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The Case for Excess

December 31, 2015

As many Oregon lawyers are aware, Oregon is the only state that requires malpractice coverage for lawyers. Any Oregon lawyer, engaged in the private practice of law, and whose principal office is in Oregon, must obtain malpractice coverage through the Professional Liability Fund (ORS 9.080). This coverage is individual to each lawyer and currently provides coverage limits of \$300,000 per claim/aggregate of claims, plus a \$50,000 claims expense allowance.

The PLF Primary Coverage Plan and limits of coverage are approved each year by the PLF Board of Directors and the OSB Board of Governors as the *minimum* malpractice coverage requirement for Oregon lawyers. Those \$300,000 limits have remained the same for nearly thirty years.^[1] Naturally, the cost of claims has steadily increased over that period and so has the frequency of claims in excess of the mandatory limits. Claims have become more complex and the value of matters handled by lawyers has increased. Certain areas of law, personal injury, business, real estate and estate planning, now present a much higher risk for excess claims.

What is Excess Coverage?

Excess coverage is professional liability coverage that provides coverage limits above, or in excess of, the statutorily required coverage limits of \$300,000. Since it is not mandatory, excess coverage is underwritten – that is, law firms must submit an application for review in order to obtain a quote for coverage. Unlike the mandatory PLF coverage, which is individual to each attorney, excess coverage is purchased to cover law firms (including sole practitioner firms). The cost of excess coverage can vary depending on a variety of factors, including firm size, claims history, areas of practice, coverage limits, deductible amount, and so on.

Excess coverage can be obtained from the PLF or from insurers in the commercial market. The PLF created an excess program in 1992 to address the difficulty that solo, small, and midsized firms faced while trying to obtain reasonably priced coverage above the mandatory limits in the mid to late 1980s. After the PLF entered the excess market in 1992, the cost of excess coverage for Oregon law firms dropped by nearly 50%. The PLF's entry into the market stabilized the cost of coverage for firms and provided a source of excess coverage for those firms overlooked by the commercial market – namely, small and solo firms. In 2015, the PLF covered approximately 700 law firms and 2100 attorneys at excess levels between \$700,000 and \$9.7 million. Of those firms, 85% were firms with 1-4 attorneys.

Does My Firm Need Excess Coverage?

Likely, yes.

In addition to evaluating the risk exposure for legal work undertaken, it is important to consider to what extent personal assets are at risk in the event of a large claim. Many lawyers feel that the mandatory \$300,000 does not afford enough protection.

What Are the Benefits of Excess Coverage?

In addition to providing lawyers coverage for large claims and protecting personal assets, excess coverage is a good idea for other reasons as well.

One of the consequences of holding the mandatory limits at \$300,000 is the ever more limited protection available when multiple lawyers and firms are implicated in a same or related claim. The availability of the \$50,000 expense allowance does give some relief in this situation, but all lawyers and law firms must ultimately share the same \$300,000 limits for the claim. Excess coverage addresses this problem by providing each firm with its own set of excess limits for such a claim.

Excess coverage can also provide coverage for activities excluded under the PLF Primary Coverage Plan. For example, claims resulting from cyber liability or a data breach are excluded in the PLF Primary Coverage Plan, Section V.23. In contrast, the PLF Excess Plan provides coverage for these

claims under a Cyber Liability and Data Breach Endorsement. The PLF added this endorsement to its excess coverage in 2013 to address the increasing vulnerability of law firms in protecting firm and client data.

The PLF Primary Coverage Plan also excludes defense against bar complaints made against a lawyer. PLF excess coverage also does not cover ethics complaints, but some commercial insurers do offer this coverage.

Conclusion

When assessing whether excess coverage is appropriate for your firm consider these questions: do your current malpractice coverage limits match the risk of exposure in your law practice? Are your personal assets protected in the event of an excess claim? If the answer to either of those questions is “maybe” or “no,” then obtaining excess coverage should be a priority.

The PLF generally recommends that law firms have excess coverage as protection against larger claims – whether that excess coverage is through the PLF or a commercial carrier.

If you have questions about PLF excess coverage, call Jeff Crawford or Emilee Preble at (503) 639-6911.

[1] Limits were increased from \$200,000 to \$300,000 in 1987. The claims expense allowance has changed some over time. For example, the limit was raised from \$25,000 to \$50,000 in 2005.



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