

Excess insurance offers peace of mind to lawyers and law firms

Would your exposure on a negligence claim be over the individual lawyer's \$1 million per claim or \$2 million in the aggregate limits offered under the LAWPRO policy for the Law Society of Upper Canada program (the "primary policy")? Excess insurance – insurance that covers you for claims after the limits under the primary policy are exhausted – offers peace of mind for lawyers, no matter what their practice entails. Regardless of whether you are considering a first time purchase of excess insurance or if you are wondering if your current excess insurance meets your firm's needs, you should consider what limits of liability should be purchased by your firm.

The factors you should consider in determining what amount of excess insurance is appropriate for your firm are outlined in this article.

Size of firm

It's not just large firms that have claims that breach the primary policy limits: Large claims can affect a solo or two-person firm as well. But, as LAWPRO claims statistics indicate, a lawyer can expect to face a claim approximately once every seven years. As the number of lawyers in a firm increases, the odds that the firm will experience a claim in a given year also increase. For this reason larger firms should appreciate that having a greater number of lawyers raises the chances that there will be more claims to erode the firm's aggregate excess limits. Accordingly, firms with 16 to 50 lawyers are more likely to purchase LAWPRO excess insurance with the highest limits offered, being \$9 million per claim and in the aggregate, than smaller sized firms.

Area of practice

When reviewing claims LAWPRO looks at both the "frequency" of claims for different

types of law (how commonly are lawyers sued in that practice area) and "severity" of claims (what is the relative cost to resolve claims). Some areas of practice are more prone to frequent claims (real estate, civil litigation and corporate/commercial law) and some have the more costly or severe claims (securities, bankruptcy, tax, environmental law, etc.). When choosing limits for your excess insurance consider whether lawyers in your firm practice in an area of law that is more likely to have frequent or severe claims.

Underlying value of files

Influencing the severity of claims, the more valuable the assets, size of transaction or potential award at the core of the retainer, the more serious the potential damages if the lawyer makes an error. When looking at these figures, also consider consequential damages that would arise from the sort of legal services provided. A firm that never has matters or transactions with underlying monetary values that exceed \$500,000 may seek lower limits than a firm which handles complex tax planning for wealthy clients or high value farm conveyances. If, for example, a firm routinely handles \$5 million financing arrangements, then the law firm should consider having in place at least enough insurance protection to cover claims of this amount.

Contractual requirements

Sometimes when lawyers bid for contracts or negotiate retainers to act for government agencies or large commercial lenders, the lawyers will discover that there are minimum insurance requirements. If a tender to provide legal services requires a lawyer to carry \$5 million E&O coverage, for example, the lawyer would, as a minimum, apply for \$4 million per claim/aggregate excess limits, on top of the \$1 million per claim/\$2 million

in the aggregate limits of liability afforded the lawyer under the primary policy. The lawyer would then have documentation available to offer in satisfaction of the tender requirements.

Consider all factors that may erode limits

A damages award against a lawyer is not the only thing that will erode limits. Interest and costs associated with defending and/or repairing the claim will also reduce or even exhaust the limits available. Keep in mind that in some scenarios defence costs can be very high. These can include: the lawyer is named as a defendant in a class action; the claim is complicated due to the number of parties or unique legal issues; or the claimant has assumed an aggressive approach to litigation that makes scheduling and discoveries take longer.

Lawyers should also be alert to the potential for erosion of aggregate limits at the primary and excess level in the event a lawyer or firm faces a number of claims in the same policy period. For example, if the same underlying advice is given to many clients on an untried point of law and that advice is subsequently found to be wrong, there could be a large number of claims or even a class action brought. We have seen this occur with respect to advice on tax issues that had not yet been subject to ministerial clarification or judicial interpretation.

Do you have other questions about LAWPRO's policy and coverage?

Visit our online collection of FAQs at lawpro.ca/faqs to find answers to all your questions.

What does it cost?

LAWPRO’s excess insurance program is underwritten and rated on an individual basis, so there is no “standard” premium. If a firm is approved for excess insurance with LAWPRO, factors which may affect the firm’s premium include, for example, the number of lawyers in or working with the firm, the practice areas, the claims history of the firm lawyers, years in practice, size of practice and the limits of liability being sought. A sole practitioner seeking lower excess limits of liability (\$1 million or \$2 million per claim/ in the aggregate over and above the primary policy limits), in a lower risk practice area and with a good claims history would commonly expect to pay in the range of \$50 to \$80 per month (excluding tax) for excess insurance from LAWPRO, based on current pricing. The same practitioner purchasing \$4 million per claim/in the aggregate in excess limits might pay over twice that amount.

Assess yourself

Knowing what exposure your firm has in the event a mistake or series of mistakes occurs is the first step in transferring the risk from the lawyers or the firm itself to an insurer. Exposure can arise from having claims that exceed your primary limits, providing services that are not covered by insurance or having gaps between when the primary limits are exhausted and the excess insurance will step in (for more on this see “Avoiding gaps in coverage”).

Peace of mind comes from knowing that the right level of protection has been purchased and put in place. For more information on LAWPRO’s excess insurance offerings please visit the excess insurance page on the LAWPRO website (lawpro.ca/excess). There is also a self-assessment tool that will allow you to test your exposure to excess claims at lawpro.ca/stresstest.

For more information on the primary or excess programs please contact our customer service department at (416) 589-5899 or 1-800-410-1013. ■

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Excess limits available through LAWPRO



Avoiding gaps in coverage

On top of making sure they have sufficient insurance to address claims that might exceed the primary program’s limits, law firms should ensure they do not have unintended gaps in coverage where a claim exceeds a sublimit under the primary policy and the excess policy does not “drop down.”

For example, under the primary program lawyers who work with other lawyers in a firm setting are required to carry Innocent Party Coverage, which provides a standard \$250,000 sublimit of coverage in the event a lawyer in the firm has a claim brought against him or her arising from a dishonest, fraudulent, criminal or malicious act that would normally be excluded under the policy. Unless the lawyers in the firm choose to “buy-up” from LAWPRO and raise the standard sublimit from \$250,000 to \$1,000,000, the members of the firm may find that there is a gap of \$750,000 between exhausting the sublimit under the Law Society program policy and when the excess policy would begin. For more on this topic please see our website at: lawpro.ca/insurance/Insurance_Type/innocent_party.asp.

Lawyers should consider buying-up the lower sublimits or asking their insurance broker if their excess insurance policy will drop down below the \$1 million threshold to provide coverage in these types of cases.

It is important to address other gaps in coverage that can commonly arise. Most often we see this when claims are brought against lawyers for work done while at former firms when those former firms do not continue to provide coverage for lawyers after they leave or retire, or when the firm has ceased operating.

Lawyers who practice with or for a firm but who are not permanent members of the firm (such as locums, or “of counsel”) may not be considered “insureds” under the firm’s excess policy. If coverage is required, let your excess insurer or broker know.