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New Insurance Product for Lay Executors

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Earlier this year, a new insurance product, ERAssure was launched and is now available in BC. While errors and omissions insurance has long been available for directors and officers, professionals and even strata council members, this is the first time that such a product has become available in Canada for executors and trustees. Similar products are available in the United States, United Kingdom and Australia.

The ERAssure product provides coverage to individual (but not corporate) executors, trustees and administrators for damages arising out of errors and omissions committed during the administration of an estate. Defence costs are also covered under the policy.

Under the policy, the insurer agrees to pay all sums which the insured becomes legally obligated to pay as damages arising out of a claim, if the liability is the result of an error, omission or negligent act in the performance of, or failure to perform, the duties of estate trustee. Like any insurance policy, there are definitions, conditions and exclusions which may limit coverage. For example, one of the requirements is that the policy must be purchased within 60 days of the testator's death. This requirement ensures that executors move to obtain coverage before significant estate decisions are made. There is an initial launch provision that allows coverage on existing estates, provided certain requirements are met.

The policy can be written on virtually any size of estate with the liability capped at three million dollars. With additional underwriting, it is possible to offer a liability limit as high as five million dollars.

One of the most important conditions to note is that the policy is "claims-made", as opposed to "occurrence" based, meaning that coverage is conditional upon the claim being made against the insured for the first time during the policy period, regardless of when the alleged error, omission or negligent act took place (subject to a number of further conditions). Prompt reporting of the claim is therefore absolutely necessary in order for coverage to be confirmed.

While the ERAssure product (as with any insurance product) does not cover all claims that an executor or trustee might face, individual executors and trustees

should be made aware of its availability. Given how costly litigation can be, it could provide protection for the appropriate estate administration.

Note that the policy does not require a trial to trigger coverage. A claim made for monetary damages is sufficient. This is important because not every dispute over estate administration becomes the subject of a lawsuit. In our experience, the number of lawsuits actually filed against executors and the number of those that proceed to trial seems relatively small in relation to all of the potential litigation. There may be a number of explanations for this:

- The cost of carrying legal proceedings through to trial is very high.
- The accepted level of ability and diligence for a lay executor is not a standard of perfection. While the courts emphasize the high fiduciary duties required of an executor, clients are sometimes surprised at the reluctance of the court to remove an executor for mere delays or poor communication. Lawyers, therefore, are typically reluctant to embroil their clients in protracted litigation except as a last resort.
- Frequently the dissatisfaction of beneficiaries is played out in the course of determining an executor's compensation. It is often in this final part of an estate administration that beneficiaries raise negligence, delays or poor investment decision making and seek to hold the executor's compensation to the lowest possible level, rather than commencing negligence based legal action. While executor compensation may be challenged in court, frequently this takes place in shorter duration hearings and can often be resolved before the actual hearing date.

Despite the restraints on estate administration litigation discussed above, there are signs that the landscape may be changing. First, with the dramatic increase in real estate values over the last 10 years, estates are proportionately larger than in previous decades, making litigation appear worth the costs. Second, the ramifications of a high divorce rate are also beginning to reverberate significantly; second marriages have potential to result in discord after death and are increasingly reflected in estate disputes.

Additionally, it has been suggested by some observers that the litigious culture of the United States may be creeping northward. Related to this is the reality of the internet which may also have an impact on increased litigation. Not only does it make the beneficiary an "expert" on all topics, the fact that an executor also has more ready access to information might well raise the standard of acceptable performance over time. Some lawyers are beginning to hear that the defence of "how should I have known" is being responded with "how could you not have known".

While it is difficult to anticipate all of the impacts of this new type of coverage, we expect that the practical resolution process will not change significantly from the

current practice. The change, however, will be in who bears the cost related to allegations of executor negligence. With an insurance policy in force, the defence and an indemnity is paid for by the insurance company and not from estate assets or the executor personally. This could be quite important when a file starts to "get out of control" and costs begin to escalate quickly. It will be the insurer who has the liability and not the executor.

While the issue has not yet been determined by the Courts, it is possible that the insurance premiums would be payable from the estate. We expect that this issue will depend on whether the Court will view this type of insurance as a necessary expense of the executor. Of course, it is also possible for a testator to provide, in his or her will, that the costs of insurance be borne by the estate.

In estates, there has often been this perceived unfairness that a lay executor must assume various burdens without the benefit of insurance coverage such as has been made available to institutional executors either through their own self-insurance or other policies. We expect the availability and use of this coverage will reduce some of the stresses that otherwise engage an estate file.

ERAssure is only available at the recommendation of legal counsel. If you or your client is an executor and interested in this product, members of our [Wealth Preservation Group](#) are able to assist.