

PROFESSIONAL LEGAL LIABILITY INSURANCE

AN IMPORTANT COMPONENT OF A LAW FIRM'S RISK MANAGEMENT PRACTICE

Often described as malpractice insurance, Professional Legal Liability (PLL) insurance is a specific form of errors and omissions (E&O) insurance tailored to meet the needs of a law firm's professional liability exposures not covered within other forms of coverage that the firm may carry. PLL, as in most forms of E&O insurance, is an outgrowth of the exclusions and gaps inherent in standard forms of insurance, most notably the property and general liability package policy, as well as the umbrella policy that may sit on top of the package and auto policies. As in most forms of E&O coverage, the courts' early interpretations of broad coverage language within package policies in favor of the insured have resulted in more insurers writing strict exclusions within those package policies. Consequently, the exclusions have led to the creation of numerous specific categories of policies designed to cover the professional liability exposures. Within this context, we will discuss the specific area of Professional Legal liability Insurance policies.

Unfortunately, PLL policies are often misunderstood because the communication of information from the carrier and broker to the law firm contains gaps in important information. Professional Liability Insurance, in this case PLL, is a specialty area of expertise within the insurance field. However, it is most often communicated through the property and casualty broker that only handles the PLL policy as an adjunct to the package policy for the firm, not as the specialty area that it is, requiring in-depth explanation to the firm of coverages, exclusions, and potential gaps specific to that firm. Perhaps more important, there are numerous claims submitted to insurers in the PLL field. It is critical that the firm utilize a professional liability expert that will integrate themselves into the claim process, acting as a conduit between the law firm and their insurer. Unfortunately, claims handling and discussions often becomes adversarial between the insurer and their insured law firm. An effective professional liability broker will insert themselves into the claims process to act as an additional advocate and resource for their client law firm.

Our discussion will focus on some of the key components and law firm responsibilities of many professional legal liability policies. We will also review a number of important factors in evaluating the differences between policies. Finally, we will briefly look at the current market environment for PLL policies.

SOME KEY COMPONENTS OF A PROFESSIONAL LEGAL LIABILITY POLICY:

A PLL policy varies from insurer to insurer. However, most of these policies contain an insuring agreement that specifically states that the cover is designed to provide for unintentional errors and omissions that cause a loss by the insured to a client or other business relationship partner. This loss must specifically relate to the firm from their legal work and action or inaction related to their activities in the practice of law. The insuring agreement will contain specific language excluding losses related to other activities, such as property loss, bodily injury, employment practice liability, outside directorship liability, and many other exclusions contemplated in other forms of insurance.

Almost all PLL policies are claims made. Claims made simply means that the claim may only be filed during the time that the PLL policy is in effect, or though an extended reporting, or “tail” period that the insured may elect to purchase prior to policy expiration from that current insurer. The converse of “tail” is “prior act, retroactive” coverage. “Prior act” coverage insures the purchaser of insurance for acts whereby a claim is filed during the current insuring period for a specific period of time when the insured was not insured with the current carrier, but rather by a previous insurer, or sometimes, by no insurer at all. As an insured renews the cover with the same insurer from the prior year, the carrier will grant the prior act, or retro date, to be carried forward. Many PLL insurers will grant prior act cover to a new insured from their carrier as long as the new insured has maintained continuous PLL cover back to that prior date. In contrast, many standard forms of property and general liability insurance are on an “occurrence” form. Occurrence policy forms permit an insured to file a claim for any period covered by that specific insurer, even if the insured is no longer insured, or even insured at all, by that or any other carrier.

Most PLL policies are underwritten based upon multiple factors. These factors include: number of attorneys in the firm, types of specialization of practice within the firm, claims history, the firm’s internal risk management practices, and amount of firm revenue. Some insurers require on-site firm visits for discussions with senior management, or telephone conferences between prospective insured and insurer. Each insurer requires that the prospective insured complete a comprehensive application specifically detailing any losses, reported claims, or incidents.

Often, PLL policies will contain specific exclusions, inclusions, and policy modifications, usually by endorsement, attached to the policy after the standard insuring agreement. Agreement on these endorsements are reached between the insurer and insured prior to binding of the coverage for that policy year. Often, the endorsements will change from policy year to year upon renewal, depending upon changes within the firm or their practices and claims history during the prior year. These endorsements are highly important and will often change the insuring agreement significantly.

LAW FIRM RESPONSIBILITIES TO THEIR PLL INSURER:

There are numerous responsibilities of the firm to not endanger the coverage extended within their PLL insurance policy. It is highly important and valuable to integrate their PLL insurance broker into all aspects of this process. While the PLL policy details the law firm's responsibilities, those responsibilities begin even before the policy is issued.

Always, the potential insured will be responsible for completing and signing their PLL new or renewal application. As a senior partner or C.O.O. of the firm must execute the application and attachments, it is critical that the firm prepare this application in complete detail. The details relating to claims, potential claims, practice areas, revenues, number of personnel, are represented as a warranty. Improper completion of these applications and attachments have been utilized by the insurer's counsel to seek to void coverage in the event of a claim. Upon the initial filing of a potential claim, counsel for the insurer usually sends the insured a reservation of rights letter. If the insured has made an intentional or even, possibly, a non-intentional omission or factual misstatement, the insurer may seek to deny the claim. In extreme circumstances, the insurer may seek to void the entire PLL policy. There have been numerous instances of litigation in this area that could possibly have been prevented by a thorough vetting of the application by both the potential insured and their broker prior to submission to the insurer's underwriters.

The insured law firm has an absolute requirement, as detailed in the insuring agreement, to report a claim or potential claim to the insurer within a specific period of time. Sometimes, an insured believes that the reporting of a claim is unnecessary, as they falsely believe that claim will likely dissolve or can be handled directly between the firm and the potential claimant. This is specifically not allowed and has led to litigation between insurers and insured's for failure to report. The specific requirements and timelines are clearly detailed within the insuring agreement and the claim provisions of the policy.

The wording within almost all PLL policies precludes an insured from settling a claim without the explicit written consent from the insurer. An insured is not allowed to work out their own settlement terms with a claimant outside of any agreement between and insured and insurer. An insured may jeopardize their cover by doing so.

A FEW FACTORS IN EVALUATING THE DIFFERENCES BETWEEN PLL POLICIES:

By no means are all PLL policies written as standardized forms that absolutely mirror one another. Further, the position of PLL insurers regarding underwriting, settlement, and claims posture varies greatly. Again, it is critical that the firm personnel responsible for evaluating and engaging PLL insurers work closely with their professional liability insurance agent to select the appropriate cover for their firm. There are a myriad of options available from which the firm may choose.

Importantly, while there are many PLL insurers, their claims and settlement approaches vary greatly. Some insurers work hand-in-hand with their insured's to amicably settle claims. At the other extreme, there are insurers who will seem to fight with their insured's to either: 1. not cover a claim or 2. seek not to settle a claim, even though it is in the insured's best interest and the policy is designed to have the insured and insurer working in a harmonious posture to effect settlement and closure. Too often, the exact opposite occurs and we find the insured and insurer working in an adversarial manner in times of claims.

From this, we have seen the emergence over the last 10 years of the "hammer clause." Simply, the hammer clause states that if an insured refuses to settle a claim for the amount that the insurer solely determines, through their claim process with counsel, to be appropriate, then the insured is only entitled to a settlement amount up to the amount that the insured's LPL insurer was willing to settle for. Any amount above that amount which is either adjudicated or settled for is purely the responsibility to the insured, even if that amount is below the limit of the policy.

It is preferable that a firm purchase a policy that contains duty to defend language. This language gives the insurer the responsibility of defending a claim even if the insurer does not believe that the claim will develop. It therefore adds the protection of having the insurer utilize expert claim counsel to mitigate the potential expansion of a claim. If the insured was forced to begin the claim process without the important assistance of those highly qualified claim's counsel from the insurer, the claim often grows considerably larger and may become disorganized.

At a minimum, the policy language within the PLL policy should allow for mutual choice of claims counsel. While some insurers force the insured to choose from a list of panel counsel selected by the insurer, this is often not in the insured's best interest to do so. Quite often, we find a conflict of interest in such a case in that the insurer has set a pre-determined rate with panel counsel and it may be that an insured feels that the counsel seeks to settle the claim quickly, at minimum cost, with the insurers interest at heart, not necessarily in the best interest of the insured.

Finally, when possible, an insured should seek a policy that contains a "pay on behalf of" provision. With this provision in the policy, the insurer pays the insured's claims counsel directly after the insured has paid their deductible. It is clearly preferable to a policy that has a reimbursement provision, whereby the insured is reimbursed by the insurer for claim counsel costs, upon submission and acceptance of those expenses to the firm's insurer. The pay on behalf of provision will enable the insured to maintain a cash flow for the firm as existed prior to the claim, removing the consequences of having to wait for the reimbursement from the insurer.

THE CURRENT MARKET ENVIRONMENT FOR PLL POLICIES:

As in any line of insurance, capacity for professional liability policies, and specifically for PLL policies, increases and decreases depending upon the amount of

insurers interested writing in those classes, claims activity, and reinsurance considerations (reinsurance is insurance that primary insurers purchase to transfer some of their risk to other insurers.)

Currently, it appears that the market for LPL remains relatively robust in the number of insurers desiring to renew with their current insured's and write new risks. Additionally, the pricing appears relatively well contained with only minor increases. This environment appears to stem from increased competition from both new carriers entering the market, and from existing insurers desiring to increase their book of LPL business. Again, with strong caution, it is advisable to work closely with a risk management broker specifically entrenched in this highly specialized field. Too often, we find that the insured did not truly understand what it was they bought, and the broker did not do an appropriate job of screening the firm and then matching the risk with the most appropriate insurer for that firm. Sometimes, only upon the filing of an LPL claim, the insured firm learns that the insurer was not the best suited insurer for that law firm. The consequences of that error may prove to be great, on many levels.

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