

Untangling the myths of excess insurance

Unfortunately, far too many lawyers do not appreciate their full exposure to claims and how excess insurance could be of benefit to them. Excess liability insurance is intended to provide additional limits over that provided by the underlying (primary) liability policy. For lawyers in Ontario, the underlying insurance which all practising lawyers (not on exemption) carry is the Law Society of Upper Canada's mandatory insurance program, which has limits of liability of \$1 million per claim and \$2 million in the aggregate.

This article addresses some of the common myths about excess insurance, and will help you determine if you should purchase excess coverage or increase the excess coverage you already have.

MYTH: "We work in a small firm, and most of the matters we handle for our clients don't involve large sums, so we don't need the excess insurance that the bigger firms carry".

If this is what's stopping you from looking into excess insurance options, you might be in for a surprise. Your firm's risk of having one or more claims that could exceed \$1 million in a given year is likely higher than you think. While it's probably true that many small firms don't need to carry \$200 million in excess insurance for possible mistakes members of the firm could make, excess coverage limits don't have to be sky-high. If your firm thinks your reasonable exposure is \$1 million more than what you currently have under the Law Society program, you can contact LAWPRO or discuss with your insurance broker or agent whether lower limits, like \$1 million or \$2 million per claim in excess of what the lawyers in your firm already carry, is available and appropriate to meet your needs. Depending on the size of your firm, the areas in which you practice, and your claims history, you may be pleasantly surprised at how reasonable rates are for excess insurance.

Small firms are the workhorses for a lot of the legal work done in this province. Your offices may be small and your staffing streamlined, but the value of the work you do for your clients should not be underestimated. You may have competitive pressure to charge a low rate for real estate deals, but if a mistake occurs (and title insurance wasn't purchased or won't respond) then you could be on the hook for the value of a house, or the value of a mortgage. Likewise, you may prepare wills for only a few hundred dollars. But if a drafting mistake is made, or if you failed to make what turned out to be an essential inquiry about the person's dependents or assets, the claim value can be wildly disproportionate to the amount charged for the service.

MYTH: “For smaller firms, the only ones that need to carry excess insurance are the ones that do real estate”.

While it is certainly true that conveyancing firms can have larger claims exposures due to the value of real estate in Ontario, almost all legal work can have exposure to large value claims. For example, while you may not “do real estate”, if you’re a family law lawyer, wills & estate lawyer or a corporate/commercial lawyer then odds are that the files you work on have a real property aspect to them and mistakes made could result in large claims relating to that real estate’s value. Do your files involve insurance or accident benefits? Actions that are dismissed for delay, missed limitation periods or “improvident settlements” can be costly claims for litigators. Don’t forget that pre- and post-judgment interest can add a significant amount to a judgment. And lawyers who give advice on how to structure matters to be most tax effective – and later realize that the Canada Revenue Agency will not allow the tax benefit – can be subject to not only large individual claims, but, in a worst case scenario, a class action relating to all clients given the same advice.

MYTH: “Even if I am sued for more than \$1 million, the damages sought are always so inflated – there’s no way I’d ever have to pay that amount.”

That’s an optimistic view of things. It fails to take into account that it’s not just the damages award, but also settlement and/or repair costs and interest that will eat away at your coverage limits. Remember that when something goes wrong, plaintiffs will usually sue everyone who might be responsible for contribution. A lawyer who has even a minor connection to a file can end up being one of many defendants. If a settlement can’t be reached or the action dismissed, that lawyer is going to have little ability to stem costs or speed up the process as the matter moves towards trial. That can mean years of costly litigation, with the potential of a negative costs award at the end.

MYTH: “My practice is low risk. I’ve never been sued. The underlying value of the files I work on is small and claims rarely occur in this area. While one of the lawyers I work with has a higher volume practice that involves real estate and civil litigation, this shouldn’t affect me because our files are kept completely separate.”

Lawyers who practice together, or who may hold themselves out as practising together, can be vicariously responsible for the acts or omissions of other lawyers. While you may never be sued by one of your clients, there are a lot of ways in which other lawyers’ clients may think you share responsibility for their files. Examples include: the other lawyer reports to you; you step in to act as a witness when documents are signed; you referred the client to the other lawyer, etc. Your insurance should reflect what the exposure is for all members of your firm and lawyers you work with.

When considering the exposure of other lawyers, your firm may also want to periodically review the claims history for all of the lawyers in the firm. Having claims made against you in the past doesn’t necessarily mean you’re going to have claims made against you in the future, but you are statistically more likely to have another claim made against you.

Even if you have a spotless claims history, what about that new hire? Does his or her claims history indicate that there might be something to worry about? Exposures can change over time and your firm should be aware of increased risks. You can gain a clearer picture of your needs by completing the “[Test Your Exposure](#)” questionnaire on our lawpro.ca website. When shopping for excess insurance, firms should pay close attention to the coverage being offered. Excess liability policies are generally intended to provide limits that exceed the underlying policy, but there may be exclusions that mean the policy is not as broad as the Law Society program policy.

If you are interested in getting more information about excess insurance, please contact LAWPRO customer service at service@lawpro.ca or by phone at 1(800) 410-1013 or (416) 598-5899. Or you can discuss this with your firm’s insurance broker/agent to find out what insurance is available and would meet your firm’s needs.

Victoria Crewe-Nelson is assistant vice president, underwriting at LAWPRO.