

BRIEFING NOTE

Professional Indemnity Claims

- *To Settle or Not to Settle? Or Rather, When & How to Settle?*

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Introduction

It is not often that professional indemnity claims make the headlines. That is unsurprising given that the professionals involved (whether they be architects and engineers, directors and officers, lawyers and other professionals) try to ensure that the underlying claim against them (i.e., for fraud, recklessness or negligence) goes away quickly and quietly.

Additional considerations come into play when professionals are also looking to their professional indemnity policies for indemnification. We seek to share our insights on how best to resolve the underlying claims whilst preserving coverage under the relevant professional indemnity policies.

Settle or Not Settle?

Whether the underlying claim is one for fraud, recklessness or negligence, most professionals would be inclined to settle such claims. This avoids a court/tribunal decision that the professional is liable for fraud, recklessness or negligence, which may affect the professional's good standing (and even ability to continue in the profession).

For those seeking indemnity under their professional indemnity policies, such policies will often provide that insurers' consent (not to be unreasonably delayed or withheld) is required prior to any settlement. When proceeding with the underlying claim and deciding on settlement, it is important to keep insurers apprised and most importantly, seek consent (even if such consent is qualified with a reservation that insurers reserve the right to dispute the reasonableness of the settlement or to rely on a fraud / dishonesty exception).

One instance – *SYT Consultants Pte Ltd v QBE Insurance (Singapore) Pte Ltd* [2022] SGHC 251 (“**SYT**”) – where a professional company had gone ahead with a settlement (albeit after coverage was denied) demonstrates the importance of adhering to policy conditions when settling the underlying claim. Where a settlement was made without reasonable basis that the company would be found liable, such settlement amounts would not be indemnified.

To avoid the SYT outcome, a professional may roll the die and wait for legal proceedings to run its course (so that if found liable, coverage is typically triggered). Putting aside reputational concerns, there is the question of exposure. Most primary layer professional indemnity policies have a limit (e.g., US\$ 10 million). In the event the professional is found liable in the underlying claim, and the amount of liability exceeds the policy limit (plus

deductible), the professional will have to cough up the excess amount unless excess layers of insurance were purchased. This means that whilst coverage is more likely to be triggered after award/judgment, coverage may not be sufficient for the full amount of liability.

When & How to Settle?

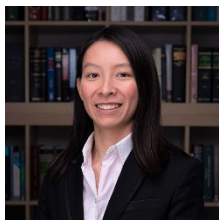
Proceeding on the basis of a risk averse professional desirous to settle the underlying claim whilst ensuring coverage under the professional indemnity policy, it is important to:

- ensure that the bases of claim and defence to the underlying claim have been sufficiently fleshed out. This will enable the professional and insurers to determine the reasonableness of the settlement;
- keep insurers apprised, adhere to all policy requirements (for e.g., obtaining a Senior Counsel / King's Counsel opinion) and obtain all necessary written consents (even if such consents are subject to reservations). Agree to settlements only after adhering to such requirements and obtaining such consents; and
- review all the potentially applicable clauses of the policy. There are instances where coverage is not in dispute but the interpretation of certain policy terms may substantially limit the amount of the indemnity. In such instances, it is best to come to an agreement of such interpretation before agreeing to settle the underlying claim.

Commentary

Our lawyers have routinely assisted with professional indemnity claims, both domestically and internationally. We have advised on policy coverage for some of the world's most prominent professional scandals, as well as weighed in on some novel questions of insurance coverage. We would be delighted to assist you or your company in considering its professional indemnity coverage.

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