

Lawyers' Professional Liability Insurance for the Distressed Risk

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Professional liability insurance is a necessity for lawyers. Unfortunately, not all lawyers are able to secure the coverage they need in the standard marketplace because they are considered to be a “distressed” risk. The question is, what exactly does “distressed” mean?

A “distressed” risk is one that has difficulty securing professional liability insurance because of claim frequency, claim severity or disciplinary complaints or actions. While “distressed” is often used interchangeably with “hard to place”, the two terms are different in that “hard to place” generally means the lawyer or law firm practices in a more risk prone practice category such as Personal Injury Plaintiff or Patent but is usually claim and disciplinary action free. If the term “distressed” describes the loss or disciplinary history of a law firm, the firm faces many more challenges in finding professional liability insurance and generally has to settle for less coverage at a considerably higher premium. The good news is that there are a few markets available, operating on a surplus lines basis, to meet the professional liability needs of the “distressed” law firm.

Surplus lines is often referred to in a negative connotation because the insurance product is not protected by any state insurance guaranty association nor is the policy form and rates charged subject to regulation and approval of the State Insurance Commissioner. However, not all surplus lines insurers are created equal. Surplus lines insurers are subject to review by the insurance company rating agencies such as A.M. Best and are generally published as an “Approved Surplus Lines Company” by state insurance departments. Before committing an insurance purchase to a surplus lines company, law firms should check with their state insurance department to be sure that the company is an approved surplus lines insurer and that it carries an A.M. Best rating of at least A VII. Many admitted professional liability companies will have a surplus lines facility to accommodate those applicants or insureds that do not qualify under their standard program guidelines, but would be acceptable on a surplus lines basis if a more acceptable premium could be charged for the exposure presented. There are several A and even A+ markets to approach in this arena.

To find an adequately rated surplus lines insurer that can be trusted to provide the needed coverage should a claim be presented often involves finding a broker that specializes in professional liability and deals regularly with distressed placements. As a general rule, most brokers that offer lawyers professional liability as a full time product line will have an insurance company or “distressed facility” that they have worked with successfully in the past. It is best to find a broker that is familiar with the policy form and claims handling ability of the company they are recommending.

Here are some valid questions to ask a broker about the insurance company offering coverage:

- Does the insurance company specialize in professional liability?
 - Is it an approved surplus lines insurer in the state and rated at least A VII by Best?
 - Does the insurance company oversee its own claims handling or farm that responsibility out to an independent adjustment firm or third party administrator?
 - Will the claims adjuster provide you with a listing of law firms in your state from which to choose your defense counsel and will the company work with you to consider a firm you recommend?
 - Is the insurance company willing to defend a spurious claim in order to protect your reputation in the community, or do they have a “get out the check book mentality” to close the claim regardless?
 - Will the insurance company regularly communicate the status of the claim with you and seek your input as to settlement or defense strategies?

Once a viable insurance company has been identified, it pays to examine the policy form and discuss strengths and weaknesses of the coverage provisions with the broker. The broker should provide a list of “coverage highlights” that discuss not just positive marketing advantages, but important coverage restrictions as well.

One of the most important coverage features to be aware of when purchasing professional liability coverage is the availability of prior acts coverage under the policy. Distressed markets often offer terms “retro inception” which means that the policy’s prior acts retroactive date will be the same as the policy’s effective date. On a Claims-Made policy, the act(s) that resulted in the claim must have occurred after the policy’s retroactive date. That situation is also known as a “no prior acts” or “restricted prior acts” policy. If the policy has restricted prior acts coverage, an Extended Reporting Period (ERP) option will need to be purchased from the expiring insurance company. An ERP can be a very economic decision as, often times, the terms will be based on rates that were provided by the standard marketplace and not surcharged for claims or disciplinary problems. A broker should be able to advise the pros and cons of purchasing this option, but two things that should be considered are:

- Is the option cancelled automatically if your license to practice is suspended?
 - Will open claims exhaust the limit of liability under the policy?

Other policy provisions that can be restricted on a distressed policy form are:

- Policy's consent-to-settle provision
 - Specific exclusions for certain practice areas such as SEC
 - Specific exclusions for certain types of legal malpractice actions such as a counterclaim as a result of a fee collection suit
 - Defense costs are generally included within and erode the limit of liability
 - Coverage is generally limited to acts performed on behalf of the named insured named in the policy declarations which can limit predecessor firm coverage, individual prior acts coverage and outside moonlighting activities
 - Extended reporting period options are restricted in length to 12 months or 36 months and are considerably more expensive than the standard marketplace

To receive the most favorable terms possible when submitting an application for professional liability insurance, a good point to remember is that you are the best representative of your practice exposure going forward. Underwriters that offer a distressed facility are not so concerned with the number and amount of past claims or even that the firm has been censured by the state bar, but that the underlying problems leading up to the claims or disciplinary ruling have been identified and addressed. A sincere, honest approach with full disclosure on claims or any other problem that has put the firm in this situation is always the best approach. Include a narrative of the systems and procedures that have been put in place to reduce the likelihood of similar claims in the future. Include comments on the merits of the claimant's claim. Tell the underwriter what was done right during the representation. If at all possible, include loss reports from previous insurers showing actual paid and reserved amounts. If the underwriter has to interpret the value of the claim, it will likely be higher than the actual reserve that the insurance company has set. Take an active interest in the payments and reserves set for the open claim and be informed on the status of the claim on a regular basis.

If you are a small or mid-sized law firm that has experienced difficulty finding lawyers professional liability insurance due to paid claims or disciplinary actions, DefenseProSM Lawyers Professional Liability may be able to help. Administered by Lockton Risk Services, a subsidiary of Kansas City-based Lockton Companies, the largest independently-owned commercial insurance broker in the United States, DefenseProSM is specifically designed to meet the professional liability needs of distressed law firms. For more information, visit the DefenseProSM website at <http://www.defenseproliability.com>. Cindy Wiedman, RPLU

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