

Changes to the 2017 Primary and Excess Plans

Last year, the PLF completely overhauled the Primary and Excess Coverage Plans. The Plans were significantly reorganized and reformatted, but the substantive changes were limited. Some, but not all, of the revisions are discussed below. In order to understand the scope of coverage under the 2017 Plans, it is important to read them in their entirety.

The revised Primary and Excess Plans are reorganized to eliminate unnecessary or repetitive language and to make it easier to find and identify related provisions. For instance, all Plan language relating to who qualifies as a Covered Party is integrated into Section II of the revised Primary Plan. By making this change, we were able to eliminate current Plan Exclusion 14 (Government Lawyers) and Exclusion 15 (Other Lawyers Not in Private Practice). Under the new language, an attorney is simply not a Covered Party regarding work that was within the scope of these previous exclusions. Similarly, everything relating to covered activities under the Plan, including language that previously appeared only in Comments and Examples, is integrated into Section III of the revised Primary Plan, Covered Activity. We believe these changes make the Plan clearer and eliminate the need for extensive explanations in the form of Comments or Examples.

Explanation of Substantive Changes to Primary Plan

1. Legally Obligated.

The Primary Plan has long included language that coverage is provided only for Damages that the Covered Party is “legally obligated” to pay. The new Plan includes, for the first time, a definition of “Legally Obligated.” This definition is added to the 2017 Plan in response to a ruling in *Brownstone Homes Condominium Association v. Brownstone Forrest Heights, LLC*, 358 Or 223 (2015). In *Brownstone*, the Court ruled that the words “legally obligated,” as used in a liability policy, are ambiguous. The new definition in the Plan is intended to remove any ambiguity as to the PLF’s intended meaning of these words. Under the definition of Legally Obligated, the PLF has no obligation to pay a settlement or Stipulated Judgment where the attorney has no actual obligation to pay money Damages and/or is protected or absolved from actual payment of Damages by reason of any covenant not to execute, a contractual agreement, or a court order, preventing the ability of the claimant to collect such Damages directly from the attorney. However, the bankruptcy of a Covered Party, standing alone, does not affect the PLF’s duties under the Plan.

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2. Damages Definition.

The 2017 Plan revises the Damages definition and clarifies, but does not change, the PLF's intent as to what types of damages are covered under the Plan. The Plan applies only to monetary damages arising from a legal malpractice claim. Under the Damages definition, the Plan does not apply to fines; penalties; punitive or exemplary damages; statutorily enhanced damages; rescission; injunctions; accountings; equitable relief; restitution; disgorgement; set-off of any fees, costs, or consideration paid to or charged by a Covered Party; or any personal profit or advantage to a Covered Party.

3. Defense Provisions.

A. Arbitration Agreements.

The revised Plan Section I.B.1 adds language to make clear that the PLF is not bound by fee agreements entered into by any Covered Party that call for arbitration of malpractice claims. The PLF does not want to be restricted by the terms of these agreements.

B. Nature and Scope of Defense.

The PLF has long had a practice of attempting to repair "mistakes" before they become claims. Repair efforts by the PLF are not a right or duty under the Plan. Section I.B.2. makes clear that the PLF has sole discretion to decide whether to undertake a repair.

C. Defense Regarding Certain Excluded Claims.

The revised Plan adds a specific defense provision stating that the PLF will defend, but not indemnify, claims for malicious prosecution, abuse of process, wrongful initiation of legal proceedings, and sanctions claims subject to Exclusion 4 of the Plan. The Plan language reflecting this policy and practice is relocated and clarified.

4. Addition of Definitions for "Private Practice" and "Principal Office."

The revised Plan adds two new definitions, one for Private Practice and one for Principal Office. These definitions clarify the PLF's meaning and are now stated as qualifications for who is a Covered Party, rather than being in the Covered Activity section, as in the previous Plan.

5. Related Claims.

The concept of "Same or Related" has been renamed Related Claims, and clarifying language has been added. The revised Plan also contains examples that demonstrate how limits work when there are Related Claims against multiple Covered Parties.

6. Exclusions.

There are some substantive changes to exclusions in the Plan. These include, but are not limited to, Exclusion 4 relating to punitive damages and sanctions, and Exclusion 11 relating to family members.

In the 2016 Plan, Exclusion 4 excluded coverage for all amounts awarded as sanctions "intended to penalize" certain types of conduct, but provided for a defense regarding such claims. The previous Plan Exclusion applied whether or not the sanction was awarded against the Covered Party or the Client. There are, however, numerous kinds of sanctions, not all of which necessarily require bad faith, malicious or dishonest conduct, or misrepresentation on the part of an attorney. Moreover, it is not always clear whether a sanction awarded is "intended to penalize" because the court may or may not include findings or other language to allow the Fund to assess the intent of the sanction.

The 2017 Revised Plan excludes imposition of attorney fees, costs, fines, penalties, or remedies imposed as sanctions against the attorney regardless of whether there was an allegation or a finding of bad faith by the attorney or a finding of such by a court. Under the new language, vicarious liability for the sanction against the Covered Party is also excluded. However, if a sanction is imposed against a Client, there is coverage for a resulting claim against the Covered Party or those vicariously liable for the Covered Party, but only if the Covered Party establishes that the sanction was caused by mere negligence. The burden of proof is therefore on the Covered Party.

The Family Member Exclusion is expanded to include additional family members and to exclude work done by family members of those who reside in the household in a spousal equivalent relationship with the Covered Party.

A chart showing changes to the exclusions between the 2016 Primary Plan and the Revised 2017 Primary Plan is available at www.osbplf.org/assets/documents/news_events/PRIMARY%20Comparison%20Chart.pdf.

Explanation of Substantive Changes to the Excess Plan

Some of the exclusions described above also apply to the Excess Plan. The primary change to the Excess Plan is to eliminate redundant provisions. A new Section IV regarding when a claim is First Made has been added to the Excess Plan. The new language clarifies that when a claim is First

Made under the Excess Plan may not be the same plan year as when the claim is First Made for the Primary Plan. There is also a new Section V clarifying which claims are Related and subject to the same Claim Year Limit. The intent is to clarify the distinction between when Claims are Related for Primary purposes versus Excess purposes.

Finally, we have made relevant exclusions identical in both Plans.

A chart showing changes between the 2016 Excess Plan and the Revised 2017 Excess Plan is available at www.osbplf.org/assets/documents/news_events/EXCESS%20Comparison%20Chart.pdf.