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Changes in Legal Malpractice Claims Profile Reflects a Stabilizing Economy

BY AVIGAE C. FYMAN

The post-crisis downward trend in number of legal malpractice claims is stabilizing, but the percentage of claims settled—and the amounts paid out—are on the rise as insurers try to avoid rising defense costs, according to a panel discussion on the ABA's latest quadrennial Claims Study.

The study was released at the ABA Fall 2016 National Legal Malpractice Conference, held on Sept. 21-23 in Chicago. Shari L. Klevens, a Partner and Deputy General Counsel at Dentons US LLP in Washington D.C., moderated a panel that delved into the study's results.

Claims by Area. The study looked at the number of claims by area of law. While Plaintiffs' Personal Injury reclaimed its position as the most common practice area for legal malpractice claims, the proportion of claims related to Personal Injury has decreased. Conversely, the study found increases in the percentage of claims arising out of Family Law; Estate, Trust, and Probate; and Collection and Bankruptcy Law. Real Estate, which constituted approximately 20 percent of all claims in the 2007 and 2011 surveys, makes up only around 15 percent of all claims in the most recent survey.

The panelists attributed the decrease in Real Estate claims to a return to baseline as we move further away from the mortgage crisis. Panelist Rajiv K. Batra noted that anecdotally, attorneys and claims professionals seem to have learned lessons from the financial crisis that have enabled them to take proactive steps to avoid claims in the Real Estate area. He's a claims specialist for AXIS Insurance in Berkeley Heights.

Klevens echoed this sentiment, noting that risk management programs that educate attorneys about best practices have been effective in reducing the number of claims.

Panelist Susan Forray, principal and consulting actuary for Milliman in Brookfield, Wisconsin, noted that from an actuarial perspective, as we get further from the mortgage crisis it may be necessary to monitor long-

term trends in Real Estate claims so that policies may be priced appropriately.

Forray noted that there was a slight increase in Real Estate claims from 2014 to 2015, suggesting that the overall downward trend has bottomed out and that we'll probably see more stability going forward.

Forray said the overall decrease in the number of claims may lead some LPL underwriters to consider decreased rates, with larger decreases for practice areas that have shown a long-term, sustainable decline.

Panelist Timothy Gephart attributed other changes in the claims profile to shifting economic and demographic trends. Gephart is vice president of claims for Minnesota Lawyers Mutual Insurance Co. in Minneapolis.

The increase in Estate, Trust, and Probate claims, Gephart noted, is likely attributable to retiring baby boomers who look to their parents' estates as retirement assets, leading them to second-guess whether the parents' attorneys took appropriate steps to preserve familial wealth.

Gephart also noted the substantial decrease in the number of Plaintiffs' Personal Injury claims this year, after a relatively high number of claims in that area over the past few years. Gephart attributed that trend to the poor economic climate causing more attorneys to "dabble" in Personal Injury law without sufficient experience. As the legal climate for lawyers has improved in other areas, there is less of this sort of dabbling and the resulting actionable mistakes, he said.

Conversely, the uptick in Family Law claims might be because divorce tracks broader economic trends—an improving economy leads to more divorces and thus more claims.

Safety in Numbers

The panel reported that claims by firm size have remained fairly consistent, with claims against solo practitioners continuing to make up about one-third of all claims. The panel attributed this to the fact that small firms have fewer resources and access to mentoring than larger firms, resulting in an increased number of errors.

But Batra observed that law firm merger activity may lead to an increased number of claims against larger firms because of increased potential for conflicts of interest.

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Open and Shut

The study showed an increase in the number of claims being closed within six months of the date of error. Forray observed that an overall decrease in the number of claims may allow claims departments to process claims more quickly.

The survey results indicate that there has been an increase in settlements, both in the pre-suit phase and after litigation has been commenced. Gephart attributed this increase to carriers being more willing to pay nuisance-value settlements in order to avoid litigation costs.

The panelists cautioned that insurers' unwillingness to defend claims could lead to a new flow of claims by a responsive plaintiff's bar.

Gephart said carriers are often more eager to settle where firms have purchased policies with low limits of liability, in order to avoid the risk of a bad faith claim down the road. However, Gephart expressed concerns that settling nuisance-value claims just encourages more of them.

Batra said that the soft market for LPL insurance has decreased deductibles, which puts the carrier's money into play at an earlier phase. He suggested that lower deductibles may also be driving an increase in early settlement.

Rising Payouts

The survey results indicate that, on the whole, the amount of indemnity dollars being paid is on the rise. The biggest uptick is in the number of claims paying \$100,000 to \$500,000 in indemnity.

Some of the increase may be attributable to inflation, Forray said. But another factor is that as fewer claims overall are being brought, the ones that are brought tend to be more severe, she said.

Gephart likewise commented that the increasing complexity of legal malpractice claims has been a driver of defense costs, which in turn drive settlement costs.

Forray said some carriers have responded to the increasing severity of claims by spending more on defense costs, such as by assigning a nurse to monitor the plaintiff or increasing rates for senior attorneys involved in defending claims in order to incentivize them to work on the claims themselves rather than delegating to associates. But rising defense costs increase insurers' willingness to settle, she said.

Neighbors to the North

Though LPL insurance is mandatory in Canada, the profiles of legal malpractice claims in the United States and Canada are more similar than different. For example, the study shows a similar decline in the number of Real Estate claims in Canada.

But Canada shows a much higher percentage of malpractice claims arising out of Personal Injury law, and U.S. insurers tend to pay out more frequently on low-value claims than Canadian insurers, the study shows.

Takeaways

The panelists summarized their key takeaways from the survey results. Gephart said more education of lawyers would be beneficial to students and insurers alike. He would also like to see increased mentoring of young and displaced attorneys, and noted that, in some states, state bar associations have been increasing such offerings.

Batra agreed, noting that the risk management advice available to attorneys is improving, but that attorneys still need to take advantage of that advice.

Forray said it is not yet clear if the increase in settlements will save insurers on defense costs in the long-term, or if it will simply result in an increasing number of claims as the plaintiffs' bar perceives a more favorable claims environment.

Insurers will need to calibrate their responses to a changing claims environment in order to achieve a proper balance, she said.