Personal costs orders may be handed out to practitioners for a number of reasons including, where:

a. practitioners (not the client) have been tardy in complying with some interlocutory procedure;

b. there has been an abuse of process such as, conducting litigation with no prospect of success\(^1\);

c. there has been unreasonable conduct, delay, neglect or default of a practitioner; or

d. applying the common law test, there has been a ‘serious dereliction of duty’ \(^2\).

Any claim for indemnity with respect to a personal costs order made by an “Insured Practitioner” is not covered under the Professional Indemnity Insurance Scheme 2009 (“The Scheme”).

“Insured Practitioner” is defined as the holder of a current practising certificate and a person who is admitted to practice in the Supreme Court of South Australia.

The insuring clause at Clause 1 of the 2009 Certificate of Insurance provides cover in respect of ‘… any civil liability incurred in connection with the Practice (including Claimants costs) in respect of which a claim is first made against the Insured during the Period of Insurance together with Defence Costs ….’

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\(^1\) White Industries v Flower and Hart (1998) 156 ALR 169

\(^2\) Myers v Elman [1939] 4 All ER 484 at 497
This insuring clause may therefore appear to respond to such a claim as the liability incurred by an Insured Practitioner involves a civil liability incurred in connection with the Practice and, a demand has been made against the Insured Practitioner during the relevant insurance period.

However, cover is provided subject to a number of conditions and exclusions. The relevant provision is contained in Section 3 of the Certificate of Insurance and in particular, Exclusion 3.4 which provides as follows:

‘The insured will not be indemnified with respect to:

3.4 any civil penalty or any punitive, exemplary or like damages or any fine, costs or expenses incurred or ordered to be paid or imposed by law.’

The above Exclusion operates to deny cover to an Insured Practitioner for a personal costs order for the following reasons:

- On a plain reading of Exclusion 3.4, cover is excluded for “… any … costs or expenses incurred or ordered to be paid …”; and
- Cover is excluded because the costs order amounts to a “civil penalty” imposed at the discretion of the Court exercising its statutory powers.

In light of the above, if a practitioner is unfortunate enough to have a personal costs order made, it will be a matter for the practitioner to consider whether an appeal should be instituted against any such order. Obviously, the practitioner would have to determine whether to allow the adverse costs order to stand, or risk further costs of an unsuccessful appeal and, a possible finding, and published decision by a judge or panel of judges that the personal costs order was justified. Consideration should be given to seeking independent advice on such a decision, though again the cost of this would fall to the practitioner.

Personal Costs Orders are not Covered!

For any queries about this, or other Risk Management Services offered by Law Claims, please contact the PII Risk Manager, Gianna Di Stefano on 8410 7677.