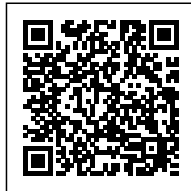


# PROFESSIONAL INDEMNITY SPECIAL REPORT 2015: THE BLAME GAME

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## **With more clients inclined to bring negligence claims against their legal advisers, lawyers need to ensure that the terms on which they accept instructions are made clear at the outset**

Law firms are increasingly at risk of being sued by clients for negligence. The fact that clients do not view lawyers in the deferential manner they perhaps once did is cited as one of the reasons for this trend, as is the perception that law firms, particularly the major players, receive massive fees for the service they provide. Accurate or not, views such as these are fuelling clients' desire to seek recompense from their legal advisers when deals or disputes turn sour. In such a climate, the onus is on law firms to ensure they take the correct steps to minimise this risk.

Jose Maria Pimentel, a partner at DAC Beachcroft in Madrid, points out that, traditionally, Spain has been a country in which a claim against a legal adviser was not culturally acceptable or common. "Now that this cultural barrier has been removed more or less since 2006, it is more common that a client instigates recovery actions against their advisers," he claims. "This is leading to an increase in professional liability claims against legal advisers."

Lawyers in Iberia are, of course, required to have some professional indemnity (PI) cover. In Portugal, PI cover is mandatory, although levels of cover have historically been quite low, while Spanish lawyers must have a professional liability insurance policy that appropriately covers civil liability. Insurance companies such as Willis, Markel International, Howden Group and XL Group are among

those to have targeted the Iberian market – research commissioned by reinsurer PartnerRe Wholesale, and conducted by Finnacord, estimated that the professional indemnity insurance market in Spain (for all professions including lawyers) will be worth €412 million in 2017, up from €393.3 million in 2013.

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Margarida Lima Rego  
Morais Leitão, Galvão Teles,  
Soares da Silva & Associados  
(MLGTS)



### **No more deference**

Market observers say there is now an increasing risk of law firms being targeted for legal action. Clients are much more prepared to go after the legal advisers should something go wrong with a case or a deal, meaning the importance of obtaining PI cover is growing. This has been driven by higher expectations from clients as well as the knowledge that lawyers have PI policies to cover claims. No longer are professional advisers treated with deference – clients have got a better understanding of how systems work and that any adverse outcomes may be a result of negligence rather than economics.

Cuatrecasas, Gonçalves Pereira litigation partner Juan Antonio Ruiz agrees that lawyers, like other professionals such as doctors and architects, are increasingly facing civil liability claims.

“Between 2011 and 2014, the number of cases relating to liability in the legal profession dealt with each year by Spanish courts doubled. The spread of legal professionals’ liability insurance – which is compulsory for law firms – has contributed to the increase.”

Margarida Lima Rego, of counsel at Morais Leitão, Galvão Teles, Soares da Silva & Associados (MLGTS), says Portuguese lawyers are in a similar predicament: “Over the last ten years we have witnessed an increase in negligence claims against legal advisors. We believe that this is mostly due to society’s growing awareness of our legal duty to seek professional liability insurance. More recently some clients have started to show interest in whether we had topped up the mandatory insurance with any additional coverage.”

Some insurance experts, such as Almudena Benito, executive director in Willis’s financial and executive risks practice in Madrid, agree that clients are increasingly looking to recoup some of the losses by making negligence claims against their legal advisers. “The client is increasingly litigious, particularly in relation to larger law firms in Spain that receive high fees for their services,” Benito says.

However, Esteban Manzano, head of Markel International Spain, has not seen a trend for clients to take such action, although he adds Markel has encountered some of these types of claims. “Liability policies are sometimes seen as a potential ‘source of income’ for distressed companies,” he says.

## Lawyers buying more professional indemnity cover, says insurer

Lawyers are buying an increasing amount of professional indemnity insurance according to Santiago Garaizábal Valle, sales director for large accounts at insurer Caser Seguros. "Lawyers' prudence has increased in recent years with regard to buying insurance," he says. "This has had an impact in that there has been an increase in the amount of secondary insurance that is purchased to provide a greater degree of coverage in addition to the basic coverage offered by the lawyers bar associations." He adds that, as a result, Caser Seguros is developing new policies for lawyers, which are mostly "professional indemnity insurance for law firms and D&O insurance, among others".

## More vulnerable to claims

With clients exhibiting a greater tendency to sue their legal advisers, experts say that common causes of claims include errors, missing deadlines and problems that have occurred as a result of using junior lawyers. Jose Antonio Muñoz Villarreal, managing partner of Muñoz Arribas Abogados, explains the majority of clients no longer simply accept an adverse result but demand a more detailed explanation in cases of an adverse or unexpected result. "If the explanations do not satisfy clients, the latter could conclude that the adverse result was caused because of the lack of diligence of his instructing lawyer," he says.

Manzano says that, in general, corporate law firms tend to be more vulnerable to professional indemnity claims, particularly in areas such as mergers and acquisitions, legislative compliance and securities law. Meanwhile, Virginia Martínez, a senior associate in Hogan Lovells' insurance and reinsurance practice, stresses that it is easier for lawyers to make mistakes on "very complicated transactions", while contentious work is vulnerable to

professional indemnity claims because there are strict deadlines to file submissions, writs and appeals with courts. The failure to meet these deadlines cannot be remedied generally and leads to the dismissal or rejection of the client's action.

"Clients have ceased to see the lawyer's role as an obligation to provide means and now see it as an obligation to produce results," Martínez adds. "When the lawyer loses a case, the client can feel tempted to try to obtain the same results by suing his or her lawyer. The same applies, for instance, on a deal – a clause drafted by a lawyer signifying obligations unexpected or undesired by the client can be the basis for a future PI claim."

In Portugal, previous judicial decisions would indicate that litigation seems to be by far the riskiest type of legal work in Portugal, according to Lima Rego. "The type of action or omission that seems to trigger the most lawsuits is that of missing a deadline within judicial proceedings," she says.

"Deadlines such as those applicable to the right to submit a statement of defence or the right to appeal appear to be the most common – in any case, when comparing our jurisdiction to others we would say that the number of negligence claims against lawyers is still fairly low."

Even so, lawyers say examples of the recurring problems that lead to many of the PI claims against firms include: allowing substantive prescription or expiry periods for submitting complaints to elapse; allowing procedural periods for answering complaints or filing appeals to elapse; not giving clients information; omitting relevant requests or elements from legal statements; and failing to return documentation provided by clients.

## Need for vigilance

Ruiz says: "Other potential areas of liability for lawyers not connected to legal actions include giving inappropriate tax advice and wrong advice on acquiring properties that do not meet the legal requisites to be used for the use intended by the purchasers."

While insurance is critical in protecting lawyers' and firms' interests, Martínez says lawyers need to be vigilant with regard to standards and internal processes in order to avoid having to use their PI policies. She adds that this approach should be adopted from the very outset of an instruction. "First and foremost, lawyers must be very careful when issuing a letter of engagement or undertaking any kind of work," Martínez says. "Proper disclaimers – regarding the information that has been actually provided or the purpose of the instruction, for instance – must be used." She adds that lawyers

should always inform their clients regarding the probability of their action being successful, as well as telling them about the costs that the exercise of an action may incur, such as paying the other party's legal costs if the lawsuit or appeal is not upheld.

Lawyers should also focus on following existing legislation. In Spain, for instance, legal professionals are subject to ordinary liability, that is liability by negligence or fault. Therefore, their work must meet the diligence level required in each case, taking all precautions when advising clients. "Keeping [clients] promptly informed, obtaining their written consent for action to be taken, sharing opinions regarding draft contracts and procedures, and ensuring their participation in everything related to defending their interests," Ruiz comments. "These are the criteria and steps to follow to reduce the risk of professional indemnity claims."

Muñoz Villarreal, recommends four key areas of good practice: proactivity and close contact with clients, including regularly reporting to clients with updates; realistic and clear advice on the relevant case and all its possible outcomes; strict observance of the deadlines in litigated cases and of the applicable limitation periods in non-litigated cases; and not taking any step without the client's express authority.

Benito also suggests that firms put adequate firm-wide procedures in place so the risk of a PI claim is reduced. "In order to identify potential conflicts of interest, it is important internal protocols are updated and in force," he says. "It is the way that law firms are able to control their risk – currently, most claims are caused by advice related to financial matters and breaches of judicial deadlines."

Manzano, who warns lawyers about future exposure in relation to issues such as cyber and anti-money laundering, suggests applying "basic risk management principles", starting with an internal risk assessment of their own professional negligence exposure, their historical claims and previous incidents. "In other words, learning from their own experience," he concludes. "Quite an obvious thing to do, but professional firms do not always pay enough attention to it."