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# Lawyers' Professional Liability Insurance

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## *Lawyers' Professional Liability Insurance*

*Donald J. Ladanyi\**

CONSIDER THE FOLLOWING HYPOTHETICAL situation: Harry C. Hadalot, attorney at law, was in the process of terminating his successful forty-two year practice. A few remaining items needed his attention, one being the drafting of a will concerning a rather large estate. Harry and his wife, Cora, had decided to purchase a \$65,000 home in the Port Saint Lucie Country Club Estates near the lazy, winding Indian River on the eastern coast of Florida. The warm climate and the newly developed neighborhood would make this location an ideal retirement setting.

Harry, perhaps due to impetuosity, negligently excluded several intended legatees in the will which he drafted. The testator had died shortly after execution of the will without discovering the error. However, the disappointed intended legatees were quick to discover the omission and were equally as quick to institute an action, as third party beneficiaries, against Hadalot for negligently drawing the will in derogation of his employment contract with the testator.

Judgment was for the plaintiffs. Harry had to cough up \$30,000 in damages. Harry had a lot, but he did not have professional liability insurance. He no longer has dreams of Florida.

### **A Basis For Liability**

Due to the nature of his profession, the practicing lawyer is invariably confronted with significant financial risks. Because of the growing number of claims for professional negligence, coupled with the fact that the monetary risk of claims is largely unmeasurable, a constantly increasing proportion of lawyers is considering the feasibility of professional liability insurance protection. This type of insurance offers not only financial security, but also a means for the advantageous and efficient settlement of just claims without damaging notoriety.

The attorney, as the accountant,<sup>1</sup> architect, physician, surgeon, and other professionals, is liable to his clients for any damages resulting from his negligence.<sup>2</sup> As a general rule, the attorney, by accepting employment to impart legal advice or to render other legal services, impliedly agrees to exhibit such skill, prudence, and diligence as well-informed lawyers of ordinary skill and capacity commonly possess and exercise in the conduct of the business which they

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<sup>1</sup> *L. B. Laboratories v. Mitchell*, 39 Cal.2d 56, 244 P.2d 385 (1952); Hawkins, *Professional Negligence Liability of Public Accountants*, 12 VAND. L. REV. 797 (1959).

<sup>2</sup> W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 32 (4th ed. 1971).

undertake.<sup>3</sup> Sometimes the standard of professional knowledge and skill is expressed in terms of "other attorneys",<sup>4</sup> denoting "average" members of the profession; however, it is a "minimum common skill" which is required and not that skill possessed by the "middle" of the profession.<sup>5</sup> Additionally, an attorney may be held to more than minimum standards if he holds himself out as a specialist.<sup>6</sup>

The general principles of tort law apply in a suit against a negligent attorney: duty, standard of care, proximate cause, and damages. The element of damages merits close analysis in that it may present a significant question to the plaintiff of whether the action should be brought in contract or tort.

The courts generally hold, however, that a liability based on contract rather than tort is not within the coverage of a policy insuring against malpractice.<sup>7</sup> To the contrary, several jurisdictions actually recognize that the client may recover in a contract action for failure of the attorney to carry out his agreement.<sup>8</sup> However, the possibility of recovering larger damages in tort usually suggests to the plaintiff that it is the better action.

The requirement of privity of contract in the area of legal malpractice is diminishing, making attorneys better prospects for liability insurance. The majority view has been that the attorney is liable only to his client and not to third parties who may have suffered damage as a result of his negligence. In a leading case, the Supreme Court of California has eliminated the requirement of privity between a beneficiary and the draftsman, who negligently prepared a will, in an action to recover damages when the will was denied probate.<sup>9</sup>

No area of the practice of law appears to have been left untouched by negligence claims. One of the most common causes of claims has been the failure of an attorney to meet some time limit set by statute or court rule. A negligent delay could include a failure to: institute a suit,<sup>10</sup> file suit before the expiration of a statute of limitations,<sup>11</sup> file a notice of appeal within a prescribed time,<sup>12</sup> or insure certain property prior to its accidental destruction.<sup>13</sup>

<sup>3</sup> Lucas v. Hamm, 56 Cal.2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), cert denied, 368 U.S. 987 (1962); Citizens' Loan Fund and Savings Ass'n. v. Friedley, 123 Ind. 143, 23 N.E. 1075 (1890); 7 AM. JUR. 2d Attorneys at Law § 171 (1963).

<sup>4</sup> 5 AM. JUR. Attorneys at Law § 124 (1936).

<sup>5</sup> W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32 (4th ed. (1971))

<sup>6</sup> Trimboli v. Kinkel, 226 N.Y. 147, 123 N.E. 205 (Ct. App. 1919); Rosenbaum, *The Degree of Skill and Care Required of a Specialist*, 49 MEDICO-LEG. J. 85 (1932).

<sup>7</sup> Safian v. Aetna Life Ins. Co., 260 App. Div. 765, 24 N.Y.S.2d 92 (1940), *aff'd.*, 286 N.Y. 649, 36 N.E.2d 692 (Ct. App. 1941).

<sup>8</sup> See, 7 AM. JUR. 2d Attorneys at Law § 167 (1963), 49 A.L.R.2d 1216, 1219-1221; W. PROSSER, SELECTED TOPICS ON THE LAW OF TORTS 433, 442 (1954).

<sup>9</sup> Biakanja v. Irving, 49 Cal.2d 647, 320 P.2d 16 (1958).

<sup>10</sup> Cox v. Livingston, 2 W.&S. 103 (Pa. 1841).

<sup>11</sup> Sager v. St. Paul Fire & Marine Ins. Co., 461 S.W.2d 704 (Mo. 1971).

<sup>12</sup> Pete v. Henderson, 124 Cal. App.2d 487, 269 P.2d 78 (1954).

<sup>13</sup> American Fire and Cas. Co. v. Kaplan, 183 A.2d 914 (D.C. Mun. Ct. 1962).

Another frequently encountered cause of claims is the failure of an attorney to make an adequate investigation into facts concerning his client's problem. The negligent attorney may fail to observe a defect in a title,<sup>14</sup> or fail to discover outstanding creditors.<sup>15</sup> Other areas may involve the failure to give correct advice,<sup>16</sup> the failure to prosecute,<sup>17</sup> the failure to follow a client's instructions,<sup>18</sup> or the failure to handle a client's funds correctly.<sup>19</sup> The aforementioned negligent acts merely scratch the surface of the possible types of claims but should be sufficient to indicate the veritable risk of financial loss and damage to reputation.

Substantial increases in the premiums on attorneys' professional liability policies have been the rule rather than the exception throughout recent years.<sup>20</sup> This is the consequence of a normal cause and effect relationship: as the number of losses suffered by insurance underwriters in the settlement of claims increases, the amount charged as a premium increases. The growth in claims is not entirely due to the fact that there are more lawyers today. The pressure of complicated tasks placed upon contemporary attorneys has led to negligent work.<sup>21</sup> A growing sophistication on the part of the general public, due in part to a greater public exposure of law suits and attorneys personally, has led clients to become more claim conscious. Lawyers themselves are not as reluctant as they once were about inaugurating a suit against a fellow lawyer. Many of the educational and public relations programs designed to improve the service and remuneration of the Bar are having a resulting by-product of increased malpractice claims. Also a change in the attorney-client relationship toward a more impersonal one, perhaps caused by the trend toward specialization, has motivated the client to be less inhibited in claiming negligence.

However, this problem is not limited to lawyers. Instead, it is part of a growing tendency in our culture wherein we are constantly striving to improve our way of life. With these efforts to constantly improve things, is it any wonder that the public should also demand

<sup>14</sup> Burns v. Palmer, 18 App. Div. 1, 45 N.Y. Supp. 479 (1897).

<sup>15</sup> Modica v. Crist, 129 Cal. App.2d 144, 276 P.2d 614 (1946).

<sup>16</sup> Strangman v. Arc-Saws, Inc., 123 Cal. App.2d 620, 267 P.2d 395 (1954); Cochrane v. Little, 71 Md. 323, 18 A. 698 (1889); Fowler v. American Fed'n. of Tobacco Growers, Inc., 195 Va. 770, 80 S.E.2d 554 (1954).

<sup>17</sup> Niosi v. Aiello, 69 A.2d 57 (D.C. Mun. Ct. 1949); Stevens v. Walker & Dexter, 55 Ill. 151 (1870).

<sup>18</sup> Lally v. Custer, 171 Cal.783, 171 P.961 (1918); Cadwallader v. New Amsterdam Cas. Co., 396 Pa. 582, 152 A.2d 484 (1959); Ramage v. Cohn, 124 Pa.Super. 525, 189 A.496 (1937).

<sup>19</sup> Strauss v. New Amsterdam Cas. Co., 30 Misc.2d 345, 216 N.Y.S.2d 861 (N.Y.CityMun. Ct. 1961).

<sup>20</sup> Denenberg, *Lawyers' Professional Liability Insurance: The Peril, the Protection, and the Price*, 570 INS. L. J. 389, 390 (1970); Wall Street Journal, Oct. 10, 1969, at 1, col. 6 (eastern ed.).

<sup>21</sup> 71-2 The Rough Notes Co., Inc., Monthly Policy, Form & Manual Analyses § 382.1 (1971).

better legal services? As a result, the public is no longer satisfied with a quality of service that may have been acceptable a generation ago; hence an increase in malpractice suits with recent rate increases reflecting this experience.

In an effort to make underwriting of this type of insurance feasible, some underwriters have excluded certain malpractice risks as being uninsurable. Furthermore, the scope and limits of actual coverage are being restricted with the use of financial limits on recovery, conditions, exclusions, deductibles, and other restrictive or limiting clauses.<sup>22</sup>

If an ambiguity or omission in the insurance agreement itself exists, the courts are entreated to interpret the intent of the parties and draw the lines of demarcation between covered and uncovered losses.<sup>23</sup>

Additionally, this limiting and restricting carries over even into the marketing area. Many agents and brokers are willing to issue a professional liability policy only if they are able to obtain business in other, more desirable insurance lines from the attorney.<sup>24</sup> Some underwriters have gone so far as to write coverage only for professional associations, such as local or state bar associations.<sup>25</sup>

### Underwriters' Policies

Lawyers' professional liability insurance was not, surprisingly, written by any American insurer until 1945.<sup>26</sup> Prior to this time, Lloyds of London was the only company to insure against such losses.<sup>27</sup> In 1959, the coverage was standardized by the National Bureau of Casualty Underwriters; however, independent forms may still exist.<sup>28</sup>

These companies currently handle the 95 per cent<sup>29</sup> of all practicing lawyers who carry professional liability insurance: coverage is now written relatively freely by California Union Insurance Co., Employers Reinsurance Corp., Interstate National Cos., Professional Insurance Co. of N. Y., The St. Paul Insurance Cos., and Underwriters at Lloyd's, London; or on a limited basis by American Home Assurance Co., American Universal Group, Cincinnati Insurance Co., CNA/insurance, Fireman's Fund American Insurance Cos., First State Insurance Co., Insurance Co. of North America, Midland Insurance

<sup>22</sup> 43 AM. JUR.2d *Insurance* §§ 194-459, 529, 754-6, 1050, 1051, 1407-31 (1969).

<sup>23</sup> *Stroehman v. Mutual Life Ins. Co.*, 300 U.S. 435 (1937); *Phoenix Ins. Co. v. Slaughter*, 79 U.S. 404 (Wall. 1870); *Loventhal v. Home Ins. Co.*, 112 Ala. 108 (1895); *Maryland Cas. Co. v. Willsey*, 380 P.2d 254 (Idaho 1963).

<sup>24</sup> *Supra* note 21.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Dautch, Lawyers' Indemnity Insurance*, 46 COM. L. J. 412, 414 (1941).

<sup>28</sup> *Supra* note 21.

<sup>29</sup> *Wall Street Journal*, Oct. 10, 1969, at 1, col. 6 (eastern ed.).

Co., Mission Equities Insurance Group, National Union Insurance Cos., Pilot & Southern Fire and Casualty Co., and Reserve Insurance Co.<sup>30</sup>

Companies writing this form of insurance are generally willing to accept the average lawyer or partnership engaged in a general practice. Those attorneys specializing in patent law, title abstract work, negligence cases and theatrical clients may have some difficulty in obtaining coverage in that some underwriters perceive these areas as being unfavorable.<sup>31</sup>

Usually, membership in a bar association is preferred if not absolutely required. Other factors which may be taken into account by underwriters in assessing the risk assumed by the contract of indemnity are the age of the insured, legal area of his practice, his qualifications, any claims already made against him, and the number of his office helpers. Any failure to disclose a material fact may result in a repudiation by the insurance company of its obligations under the policy.

### Coverage

Lawyers' professional liability insurance is designed to cover direct pecuniary loss and expense arising from claims for neglect, error or omission in the performance of services in a professional legal capacity by an attorney or law firm.

The language of other policies will vary somewhat, but the following clause taken from the St. Paul policy is representative:<sup>32</sup>

To pay on behalf of the insured all sums which the Insured shall become legally obligated to pay as damages arising out of the performance of professional services for others in the insured capacity as a lawyer and caused by the insured or any other person for whose acts the insured is legally liable (the performance of professional services shall be deemed to include the insured's acts as an administrator, conservator, executor, guardian, trustee or in any similar fiduciary capacity, but only to the extent for which in the usual attorney-client relationship the insured would be legally responsible as attorney for a fiduciary) and the Company shall have the right and duty to defend in his name and behalf any suit against the Insured alleging damages, even if such suit is groundless, false or fraudulent; but the Company shall have the right to make such investigation and negotiation of any claim or suit as may be deemed expedient by the Company. The Company, however, shall not make settlement or compromise any claim or suit without the written consent of the Insured.

If litigation should arise under the coverage of the policy, the particular phraseology may be of great significance. In *Strauss v. New*

<sup>30</sup> THE ROUGH NOTES CO. INC., INSURANCE MARKET PLACE 52-3 (9th ed. 1971).

<sup>31</sup> *Supra* note 21.

<sup>32</sup> St. Paul Fire & Marine Ins. Co.'s Lawyers' Professional Liability Policy.

*Amsterdam*,<sup>33</sup> the policy provided coverage for claims arising out of the insured's professional capacity caused by any "negligent act, error or omission". The main issue was whether the coverage extended to a claim of the nature asserted against the insured. He had prepared an agreement pursuant to which his client placed a sum of money in escrow. When the client demanded the return of the money, the attorney refused. The client instituted an action alleging the delivery of money and the failure to return it. The attorney notified his insurance carrier of the claim upon which the company disclaimed liability. The attorney made a settlement with the client and was denied recovery of his loss in an action against the insurer.

The court resolved that insurance coverage for claims arising out of "malpractice, error or mistake" is clearly legally distinguishable from coverage for breach of contract. Since the claim against the attorney did not allege that he failed to employ the requisite degree of professional skill and care in the representation of his client, the plaintiff attorney was denied recovery.

Generally two types of coverage, individual and partnership, are available to protect the insured.<sup>34</sup> Under individual coverage, the insurer pays all sums which the insured, or any other person for whose acts the insured is legally responsible, becomes legally obligated to pay as damages. However, the coverage does not apply if the insured is a member of a partnership.

Under partnership coverage, the insurer is obligated to pay only when one or more claims arise out of the same professional service either jointly or severally against two or more members of the partnership, or against any member and the partnership, against the partnership, or against the insured solely because he is a member of the partnership. Some independent forms are not so divided.

### Liability Exclusions and Limitations

A lawyers' professional liability policy does not apply to any dishonest, fraudulent, criminal or malicious act or omission of any insured, his partner or employee.<sup>35</sup> In *Sacks v. St. Paul Fire & Marine Insurance Co.*,<sup>36</sup> the policy provided that the insurer would pay any damages arising out of the performance of professional services of the attorney except for dishonest, fraudulent, criminal, or malicious acts or omissions. The insured attorney had been sued by another lawyer for wrongful interference with an alleged contract of retainer between another attorney and that lawyers' client. One count also charged slander. The insurance company refused to defend the insured on the

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<sup>33</sup> *Strauss v. New Amsterdam*, 30 Misc.2d 345, 216 N.Y.S.2d 861 (CityMun.Ct. 1961).

<sup>34</sup> *Supra* note 21.

<sup>35</sup> *Id.*

<sup>36</sup> *Sacks v. St. Paul Fire & Marine Ins. Co.*, 303 F.Supp. 1339 (D.D.C. 1969); *accord*, *Continental Cas. Co. v. Reinhardt*, 247 F.Supp. 173 (D.Ore. 1965); *Cadwallader v. New Amsterdam Co.*, 396 Pa. 582, 152 A.2d 484 (1959).

grounds that the suit was excluded from coverage in that the complaint alleged an involvement with "dishonest, fraudulent, criminal or malicious act(s) . . ."

The court concluded that the insurance company is not under a duty to defend a complaint wholly unrelated to the subject matter of a policy; however, if any of the elements of the complaint "might" be within the ambit of the policy, the duty to defend attaches. The court found that the insurer was obligated to provide legal defense to the insured attorney.

A second area of exclusion applies to any claim made by an employer against an insured who is a salaried employee of the employer.<sup>37</sup> This employment relationship is excluded in that a hazard is established which the professional liability insurance does not contemplate: an attorney as an employee acts in many capacities which are non-legal in nature. The risk taken by an insurer is therefore substantially increased to the point of exclusion. This relationship risk is demonstrated in *Escot v. BarChris Construction Corp.*,<sup>38</sup> where the defendant, an attorney and director of BarChris, was sued as a director of the defendant corporation and as a signer of a registration statement which allegedly contained false statements and material omissions in the prospectus contained therein. The court reasoned that, even though this was not an action against the defendant attorney for malpractice in his capacity as a lawyer, he should be held to the standard of making a reasonable investigation of the facts within the prospectus which he drafted.

A professional liability policy will also not apply to the bodily injury of any person, or to the injury or destruction of any tangible property.<sup>39</sup> A loss sustained by the insured as a beneficiary or distributee of a trust or estate is likewise excluded from coverage.

Finally, another exclusion which may be discovered in some insurers' contracts excludes the conduct of any business enterprise owned by the insured or in which the insured is a partner, or even one which is controlled, operated or managed by the insured.<sup>40</sup> This also applies whether the attorney acts individually or in a fiduciary capacity, including the ownership, maintenance or use of any property.<sup>41</sup>

### **Amounts of Coverage**

The person best qualified to determine the amount of coverage required is the individual lawyer. He can assess the financial risks involved in his practice based on the character and magnitude of the business which he transacts and on his personal financial worth. He

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<sup>37</sup> *Supra* note 21.

<sup>38</sup> *Escot v. BarChris Constr. Corp.*, 283 F.Supp. 643 (S.D.N.Y. 1968).

<sup>39</sup> *Supra* note 21.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*



should bear in mind that the greater the number of office employees in proportion to the number of named insureds, the greater is the risk of error. Also, the gross amount of coverage must reflect all claims which may be brought against the insured under the policy, including possible claims made subsequent to expiration of the policy.

Insurance manual rates provide for a basic per-claim limit of \$5,000 for all damages arising during the policy period, regardless of the amount of claims or claimants, and an annual aggregate limit of \$15,000. The aggregate limit will apply separately to each annual period within policy periods longer than one year. The yearly limit will also apply separately to individual and partnership coverage. However, only a single aggregate is available for partnership protection whereas both the basic per-claim and annual aggregate limits apply separately to individual coverage.

The basic rates may be extended beyond the minimum limits up to \$100,000 for a basic per-claim limit and up to \$300,000 for an annual aggregate limit. If additional coverage is desired, an umbrella liability policy may be superimposed over the maximum basic professional liability limits to provide protection for a large firm.

The amount of the deductible will usually vary in relation to the amount of the policy limit. A minimum of \$500 is used, however, as the standard deductible. Policies with high coverage limits will invariably contain minimum deductibles of at least \$1,000. From an insurance underwriters standpoint, this larger deductible makes underwriting more attractive.

### **Persons Covered**

Coverage is extended to the partnership itself and every lawyer who is named as an insured in the policy declarations. Only a lawyer, whether a partner or an employee, may be named as an insured. Law clerks, investigators, abstracters, stenographers, file clerks and other such employees may not be designated as insureds in that they are not "professionals" within the contemplated scope of lawyers' professional liability insurance. However, the named insureds are covered for uninsured employees' errors which imputedly create liability in the insureds.

If the insureds act as administrators, executors, guardians, or trustees, their liability for acts or omissions in that capacity is deemed to be covered only to the extent of the fiduciary's legal responsibility arising in the usual attorney-client relationship.

### **Time and Territory**

Policies are normally written to take effect from the time of contract inception and to continue for a specified duration unless there is an expression of intent by the insurer or insured to cancel the agreement. Where a claim or suit occurs before the effective date of insurance, the policy is obviously inoperative. However, coverage

will apply to acts or omissions committed prior to the policy period when a claim is made or suit is brought during the policy period, provided that the insured did not or could not have reasonably foreseen that such acts or omissions might become the basis of a claim or suit when he purchased the insurance.

Where both the cause of liability and the claim occur during the policy period, most policies cover without restriction as to the time of presentation of the claim to the insurer.

It should be noted that the Lloyd's policy is written on a "claims made" basis. The coverage applies to any claim made during the policy period regardless of when the cause occurred. Furthermore, if the insured, during the policy period, believes that an occurrence might later give rise to a claim, he can give written notice of the occurrence to the underwriters and thus be covered for any such claim whenever it may arise. The claim will then be deemed to have been made during the policy period.

Thus, under the Lloyd's policy, a retiring attorney will be protected only if he previously gave notice during the effective policy period. Under the American policies, however, the attorney will be covered for any acts which occurred during the policy period without reference to when the claim is presented.

In regard to territorial coverage, the American policies, as standardized by the National Bureau of Casualty Underwriters, apply to acts or omissions within the United States, its territories or possessions and Canada. In contrast, the Lloyd's policy covers acts committed anywhere in the world.

### **Defense and Settlement**

In antithesis to other forms of liability insurance, an outstanding feature of lawyers' professional liability insurance is the defense insuring agreement. The insurance company is obligated to defend any suit brought against the insured which is within the coverage of the policy, even if the allegations are groundless, false or fraudulent.<sup>42</sup> Where, however, irresolution exists as to whether or not the allegations of a complaint against an insured state a cause of action within the coverage of the policy, such doubt will always be resolved in favor of the insured to compel the insurer to defend the action.<sup>43</sup> The insurer is not bound to defend a suit on a claim which is patently outside the policy coverage even though the terms of the policy obligate the insurer to defend all suits, whether groundless, false

<sup>42</sup> *State Farm Mut. Auto Ins. Co. v. Taylor*, 233 S.2d 805 (Miss. 1970).

<sup>43</sup> *Continental Cas. Co. v. Reinhardt*, 247 F.Supp. 173 (D.Ore 1965); *Campidonica v. Transport Indem. Co.*, 217 Cal. App.2d 403, 31 Cal. Rptr. 735 (1963); *Transamerica Ins. Co. v. Rutkin*, 218 S.2d 509 (Fla. 1969); *Sprayregen v. American Indem. Co.*, 105 Ill. App.2d 318, 245 N.E.2d 556 (1969).

or fraudulent.<sup>44</sup> Illustrative of a claim outside liability coverage is a situation wherein the allegation is grounded neither in contract nor tort.<sup>45</sup> The plaintiff merely alleged that the attorney was liable because he procured the issuance of a subpoena for the plaintiff as a witness in furtherance of the attorney's client's cause.

Coverage under professional liability insurance generally excludes intentional torts and dishonest, wrongful and malicious acts or omissions; however, a complaint will not be excluded from coverage merely because, in addition to a claim covered by the policy, there are allegations of maliciousness.<sup>47</sup>

Regardless of the final determination of a malpractice suit, the publication of the allegations alone may have a damaging effect upon the lawyer's professional status. Thus it may be in the best interest of the attorney to settle the claim without the attendant adverse publicity which may result from judicial proceedings. Financial considerations might thus be far less important than the attorney's interest in preserving his reputation. However, the insured must not, except at his own expense, voluntarily make any payment, assume any obligation or incur any expense arising from a claim.

In *American Fire and Casualty Co. v. Kaplan*,<sup>48</sup> the plaintiff-attorney neglected to impose fire insurance upon certain premises in accordance with an agreement with his client. The premises were subsequently damaged by fire. The attorney notified the defendant-insurer of his negligence and requested it to disburse the amount necessary to repair the damage. The insurer refused. The attorney consequently made payment of the claim and instituted suit. In substance, the court held that if an insurer denies liability on an asserted claim, the insured may assume control of the litigation or effect a reasonable and prudent settlement. In such event, the insured's payment of the claim is not a voluntary payment which would disburden the insurer from liability under a policy which stated that the insured shall not, except at his own expense, voluntarily make any payment.

Subject to the written acquiescence of the insured, the insurer may make such settlement as it deems expedient. The insurer is not permitted to admit liability or settle any claim without such consent due to the value associated with an attorney's reputation in this

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<sup>44</sup> *State Farm Mut. Auto Ins. Co. v. Flynt*, 17 Cal. App.3d 538, 95 Cal. Rptr. 296 (1971); *Central Bearings Co. v. Wolverine Ins. Co.*, 179 N.W.2d 443 (Iowa 1970); *Lang v. General Ins. Co. of America*, 268 Minn. 36, 127 N.W.2d 541 (1964); *Babich v. Oja*, 258 Minn. 287, 104 N.W.2d 19 (1960); *Gottula v. Standard Reliance Ins. Co.*, 165 Neb. 1, 84 N.W.2d 179 (1957); *Hersey v. Maryland Cas. Co.*, 102 N.H. 541, 162 A.2d 160 (1960).

<sup>45</sup> *Transamerica Ins. Co. v. Rutkin*, 218 S.2d 509 (Fla. 1969).

<sup>46</sup> *Grieb v. Citizens Cas. Co.*, 33 Wis.2d 552, 148 N.W.2d 103 (1967).

<sup>47</sup> *Sachs v. St. Paul Fire & Marine Ins. Co.*, 303 F.Supp. 1339 (D.D.C. 1969).

<sup>48</sup> *American Fire and Cas. Co. v. Kaplan*, 183 A.2d 914 (D.C. Mun. Ct. 1962); *accord*, *Traders & Gen. Ins. Co. v. Rudco Oil & Gas Co.*, 129 F.2d 621, 142 A.L.R. 799 (10th Cir. 1942).

professional field. However, if the insured insists on contesting a claim which the insurer prefers to settle, the interest of the insurance company may be in opposition to that of the insured.

In addition to the applicable limits of liability, the insurer will also reimburse all expenses incurred by the insured, all costs taxed against the insured in such a suit plus any accrued interest on the unpaid judgment, premiums on certain related court bonds, and all reasonable expenses, other than loss of earnings, incurred by the insured at the insurer's request.

### Notice Provisions

In the event the insured becomes cognizant of an alleged negligent act, error or omission, a written notice containing full particulars of the occurrence must be given by the insured to the insurer as soon as practicable after receiving such information.<sup>49</sup> The insurer may establish a time limit, such as twenty days.<sup>50</sup> Failure to file this notice may result in a disclaimer of coverage by the insurer; however, any claim made by the insured will probably not be invalidated if the insured can demonstrate that it was not reasonably possible to give such notice within the prescribed time and that such notice was given as soon as reasonably possible.

The case of *Sager v. St. Paul Fire & Marine Insurance Co.*,<sup>51</sup> involved a lawyers' professional liability policy requiring the insured to give notice as soon as practicable as to any occurrence covered by the policy. The insurer contended that the attorney failed to substantially fulfill his obligation under the notice provision in that he did not apprise the insurer that his client's case had been dismissed. The insurer argued that if notice had been timely given there would have been time to refile the case prior to the expiration of the five-year statute of limitations.

The Supreme Court of Missouri opined that if the attorney had been cognizant of the five-year limitation there probably would not have been any problem, but since the attorney was not conscious of the fact, it would not be logical to argue that he should have notified the insurer of something of which he was not aware. The only "occurrence" which justified "notice" eventuated when the client's cause of action was in fact barred by the statute. The attorney's failure to alert himself to the statute was a matter insured against. Since the attorney gave notice promptly after he realized that the action was barred, he substantially complied with his obligations under the policy. Until such a claim comes into existence, the insurer has no particular interest in the attorney's activities, nor

<sup>49</sup> *E.g.*, Fireman's Fund Ins. Co.'s Lawyers' Professional Liability Policy.

<sup>50</sup> *E.g.*, St. Paul Fire & Marine Ins. Co.'s Lawyers' Professional Liability Policy.

<sup>51</sup> *Sager v. St. Paul Fire & Marine Ins. Co.*, 461 S.W.2d 704 (Mo. 1971).

is the attorney under a duty to advise the insurer of his difficulties in representing the client.

Notice provisions also require that if suit is inaugurated against the insured, every summons or process must be forwarded immediately to the insurer.

Premium rates are currently reflecting the insurers' impecunious experience in the professional liability market. However, there are several means by which the attorney can mitigate his annual premium. Although underwriters generally employ minimum deductibles of at least \$500, the acceptance of an additional deductible by the lawyer will reduce the premium. Likewise, if deductibles are not mandatory, the acquisition of a deductible will lower the rate.

Prudent purchasing of a policy will also economize monetary expenditures. Purchasing a prepaid three-year policy instead of the standard one-year term will forestall any new rate increases which are eminently probable, and perhaps conserve at least ten percent on the premium. In a partnership, individual contracts covering each partner will invariably cost more in the aggregate than one partnership policy because of the coverage enjambments and additional paper work.

Another possible source of savings may be found in group insurance programs. Opportunities to take advantage of such programs are on the rise. Since 1963, national legal fraternities have begun to work in conjunction with insurers to offer group plans.<sup>52</sup> The plans may not tender substantial monetary savings; however, collective protection against cancellation is afforded. This is an important factor to be considered in the wake of the recent market withdrawals by a number of insurers.

State and local bar associations, in many instances, are now offering group professional liability policy programs in addition to their normal varieties of life and health insurance.<sup>53</sup> This is not usually "group" coverage in its true sense in that individual policies are issued to lawyers or firms. However, as a group, there is a continuing review in this area of the available policies, underwriting factors, and types and causes of claims. An opportunity is thus afforded to continually educate the attorney in relation to trends in claims for professional negligence.

### Conclusion

To avoid claims in his own personal practice and to thereby aid in restricting the upward trend of premium rates, the practicing attorney should: (1) keep abreast of current developments in law and professional liability; (2) refer matters which may require more

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<sup>52</sup> The Reporter, Phi Alpha Delta Law Fraternity, Oct., 1963, at 3, col. 4.

<sup>53</sup> *E.g.*, Illinois State Bar Association's 1966 Professional Liability Program.

expertise; (3) establish an office system which will not allow important deadlines to be missed; and (4) establish a good client-attorney relationship by keeping the client informed as the case progresses and by pointing out the weaknesses of the case.

The current inclination toward larger and more frequent liability claims coupled with the constantly expanding concepts of professional liability makes it imperative that the practicing attorney conscientiously investigate and consequently purchase a form of professional liability insurance which is suitable to his requirements.