



# PROFESSIONAL INDEMNITY INSURANCE RISK FACT

## PROFESSIONAL INDEMNITY INSURANCE

Previously clearly defined and distinct, the responsibilities of the professional have changed. Traditionally, people like Accountants, Surveyors, Engineers, and Architects, the mainstream professions, were regarded as 'professionals'. Modern reliance upon services provided by others and the

increased use by business outside consultants has increased the scope of this term and a professional is now often regarded as any person who offers 'specialist' advice or service.'

Professional Indemnity insurance policies are generally provided through

a specialist insurance market and may vary amongst different insurers. This risk fact provides a general overview on the type of insurance cover normally found in such policies but does not provide the full terms, conditions, exclusions and limitations found in such policies.

## WHAT IS PROFESSIONAL INDEMNITY?

### Breach of Duty

A Typical PI policy will provide indemnity to the insured '... against loss arising from any claim or claims for breach of duty which may be made and reported to the insurers during the policy period by reason of any neglect, error or omissions committed in the conduct of the insured's professional business...' Some policies are more tightly worded.

### Civil Liability

Some PI policies go further than the standard cover and provide indemnity to the insured 'for any civil liability whatsoever...'. This covers such areas as breach of contract, libel and slander (some standard policies may include libel and slander as extensions of policy wordings).

Because the operative clause of a 'civil liability' policy is so wide, there is normally a long list of exclusions in order to exclude liabilities that should be covered elsewhere, otherwise things like Employers Liability and Public Liability might be covered. Some inexperienced PI insurers have got this very wrong in the past and inadvertently picked up such liability exposures under a PI policy.

### Contractual liability that is not caused by negligence

This is often excluded from PI policies and occurs when a professional signs

up to a contract which might impose a liability that goes beyond what one would normally expect in law. Examples include liquidated damages, eg. Late delivery penalties – or accepting liability for otherwise unforeseeable economic loss, eg. business interruption.

### Legal costs

These are normally covered by PI policies, subject to the insurer's prior consent. They cover the costs of investigation, defence and settlement of claims. These costs might embrace lawyers for investigation and defence, loss adjusters, experts and court costs. The costs are sometimes included within the limit of indemnity (in which case they erode the cover for damages) and sometimes the excess applies to the costs; this is often the case for hazardous risks or where foreign, particularly North American, jurisdiction is involved.

If the excess applies to legal costs there can be policy disputes where an insured disagrees with the expenses being incurred by an insurer, particularly in the event of a successful defence of a spurious claim. Many insurers want the insured to retain a real stake in the successful defence of claims and want to avoid financial involvement in regular small nuisance claims – so they impose the costs inclusive excess.

### How does liability arise?

The professional person must exercise whatever degree of care and skill is reasonably expected of any competent practitioner in that profession at that time. If a person provides advice or a service to another and carries that work out negligently, he can be held legally liable for the consequences. Normally, such advice or services are provided under the terms of a contract. Liability can arise because there has been a breach of duty of care or a breach of a contract (the latter normally only covered by a PI policy where there has also been a breach of duty of care).

Other than in breach of contract, for legal liability to be established, the professional must be shown to be in breach of his duty of care – but there is an alarming move towards liability just because things have gone wrong.

### Usual Cover

In addition to the obvious cover, PI policies often include:

- Libel and slander
- Loss of documents
- Dishonesty of employees
- Fidelity
- Unintentional breach of confidence
- Infringement of copyright and intellectual property rights
- Previous firms or previous partners

## “CLAIMS MADE” POLICY FORM

Professional indemnity, directors & officers, medical malpractice and libel insurance are nearly unique in operating generally on a ‘claims made’ basis. This provides cover for claims made (and reported to the insurer) during the period of insurance only. In contrast, other liability covers normally provide indemnity for ‘losses occurring’ during the policy period. This is not the same across the world – for example in Europe, PI has historically been written on a ‘losses occurring’ basis – but the trend worldwide is towards ‘claims

other type of cover in Malta.

A claim is generally notifiable under a PI policy when the insured first becomes aware of circumstances that could lead to a claim – this could be anything from a verbal criticism to receipt of a statement of claim. The interpretation of when this situation occurs is the source of frequent policy disputes between the insurer and insured.

## NOTABLE FEATURES ON ‘CLAIMS MADE’ POLICY ARE:

A Claim might be made against a policy written now but the act of neglect might have occurred many years previously.

It protects the insured against the erosion of the value of cover by inflation. Where latent defects might lead to claims many years after an act of neglect, such as in the construction industry, this can be crucial in times of only modest (let alone high) inflation.

It protects the insurer against the effects of legislative changes, inflationary awards and claims made with new knowledge. It was not so long ago that the market was predicting the disappearance of ‘losses occurring’ policies altogether following the wake of losses arising from US asbestos and environmental claims under policies written decades previously, on terms and conditions prevalent at the time which could not possibly have anticipated the losses to hand.

It allows the insurer to ‘get off’ a risk completely by simply refusing to renew. This is fine for an insurer that discovers a sub-standard insured or where an insurer wants to leave a particular market sector but it leaves the quality insured very exposed to market ups and downs.

If the policy lapses for any reason, there is normally no cover thereafter for any claims that might arise, regardless of when the alleged neglect might have occurred.

### Retroactive date

Many ‘claims made’ policies incorporate a retroactive date, either as part of the wording or by endorsement. This effectively excludes claims arising from things done or that ought to have been done before the retroactive date, or often claims arising out of contracts entered into before the retroactive date. If there is no retroactive date then cover is fully retroactive for all work since commencement of the business.

It is normal for an insurer to apply a retroactive date of inception of the policy if there has been no prior cover. If retroactive cover is required then most insurers will offer it for a one-off additional premium.

### Previous business activity

Because of the claims made nature of PI policies, special care needs to be taken to ensure that the cover includes predecessor practices or partners’ liabilities arising out of former

partnerships elsewhere. At least to the extent that you want cover for this activity. Many short form proposals only ask for minimum underwriting information and don’t address these issues. Brokers should be careful to attend to them in order to avoid tears in the event of a claim.

### Limit of indemnity

This is the maximum amount of money that a PI policy will pay out. It might be eroded by costs and expenses. It frequently operates in the annual aggregate for all claims but often comes with reinstatements or applicable to each and every claim without aggregate limit. Where the limit is not aggregated, careful attention needs to be paid to the definition of a ‘claim’ – for example a series of linked claims is normally deemed to be one claim for policy purposes.

### Excess

This is the first amount of every claim that is uninsured. It generally applies to each and every claim, but it can occasionally be aggregated or deleted entirely. Insurers need to be careful here depending upon the nature of the insured’s business.

## BROKERS RECOMMENDATIONS

Obviously, each insurer has its own preferred wordings, with particular exclusions and different limits applying.

If you need further information on your travel insurance needs, please call us or send an email to [insure@firstunited.com.mt](mailto:insure@firstunited.com.mt)

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