Communique April 2022

Law Society of Manitoba
Professional Liability Claims Fund

ALL ABOUT EXCESS INSURANCE – DO YOU NEED EXCESS?

Your mandatory coverage

Lawyers often ask me if they have enough insurance. All insured lawyers in the province of Manitoba have **mandatory** insurance coverage of $1 million per claim with an annual aggregate limit of $2 million. The $1 million per claim limit means if a disgruntled former client presents a claim against you between July 1, 2022 and July 1, 2023, you would have coverage for up to $1 million for defence and damages combined on that claim. The annual aggregate means if three unhappy clients each make claims against you between July 1, 2022 and July 1, 2023, you have a total of $2 million to cover the damage and defence costs on those three claims and that once you hit that $2 million cap, you are on your own.

CLIA excess

You should consider these limits of insurance when you decide how much is enough coverage for your practice. You can purchase excess insurance that covers you for claims that might arise after your $1 million per claim and $2 million aggregate limits have been exhausted. Excess coverage is available through the Law Society from the Canadian Lawyers Insurance Association (CLIA) in amounts from $1 million to $20 million. Contact CLIA directly at service@clia.ca for more information.

Claims Made

Like most excess liability policies, CLIA's excess liability program is **"Claims Made"** meaning that you will need to have insurance in place when a claim is made and not when the work was done. It is not transaction based coverage. Firms that do not renew their excess insurance will not have coverage for losses reported after the expiry date of the policy. So, if you purchased coverage with a specific transaction in mind, that coverage will need to be renewed as long as the possibility of a claim still exists.

Excess insurance is different from Mandatory coverage in this respect. On your mandatory coverage, as long as you had insurance at the date of the alleged error, you are covered for that claim even if, when the claim is presented, you are no longer insured, practising or alive. Mandatory coverage stays with you forever. Excess insurance does not.

Seamless coverage

Purchasing your excess liability coverage through CLIA provides you with seamless coverage. Your initial report to Professional Liability Claims fund staff here in Manitoba is deemed a report to CLIA. So, if a claim that looks like it isn't going anywhere suddenly and unexpectedly goes south some years later, you will still be covered, because it was considered reported to CLIA at day one.

Coverage in retirement

Lawyers contemplating retirement often call us about continuing coverage. If you were insured under the mandatory coverage when you did the work, you continue to have $1 million mandatory coverage even if you are no longer practising when a claim is made. But, depending on your practice before you retired, you may need more than that $1 million mandatory limit of coverage to give you comfort in your retirement. CLIA is able to provide all retired inactive lawyers with a **25% discount for excess coverage.** Check with your accountant, but for most retired lawyers, that premium would also be tax deductible.

Things to consider when making your decision to Buy Excess insurance

1. Does your Client require it?

Some clients require proof of excess insurance. Lenders may require insurance at a level that matches a loan advance. Some government agencies or large corporations may require proof of a minimum level of insurance that is higher than the mandatory $1 million as a condition of the retainer. You can buy excess from CLIA now or at any time throughout the year, but remember, coverage purchased with a single transaction in mind should be renewed as long as the possibility of a claim relating to that transaction still exists.

2. Do you or your partners practice in an area of law with a higher risk of many claims or of larger claims?

Some areas of law consistently result in more frequent claims. For instance, real estate files account for the highest number of claims by volume, but these are usually less costly per claim. Missed limitations on medical malpractice or personal injury files, or securities or tax law related claims arise less frequently, but damages tend to be more severe. When you are deciding whether to purchase excess insurance and in what amount, consider whether your practice and that of your partners and associates falls into areas of law that are high risk for frequent claims or high risk for severity.

3. Do you handle large dollar value files?

You should also assess the potential quantum of damages arising out of potential claims. Valuable estates, farm transactions and family law files where the value of assets at issue is high all have the potential to develop into large claims. Personal injury, including medical malpractice, has potentially high value if limitations are missed or claims are dismissed for delay. We had over 20 dismissal for delay claims reported last year! If you and your firm seldom deal with matters where more than $500,000 is at issue, you may not feel such a pressing need. However, large claims continue to arise out of unforeseen areas of law. For instance, ten years ago, we did not expect to see drafting and executing wills as a top five area of law for frequency of claims. We also did not expect ineffective counsel at first instance to be a common ground of appeal in criminal law, with resulting claims.

4. Could large Defence expenses erode your $1 million coverage?

You should also remember that it is not only the indemnity or damage payment which might ultimately erode the limits of your insurance. Defence costs eat into your coverage limits. There have been claims in Canada where costs incurred in defending lawyers in complex legal malpractice suits have exceeded $1 million, with the mandatory limit totally gone before damages are paid. We have had several professional liability files in Manitoba that have gone on for years, with many preliminary motions, multiple parties, expensive experts and then lengthy trials, appeals and leave applications. The cost of defending these claims dramatically decreases the amount left to satisfy damage awards.

The decision is yours.

You are the only one who can assess your firm's exposure to a claim or series of claims that might take you over the mandatory $1 million limit or the annual $2 million aggregate limit. Take some time and consider your exposure today.

The Canadian Lawyers Insurance Association (CLIA) offers excess coverage in amounts from $1 million to $20 million in excess of the $1 million mandatory insurance. They also offer extended and stand-alone cyber insurance.

If you would like more information on this year's CLIA Excess Program, excess coverage for retired lawyers, or Cyber insurance please contact CLIA at service@clia.ca.