



Taking cover

To the surprise of many clients, professional indemnity insurance is by no means universal among India's law firms

Alfred Romann reports

When B Ramalinga Raju, the founder and former chairman of Satyam, confessed to cooking the books at his company, he unwittingly exposed low standards in India's accountancy profession. For not only had Satyam's management been falsifying its accounts over a number of years, but the company's auditors, Price Waterhouse – the Indian affiliate of PricewaterhouseCoopers (PwC) – had not picked up on it.

PwC now faces several lawsuits, including a class action suit in the US, which could cost it hundreds of millions of dollars. But fortunately for the accountancy firm, it has significant professional indemnity (PI) insurance which is likely to cover the bulk of any award against it.

The Satyam debacle has prompted a debate over levels of accountability in the country's accountancy profession, even though the majority of accountancy firms are covered by PI insurance. The legal profession, however, is in a different position. Not only is it uncommon for Indian law firms to have any form of PI insurance, but it is almost unheard of – for now at least – for law firms to be sued by their clients.

"Most firms are not sued for professional negligence," says Mona Bhide, a partner at Dave & Girish & Co in

Mumbai. Instead, aggrieved clients typically turn to the Bar Council of India for recourse. But such action often proves futile. The Bar Council does not normally award monetary compensation and the best a disgruntled client can realistically expect to achieve is a strongly worded letter sent to the offending law firm.

Bhide says that she not heard of a single instance in which the Bar Council has taken a lawyer's licence away.

Is it necessary to take cover?

With Indian law firms rarely being held to account for their errors or oversights, it's hardly surprising that a large number of them have never felt the need to insure themselves against the possibility of a negligence claim.

"PI insurance is, by and large, not necessary for legal practitioners in India," says PM Thimmaiah, a partner at MD&T Partners in Bangalore. He believes that the scope for professional misconduct by lawyers is quite narrow and that it is generally restricted to wrongful acts that are wilfully committed.

Niti Dewan, a senior patent and trademark consultant

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Mona Bhide

Partner

Dave & Girish & Co



at RK Dewan & Co, says it would take a “very good and persuasive insurance agent” and a “threat from some cantankerous non-understanding clients” for firms to take out PI insurance. However, she declines to reveal whether her firm carries such cover, saying the matter is “internal and confidential”.

Others, such as SR Kamalacharan, a partner at Bangalore-based Sundaraswamy & Ramdas, are also dismissive of the need for cover. “Not many legal practitioners would be concerned [about taking out PI insurance],” says Kamalacharan, whose firm is among those that do not have cover. He justifies this position by explaining that lawyers in India do not offer their clients any assurances of the success of lawsuits, and that fees, which are agreed in advance, are payable “whatever the outcome” of the case. “There are no laws concerning initiation of legal malpractice suits or claims against lawyers,” he adds.

Other lawyers do see the need to take cover. “It is absolutely desirable for Indian law firms to have professional indemnity insurance,” says Pravin Anand, the managing partner of Anand and Anand.

Shardul Thacker, a partner at Mulla & Mulla, agrees: “It is prudent and business-like for Indian law firms having a sizable practice to maintain adequate PI insurance.” Thacker’s firm is insured for US\$1.5 million, but so far,

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PM Thimmaiah

Partner

MD&T Partners



the insurance has never been put to use. “Fortunately, we have never been faced with a claim by any client,” he says.

Sudhir Ravindran is the CEO of Altacit Global, another firm that has PI insurance. “A risk-conscious and professional firm would take out professional indemnity insurance,” he says.

“Professional indemnity insurance is necessary because it is good practice and some clients expect it,” concurs Zia Mody, the managing partner of AZB & Partners, whose firm is also insured.

A shock for clients

Clients appear to agree. “We would like to see professional indemnity insurance,” says a senior in-house counsel at a major international bank, “because it indicates a level of professionalism and diligence that we believe our legal service providers should be striving for.”

“The lack of PI insurance cover comes as a surprise to me,” says Judith Crosbie-Chen, the legal director for Asia-Pacific at Logitech.

It is prudent and business-like for Indian law firms having a sizable practice to maintain adequate PI insurance

Shardul Thacker

Partner

Mulla & Mulla



“It’s not very professional,” adds Carlo van den Akker, the Asia-Pacific general counsel at NXP Semiconductors, “particularly if a law firm is engaged in major transactions such as mergers and acquisitions.”

Benjamin Adams, the director of legal and intellectual property for Nokia India, is also surprised to hear that some major Indian law firms operate without PI cover. “Our standard engagement letter includes a representation that they have professional liability insurance, so our expectation and understanding is that the Indian firms we are working with do have insurance,” he says.

“I’m surprised,” says the vice-president of legal affairs at a major Asia-based airline. “I would have thought that aside from good risk management, the regulators would require it.”

But at present, the regulators do not require it. And as Rajesh Begur, the managing partner of ARA Law, points out, “the only time a firm would be driven to take out this type of insurance is if any Indian firms were sued for negligence”.

Professional indemnity insurance is necessary because it is good practice and some clients expect it

Zia Mody
Managing Partner
AZB & Partners



Changing attitudes

Although a disgruntled client can, in theory, take a law firm to court, it has always been assumed that only the most brazen or wealthy would even consider such an audacious step. But Deepika Mathur, the vice-president of underwriting at HDFC Ergo, a general insurance company, warns that these attitudes are “changing rapidly and aggressively”.

Mathur’s observation is substantiated by Mrinal Ojha, a partner at insurance boutique Tuli & Co. His law firm recently handled two cases in which the defendants were lawyers. Both were brought by foreign companies that had received flawed advice from Indian law firms and suffered losses as a result.

“The risk exists and is likely to increase with the passage of time, especially now that Indian firms are dealing with a vast number of foreign clients,” says Ojha. “Many foreign clients come from jurisdictions where actions against lawyers for negligent advice are not uncommon.”

Ojha acknowledges that claims against lawyers still make up a tiny percentage of the PI cases handled by his firm, but argues that it is significant that such claims are being handled at all.

Even two cases against lawyers would have been unthinkable a few years ago.

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Carlo van den Akker
Asia-Pacific General Counsel
NXP Semiconductors



Efficiency triggers action

Improvements to India’s judicial system – and the corresponding increase in the likelihood that a client will take action – are also forcing law firms to think more seriously about PI insurance.

While many of the country’s courts are still chronically backlogged, specialist tribunals and streamlined processes are getting things moving in some key areas. And as the judicial system becomes more efficient, clients are coming to the realization that suing a law firm is no longer beyond the realm of possibility.

Empowered with a new appreciation of their avenues to recourse, clients are pondering how their legal advisers would be able to respond to any such action, and whether they would have the financial strength to pay adequate compensation in the event of damages. They are also seeking assurances that if their law firm was to be sued by a third party, it would have sufficient resources to withstand the action against it while maintaining a high standard of service to its other clients. PI insurance gives them greater confidence in this regard.

“We have been told by clients that while they trust our advice, our having PI insurance gives them additional comfort, says Akshay Jaitly, a partner at Trilegal in New Delhi.

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Benjamin Adams
Director, Legal & Intellectual Property
Nokia India



As a result, a growing number of clients are starting to insist that their law firms have PI cover.

Nokia, for example, always expects its legal advisers to have professional indemnity insurance. Adams explains that this policy is “not necessarily as insurance to protect us against bad advice, though that is of course useful, but most importantly, to ensure that if the lawyers face a claim from a third party, they are able to withstand it and continue to operate and support us on any pending engagements”.

Other clients say that while PI insurance is desirable, it is not always a prerequisite. “It depends what we want the law firm for,” says Leo Seewald, the chairman of Manulife Asset Management in Taiwan. “If I need a legal opinion or if I am going to base an important decision on that advice, then certainly. But if all I need is some basic advice or some filings, then it is not as important.”

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Rajesh Begur
Managing Partner
ARA Law



Although PI insurance is a serious consideration for many clients, it is unlikely to overshadow the fundamental goal of finding the law firm that is best equipped for the task at hand. “Whether an Indian law firm has or does not have PI does not affect our choice,” says the senior in-house counsel at a major bank. “This is because there are still only a handful of firms – less than 10 in India – that we would trust with our work and I believe that none of them currently has PI.”

Ceding to client pressure

International clients are more likely to demand PI insurance than domestic ones. “Indian clients probably don’t expect Indian law firms to have it. However, foreign clients would expect it, and often ask before making a choice of law firm,” says Rabintra Jhunjhunwala, a partner at Khaitan & Co.

There is therefore a perception that firms that deal heavily with foreign clients and work on international transactions have a more pressing need to seek cover.

“Not having insurance is usually an indication of a firm that does not practise at an international level,” says Seewald.

Accordingly, PI insurance is common among legal process outsourcers (LPOs), most of which look beyond India’s shores for virtually all of their customers. Anthony Alex, the managing director of legal services at Pangea3, one of India’s largest LPOs, says PI insurance is “significant to our business”. Pangea3 covers itself in all markets where it has customers. Indeed, most of the company’s customers demand it.

Law firms too are concerned about their exposure in overseas markets. Aliff Fazelbhoj, a partner at ALMT Legal in Mumbai, believes that Indian law firms with overseas offices have a greater need for cover. “Unless you have offices abroad, you don’t really need it,” he says.

ALMT has an office in London and it has PI cover for that office. “There are a few international clients that do ask for it, and if you don’t have it they might be a little uncomfortable,” Fazelbhoj says.

Hindsight is a wonderful thing

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Mrinal Ojha
Partner
Tuli & Co



Product awareness falls short

While some Indian law firms are warming to the idea of PI cover, others lament the poor range of insurance products available to them. “We do not use professional indemnity insurance as there are very few providers in India,” says Chetan Chadha, a patent attorney and head of the international department at IP boutique Chadha & Chadha.

In spite of Chadha’s concerns, several of the country’s major insurers, including HDFC Ergo, Tata AIG and ICICI Lombard, offer PI insurance for law firms. But they spend little time advertising the fact. This is because “the market is limited,” says Mathur at HDFC Ergo.

The first PI products for professional service providers came onto the market about 15 years ago, just as the country’s outsourcers were starting up. To this day, outsourcers and IT companies remain the biggest buyers of PI insurance. The next biggest buyers are those in the financial services sector, followed by doctors. Law firms are way down the list. “Only a handful [have bought it],” says Mathur. “The volumes are still not there.”

One reason for the lacklustre uptake could be cost. Thimmaiah at MD&T Partners says “the premium payable for PI insurance is subject to a lot of factors ... and is quite high.”

Can this cost be passed on to clients? “No. Certainly not directly,” says Adams at Nokia. He believes that the country’s higher-end firms, which tend to charge premium fees, should already include PI cover as part of their offering to clients. “It is my assumption that the more sophisticated Indian firms will have PI insurance along with higher billing rates,” he says.

Policy decisions

The cost of PI insurance in India is comparable to that in the West. However, since the billing rates of law firms are considerably lower in India, the relative cost of the insurance is higher. Policy prices are normally determined by a firm’s number of partners, its gross revenue, the nature of the services it provides, its claims experience and its risk management procedures.

Insurance may be purchased for a whole firm or for individual lawyers, but in India this is complicated by the fact

Who’s got cover?

The following Indian law firms are among those that do have professional indemnity insurance

Law Firm	Level of PI cover
Altacit Global	Undisclosed
Amarchand Mangaldas	Undisclosed
Anand and Anand	Undisclosed
ARA Law	Undisclosed
AZB & Partners	Undisclosed
Bhasin & Co	Undisclosed
Dave & Girish & Co	US\$300,000
DSK Legal	Undisclosed
Gagrats	Undisclosed
IP Gurus	US\$220,000
J Sagar Associates	Undisclosed
Khaitan & Co	Undisclosed
King Stubb & Kasiva	US\$2 million
Luthra & Luthra	Undisclosed
Majmudar & Co	US\$1 million
Mulla & Mulla	US\$1.5 million
Nishith Desai Associates	Undisclosed
OP Khaitan & Co	US\$550,000
Philip’s & Co	US\$250,000
Phoenix Legal	Undisclosed
Remfry & Sagar	US\$1.1 million
S&R Associates	Undisclosed
Seth Dua & Associates	Undisclosed
Singhania & Partners	US\$220,000
Surana & Surana	US\$500,000
Trilegal	Undisclosed
Tuli & Co	Undisclosed
Udwadia & Udeshi	US\$220,000

This list is not exhaustive. In the course of researching this list, approximately 150 Indian law firms were contacted. More than 40 reported not having PI insurance. A much larger number declined to comment or did not reply. Figures have been converted into US dollars and rounded to the nearest US\$10,000.

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Chetan Chadha
Patent Attorney
Chadha & Chadha



that many lawyers are not technically employed by their law firms. Instead, they work on retainers and are engaged as independent consultants.

A typical PI policy protects practitioners against the burden of fighting a lawsuit for professional negligence, or in relation to errors and omissions made while providing a service. The former is the most common claim against lawyers. Policies are issued for a year and cover both the costs of defending a suit and any awards made against the practitioner.

They can also cover personal injury and breaches of confidentiality, but do not cover fraud or dishonesty of the employees of the law firm, criminal acts and claims made by employees.

The PI policies most frequently taken out by Indian law firms provide cover of between US\$200,000 and US\$1 million (see *Who's got cover?*, page 19). "If they buy US\$1 million in cover, they would be fairly pleased with themselves," says Mathur. But this is still a negligible amount by international standards.

The Law Society of England and Wales, for example, requires lawyers working for corporate firms to be covered for at least £3 million (US\$4.7 million).

Not having insurance is usually an indication of a firm that does not practice at an international level

Leo Seewald
Chairman
Manulife Asset Management
(Taiwan)



This discrepancy is clearly apparent to law firm clients. "In a country like India I expect that the actual levels of PI that law firms could afford would never be enough to reimburse us for the level of losses we could suffer if they give us faulty advice," says the senior in-house counsel at a major bank.

Catalysts of change

As a result of the Satyam debacle, India's accountancy profession is considering new rules. In his annual letter to members, Amarjit Chopra, the president of the Institute of Chartered Accountants of India, noted that following Satyam, "action against our members, i.e. auditors, is a reality".

Chopra went on to note that the institute's current disciplinary mechanism does not permit it to take action against erring members, and he proposed amendments to the Chartered Accountants Act, 1949, to rectify the situation.

If they buy US\$1 million in cover, they would be fairly pleased with themselves

Deepika Mathur
Vice-President of Underwriting
HDFC Ergo



Opinions are divided over whether the legal profession will follow suit and deal with its own liability issues. Some believe it will require its own "Satyam moment" to spur it into action, while others are confident that the slow but steady uptake of PI insurance by Indian lawyers will continue.

The growth of insurance products typically follows the emergence of actual risks and the market's familiarization with their consequences. Therefore, an increase in the number of cases brought against Indian law firms would be expected to drive a corresponding increase in the uptake of PI insurance. Further stimulus would come from clients who push their law firms to purchase adequate cover as a precautionary measure.

But perhaps the strongest catalyst of change would be an edict by the Bar Council of India making PI insurance mandatory for all law firms, as it is in many other jurisdictions.

"What would drive us to take out professional indemnity insurance is the fact that it is mandated under the law, or if there is a Bar Council advisory to do so," says Sunita Sreedharan of SKS Law Associates, an uninsured law firm in New Delhi. ■