level, the rationale for PI Insurance covering only an insured's civil liability is not difficult to discern.

Criminal laws are made for the safety and protection of society as a whole. It would be contrary to the public policy of most legal systems to permit persons who commit criminal offences (which, under the concept of *mens rea*, imply a notion of an intent to engage in the criminal conduct as opposed to engaging in such conduct through negligence) to shield those persons from the liability that attaches to breaking the law. For that reason, PI Insurance, like most forms of insurance, will not cover an insured professional for criminal liability.

Yet, while most of us would agree that this position makes sense as general rule, in the UAE and in the GCC generally the range of conduct that can attract criminal liability is greater and in many cases requires

a lower threshold to be met in order to justify prosecution than would be the case in, say, Western Europe or North America. Without intending to be exhaustive, examples of the kind of legal conduct where this is the case are:

- defamation;
- written or verbal insults;
- certain forms of negligence;
- certain forms of corporate mismanagement;
- certain cyber communications.

This feature of the criminal jurisdiction of the UAE and of other GCC countries has serious implications when it comes to obtaining suitable professional indemnity coverage in the region.

Because most PI Insurance wordings used in the UAE and in the GCC are not drafted in the region, they have usually not been tailored to take into account differences unique to the local legal landscape here. In particular, they will not have been tailored to take into account the wider range of conduct that can attract criminal liability.

Consequences for local insurance coverage

As a result, a professional in, say, the UAE or Qatar or Kuwait who has the misfortune to find himself or herself the defendant to a civil claim arising out of the conduct of their profession will learn, no doubt to their deep dismay, that they will not be covered under their PI Insurance if the claim is picked up by a local prosecutor and becomes a criminal prosecution. The risk of this occurring in the GCC is high because all the forms of conduct listed above can attract both civil and criminal liability.

To illustrate, in a number of cases, medical practitioners who have provided medical advice or who have performed surgical procedures negligently have found themselves subject to civil claims by the medical practitioner's patients and then to criminal prosecution by a local prosecutorial authority, leading to a hefty fine and even, in some cases, to terms of imprisonment.

If the medical practitioner was covered under a policy of PI Insurance, as they usually will be, his or her costs of defending the civil claim brought by the patient and any subsequent damages awarded to the patient will be covered under the medical practitioner's PI Insurance.

However, the medical practitioner's PI Insurance will not cover the medical practitioner for the costs of defending the criminal prosecution or for any fine that is later levied on the medical practitioner consequent upon a guilty verdict. This is the case irrespective of whether the medical practitioner is ultimately acquitted at the end of the criminal proceeding. The result will be that all the costs of responding to, and defending, the criminal proceeding will need to be paid for out of the medical practitioner's own pocket.

Similar cases have occurred in which lawyers, either in the course of providing legal advice or in acting for clients in contentious matters, are alleged by an overly sensitive opposing party or by the opposing lawyers of having defamed that party or that party's lawyers.

As defamation is a criminal offence under the UAE's penal code, there is always a risk that a lawyer could be forced to defend a criminal prosecution for defamation for which the lawyer would not be entitled to any cover under his or her firm's PI Insurance

Possible solutions

One solution to this problem would be for local insurers to create professional indemnity wordings that are better tailored to take into account the wider range of conduct that can attract criminal liability in the region. That way, professionals who are subject to criminal prosecution for conduct carried out squarely within the professional's profession would be better protected.

Failing that, professionals could request that their employers or their partners agree to indemnify them for the costs of defending any criminal prosecution and for any monetary penalty resulting from the practice of their profession. This is less than ideal but it would be better than the present situation where, in the absence of the professional having any contractual right to be indemnified by the professional's employer or fellow partners, it leaves the professional legally unprotected in the event that a professional liability claim leads to a criminal prosecution.

For further information, please contact [Justin Carroll \(j.carroll@tamimi.com\)](mailto:j.carroll@tamimi.com).