Landscape Institute
Insurance Services
Administered by the MFL Affinity division of McFarland Finn Limited

Protecting your reputation in retirement

Insurance for your reputation

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Protecting your reputation in retirement

Professional Indemnity Insurance (PII) covers professionals against losses arising out of a breach of professional duty, which in practice usually means negligent acts, errors or omissions.

It became more widely demanded and available after Hedley Byrne v Heller & Partners in the early 1960's. The Hedley Byrne case was concerned with liability for financial loss (i.e. without physical injury or damage) and it extended the duty of care beyond that already owed to clients, to other parties in certain circumstances.

A duty of care arises when a professional is in a contractual relationship with his own client:

- Terms of engagement may contain express obligations on the part of the professional to carry out services to a proper professional standard.
- In practice, a professional must exercise the level of skill reasonably to be expected of a member of that profession.
- If not expressly stated, the court will imply similar obligations into the contract.If not expressly stated, the court will imply similar obligations into the contract.
- Failure to meet appropriate standards will amount to a breach of contract by the professional and consequent liability to the client for any loss arising.

But common law liability can also arise, outside of or running parallel to the contractual arrangements, in the tort of negligence:

- The common law duty of care – "everybody has a duty to regulate his actions and the activities of his employees so as not to cause injury or damage to others".
- Failure to exercise reasonable skill and care in the conduct of professional work can give rise to liability to a client in negligence, in addition to the existing contractual liability.

This is important because in some circumstances, a longer period of time is available in which to bring claims in tort compared with contractual claims.

It is also important to understand that liability can arise from advice given even where no fee is involved.

Claims made wording

PII cover applies to claims made within the period of the policy, irrespective of when the negligent act was committed (which is in contrast with "occurrence" based insurance, as in Employers' Liability or Public Liability).

It is not relevant when a defective design was devised, or when a structure was constructed to that design, or when the structure fell down because of the defect, but when the resultant claim is actually made.

This is thought to be the only practical way to operate insurance for projects or assignments extending over many years. Therefore, cover needs to be in force when the claim is actually made, which could be years after the completion of the project, or after the professional left the practice where he made the professional error, or even after he retired. Liability is not extinguished by the death of the professional and therefore, there is the possibility of a claim against his Estate.

'Run-off' cover is concerned with insurance during the period after the professional activity ceased.

These notes are concerned only with personal run-off cover. Special considerations can arise in the event of the discontinuation of a firm – where a firm is dissolved, or is taken over, or simply ceases to practice.

Retroactive cover

Provided that PII cover is properly arranged, it applies to work carried out before the inception of the policy, to the extent that is necessary. Most claims do arise from work carried out before the current period of insurance, as defects tend not to become apparent for some time after construction.

Collateral warranties

These are agreements creating contractual relationships with parties other than a professional's actual client. They invariably contain requirements for PII cover to be maintained for lengthy periods after construction.

Who should purchase PI cover?

Professionals providing advice need to carry this cover. They need also to bear in mind their "vicarious liability" (i.e. liability for the actions of others) for the work of their employees, subcontractors and other parties for whom they are responsible.

Retiring professionals and other run-off liabilities

As can be seen, claims can arise after

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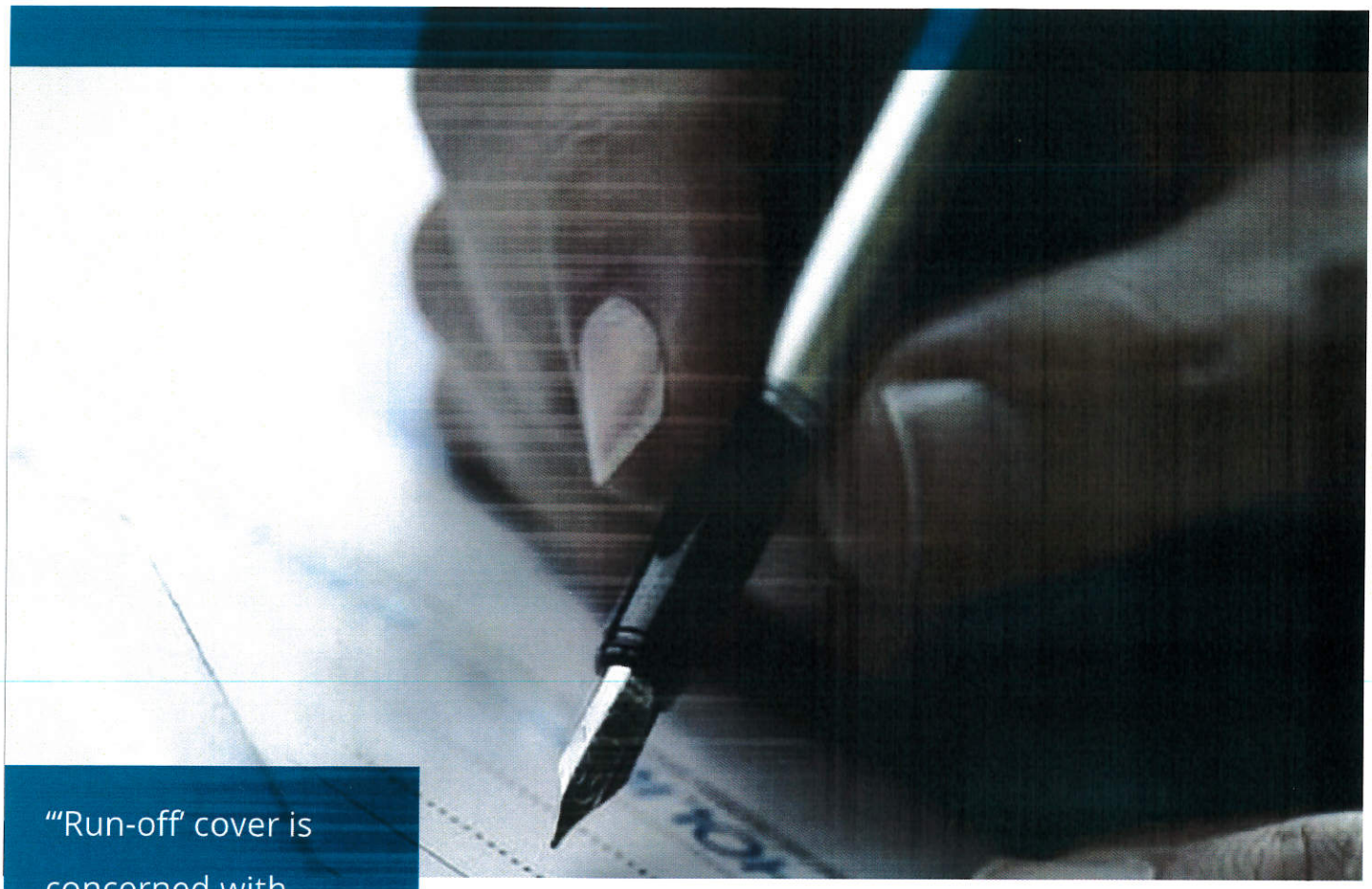

"'Run-off' cover is concerned with insurance during the period after the professional activity ceased"

a professional has retired. Potential liabilities can and do extend into retirement. Run-off liabilities also arise in other situations:

Self employment to employment and vice versa:

Professionals ceasing to practice on their own account and moving into employment continue to be liable for their past work. Cover needs to be arranged accordingly.

People leaving employment can be personally liable for work which they themselves carried out while employed by the firm (This follows the precedent of Merrett v Babb, although particular circumstances would have to apply).

Professionals changing their career:

The same principles apply where the change in status involves moving into and out of the profession.

Why should PII cover be purchased?

- Transfer of risk to an insurer
- Regulatory or professional body requirement:
- There are different attitudes and rules in different professions
- To protect the reputation of the profession and safeguard the public employing them
- Peace of mind for the Professional.
- Client protection

The benefits of PII

- Access to specialist advice, for instance:
- Liabilities and the cover required
- Claims handling
- Analysis of potential exposures, such as the wording of collateral warranties
- Legal help lines
- Protection of your reputation

When should PI cover be purchased and for how long?

PII should be in place for the whole of the professional's working life and in retirement.

Time periods for making claims:

- People often refer to the "standard" limitation period, meaning three years for personal injury and six years for other loss or damage, in accordance with the statute of limitations. However it is not so simple!
- For contracts "under hand" (which

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Act, three years are allowed from the date of discovery subject to a long-stop of 15 years (but even that might not be the end).

Run-off liability cover

The standard definition of the Insured under a PII policy includes the following, in all cases in respect purely of work carried out on behalf of the insured firm:

- current partners and directors – as listed in the proposal form
- new partners and directors
- former partners and directors
- former partners and directors remaining as consultants
- current employees
- former employees
- the estates of deceased persons in those categories
- Where the practice continues and where it maintains PI cover, run-off liabilities are taken care of. Failing that, a run-off policy for the benefit of the individual is required

Availability of run-off cover

Insurers do not like providing run-off cover in isolation but the Insurer providing cover at the time of retirement will usually continue to offer run-off cover.

One possibility would be to purchase a single policy providing cover for six years (the maximum available) for a one-off premium but, in the current insurance market, this is not generally available. All that can be obtained at the moment is annually renewable cover. There are advantages and disadvantages with each option.

Run-off and the LI members' insurance scheme

One of the benefits offered by the LI PII Scheme is that there is automatic provision to provide members with 'run-off' cover if they have been a scheme member for 3 years.

The premium is a pre-determined percentage of the member's current premium to enable retiring members et al to budget with some certainty. The premium will be a "one-off cost" for a full 6-year period.

Most of the benefits that apply to running covers will follow through, ie:

- Full Civil Liability Wording
- Free Legal Helpline
- Claims Handling Assistance
- Premium Financing Facilities

Further information

If you require further information on professional indemnity insurance, please contact the LI or speak to representatives of MFL Professional Partnerships on 0161 236 2532.

Contact the LI Insurance Services team to discuss your PI arrangements:

T: 0161 233 4498
W: www.li-insurance.co.uk