

Excess Insurance:

More necessary than you may believe

Who should be thinking about the need for excess insurance? Everyone.

As the complexity of claims increases, more lawyers are recognizing that their potential exposure to risk may be larger than they anticipated. To protect themselves and their law practices, they are turning to excess insurance to provide an extra layer of malpractice insurance protection.

Based on our statistical analysis, lawyers in practice for the typical length of a law career will have at least three claims made against them over the course of their law practice. One out of every two lawyers reading this article will have to report a claim in the next eight years. Four out of five lawyers in practice for 20 years have already had at least one claim made against them.

IT TAKES JUST ONE CLAIM

A single claim is all it takes to erode coverage limits to the point where there are insufficient funds left to resolve that claim.

How can this happen?

- Defence costs alone could quickly mount to \$500,000 or more if the claim requires a substantial defence.
- Significant prejudgment interest likely will be assessed on a claim that arises out of services provided years ago.

- The stakes, and the cost of claims, are significantly higher in some areas of law, such as securities, tax, pensions, real estate, and estate work.

As well, many claims today are more complex than in the past – resulting, for example, in an increase in the average cost of claims on which we incur defence or indemnity costs over the past decade.

Lawyers need to consider that it is not only their own work and clients that they have to worry about: You can also be held accountable for the work of partners, associates, employed lawyers, others with whom they have worked, and those to whom they've subcontracted work, in the past and present. In fact, anyone who provides services in connection with the firm, or whose work or expertise that you rely on, could become the root cause of a claim.

Without excess insurance coverage, you could be personally liable – with potentially devastating personal and professional consequences – for any costs that exceed the \$1 million per claim/\$2 million in the aggregate coverage limits provided by the LAWPRO primary liability insurance program.

To assess your potential exposure to claims and the need for excess insurance, take the Test Your Exposure test on page 10 of this magazine.

LAWPRO Excess program marks 10th anniversary in 2008

LAWPRO's Excess Insurance program was launched in 1998 to address a clearly identified need: Small practice (firms of up to 15 lawyers) and solo practitioners needed to be better informed of their potential claims exposure – and needed access to competitively priced excess insurance that would provide an extra layer of malpractice insurance protection for those who decided they needed this coverage.

That first year, 80 firms – many of them first-time buyers of excess insurance – opted for the LAWPRO program. By 2007, 1,350 firms had chosen LAWPRO as their excess provider, most of which did not have excess coverage in place before joining LAWPRO's Excess program. Our consistent drive to raise lawyers' awareness of liability issues clearly continues to hit home. As well, those who have placed their excess coverage with us in the past clearly feel they are well-served: Consistently, 95 per cent or more of firms renew their excess coverage with LAWPRO from year to year.

In response to changing market conditions, our Excess program has also continued to evolve. In 2007, for example, we expanded the program to selectively underwrite firms of up to 50 lawyers; and to respond to the need for higher limits for firms of this size and smaller, we introduced a new \$9 million limit option.

Today, LAWPRO's Excess program provides limits that range from \$1 million per claim/\$2 million in the aggregate to \$9 million per claim/\$9 million in the aggregate (note these are firm limits that apply to all lawyers in the firm collectively, and are above the primary program limits of \$1 million per claim/\$2 million in the aggregate provided each lawyer in the firm).

Excess Insurance applications are available at our website (www.lawpro.ca) in the File Online section of the site.

Information is available from our Customer Service Department at: (416) 598-5844 or 1-800-410-1013; or by e-mail to: service@lawpro.ca

Test your exposure

Take this test to quickly assess your potential exposure to claims – and your need for Excess Insurance coverage.

How to score

Give yourself one point for each “Agree” that you record.

What do you know about the law practices of others – tenants, associated law practices, co-counsel, back-up or previous counsel, ‘of counsel’, and others, past and present – for whom you may be held responsible.

- AGREE** 1. I am familiar with their file practices, procedures, and communications, including in-take procedures, documenting retainers, reviewing opinions, docket control and diary systems, completeness of documentation, and file retention and storage.
- AGREE** 2. I am satisfied that the letterhead, office signage, reception and telephone, website, blog, advertisement and promotional materials, as well as retainers and billing arrangements of my practice and others affiliated with me, consistently and clearly communicate the nature of the relationship of my practice to that of others.

How carefully have you assessed the exposure relating to the areas of law in which you – and those affiliated with you – practise or practised?

- AGREE** 3. I have not practised and do not expect to practise in the more claims-prone areas, such as litigation, real estate, corporate and commercial, tax and securities law. My past and/or present partners, associates, employees or others for whom I may be held responsible, have not practised and do not expect to practise in these areas either.
- AGREE** 4. When I or members of my firm have become involved in these more claims-prone areas of practice, the work has been focused in the hands of a few with the right expertise, or with others under the appropriate supervision or guidance.

What checks and balances are in place for your firm’s trust accounts?

- AGREE** 5. Neither I nor members of my firm maintain large trust accounts or trust accounts with much activity.

- AGREE** 6. When it comes to trust accounts, our firm has careful controls in place to govern activity in these accounts; our trust accounts are overseen by more than one lawyer, and two signatures are required for each cheque or withdrawal.

Have you assessed the exposure that comes from potentially high-stakes transactions?

- AGREE** 7. My firm does not handle major financial transactions and /or represent clients where the stakes are high, such as class action suits, pensions, securities, tax or patents and trademarks.
- AGREE** 8. I appreciate that the modest beginnings of past clients may have grown, and that the stakes, and any interest accruing, associated with past services, may have grown. As well, I am satisfied that I have plenty of coverage to deal with this exposure.
- AGREE** 9. My colleagues and I do not rely on the same research, or general or past opinion when we provide opinions to different clients – a situation that could significantly compound our exposure to claims.

What other excess insurance may be in place for your benefit?

- AGREE** 10. I have arrangements in place with my former firm(s) to ensure that they continue to maintain excess insurance or advise me if they fail to do so, and have reviewed the excess policy and am satisfied that it covers me for my past activities with them.

Total points

Your score and need for Excess Insurance

10 points: You are doing a good job of keeping on top of the practice issues that could result in claims. But that does not mean you are home free. Remember that no matter how well you assess your exposure, claims often arise from the least-expected quarters and Excess Insurance could provide you with that peace of mind that comes with knowing you have sufficient liability insurance coverage in place.

0 points: Your exposure to claims is very likely significant. LAWPRO encourages you to carefully consider your exposure and apply for Excess Insurance coverage. As well, we encourage you to revisit each of the issues raised in this test of your potential claims exposure.

Any other score: The lower your score, the greater your potential exposure to claims. Consider especially those areas where you were unable to “agree” to the test comments. A careful assessment of your and your firm’s practice habits, internal systems and the exposure that your current and past clients represent is always helpful – and a good start in determining your firm’s needs for additional insurance coverage.

Exempt lawyers are still at risk

Many lawyers believe that claims are not as much of an issue once they are retired or otherwise exempted from paying the insurance premium. They also (mistakenly) believe their \$250,000 Run-Off Coverage provides adequate protection for any claims that may be made against them.

For many lawyers, the opposite is true.

LAWPRO has recently seen several cases where retired lawyers have exhausted their \$250,000 Run-Off Coverage limit. As well, our statistics tell us that one in 50 claims against lawyers exceeds the \$250,000 mark; and one in 100 claims tops \$500,000. Thus, a single claim could easily exceed your \$250,000 Run-Off Coverage limits.

Moreover, the standard Run-Off Coverage provides you with limited protection over time: The \$250,000 per claim/in the aggregate limit is a one-time limit and applies to all of the claims made against you while on exemption.* A common misconception is that this limit is renewed every year. On the contrary, \$250,000 is the total of all coverage you will have for all claims made against you (and your estate) in the past, present and future while exempt.* Once the \$250,000 limit is used up, you are personally liable for any additional costs. As a result, a series of smaller claims over time can exhaust your coverage.

In addition, your exposure to claims may be higher than you think:

- Legal services which you or former partners or associates provided in the past may give rise to a claim, now or in the future.

- Lawsuits arise from many quarters – past clients, your former employer(s) and their officers or directors, shareholders, employees and any others who have relied on your legal advice.
- Many claims do not surface for several years after Professional Services were provided; up to 10 per cent of claims are not reported until five years after the service that gave rise to the claim was provided.
- Although legislative changes such as the *Limitations Act, 2002*, may provide greater defences, they do not address all areas of exposure.

If you are concerned that claims arising out of past legal activities could exceed your \$250,000 Run-Off Coverage limits, you can apply to buy up these limits (as well as your Innocent Partner Coverage limits) for an additional premium. Increased Run-Off Coverage protection can be tailored to your particular needs, as is more fully described on the previous pages.

For a more detailed discussion of the issues that those on exemption should consider in assessing their potential exposure to claims, and for information on Run-Off Coverage and options to increase your coverage protection, please see the LAWPRO website at www.lawpro.ca, or contact our Customer Service Department at 416-598-5899 or 1-800-410-1013, or by e-mail at service@lawpro.ca, and ask for a copy of the Insurance Matters brochure that applies to your category of exemption.

* This does not apply to lawyers who qualify for the mobility exemption or exemption for temporary leave of absence.