



## ERAssure – Executor’s Insurance

*By Sarah Shipley\**

As you may be aware, there is a relatively new insurance product on the market for Executors. Executor’s Insurance covers defence costs and legal liability arising out of actual or alleged negligence in the administration of the estate. Currently, ERAssure is the only provider of this kind of insurance.

For some time now my office has been discussing the availability of ERAssure with both our testator and executor clients. As was stated by Jordan Atin during the recent 15<sup>th</sup> Annual Estates and Trusts Summit, it is only a matter of time before a lawyer is sued for not having advised their client of the availability of ERAssure.

On day 2 of the Summit, Jordan Atin presented an excellent paper titled “Executor’s Insurance” which offered an easy to read and informative synopsis on the need to know facts with respect to this insurance product. I recommend his paper to all practitioners who draft Wills and/or provide estate administration or Executor services to their clients. In summary, Jordan’s paper discusses the risk of personal liability that are borne by an Executor both in contract and in tort, the differences in coverage between LawPro and ERAssure for lawyers acting as Executors for their clients, and lastly, highlights policy points of interest.

In his paper, Jordan highlights eighteen examples where executors could be found negligent. For example: improper interpretation of the Will or not following the terms of the Will, self-dealing, delay in payment to beneficiaries, not selling assets in a timely way, failing to invest excess cash, improper delegation of duties. Coverage does not extend to income or probate tax liability. From my experience, most first time executor clients are oblivious to the kinds of actions or inactions that can give rise to a claim for negligence. Accordingly, it is important to point out to your clients such examples when discussing the availability of insurance so they can appreciate the protection they will afford by purchasing a policy of Executor’s Insurance.

Given the plethora of case law surrounding claims for breach of an executor’s or trustee’s fiduciary duties, there is certainly a market for Executor’s Insurance. In cases where the courts have found that an executor or trustee has in fact breached their fiduciary duties, they may be held personally liable. For example, Jordan Atin refers to the recent decision in the case of *Zimmerman v. McMichael Estate*, (2010 CarswellOnt 3481) wherein the trustee was found to have been negligent in the administration of the trust. As a result, Justice George Strathy deprived the trustee of compensation and ordered that Mr. Zimmerman reimburse the estate personally for compensation pre-taken (together with pre-judgment interest from the date of each taking). Mr. Zimmerman was also ordered to pay costs out of his own pocket.

In *Zimmerman* the issues were before the court in the form of a passing of accounts application. I note that Mr. Zimmerman had been acting as an attorney for property of Signe K. McMichael from November 18, 2003 to September 30, 2008 and as trustee of the Signe McMichael Trust from May 16, 2004 to September 30, 2008. Currently an Executor's Insurance policy has a maximum 3 year term. Accordingly, while having a policy with ERAssure may have offered some protection for Mr. Zimmerman, it is unclear how ERAssure would separate the coverage from personal liability when the executor has been found negligent for their administration of an estate or trust for more than the 3 year policy term.

Generally, when an executor is sued by the beneficiaries, it is not uncommon for the executor to bring the lawyer in as a 3<sup>rd</sup> party to attempt to displace some liability. Accordingly, Executor's Insurance can provide some protection to Lawyers as well. With an Executor's Insurance policy in place, the executor would be covered for any damages and costs the executor incurs arising out of a claim.

There are deadlines by which an Executor must apply for the insurance so it is essential that an Executor client be advised of the availability of the insurance during the initial consultation. In most cases the Executor named in the Will has only 30 days from the date of death to submit an application. In the case of an intestate estate, the Estate Trustee will have 30 days from the day the Certificate of Appointment was issued. Coverage requires probate of the Will, but still applies to multiple wills when the executors and beneficiaries are the same.

Lastly, although LawPro coverage may protect us when acting as an Executor for a client<sup>1</sup>, an Executor's Insurance policy is worth consideration. If a claim is made against a lawyer for negligence in respect of his/her administration of the estate, the lawyer can rely on the Executor's Insurance policy, which unlike LawPro has no increased premiums, trailer fees or deductibles.

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<sup>1</sup> If the lawyer was appointed as an Estate Trustee by a family member or friend who is not a client of the lawyer's firm, LawPro takes the general view that your executorship is not covered by the definition of Professional Services and LawPro coverage would not apply in such circumstances.