

2011 LEGISLATION ALERTS

CHANGES TO PLF CLAIMS MADE PLAN

The PLF Board of Directors and the OSB Board of Governors approved changes to the 2012 PLF Claims Made Plan in three areas.)

Deletions are noted by strikethrough. Additions are noted by bold and underlined. Comments are italicized.

Losses Involving the Administrative Aspects of Law Practice

PLF coverage is intended to cover professional services performed by Oregon lawyers. However, the PLF has had claims involving the administrative aspects of running a law firm. The claims raise a number of potential issues, including the definitions of “Covered Activity” and “Damages” and what coverage, if any, is appropriate for these types of claims. The Plan revisions are aimed at two problem areas: when lawyers are defrauded by common scams and instances in which law firm staff embezzle or otherwise misuse trust account monies. The changes are designed to make clear that such losses are not covered by the PLF Coverage Plan.

Changes were made to the explanation of “professional services” in the Comments to Section III – What Is a Covered Activity and the language of Exclusion 16 and its Comments.

Changes to Comments to Section III:

Professional Services. *To qualify for coverage under Section III.1 and III.2b, the act, error or omission causing YOUR liability must be committed “in rendering professional services in YOUR*

capacity as an attorney, or in failing to render professional services that should have been rendered in YOUR capacity as an attorney.” This language limits coverage to those activities commonly regarded as the rendering of professional services as a lawyer. This language, in addition to limiting coverage to YOUR conduct as a lawyer, is expressly intended to limit the definition of COVERED ACTIVITY so that it does not include YOUR conduct in carrying out the commercial or administrative aspects of law practice. Examples of commercial or administrative activities could include: ~~such as~~ collecting fees or costs; guaranteeing that the client will pay third parties (e.g., court reporters, experts or other vendors) for services provided; ~~or~~ depositing, endorsing or otherwise transferring negotiable instruments; depositing or withdrawing monies or instruments into or from trust accounts; or activities as a trustee that require no specialized legal skill or training, such as paying bills on time or not incurring unnecessary expenses. The foregoing list of commercial or administrative activities is not exclusive, but rather is illustrative of the kinds of activities that are regarded as part of the commercial aspect of law (not covered), as opposed to the rendering of professional services (covered).

Example. *A client purports to hire the Covered Party and provides the Covered Party with a cashier’s check, which the Covered Party deposits into her firm’s client trust account. The Covered Party, on the client’s instructions, wire-transfers some of the proceeds of the cashier’s check to a third party. The cashier’s check later*

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turns out to be forged and the funds transferred out of the trust account belonged to other clients. The Covered Party is later sued by a third party such as a bank or other client arising out of the improper transfer of funds. The Covered Party's conduct is not covered under her PLF Plan. Placing, holding or disbursing funds in lawyer trust accounts are not considered professional services for purposes of the PLF Plan.

Changes to Exclusion 16:

[GENERAL TORTIOUS CONDUCT EXCLUSIONS]

16. This Plan does not apply to any CLAIM against any COVERED PARTY for:

- a. Bodily injury, sickness, disease, or death of any person;
- b. Injury to, loss of, **loss of use of**, or destruction of any real, personal, or intangible property or loss of use thereof; or
- c. Mental anguish or emotional distress in connection with any CLAIM described under Subsections a or b.

This exclusion does not apply to any CLAIM made under ORS 419B.010 if the CLAIM arose from an otherwise Covered Activity.

Changes to Comments to Exclusion 16:

*Subsection b of this exclusion is intended to encompass a broad definition of property. For these purposes, property includes real, personal, and intangible property (e.g., electronic data, financial instruments, **money**, etc.) held by an attorney. However, Subsection b is not intended to apply to the extent the loss or damage of property materially and adversely affects an attorney's performance of professional services, in which event the consequential damages resulting from the loss or damage to property would be covered. For the purposes of this Comment, "consequential damages" means the extent to which the attorney's professional services are adversely affected by the property loss or damage.*

Loss or Breach of Confidential Data

The risk associated with the loss, compromise, or breach of confidential or private information held by attorneys is a growing threat because much of this information is held or communicated in electronic form. The PLF Coverage Plan has been modified to include a new exclusion, Exclusion 22, to address this issue. The new exclusion is consistent with coverage exclusions in other malpractice insurance policies. Liability carriers all over the country are attempting to address the growing risk, and various stand-alone policies are available commer-

cially. The PLF is in discussions with reinsurers to explore the feasibility of offering such coverage as part of the PLF's Excess Program or in some other manner.

New Exclusion 22 and Comments:

[CONFIDENTIAL OR PRIVATE DATA EXCLUSION]

22. This Plan does not apply to any CLAIM arising out of or related to the loss, compromise or breach of or access to confidential or private information or data. If the PLF agrees to defend a SUIT that includes a CLAIM that falls within this exclusion, the PLF will not pay any CLAIMS EXPENSE relating to such CLAIM.

COMMENTS

There is a growing body of law directed at protecting confidential or private information from disclosure. The protected information or data may involve personal information such as credit card information, social security numbers, drivers licenses, or financial or medical information. They may also involve business-related information such as trade secrets or intellectual property. Examples of loss, compromise, breach or access include but are not limited to electronically stored information or data being inadvertently disclosed or released by a Covered Party; being compromised by the theft, loss or misplacement of a computer containing the data; being stolen or intentionally damaged; or being improperly accessed by a Covered Party or someone acting on his or her behalf. However, such information or data need not be in electronic format, and a data breach caused through, for example, the improper safeguarding or disposal of paper records would also fall within this exclusion.

There may be many different costs incurred to respond to a data breach, including but not limited to notification costs, credit monitoring costs, forensic investigations, computer reprogramming, call center support and/or public relations. The PLF will not pay for any such costs, even if the PLF is otherwise providing a defense.

Exception to the Relation Back Rule

The third change to the PLF Coverage Plan is intended to clarify Section IV.1.b(2). That subsection addresses a problem that can arise when claims are related and only one limit is available. Sometimes a claim can relate back to a claim that was made before a covered party began participating in PLF coverage. This subsection of the Plan is intended to protect the attorney by allowing for coverage when this happens.

Without this exception, the covered party would have no PLF coverage for the claim.

The intent of the subsection is to allow PLF coverage if there is no other coverage available, but not to create an addition coverage limit. As the Comment notes, there would still be only one limit available for the related claims. The change removes the double negative and replaces it with an affirmative statement, better aligning the PLF's intent with the Plan language and Comment.

Changes to Section IV.1.b(2):

Two or more CLAIMS that are SAME OR RELATED CLAIMS, whenever made, will all be deemed to have been first made at the time the earliest such CLAIM was first made. ~~However, this provision will not apply to YOU if YOU have no other coverage from any source applicable to the CLAIM (or that would have been applicable but for exhaustion of limits under that coverage. **This provision will apply to YOU only if YOU have coverage from any source applicable to the earliest such SAME OR RELATED CLAIM (whether or not the available limits of liability of such prior policy or plan are sufficient to pay any liability or CLAIM).**~~

If you have questions or comments about the changes for 2012 or other coverage matters, please contact Jeff Crawford or Emilee Preble, 503-639-6911.

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