

# Suddenly uninsured

An Ontario practitioner learns the perils of changing firms the hard way.

By Mitch Kowalski

**L**ike most other lawyers slogging away in Ontario's mid- to large-sized firms, I was not concerned about professional liability insurance. LawPRO provided mandatory coverage of \$1 million, and all such firms obtain excess insurance to cover claims that exceed that amount. It wasn't until I changed firms, then got sued, and then left private practice, that I learned some interesting and scary facts with respect to insurance claims and coverage.

Professional liability insurance policies in Ontario (whether provided by LawPRO or by an excess insurer) are issued on a "claims made and reported" basis. In other words, in Ontario you need to be insured at the time the claim is made and reported. The fact that you had insurance at the time you did the legal work that gave rise to the claim is irrelevant.

Not every province follows this practice. For example, the Law Society of British Columbia's Captive Insurance Company Ltd. issues "claims occurrence" policies: as long as the lawyer was insured at the time the legal work was done, she will always be covered for claims arising from that work. Did we really need another reason to move to British Columbia?

### Changing firms

After working for two years at my new firm, I was sued by former clients with respect to work done at my previous firm. I assumed that my new employer's excess insurer would cover the part of the claim that exceeded \$1 million. I was wrong. An excess insurer typically provides coverage for claims made against past and present partners and/or employees of a firm for legal work done while they were partners or employees of that firm.

The following example helps illustrate this issue. Sally the lawyer moves from Firm A to Firm B. While employed at Firm B, a claim for \$2 million is made against Sally for work she did while at Firm A. LawPRO provides coverage up to \$1 million.

But the excess insurer of Firm B denies coverage for the other \$1 million, because even though Sally was insured at the time

the claim was made, the claim did not arise from work she did while at Firm B.

Sally therefore has to seek indemnity from the *current* excess insurer of Firm A. Note that this indemnity does not come from the company that provided excess insurance to Firm A at the time Sally did the work that gave rise to the claim. In other words, Sally must rely upon Firm A to maintain sufficient excess insurance for *any future claims* against her.

In my case, my former firm self-insures for claims under \$10 million; the firm's excess coverage — which is considerable — doesn't kick in until a claim exceeds \$10 million.

In addition to lawyers, few clients understand the ramifications of a "claims made and reported" policy, particularly those who insist that their lawyers possess a certain amount of excess insurance coverage. The required coverage may be in place at the time the work was done, but it may not be there at the time the claim is made — when it is really needed.

### Leaving private practice

Because of the predominance of "claims made and reported" policies, Ontario lawyers must obtain run-off insurance when they leave private practice (e.g., to retire, work as a government lawyer, or work as in-house counsel). LawPRO provides free run-off insurance in a one-time amount of \$250,000. But this one-time amount, once exhausted, will not be renewed. So if a successful claim for \$200,000 is made against you, your excess insurance coverage will be reduced to \$50,000 for the remainder of the policy period.

LawPRO also provides additional excess insurance coverage for an annual premium (as a real estate lawyer, I purchased this product). But there's a 45- to 60-day coverage gap during the waiting period between the date they file the necessary forms for excess insurance and the date your insurance becomes effective.

If you practise in Ontario, it is vital that you do not leave your firm until the appropriate amount of excess run-off insurance is in place. Lawyers in other provinces should ask their insurers about the nature of their coverage as well.

### Suggestions

Over the last ten years, more lawyers than ever before have moved between firms or moved in-house. Most, however, never give a second thought to how these moves affect their personal liability. From my experience, I have some suggestions for lawyers on the move:

1. When considering a move to a new firm, review the excess insurance policy of your potential new employer to determine if your coverage is higher or lower than at your current firm. Aside from increasing your personal liability, lower coverage will also prevent you from doing work for those of your clients who require higher coverage.
2. No matter where you move, consider obtaining some kind of assurance from your old firm as to the amount of excess coverage it will maintain after you leave. Confirm that all present and future excess insurance policies will cover your past work at your old firm.
3. If you decide to leave private practice, notify your particular province's insurer immediately and file all necessary forms for the required excess run-off insurance, so that this coverage commences the day after you leave private practice.
4. If you're moving in-house, ask your employer to pay the cost of your run-off insurance.
5. If you're being laid off and you will not return to practice, consider whether the cost of run-off insurance should form part of your termination package. Even as an associate, you have incurred liability at that firm that may come back to haunt you. That would only add insult to injury. ■

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