

Brief narrative on open CLLAS claims with total incurred in excess of \$2,000,000 (December 31, 2017):

2005-177

This is a Quebec claim, so there is \$10 million in underlying insurance available from the Barreau. The claimant is a large company for which the insured acted in defending a series of product's liability claims that extended over many years. Several actions were defended without the claimant's insurers contributing to defence costs. The claimant instructed our insured to sue those insurers. The allegation is that the insured may not have amended the actions against the insurers to include additional insurers as time went by, and limitation periods have now expired. The legal costs associated with the protracted litigation have been significant.

2008-001

This claim arose out of a shareholders' dispute in a privately held company. A disgruntled, significant shareholder wanted to sell his shares in the company but could not do so without the consent of the two other major shareholders. The company wanted to control who invested in it and did not want the shares sold in the open market.

The company consulted the insured as to how it could restrict the sale of shares. The insured recommended the company amend its Articles of Incorporation to provide restrictions on the sale of shares. The amendment was passed at the company's Annual General Meeting. The insured failed to note that, under the *Canadian Business Corporation Act*, any amendment of the company's Articles that materially varies the rights and restrictions attached to shares also gives rise to dissent rights to those shareholders who did not vote in favour of the resolution. Those shareholders who opposed the resolution became entitled to have their shares purchased by the company at fair market value.

This claim was settled. A portion of the insurers' payment is a loan to the company. The company continues to repay CLLAS on the loan.

2008-113

Between 1999 and 2003, the insured was retained to provide tax opinions about the syndication of several charitable donation programs to Canadian residents. The charitable donation program was built on the concept that leasehold timeshare weeks at various resorts were gifted to a Trust. Canadian residents could apply to become beneficiaries of the Trust. The trustee of the Trust (the "Trustee") was responsible for reviewing and accepting applications for beneficiaries and making distributions of time share units to qualifying beneficiaries ("Participants"). Participants were then requested, but not compelled, to make a donation of timeshare units to one of a select number of charities. Participants would then receive a tax credit for the donation.

In 2004, the Canadian Revenue Agency (CRA) took an increasingly aggressive stand on charitable donation programs. Many ensuing judicial decisions disallowed donations made through these and other programs. The primary basis of disallowance or reduction of the tax credit was that the actual fair market value of the donation was less than the appraised amount put forward by the promoters.

A class proceeding was commenced against the firm by donors who were reassessed by CRA. The basis of the claim is that the donation programs could not have proceeded without the insured's opinion. CLLAS has brought Third Party Claims against several advisors to members of the class.

2010-059

This matter arises out of work performed by the insured law firm with respect to the restructuring of a major manufacturing company during the financial crisis in 2008/09. Part of the restructuring included the reduction of the

company's distribution network. A number of the company's distributors agreed, under severe time constraints, to accept the company's offer to terminate the relationship. Many of these distributors commenced a class action against the company and the insured firm. The decision on the common issues trial was rendered in July 2015. The judge found no liability on the part of the company, but found the insured firm liable.

The essence of the decision is that the firm owed a duty of care to the distributors and should have advised them to band together and negotiate improved terms on a collective basis. As a result, the judge assessed aggregate damages on behalf of the class members in the amount of \$45 million. The judgment was appealed, and we were partially successful on appeal, and damages have been reduced. Leave to appeal to the Supreme Court of Canada was refused and the final damages award will now be issued by the judge at first instance. The exact amount of this award is uncertain, but we anticipate that it will be reduced from \$45 million to about \$26 million. Costs and interest will be added to this amount.

2010-065

This claim concerns contract drafting. The claimant was a sub-contractor for a large company providing services to a power utility. The power generation plant had to be shut down due to negligence of the sub-contractor. It turned out that the main contract with the utility contained language limiting the contractor's liability. The sub-contract (which was prepared on the advice of our insured) did not contain such limitations, despite the apparently clear instructions of the claimant that it did not wish to expose itself to open-ended liability. Ultimately, the main action was settled for \$7.5 million, with the sub-contractor's insurer paying about \$6.7 million of the settlement. This claim was settled following a mediation for \$4 million.

2010-165

The firm represented the claimant in a dispute with a builder for faulty construction of a warehouse facility under a Design-Build Agreement. The firm commenced an action against the builder in 2004. In 2009, the builder brought a motion to the court to strike the action on the basis that the dispute should have proceeded by arbitration under the Design-Build Agreement. The provincial Court of Appeal agreed and the claimant's action was struck. By this time, the limitation period had tolled and the claimant was unable to commence an arbitration proceeding. The claimant has sued the firm for loss of its right of action against the builder.

2011-145

This claim concerns a class action brought on behalf of participants in a charitable donation program that operated from 2001 to 2003. The program (which was of a nature that was quite common at the time) was structured such that the amount of the tax deduction exceeded the actual cash donation made by the taxpayer. The Canada Revenue Agency subsequently took a dim view of these types of programs and reassessed the participants based on Canada's general anti-avoidance rule. The insured firm had provided advice to the promoter of the charitable donation program, who has also been named in the class action. The insured firm has third-partied the financial advisors who advised their clients to participate in the program.

2011-193

This claim concerns tax advice provided by the insured in connection with a trust. The trust had been set up years previously (with advice from another CLAS law firm) and was structured as an estate freeze in such a way that it could not accept assets. In 2004, our insured was consulted about the tax implications of adding a major new property to the trust and failed to identify the tax concerns. The taxpayers have been reassessed and must pay about \$7 million in tax. Our arguments include a limitations defence, a reliance argument, and most importantly a failure to mitigate

argument. According to our experts, the taxpayer could have effected an estate freeze when it learned of the problems and avoided the tax on the escalating value of the property.

2014-079

Our insured acted in the transition of a business to a new entity due to the pending retirement of the principal owner. The new business ran into financial difficulty. It was discovered that as a part of the reorganization that certain financial guarantees made by the departed principal to the organization's surety insurer had not been released, nor were any indemnities provided by the new company. The claim by the principal was settled for \$1.25 million but portions of the claim continue. There is a third party claim against the insurance broker who arranged the surety bond.

2014-131

The insured firm acted for a pay-day lender. Pay-day lending is regulated under provincial statute. The provincial government had taken aim at the lender for alleged predatory lending practices. The lender began marketing a different product which it believed put it beyond the ambit of the provincial statute. The lender voluntarily did not renew its provincial licence. The provincial government brought an application for a declaration that the lender's new product did not put the lender beyond the government's regulation. The court found for the government. The court's decision led to the immediate collapse of the lender leaving many investors and creditors hanging.

The lender's receiver commenced an action against the insured firm, the lender's financial advisor and the lender's auditor for alleged negligent advice.

2014-134

The insured acted for the Board of Trustees for a real estate investment trust (REIT) on the purchase of certain investment properties.

The REIT is publicly traded on the Toronto Stock Exchange ("TSX"), and is managed by the Board of Trustees. The purchase in question had been authorized by the Trustees, without a vote of unitholders of the REIT. The transaction was subsequently unwound by the Trustees when they learned certain facts after closing that persuaded them that the interim CEO of the REIT and the Vendor of the subject properties were "related persons" or "acting together" as defined under the applicable TSX rules and *Securities Act* regulations. Because of this revelation, the Trustees determined that a unitholder vote on the transaction ought to have been held.

The price of the units declined after the unwind. A class proceeding has been commenced on behalf of a class comprised of unitholders of the REIT for the loss of unit value arising from the revelations. The insured was released from the class action but there remain pending claims by the Trustees for alleged negligent advice with respect to the transaction and the former CEO for breach of fiduciary duty and reputational damages.

2017-091

This is a social engineering loss. The firm acted for the vendor of condominiums. A unit sold of \$2.5 million and the insured was instructed to wire the closing funds to the client's mortgage company in partial discharge of its mortgage. Someone managed to get in the middle of the email traffic and advised the firm (via an email address that closely, but not exactly, matched that of the client) to wire the funds to a Hong Kong bank account. Of the \$2.5 million, about \$800,00 has been recovered from the Hong Kong bank. We are working to see if the mortgage company and/or the firm's crime insurer will contribute to the settlement.