

FURMAN KORNFELD & BRENNAN LLP

61 Broadway, 26th Floor, New York, NY 10006

Tel: 212-867-4100 Fax: 212-867-4118

www.fkblaw.com

Miscellaneous Professional Liability Overview*

August 22, 2014

*By Andrew R. Jones, Esq. & Xan L. Marshall, Esq.***

Introduction

As professionals, every day there is a chance that you could create exposure to liability claims just by carrying on in the normal course of your business. In today's litigious environment, you could easily be met with a displeased client who feels they have in some way been "damaged" by the performance of your professional services. Failing to prepare for instances in which you may have to defend a suit could be catastrophic.¹

Miscellaneous Professional Liability (MPL) insurance, sometimes referred to as "errors and omissions liability (E&O) insurance" covers errors and omissions for a variety of professional service providers, including service providers such as translators, travel agents and event planners.² MPL insurance provides coverage for negligence in the performance of professional services where a reasonable standard of care is generally expected.³ Common mistakes include overlooking a critical piece of information, misstating a fact, and forgetting to do something. These mistakes can lead to claims of error, omission, negligence in providing a professional service, failure to provide a professional service, and malpractice.⁴

Professional or General Liability Insurance?

Whether you need general or professional liability varies from case to case and will depend on what sort of services you offer. Indeed professional liability insurance is reportedly one of the most misunderstood insurance products for many businesses and professionals.⁵ The misunderstanding could prove costly in the event of a claim. Many professionals confuse the two coverages, often securing *general* liability coverage (only) with the belief that it is adequate. While general liability adequately protects some professionals, it does not protect others, such as

¹ The average total reported cost associated with an E&O lawsuit was \$180,414, according to the Chubb 2013 Private Company Risk Survey. <http://www.chubb.com/businesses/csi/chubb13747.pdf>

² <https://www.travelers.com/business-insurance/management-professional-liability/private-non-profit/miscellaneous-liability.aspx>

³ Id.

⁴ http://www.chubbemail.com/files/2013_09_cis_what_is_mpl.pdf

⁵ <http://www.cksteele.com/index.php/business-tools-resources/hot-topics/39-business-insurance-articles/253-difference-between-general-liability-and-professional-liability>

advisors, from liability related to their professional expertise.⁶ The main difference between the two is the type of damages that are protected.

General liability tends to apply to losses that involve bodily injury, death, or damage to physical property.⁷ General liability coverage generally does not cover any economic damages that arise out of a professional's performance or failure to perform professional services.⁸ On the other hand, professional liability coverage generally involves losses of an economic nature caused through negligence in performing or failing to perform professional services.⁹ As a professional, your client depends on your expertise. If your advice, guidance, or instruction leads to a financial loss (direct or indirect) to a client, professional liability insurance will apply to respond to that loss.¹⁰

As a caveat, virtually every business or professional should have general liability insurance to protect you from bodily injury, property damage, or personal injury claims. Whether you will need professional liability varies according to profession. For example, if you consult or provide expert advice and services to clients who then provide a product or service based on that advice, you could be at a significantly higher risk and need for professional liability coverage.¹¹ To ensure that you are protected fully from liability, if possible, you may want to consider purchasing general liability and professional liability insurance.

Which "professionals" need professional liability insurance?

The most well-known professionals who need professional liability insurance are doctors, lawyers, accountants, architects, engineers, etc. However, less thought about individuals such as advertising agencies, wedding planners, fitness/yoga instructors can also benefit from such policies. For example, consider the wedding planner: If a wedding planner reserves a reception hall, confirms a band, and hires caterers for May 1 instead of the correct wedding date of May 15 and all of the hired parties show up on May 1, who pays?¹² Also consider the freight shipper: If he sends a time sensitive shipment of goods to North Korea instead of South Korea and their client loses sales and money, who covers the loss?¹³ These constitute two great examples of where having an MPL policy could greatly save the professional from a disastrous financial burden.

The Insurance Journal recommends MPL/E&O coverage if you are in the business of providing a professional service to your client for a fee.¹⁴ Different insurance carriers choose to

⁶ *Id.*

⁷ What is the Difference Between Professional Liability and General Liability, JLT Facilities, *available at* http://www.jltfacilities.com/liability/technology/pdf/pl_vs_gl.pdf

⁸ *Id.*

⁹ *Id.*

¹⁰ <http://www.cksteele.com/index.php/business-tools-resources/hot-topics/39-business-insurance-articles/253-difference-between-general-liability-and-professional-liability>

¹¹ *Id.*

¹² <http://www.insurancejournal.com/magazines/features/2004/07/19/44745.htm>

¹³ *Id.*

¹⁴ <http://www.insurancejournal.com/magazines/features/2004/07/19/44745.htm>

provide MPL coverage for different professionals. For example, Travelers MPL insurance covers more than 75 professionals including interpreters, newspapers, and tutors.¹⁵

Devil in the Detail: What constitutes “professional services?”

Courts have struggled with defining “professional services.” The most often quoted definition of a professional service comes from *Marx. V. Hartford Accident & Indemnity Co.* and states that a professional service is “one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual.”¹⁶ To determine whether services are professional in nature, the Fifth Circuit instructs us to look at the character of the services performed and whether special knowledge and technical expertise are required to do so.¹⁷ Professional services tend to involve discretion acquired by special training and the exercise of special judgment.¹⁸

The majority rule throughout the United States is that acts relating to an insured’s *business* functions and efforts to operate a business—such as an insurance agent usurping a competitor’s insurance program, an insurance agent steering business to various insurers, and a debt collector billing services to its own clients—are generally business acts that are not part of an insured’s profession and are not covered under policies providing coverage for “professional services.” Indeed, as seen in *Albert J. Schiff Associates v. Alan B. Flack, As Lead Underwriter under Lloyd’s Policy Nos. LC 65458 and LC 65457, et al.*, just because certain activities are connected with a covered business or profession does not mean that they are “professional services” as covered by professional liability policies.¹⁹ While services such as renting an office, hiring employees, and arrangements to expand the size of one’s activities all prepare for the performance of business or professional services, they are not the professional services contemplated by an errors and omissions policy. These policies are intended to insure a member of a certain profession against liability arising out of the mistakes inherent in the practice of that particular profession.²⁰

These types of business activities, which as noted, may not be covered under a professional liability policy, may also not be covered under a general liability policy. If injury results from renting an office, hiring employees, expanding business activities, etc, there may be coverage under a general liability policy. However, there may be no coverage under either policy if purely economic injury is alleged.

¹⁵ <https://www.travelers.com/business-insurance/management-professional-liability/documents/59823.pdf>

¹⁶ 157 N.W.2d 870 (Neb. 1968).

¹⁷ *Thermo Terratech v. GDC Enviro-Solutions, Inc.*, 265 F.3d 329, 336 (5th Cir. 2001) (quoting *Abramson v. Florida Gas Transmission Co.*, 908 F. Supp. 1389, 1394 (E.D. La. 1995) (internal quotations omitted)).

¹⁸ *Id.*

¹⁹ *Albert J. Schiff Associates v. Alan B. Flack, As Lead Underwriter under Lloyd’s Policy Nos. LC 65458 and LC 65457, et al.*, 51 N.Y.2d 692, 417 N.E.2d 84, 435 N.Y.S.2d 972 (1980).

²⁰ *Grieb v. Citizens Cas. Co.*, 33 Wis.2d 552.

Solutions for Ensuring Adequate Coverage:

Professionals have three broad options in the face of possible exposure that “falls between” the coverages offered by general and professional liability policies:

1. Risk uninsured exposure

Professionals or *quasi*-professionals can always take a calculated risk not to be fully covered for possible exposures that falls between the coverages offered by general and professional liability insurance. For example, a potential insured may determine that it is not at risk for economic claims resulting from business activities outside of the insured’s “profession” (such as renting an office, hiring employees, expanding business activities, etc). Such risk should always be carefully considered and the cost-benefit of the price of insurance versus the protection and peace of mind that comes with comprehensive coverage should be analyzed.

2. Seek “umbrella” coverage

You can seek “umbrella” (or over-arching) insurance via your insurance broker for a particular type of risk or exposure. Many insurance companies issue such policies; they will ask for proof of underlying insurance (your professional and general liability insurance).

3. Seek a general or professional liability policy endorsement.

You can seek an endorsement (“rider”) from your insurance broker for a particular risk you may be concerned about. Most insurance companies will have some degree of flexibility and can customize coverage to suit your particular needs. Note that it is important to seek such an endorsement/rider before any claim or lawsuit is threatened or commenced. Otherwise, the carrier will likely refuse to offer the coverage and/or will have grounds to deny coverage if the threatened claim or lawsuit is not adequately disclosed.

****Disclaimer:*** *The foregoing is a **general** guide and does **not** represent a complete analysis of the issues covered. It is intended to highlight matters that may be of interest to insureds, but insureds should always seek specific guidance on particular matters.*

*****Andrew R. Jones, Esq. is a Partner and Xan L. Marshall, Esq. is an Associate at the New York City-based law firm of **Furman Kornfeld & Brennan LLP**. Andrew and Xan’s practice focuses on professional liability and insurance coverage matters, including the direct defense of professionals and advice to insurers as to coverage issues. They have drafted various insurance policy forms for domestic and international insurers, and have advised on coverage matters in the U.S. and abroad. For more information on the authors and this topic, please visit: www.fkblaw.com.***