IN BRIEF

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Malpractice Prevention Education for Oregon Lawyers

The Sharing of Primary Plan Limits

Most attorneys are generally aware that the Professional Liability Fund primary plan limits do not "stack." This "anti-stacking" rule can apply within a firm or among firms. Because of the increasing number of cases we see in which separate firms are used by the same clients on related matters, and because of the increasing complexity in PLF claims, it is a prudent time to make covered parties aware of the anti-stacking provisions and how they operate. The purpose of this article is to alert covered parties to the potential problems in working on a related case.

Coverage Plan Definitions

Section VI.2 of the 2009 PLF Claims Made Plan (Plan) states the coverage limit rule as follows:

"If this Plan and one or more other Plans issued by the PLF apply to the SAME OR RELATED CLAIMS, then regardless of the number of claimants, clients, COVERED PARTIES, or LAW ENTITIES involved, only one Limit of Coverage ... will apply."

Section I.14 of the Plan defines the term SAME OR RELATED CLAIMS as follows:

"[T]wo or more CLAIMS that are based on or arise out of facts, practices, circumstances, situations, transactions, occurrences, COVERED ACTIVITIES, damages, liability, or the relationships of the people or entities involved (including clients, claimants, attorneys, and/or other advisors) that are logically or causally connected or linked or share a common bond or nexus...."

Application Within a Firm

These terms, generally known as "anti-stacking" provisions, mean that if a number of attorneys in the same law firm work on the same or related matter and claims for damages are made against those attorneys, the attorneys all share one $300,000 limit of coverage and one $50,000 claims expense allowance for those claims.

Application of Anti-Stacking in Different Firms

This coverage rule applies even to attorneys from different law firms, as long as the claims made against them are "related."

In a related claim with exposure above the primary limit of $300,000, the total limit available for indemnity is $300,000. When the covered parties work in separate firms, each also generally has a separate $50,000 claims expense allowance. In this situation the expense allowances do stack. However, once each expense allowance is expended, the coverage limits for both attorneys are cumulative, that is, any indemnity or additional expense payments (over the covered party's $50,000 allowance) for one attorney are subtracted from what is available for the other. Although the PLF is very careful in these circumstances and does everything in its power to obtain a fair result for all covered parties, it is possible that a primary limit for a claim might be fully expended on one covered party's claim prior to a claim being made against the second covered party. In that case, there would be no primary coverage for the second covered party. If excess coverage has been purchased, the problem is mitigated or alleviated entirely, depending on the size of the claim.

Rationale for Anti-Stacking

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The PLF primary plan is priced to provide a basic "floor" level of coverage and is not designed to handle large losses for which excess coverage should be purchased. The prohibition against the stacking of limits is part of this cost containment. It protects the Fund from being exposed to an unknown number of limits based on a single event. Without the "same or related" provision, when a number of covered parties work on the same matter and a viable claim is made, the number of limits would equal the number of lawyers who would arguably be responsible for the error. For example, using the coverage limit of $300,000, if ten lawyers worked on a disputed matter, the limit would be $3,000,000 instead of $300,000.

The $300,000 limit of coverage satisfies the vast majority of claims and also contains a significant "cushion." For example, the average cost for a PLF claim over the last ten years (including the amounts paid for defense counsel, court costs, and experts) is approximately $17,000. The vast majority of claims are settled at far below the primary limit. Because the overall balance of the "same or related" provision and the cost of operating without that limit might increase the assessment substantially, the equities significantly favored inclusion of the provision.

Protecting Yourself From the Risk

In view of the risk, albeit quite small, for any particular covered party being subject to a claim in which the "same or related" provision is implicated, covered parties can do several things to insulate themselves from the potential negative effects of the provision.

1. Purchase excess insurance. Excess insurance is very reasonably priced and provides certain protection.

2. Ask prospective clients whether they have worked with other lawyers on the matter. If they have, make certain you are satisfied that the previous work met the usual standard of care.

Staying within your practice area and documenting your actions are always good defenses against potential malpractice claims. Attorneys should review and familiarize themselves with the Plan. Go to **www.osbplf.org**, and click on Coverage Plan under Primary Coverage.

Recent Coverage Plan Changes Mitigate Impact

Over the last several years, the PLF has worked to mitigate some of the harsher aspects of the "same or related" provision. One of the recent changes in the Plan is the extension of additional expense allowances to attorneys from separate firms who work with separate clients on "same or related" matters. Another recent change in the Plan provides that even if the claims arise from a "same or related" matter, attorneys will have their own sets of coverage limits if they represented different clients or groups of clients whose interests were adverse. For example, if both parties to a real estate transaction sue their respective lawyers, the recent change could extend a set of coverage limits to each lawyer.

We will continue to look for ways to make the Plan responsive to the needs of Oregon lawyers while remaining affordable.

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Professional Liability Fund