

# Claims costs climb into \$100 million territory

Our readers will by now be familiar with the news that total claims costs (including internal handling costs) for each of the 2011 and 2012 policy years are expected to be in the \$100 million ballpark.

Our ongoing actuarial analysis makes it clear that claims costs of \$80 million and more (before internal adjusting expense) are now the norm, not the exception. This is a very significant development when compared to the trend for the earlier part of the last decade, during which annual claims costs came in consistently within a \$50 million to \$65 million range.

In the August 2012 issue of *LAWPRO Magazine*, President and CEO Kathleen Waters' editorial "Top 10 reasons we're in a \$100 million world" summarized our analysis of the causes of the growth in claims costs, which include:

- more claims (and more expensive claims) being reported;
- claims driven by communication problems and/or inadequate investigation or discovery of facts;
- more claims being reported in the litigation stage (instead of earlier, when they would be less expensive to resolve);
- more class action claims and more "cluster" claims;

- more claims by self-represented litigants and more claims by vexatious litigants; and
- economic factors, including growth in property values and the introduction of HST on defence costs.

Nevertheless, despite the elevated level of claims costs, the base premium for 2013 will remain at \$3,350 per insured lawyer – the same as it was for 2011 and 2012.

Why isn't the base premium going up if claims are so bad?

While many factors go into the premium-setting decision, the most important test is whether LAWPRO is expected to emerge from the policy year with an acceptable solvency test result. Sound program management, including the 2011 premium increase, careful investment choices in a tough market and efforts to contain administrative costs, have kept the program on a sound financial footing.

This sound management has allowed us to provide the bar with three consecutive years of premium stability. We're holding the line for now... but we're very concerned about the growth in claims costs. We'd like the bar to understand and share our concern: Expect to hear more from us in 2013 about how all lawyers can help reduce claims costs by taking steps to avoid malpractice errors.

## Why you don't (but should) think about Excess insurance

If you are relying on only the coverage offered under LAWPRO's mandatory insurance program to satisfy claims that may be made against you, you may be at financial risk. The coverage limits under the mandatory program are \$1 million per claim and \$2 million in the aggregate. The cost of resolving claims is growing every year, and the monetary value at risk in the cases you are handling may be growing as well. Consider the myths and realities below before making your decision about Excess coverage.

*"I've been practising for years without a claim. Even if I get sued it won't exceed the mandatory insurance limits."*

Lawyers are more likely to be sued in the tenth year of practice than in the first. Over time lawyers assume more responsibility for files, acquire more clients and take on larger and more complicated matters. Claims will also often take years to mature, so an error that occurred in the second year of practice may not be identified until some years

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later. A single claim can seriously erode a lawyer's coverage limits under the mandatory program through defence costs alone, reducing the amount left to settle the claim or pay any judgment, while the cost of defending and settling claims continues to rise in Ontario.

***“The new firm I’m going to carries a lot of Excess insurance, so I don’t have anything to worry about.”***

The mandatory program is a “claims-made” policy, so the policy that responds is the one in place when a claim (as defined in the applicable policy) is made against a lawyer for the first time, no matter when the actual or alleged error, omission or negligent act took place. This applies so long as the lawyer did not know or ought not to have known of the claim or circumstance giving rise to the claim prior to the policy period. What triggers coverage can differ, even among “claims-made” Excess policies, so it is important to consider consistency in trigger provisions as well as other provisions involving coverage, to minimize the possibility of gaps in coverage when changes occur.

In considering your prior firm exposures, you cannot assume that because your new firm carries Excess insurance that this will protect you against claims arising out of work at your former firm. Although some Excess insurers may, or do as a matter of course, extend protection to include work at one or more predecessor firms to the existing firm, the protection afforded, if any, needs to be verified in each instance; lateral transfers between firms generally go unprotected. So, when moving from one firm to join another, it is important that you satisfy yourself that adequate Excess insurance continues to be purchased by your former firm, that the coverage extends to you as a former firm member and that details of ongoing Excess insurance in place remain available to you.

***“As an associate I don’t get to make the decisions about Excess insurance anyway, so I’m just counting on the partners to do what’s right.”***

It’s important to educate yourself on your firm’s Excess insurance: Once coverage limits are exhausted you could be personally liable for a claim made against you. Whether you are an employee or a partner/shareholder in the firm, a written agreement (such as a partnership, shareholders or employment agreement) can address such insurance issues as who is responsible for payment of deductibles and premiums, and what will happen if the lawyer leaves the firm, the partnership dissolves or the firm undergoes a significant change in management.

If the firm is to continue in a different form (e.g., become a limited liability partnership or law corporation) or a successor firm is to be created, Excess coverage may be available for the predecessor firm through the new firm’s Excess insurance. Otherwise, the existing firm’s Excess policy in place before transition may provide for (the purchase of) an extended reporting period if conditions are met, and the availability of separate tail coverage for this firm can be explored. Failure to ensure that adequate Excess coverage is in place for predecessor and prior firm work can be a very costly mistake.

***“As a partner with the firm, I made sure we had sufficient insurance in place that took into account the size of our firm, the nature of the practice and our likely exposure in the event of claims.”***

As firms change over time, so too should your insurance be updated to reflect current needs. Changes in the nature of the files, clients, types of transactions and the claims history of the firm members can impact a firm’s insurance needs and the ability to maintain or obtain appropriate levels of insurance.

One type of change that may occur is the addition of new lawyers to a firm. As part of the interview process, firms should enquire into the claims history of new hires to see if the lawyer’s track record for claims is likely to subsequently impact the underwriting and rating of the present firm’s Excess insurance. Another type of change may be more files or transactions involving larger amounts that are not adequately covered anymore.

Even if the existing Excess insurance has limits that appear to meet your firm’s needs, gaps in coverage may still arise. For example, this can result from a failure to buy-up or increase sublimits (i.e., special lower limits) that exist under the mandatory program and may apply to your situation, such as Optional Innocent Party protection or Run-Off Coverage options, or if the aggregate limit for all claims in a fund year has been exhausted. If additional coverage under the mandatory program has not been purchased to address this, or if the Excess insurance fails to “drop down” below \$1 million to the lower sublimit in order to address the gap created by the sublimit, there may be a large uninsured exposure between the limits available under the mandatory program and the point where Excess insurance would begin to respond.

***“I’ve scaled back my practice. In fact, to keep my expenses down I share an office with lawyers and other professionals and operate as a sole practitioner. It wouldn’t be worth it for me to purchase Excess insurance.”***

Exposure to claims can come from many sources. Informal associations with other lawyers and professionals can leave you open to liability if someone reasonably believes you are in practice together or you are otherwise, at least in part, responsible for the services provided by others. This may include work done by employees, co-tenants, “of counsel” lawyers shown on the letterhead, *locums*, or other persons who appear to be affiliated with the lawyer’s practice. As well, your past can come back to haunt you and work done prior to scaling back your practice can ultimately give rise to a claim that exceeds the apparent dollar value of the file when you worked on it.

Be alert to your insurance needs and take action to control your personal exposure. For more information on the LAWPRO Excess Insurance program, contact LAWPRO Customer Service at (416) 598-5899 or 1-800-410-1013 and request a no-obligation premium estimate for your firm. After reviewing the premium estimate you can now apply on-line at the secure section of our website (**MY LAWPRO** at [www.lawpro.ca](http://www.lawpro.ca)).

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