



COVID-19 IMPACT ON PROFESSIONAL INDEMNITY POLICIES

India is facing a complete lockdown due to the onset of COVID-19. As a measure to limit the transmission of the deadly virus, the Indian Government has been taking several pre-emptive measures like locking borders, lockdown of offices and businesses, restricting transportation only to essential services and commodities, etc.

Several organisations are looking at potential claims for breach of contract, in anticipation of losses that organisations may expect due to this. Discussions have already started with insurance companies on covering loss of profit due to the current pandemic situation within the liability policies, particularly Professional Indemnity (PI) policies.

WHAT ARE THE IMMINENT EXPOSURES?

While most companies have implemented a work from home regime to ensure continuity of business and services, this has not been possible for all organisations. Even for businesses that have tried to implement the process, the key issues being faced are lowered efficiency, impact on timelines, and altered service levels. While work is being carried out at home, there seems to be an increase in potential vulnerabilities that an organisation faces (for example cyber breach, confidential and personal data breach). Negligence, errors and omissions may be on the rise and could result to third party claims as well.

The absence and illness of key personnel within professional services firms, at the client's and among third party advisors may increase the likelihood of errors (and therefore, potential

negligence claims). Professional service providers ought to prepare and implement robust contingency plans.

Organisations could face potential claims from clients, members of the public and employees for the failure to adequately protect them from contracting Coronavirus. Obvious examples are hospitality and travel companies (cruise ships, hotels, restaurants, airports, airlines etc.). Similar claims may be brought not only by employees in those businesses, but also employees in the health sector if they are not adequately protected. Healthcare professionals – the frontline warriors against COVID-19, are the ones that are highly exposed to such liabilities given the sensitivity of the crisis. There might be claims of medical negligence while treatment for COVID-19 is being meted out.

WHAT DOES PROFESSIONAL INDEMNITY POLICY COVER?

Professional Indemnity insurance indemnifies organisations for their legal liability arising out of third party claims, made with respect to the professional services being provided. It also provides for defence costs and compensation /settlement expenses which arise from the above legal liability. A standard cover would be for losses incurred by Insured due to claim arising out of wrongful acts in the performance of professional services or products.



WHAT SHOULD AN INSURED WATCH OUT FOR?

A failure to perform due to COVID-19 lockdown would usually be covered by such policies only if the definition of “Losses” or “wrongful acts” is wide enough. An example of when a policy for professional indemnity may not land up covering COVID-19 related non-performance would be if the cover is for error or omission arising due to negligence alone, and not a failure to act altogether. Similarly, if the definition of wrongful act is restricted to error or omission in the provision of the Professional Service, an Insurer could argue that it does not extend to instances where services could not be provided at all.

Similarly, there are several exclusions in a standard PI Policy that should be looked into and

carefully examined in this scenario. Exclusion for financial injury due to delay in performance of services or delivery of goods or insolvency, bankruptcy may be very widely interpreted. At times, the policy excludes “property damage” which includes loss of use. However, usually in tech policies, the exclusion would carve out damage to intangible property like data and software. For any PI claim arising out of the government mandated lockdown, an important exclusion to be looked into is the exclusion for loss caused due to a government order (as distinguished from a loss arising from a government proceeding).

WHAT CAN THE INSURED DO?



Organisations should go through their entire insurance portfolio and assess policy wordings. It is possible that the insurance industry may experience negative coverage interpretation trends and exclusions start emerging in policy language. Care should be taken to review liability policy language for any such provision.

From a liability perspective, the potential for claims against professionals after a crisis can be expected to rise. While professional services are being provided, one needs to be careful to ensure no error, negligence or non-performance creeps in. If a professional negligence were to take place, immediate notification must be made to the Insurer to avoid any technical breach. This must also include consultation with your legal advisors for review of policy terms and conditions to determine coverage, applicability of any exclusions, and adherence to all policy terms and conditions.

In the current situation, while there is not much scope to foresee or predict risks, one could definitely take steps to mitigate risk and resulting losses. As a professional, one needs to uphold the fiduciary duties and act diligently, while being aware of potential risks and liability. As someone correctly said – being forewarned is being forearmed and now is the time!!!



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PRUDENT INSURANCE BROKERS PVT. LTD.

Registered Office 101, Tower B, Peninsula Business Park, G.K. Marg, Lower Parel, Mumbai - 400 013, Maharashtra, Tel: +91 22 3306 6000
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