

PERSPECTIVES

An attorney's guide to insurance and risk management

MSP L 11/01 "The Hardening Lawyers Professional Liability Marketplace"

November, 2001

NOTE: The following article spells out the reasons for the rate increases that were taking place prior to September 11, 2001. The catastrophes that took place on that day have had a substantial adverse affect on insurance rates. On average, for all lines of coverage, rates are increasing approximately 20-40%, but in some cases can go much higher.

It is recommended that you start your renewal process early, and that you take into consideration these increases for next year's budgets.

The Hardening Lawyers Professional Liability Marketplace

By Michael Thomas and Howard Goldstein

This article originally appeared in the July 2001 issue of the PLUS Journal, the monthly publication of the Professional Liability Underwriting Society (PLUS). It is reprinted here with the permission of PLUS.

The much-anticipated hardening of the lawyers professional liability (LPL) market seems to have finally taken hold following years of price decline and coverage expansion. Most insurance professionals have been predicting this change virtually since the beginning of the soft market in the early 1990's. The reasons lie predictably in industry and economic trends, reinsurance pressure, and increasingly adverse developments in the claims environment.

A significant component of the increasing cost of LPL insurance is simply a mirroring or following of the industry. Questionable economic times will cause insurers to become increasingly conservative. As profit margins are expected to become narrower, underwriters are less willing to risk making mistakes, particularly in a line that posted poor results for many carriers. These poor results have

led to notable LPL carriers leaving the market, changing their niche or greatly reducing their respective appetite for lawyers' exposure. Whether this has occurred due to their shift in focus, short-sightedness or lack of LPL expertise, or over-aggressive underwriting is debatable, but visible players have left the marketplace.

Reinsurers too are playing a part in escalating costs for lawyers. As they are more carefully selecting uses for their capital, reinsurers have become

(Continued on page 2)

Published by

Cavignac & Associates

INSURANCE BROKERS

License No. OA99520

1230 Columbia Street, Suite 850, San Diego, CA 92101-3547

Phone: 619-234-6848

Facsimile: 619-234-8601

Website: www.cavignac.com

(Continued from page 1)

less anxious to provide protection to LPL providers. Discussions we have had with numerous reinsurers point to the fact that LPL has not been kind to many carriers and their respective reinsurers. Underlying costs of providing LPL have thus pressured premiums upward.

The LPL claims environment has changed significantly over the past year or so, with new legislation, and changes in the legal "playing field" leading to new challenges in managing claims, increased defense costs and claims frequency. Management of claims will inevitably play a huge role in underwriting results and accordingly in premium levels. Insurers that do the best and most diligent job of handling losses will be in more favorable positions and will have a more optimistic outlook of their own future participation. Some carriers may even be compromising their underwriting results by paying claims, which may be without merit. For LPL providers to thrive, they have an economic duty to investigate their claims thoroughly to verify coverage issues before committing to coverage.

The cost of defending claims continues to rise, and will always be an influential factor in premium determination. Malpractice defense firms, which have earned insurer confidence, are secure in their niche and their hourly rates have grown accordingly. Insurers must pay higher defense costs, but

with the inherent promise that they will save money on indemnity settlements.

One adverse development is the trend in some jurisdictions to award the plaintiff costs of prosecuting a legal malpractice claim in addition to any damage award. The New Jersey case of *Saffer v. Willoughby*, 143 J.J.2546 (1995) stands for this proposition, which tends to increase frequency by providing the plaintiff bar with incentive to take claims of modest value that may previously have been declined. Also, severity is increased by concomitant additional costs of defense and indemnity.

Another key development is the propensity of courts to "hold the generalist to the standards of the expert." While the trend in the legal profession, among others, is clearly toward more specialization, many generalist firms or sole practitioners are under significant economic pressure not to turn away clients. While it appears unreasonable, if not unfair, to expect a generalist to provide the same professional expertise as a specialist, it is nonetheless the practice of many LPL plaintiff attorneys to establish malpractice by retaining attorneys that specialize within areas of practice as experts. It is not usually practical for the generalist's defense attorney to assert that his client provided "average" legal services. In the Information Age, speed of communications and access to databases has raised

(Continued on page 3)



Cavnac & Associates
INSURANCE BROKERS

Visit our website!

- ◆ Insurance information & applications
- ◆ Certificate requests on-line
- ◆ Bond requests on-line
- ◆ Prior publications and MORE!

www.cavnac.com

No more “Snail Mail!”

- **ALL FUTURE ISSUES** of our newsletters will be **sent by e-mail**
- Please **visit our website** to add yourself to our **Lawyers e-mail list**
- OR send your **name, name of newsletter** and **e-mail address** to **gcornwell@cavignac.com**

(Continued from page 2)

the standards by which generalist attorneys are measured.

In an economic downturn, another inevitability is an increase in claim frequencies. As businesses either fail or become distressed, the lawyers involved in these businesses will come under increased scrutiny. Between legitimate mistakes discovered under this increased scrutiny, as well as deep-pocket scapegoating, it is unavoidable for claim reports to increase.

A growing hazard within the legal profession is the failure to properly supervise attorneys who may be under-experienced. Economic pressures may cause mid-size and larger firms to rely more on cheaper, younger attorneys while at the same time devoting fewer more expensive supervisory person-

nel to oversee engagements. All firms and sole practitioners may feel increasing pressures to undertake undesirable engagements to meet their bottom line.

A final factor causing frequency to be on the rise may be societal. “Lawyer-bashing” has become a part of social fabric. An inherent distrust and disdain for attorneys has perhaps increased people’s willingness to sue lawyers and also to cause juries to presume wrongdoing in some cases.

The increasing reinsurance costs, economic factors, increasing severity and frequency of claims have all led to the current hardening market. Future movement of premiums will continue to be influenced by all of the factors above. Most professional liability professionals believe that this is the start of a trend, and far from the end.*

Disclaimer: “Perspectives” is published as a service to lawyers. While the information contained herein is believed to be reliable, readers are advised to consult their own legal and insurance counsel for assistance in applying it to their unique situations.
