Enhanced coverage

for counterfeit certified cheques and bank drafts

Beginning in January 2010, coverage under the Law Society's insurance program for fraud-related claims involving counterfeit certified cheques and counterfeit bank drafts is being expanded.

Under the current program, no indemnity protection has generally been available for any shortfall between the lawyer and his or her bank resulting from the deposit of a counterfeit certified cheque or bank draft into the lawyer's trust account as a result of such frauds. However, coverage is provided in the ordinary course for such claims in which trust funds of legitimate clients are inadvertently taken.

As part of the standard program in 2010, coverage will be expanded to provide Ontario's practising insured lawyers with some overdraft protection, provided certain requirements are met.

Background

While there are many forms of frauds involving counterfeit cheques and bank drafts, the two most common fraud scams involving counterfeit instruments that target lawyers' trust accounts include:

- business loan frauds, where a client seeks a lawyer's assistance in securing a business loan; and
- debt collection frauds, where a lawyer aids in the collection of a debt for a client.

Details concerning these two types of fraud are more fully described in the Summer 2008 LawPRO Magazine (volume 7, issue 2) which is available online at http://www.practicepro.ca/LawPROmag/LawPROmagazine7 2 Aug2008.pdf

As these fraud schemes unfold, it is in most instances the trust funds of legitimate clients that have been taken when the counterfeit nature of the certified cheque or bank draft becomes known. Occasionally, the lawyer's trust account happens to not have sufficient funds to

fully cover the amount of the fraud, and the lawyer has been left in an overdraft position with his or her bank.

As discussed in the Summer 2008 issue of LawPRO Magazine article "Not all claims are covered," program coverage has been afforded as a matter of course with regard to trust funds taken that belong to legitimate clients of the lawyer for whom professional services have or were intended to be provided.

It is important to recognize that the policy insures lawyers' professional services. In the event of a shortfall between the lawyer and his or her bank, no indemnity coverage has been available under the program policy in LAWPRO's view for this shortfall, in that no professional service was provided to the bank. In this instance, the claim of the bank is for payment of debt based upon contract, not for damages arising out of the performance of professional services.

It should be noted that the scope of protection under the 2009 and prior years' program is at least as broad as that provided by other law society programs, and that commercial markets – though in a position to provide more comprehensive protection through other forms of insurance – have opted not to do so.

LawPRO is expanding the base program coverage for 2010 to provide some overdraft protection to practising insured lawyers in relation to such claims, provided certain requirements are met.

Enhanced coverage requirements & limitations

Under Endorsement No. 7 to the 2010 program policy, limited trust account overdraft protection is effectively provided where liability for the overdraft results from the handling of a counterfeit certified cheque or counterfeit bank draft in the insured's capacity as a practising lawyer.

The amount of coverage provided with respect to this enhanced protection is subject to a sublimit of \$500,000 per claim and in the aggregate (i.e. for all such claims reported by the lawyer or lawyers in the firm that year). This amount is inclusive of claim expenses, indemnity payments and/or costs of repairs.

As a sublimit, these claims reported would also reduce the amount of protection remaining under the \$1 million per claim/\$2 million aggregate policy limit provided to the practising lawyer.

For the overdraft protection to apply though, at least eight business days must have passed following deposit of the instrument into the lawyer's trust account before instructions are given concerning payment of funds.

Alternatively, the lawyer must have received confirmation from either his or her own financial institution or the drawee financial institution that the drawee financial institution has verified the validity of the instrument, and had this confirmation documented in writing between them (by either the lawyer or financial institution), before payment instructions were given.

As well, the drawee financial institution indicated on the counterfeit certified cheque or counterfeit bank draft must be a Canadian financial institution, and the instrument must have been inspected and deposited by the lawyer, or a partner or employee of the lawyer.

No overdraft protection is afforded in relation to retainer deposits, untransferred fees, or other amounts relating to legal fees, accounts or fee arrangements. As well, some limitations in deductible may apply.

For further details, see the program policy (LawPRO policy no. 2010-001), which is available online at: http://lawpro.ca/insurance/pdf/LawPRO Policy2010.pdf.

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Of course, lawyers will not always be in a position to fully meet the requirements of this enhanced protection. In that instance, lawyers can expect to be covered in the ordinary course in relation to trust funds belonging to legitimate clients. However, if the lawyer is left in an overdraft position with his or her bank, no indemnity protection should be expected in relation to the overdraft position.

Regardless of these requirements for overdraft protection, lawyers are encouraged to adopt a best practices approach in their dealings and exercise prudence in how funds are to be transferred.

Certainly, wire transfers using the Large Value Transfer System (LVTS), as well as real estate lawyers' use of Teranet's Closure® service, should be considered to avoid the prospect of counterfeit certified cheque and bank draft exposures.

Look for more information on how to manage counterfeit certified cheque and bank draft exposures in the December issue of our online LawPRO Webzine.

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Surcharge on real estate transactions

Remitting the surcharge

increases to \$65 effective January 1, 2010



the levy surcharges are considered insurance premium and therefore are NOT subject to GST. They are subject to PST,

to the Law Society

subject to GST. They are subject to PST, and the total amount to be remitted to the Law Society is \$65 per transaction, calculated as follows:

As has been the case for the past 10 years,

Total	\$ 65.00
PST	4.81
Surcharge	\$ 60.19

Real estate lawyers are reminded that the real estate transaction levy surcharge will increase to \$65 from \$50 for any transactions in which files are opened on or after January 1, 2010.

Transactions in which files are opened prior to January 1, 2010, but which close later in 2010 will be subject to the \$50 surcharge in effect when the file was opened.

The change in the amount of the surcharge also means changes in the way the surcharge is remitted to the Law Society and/or disbursed to clients.

Calculating the surcharge when it is disbursed to clients

The full \$65 that you have remitted to the Law Society may be disbursed to clients. Like other disbursements, the levy surcharge is subject to GST (5 per cent), calculated as follows:

Total	\$ 68.25
GST	3.25
Surcharge	\$ 65.00

Filing the levy surcharge

In keeping with LawPRO's sustainability initiative, lawyers are encouraged to

complete their levy surcharge filings online. A PDF copy of the 2010 transaction levy booklet can be downloaded at http://lawpro.ca/lnsurance/ Insurance Forms/insurance 4 forms.asp.

Filing online is quick and easy:

- Go to <u>www.lawpro.ca</u> and select either File Online (in the left navigation menu) or the MY LawPRO icon at the top right of our home page.
- Sign in to the secure section of the LawPRO website using your Law Society number and confidential password.
- Select Transaction Levy Filing from the list of options provided (on the left side of the page) or select the Transaction Levy Filings tab in MY LawPRO.
- An up-to-date accounting of your filings for the current and past year will appear.
 Click on the File now link for the appropriate quarter filing, and you will be presented with a pre-populated form which you update with transaction data for that quarter and you are done.

Please note that filing online requires electronic payment by credit card or by pre-authorized bank account withdrawal.