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# Lawyers' Professional Liability Insurance

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sue only the teacher, but ill will and personal animosity might cause him to seek damages from the teacher alone.

When a teacher who has negligently injured a student by a non-discretionary act within the scope of his employment is sued by the injured student, he is in effect insured against pecuniary loss by the school district if he makes a timely request that it defend the action. By insuring the teacher the legislature has curtailed the force of possible pecuniary loss as a deterrent to negligence. Consequently, the teacher may be less inclined to adhere to the standard of care imposed by the courts.

On the other hand this expansion of governmental liability for the torts of its employees may result in a less rigorous application of tort principles of fault by the courts, as one writer suggests.[59] Contributory negligence on the part of the pupil may become harder to establish in a given case, and the district, through its employee, the teacher, may be held to an increasingly broad duty to foresee possible dangers and guard against them. This would result in the imposition of a more strict standard of care on the teacher.

As a result, the teacher's relaxed attitude toward his duty of care would be at odds with a more strict interpretation of his duty by the courts. The amount of litigation arising out of injuries to school children surely would be increased, and even more recoveries would appear inevitable.

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[59] Proehl, *Tort Liability of Teachers*, 12 VAND. L. REV. 723, 742 (1959); see David, *Tort Liability of Local Government: Alternatives to Immunity from Liability or Suit*, 6 U.C.L.A.L. REV. 1 (1959).

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## LAWYERS' PROFESSIONAL LIABILITY INSURANCE

The most careful attorney, like the most careful driver, may fall into a negligent error causing unfortunate loss to his client. Recent cases evidence a trend toward broadening the scope of the attorneys' liability for such inadvertence.[1] Protection for lawyers against malpractice liability is available in the form of professional liability insurance.

Among the companies offering policies are the American Casualty Company, Continental Casualty Company, Fireman's Fund Insurance Company, Lloyd's of London (Holland America Insurance Company-Mission Insurance Company, the "Ham Pool"), St. Paul Fire and Marine Insurance Company and Travelers Indemnity Company. This note does not attempt to evaluate the individual policies, which the practitioner can best do for himself; rather it describes the basic attributes, similarities and dissimilari-

[1] See Lucas v. Hamm, 56 Cal. 2d 583, 15 Cal. Rptr. 821, 364 P.2d 685 (1961), *cert. denied*, 368 U.S. 987 (1962).

ties of the policies, and calls attention to the possible legal ramifications of the varying phraseology employed.[2]

*Coverage*

The scope of each policy's coverage is expressed within its insuring agreements.[3] Most policies offer either individual or partnership ("firm") coverage. A recent innovation, however, is the group plan offered by a national legal fraternity in conjunction with American Casualty Company.[4]

In general, all policies provide for payment of claims arising out of the insured's "professional capacity" as an attorney.[5] Some of the plans also expressly include coverage for liability flowing from the attorney's role as lawyer for a fiduciary,[6] and at least one policy extends coverage to the attorney's activity as a notary public.[7] Not only is the individual attorney covered, but the policies also extend to "any other person for whose acts or omissions the insured is legally responsible"[8] in his capacity as a lawyer. Such extension of coverage is especially important where delegation of ministerial tasks is both essential and commonplace.

While there is substantial similarity in respect to the role from which the insured's liability must arise (*i.e.*, his "professional capacity as a lawyer"), there are apparently some marked differences as to the character of the activities which the policies will cover. Thus most policies extend coverage to claims caused by "any act, error or omission of the insured," while some cover "negligent act, error, or omission." Still another variety

[2] Since the cost of coverage is subject to fluctuation and the amount of coverage is dependent upon individual requirements, they are not discussed in this note. However the following figures are submitted as indicative of such matters. Lloyd's of London ("Ham Pool") as of March 15, 1962 was prepared to write coverage up to a limit of $250,000. Where coverage was set at $25,000, the annual rate for the first insured was $46.20. Clearly the cost of coverage is not prohibitive.

[3] Hirsh, *Insuring Against Medical Professional Liability*, 12 VAND. L. REV. 667, 669 (1958). See also Harwick, *How to Read a Liability Insurance Policy*, 13 HASTINGS L.J. 175, 176 (1962).

[4] The Reporter, Phi Alpha Delta Law Fraternity, Oct., 1963, p. 3, col. 4.

[5] A leaflet of the Fireman's Fund Company states that the following areas of liability, subject to applicable policy provisions, are covered: default; error; mistake; error in judgment; failure to communicate offer to client; failure to plead properly; failure to file notice (for new trial, appeal, to make other motions during or subsequent to trial); failure to properly verify pleadings; errors in draftsmanship (contracts, agreements, deeds, wills, etc.); failure to discover defects in title; erroneous legal opinions; "negligent" libel or slander; disappearance or loss of money, securities, currency; allowing expiration of option, privilege, etc.; failure to file claim in bankruptcy; and failure to comply with statutes of limitations. All policies contain express statements of forms of liability excluded from coverage. For example, the Fireman's Fund leaflet indicates the following areas are not covered by their policy: dishonesty; embezzlement; criminal acts; assault, etc.; conduct of business enterprise; bodily injury or sickness; loss of or damage to tangible property; obtaining divorce by fraud; intentional libel or slander; and malicious acts. It should here be noted, however, that such announcements are merely indicative of anticipated coverage and unless incorporated by reference do not define the extent of coverage. See 29 AM. JUR. *Insurance* § 270 (1960).

[6] *E.g.*, Fireman's Fund Insurance Company's Lawyers' Professional Liability Policy.

[7] Continental Casualty Company's Lawyers' Professional Liability Policy.

[8] The Travelers Indemnity Company's Lawyers' Professional Liability Policy.

of policy extends simply to "acts or omissions." The particular phraseology may prove of great import if litigation should arise under the policy. This point is saliently illustrated by the recent New York case of *Strauss v. New Amsterdam.*[9] In that case the plaintiff, an attorney, drafted an agreement whereby *X* placed a sum in escrow along with *Y*. *X* subsequently demanded a refund asserting that plaintiff was in fact representing himself and not *X* in the transaction. The attorney notified his insurance carrier of the claim, but the latter disclaimed liability. The attorney settled with *X*, and was denied recovery of his loss in this action against the carrier. The policy provided coverage for claims arising out of the insured's professional capacity caused by any "negligent act, error or omission." The court reasoned that the plaintiff's liability sounded in contract for money had and received. It construed the language to cover malpractice, which is essentially tortious,[10] and since no claim was made that the plaintiff failed to employ the requisite degree of professional skill and care in the representation of his client, he was precluded from recovery. This case clearly raises a crucial question for those seeking to ascertain the scope of coverage under a professional liability policy. It is representative of a line of authority for the view that liability predicated on contract and not tort is not within the scope of professional liability policies.[11] This problem is raised where the term "negligent" or analogous terms are employed in a policy. This issue of legal semantics was tacitly noted in a publication by a national legal fraternity wherein it was said that "by omitting 'negligent' the policy provides the broadest professional protection possible."[12]

If the common terminology "negligent act, error or omission" were read not as a negligent act or a negligent error or a negligent omission, but as a negligent act or an error or an omission, the policy would cover liability not founded on malpractice alone. Such an interpretation recognizes that an action on a contract may result from an error or mistake.[13] This construction was tacitly supported in the case of *Cadwallader v. New Amsterdam Casualty Co.*[14] Plaintiff, an attorney, had contracted for the withdrawal of two other attorneys in a condemnation proceeding so as to solely represent all claimants. In consideration for the withdrawal the plaintiff agreed

[9] 30 Misc. 2d 345, 216 N.Y.S.2d 861 (Munic. Ct. 1961).

[10] *Id.* at 346, 216 N.Y.S.2d at 846.

[11] See 29A AM. JUR. *Insurance* § 1358 (1960).

[12] See note 4 *supra.*

[13] See Note, 10 BROOKLYN L. REV. 411, (1941); Sutherland v. Fidelity & Cas. Co., 103 Wash. 583, 586, 175 Pac. 187, 188 (1915):

> The words "malpractice," "error" and "mistake" . . . do not necessarily mean the same thing. If they were so intended, it was an idle thing to insert more than the word malpractice. A physician may err or make a mistake without being guilty of malpractice. This policy covers malpractice. It covers mistake in the practice of appellant's profession; and if liability flows from either, . . . it is plain that the policy undertook to insure against such mistake or such error, as well as against malpractice.

*Accord,* Burns v. American Casualty Co. 127 Cal. App. 2d 198, 203, 273 P.2d 605, 609 (1954). The authority of these cases is fortified by the well recognized rule of construction that an ambiguity in an insurance policy will be construed in favor of the insured. See RESTATEMENT, CONTRACTS § 386 (1933).

to withhold the withdrawing attorneys' professional fees out of the condemnation award. An "additional insured" on the policy "mistakenly and negligently" paid the award directly to the clients without withholding the professional fees as agreed. In an action by the other attorneys the insurer, under a policy agreeing to pay any "lawful claim" arising out of the insured's performance of professional service as an attorney caused by a "negligent error or omission," refused to defend. In this action a directed verdict in favor of the insured attorney against the carrier was affirmed. The court did not discuss the theoretical problem raised by *Strauss*. Its decision, however, recognizes that a breach of contract can result from an error or mistake, and when it does it is within the scope of a professional liability policy covering "negligent acts, errors or omissions."

The use of words such as "negligent" in the insuring agreement should put the prospective insured on guard; the apparent scope of coverage may be greatly limited by the inclusion of such terms. In any case, the legal consequences of the phraseology defining the scope of coverage should be given careful consideration.

*Policy Period and Territory*

Where both the act or omission giving rise to liability and the claim against the attorney occur before coverage is begun or after coverage has terminated, obviously no policy is operative. When the act or omission giving rise to liability occurs prior to the effective date of the policy, but the claim is presented to the attorney during the policy period, all plans appear to offer some degree of protection. Most policies provide for protection against all such liability upon condition that the insured, "at the effective date of the policy, had no knowledge or could not have reasonably foreseen any circumstance which might result in a claim or suit."[15] A declaration to this effect is usually required in the application for the policy.[16]

Where both the cause of liability and the claim against the insured occurs during the subsistence of the policy, most plans cover without restriction as to the time of the claim's presentation to the insurer. At least one plan, however, provides coverage only "during the policy period *and then only* if claim is brought within fifteen years after the end of the annual policy period in which the act, error or omission occurred."[17]

Coverage varies in respect to claims against the insured submitted after the policy's discontinuance, but arising out of act or error occurring during the effective policy period.[18] The most inclusive and the most common

[14] 396 Pa. 582, 152 A.2d 484, 72 A.L.R.2d 1242 (1959).

[15] St. Paul Fire and Marine Insurance Company's Lawyers' Professional Liability Policy.

[16] Aman, *Professional Liability Insurance for Lawyers*, 6 PRAC. LAW. (no. 5) 20 (May, 1960). Aman's article contains an excellent discussion of the policies available.

[17] Continental Casualty Company's Lawyers' Professional Liability Policy (emphasis added).

[18] The importance of coverage for errors occurring during the operativeness of the policy but for which claim is not made until its lapse is somewhat peculiar to the profession. Thus an error in drafting a will may not be discovered until probate. The time differential between execution and such proceedings may be substantial.

provisions indicate that coverage applies "to professional services performed for others during the policy period"[19] irrespective of the fact that the claim is made after the policy has lapsed. Such provisions are generally supplemented with a statement that on the death or legal incompetency of the insured the policy will cover the insured's legal representative, as the insured, "as respects any liability previously incurred and covered by . . . [the] policy."[20] One policy provides that claims made subsequent to the lapse of the policy for liability occurring by an act or an omission during its subsistence are covered only if the insured provides written notice during the term of the policy regarding the occurrence from which his liability emanates.[21]

As to the geographic effectiveness of the policies, the general provision covers acts or errors which occur "within the United States of America, its territories or possessions, or Canada."[22] At least on policy, however, offers to insure "wherever"[23] liability occurs.

*Defense and Settlement*

Most insurers agree to defend in the name of the insured any suit covered by the terms of the agreement even if the suit is, in fact, "groundless, false or fraudulent." Liability is conditioned on prompt notice of claim or suit and the assistance and cooperation of the insured. Most plans expressly preclude the insured from voluntary payment of the claim except at his own peril.[24] Provisions are also made for the insurer to "pay all premiums on bonds to release attachments" and to give reimbursement for all of the insured's "reasonable expenses, other than loss of earnings, incurred at the company's request."[25] The total expenses, including judgment, are limited by the company's pecuniary liability under the policy.

Irrespective of the eventual outcome of a suit alleging professional malpractice, the very fact of the allegation alone may be injurious to the lawyer's professional status. It may often be in the best interest of the attorney to secure a settlement without the adverse publicity that may result from a judicial proceeding. Therefore, the policies generally provide a settlement clause within the insuring agreement whereby such a result can be achieved. Since motivation and expedience for settlement may not always be mutual between the insurer and the attorney, it is frequently further provided that settlement on the part of the insurer requires the written consent of the insured. At least one plan provides in such instances, however, that the insurer's liability for the claim, in face of lack of consent,

[19] St. Paul Fire and Marine Insurance Company's Lawyers' Professional Liability Policy.

[20] *Ibid.*

[21] Lloyd's of London ("Ham Pool") Attorney's Indemnity.

[22] The Travelers Indemnity Company's Lawyers' Professional Liability Policy.

[23] Lloyd's of London ("Ham Pool") Attorney's Indemnity.

[24] When the insurer has disclaimed liability, payment by the insured is not "voluntary" within the meaning of that term as used in the policy. American Fire & Casualty Co. v. Kaplan, 183 A.2d 914 (D.C. Munic. Ct. 1962).

[25] St. Paul Fire and Marine Insurance Company's Lawyers' Professional Liability Policy.