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Seven Things About Professional Liability Coverage, Part 2: Claims Made and Reported Provisions

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This is the second in a series of posts from the [Federation of Defense & Corporate Counsel's \(FDCC\) Blog](#) on issues arising under professional liability policies. The aim of this series is to provide sufficient background information to allow the defense attorney to identify relevant issues frequently raised by professional liability policies and to formulate a plan for addressing them. This is not a treatise on how different jurisdictions view professional liability issues. For that, the reader should review the DRI's 2012 publication *Professional Liability Insurance: A Compendium of State Law*. There are, of course, other issues of importance not discussed here.

Professional Liability Insurance is Commonly Written on a Claims Made and Reported Basis

Many, although not all, professional liability policies are issued on a claims made and reported basis, as opposed to being issued on an occurrence basis. This means that in order for there to be coverage, the claim against the insured must first be made during the policy period and it must also be reported to the insurer during or immediately after the policy period. This differs from commonly available occurrence-based general liability and automobile policies, which cover any injury or damage occurring during the policy period with regard to when the insured was negligent or when the claimant files suit. Some policies are written only on a claims made basis, with no requirement that the claim must also be reported during the policy period. Where those policies permit reporting outside the policy period, they often require that notice be given within a specified period of time after policy expiration.

Just as the concept of an "occurrence" is central to general liability policies, the concept of a "wrongful act" is central to claims made professional liability policies. In simple terms, the wrongful act, while usually defined as what the insured has done to get himself or herself sued. The wrongful act does not have to happen during the policy term, but as discussed below, it must happen after the retroactive date.

One standard claims made and reported provision reads as follows:

2. This insurance applies to "wrongful acts" only if:
 - a. The "wrongful act" takes place in the "coverage territory;"
 - b. The "wrongful act" did not commence before the Retroactive Date, if any, shown in the Declarations or after the end of the "policy period;" and
 - c. A "claim" against any "insured" for damages because of the "wrongful act" is first made during the "policy period" or the



- Section VII, Extended Reporting Period, if applicable, in accordance with Paragraphs 3. and 4. below.
3. A "claim" will be deemed to have been made at the earlier of the following times:
 - a. When notice of such "claim" is made and reported to us in accordance with the provisions of Section VI, Condition C. Duties In The Event Of A Claim Or A Wrongful Act That May Result In A Claim; or
 - b. When a "claim" against an "insured" is made directly to us in writing.
 4. A "claim" received by the "insured" during the "policy period" and reported to us within 30 days after the end of the "policy period" will be considered to have been reported within the "policy period." However, this 30-day grace period does not apply to "claims" that are covered under any applicable Extended Reporting Period or subsequent insurance you purchase, or that would be covered but for exhaustion of the amount of insurance applicable to such "claims."

ISO Form LW 00 01 03 11.

Many companies do not use ISO forms for professional liability coverages. Rather than adopt the ISO outline-centric policy structure, it is common for the claims made element of the coverage grant to be incorporated into a one paragraph coverage grant, such as the following:

To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages resulting from any claim or claims first made against the Insured and reported in writing to Company during the Policy Period for any Wrongful Act of the Insured or of any other person for whose actions the Insured is legally responsible, but only if such Wrongful Act occurs during or prior to the P Period and solely in rendering or failing to render professional services for others for a fee in the Insu capacity as an Insurance Agent, Insurance Broker, Insurance Consultant or Notary Public.

[XL Insurance Agents & Brokers Professional Liability Form \(PDF\)](#)

Because the claims made element is part of the coverage grant, claims made policies are ordinarily exempt from application of the notice-prejudice doctrine. *Safeco Title Ins. Co. v. Gannon*, 774 P.2d 30 (Wash. App. 1989); *World Health & Educ. Foundation v. Carolina Cas. Ins. Co.*, 612 F.Supp.2d 1089 (N.D. Cal. 2009); *Slater v. Lawyers Mut. Ins. Co.*, 278 Cal.Rptr. 479 (Cal. App. 1991); *Zuckerman v. National Union Fire Ins. Co.*, 495 A.2d 395 (N.J. 1985). Under the notice-prejudice doctrine, an insured's failure to give timely notice of a claim does not eliminate coverage unless the insurer can show actual prejudice from the late notice. *v. American Equity Specialty Ins. Co.*, 30 Cal.Rptr.3d 631, 633 (Cal. App. 2005). Because this doctrine does not apply to claims made policies, late reporting defeats coverage even if there has been no other prejudice to the insurer.

What is a Claim?

With claims made coverage, it is essential that the insured recognize when a claim is being made. Some situations are simple: The filing of suit against the insured counts as making a "claim" against the insured on most professional liability policies. But, that's not all. In many instances, any written communication from a claimant expressing an intent to seek damages from the insured will constitute a claim for policy purposes.



some forms, a request to toll the statute of limitations also constitutes a claim. (Travelers Form MPL-3001 01-09 -

<https://www.travelers.com/business-insurance/management-professional-liability/documents/MPL3001.pdf> In addition, most claims made professional liability policies contain "potential claim" provisions allowing the insured to give notice during the policy period of a potential claim, so that any later made claim by the same claimant for the same wrongful act will relate back to the policy period. This is important because most policies also exclude coverage for claims of which the insured knew before the beginning of the policy period. Once a claim is made, the insured needs to report it.

What qualifies as reporting a claim to the insurer or "notice" of a claim to the insurer has been the subject of considerable litigation in recent years. For example, last year a claimant failed to persuade the Nevada Supreme Court that constructive notice based upon press reports was sufficient to satisfy the insured's obligation to report the claim to the insurer. In *Physicians Insurance Co. v. Williams*, 279 P.3d 174 (Nev. 2012), Physicians issued a claims made professional liability policy to a dentist, Dr. Ahmadi. Williams was a patient of Dr. Ahmadi. Unfortunately for Williams, and unknown to him until it was too late, Dr. Ahmadi used "street cocaine" to anesthetize Williams' gums during a root canal. Williams, a union truck driver subject to drug testing then failed a mandatory drug test. Williams lost his job and his 20 year career.

Dr. Ahmadi was also using the cocaine himself. He was criminally charged with cocaine trafficking and illegally prescribing painkillers to phony patients for his own consumption. His dental license was suspended in early 2004. Around the same time, Physicians became aware through other sources (including a property insurance claim) of Dr. Ahmadi's unorthodox use of cocaine.

The policy Physicians had issued to Dr. Ahmadi was canceled by Physicians effective April 14, 2004, because of the license suspension. On February 6, 2004, *i.e.* before the policy was canceled, Williams sent Dr. Ahmadi a demand letter. Dr. Ahmadi did not forward the letter to Physicians. On April 15, 2004, the day after the effective date of the policy cancellation, Williams filed suit against Dr. Ahmadi and eventually obtained a default judgment. Williams then sued Physicians. The Physicians policy contained a number of requirements for making a claim:

You must include the date, time and place of the professional health care incident; a description of the professional health care services you provided; a description of the professional health care incident; the name, address and age of the claimant or plaintiff; the names of witnesses, including other treating health care providers.

The Nevada Supreme Court rejected Williams' attempt to use Physicians' general awareness of Dr. Ahmadi's conduct to satisfy the policy's notice requirement because the specific information requested by the policy terms had not been provided. Thus, the Court ultimately held, there was no coverage under the Physicians policy.

For defense attorneys representing professionals, compliance with the notice provision in a professional liability policy is critical. Unfortunately, like Dr. Ahmadi, many professionals accused of wrongful acts are in remiss in following their policy's claim reporting requirements. Indeed, a substantial portion of the published late notice cases involve attorneys who failed to report claims against them in a timely fashion and in the manner required by the policies insuring them. See, e.g., *Zuckerman, supra*; *Gulf Ins. Co. v. Dolan, Fertig & Curtis*, 433 So.2d 512 (Fla. 1983). Care must



taken by defense counsel to understand and follow the claim reporting requirements of professional liability policies.

On occasion, claims are first made against the insured shortly before the policy period ends. In those circumstances, many, but not all, professional liability policies include "extended reporting period" provisions that can provide the insured additional time after policy expiration to provide notice of a claim. An extended reporting period provision is different from a "tail" which provides coverage for claims first made and reported during the tail period for claims based upon wrongful acts occurring on some earlier date. Typically, extended reporting period provisions apply only if (a) the policy is not renewed or replaced; and (b) the insured makes an affirmative election and pays an additional premium for the extended reporting period at or before the expiration of the policy. When coverage continues across multiple policy years with the same insurer, some policies permit notice to be given during the current year for a claim made during a prior policy year.

In sum, an insured's notice of claim under a professional liability policy must not only be timely, but in many cases – like Dr. Ahmadi's – it must also be specific. The specific requirements for providing sufficient notice of a claim vary by policy and by the insured's industry. Halfhearted compliance with those requirements can, and often does, imperil coverage. The lesson for defense counsel, whether they represent the defendant professional or they fear becoming the defendant professional, is to provide complete and detailed notice of a claim or potential claim to the insurer as early as possible. With claims made and reported coverage, problems ignored do not get better. Wishful thinking is not a viable strategy for the insured or counsel.

Counsel representing the professional liability insurer must also be cautious in analyzing apparent late claim situations for things are not always as they seem. Were the circumstances of the claim reported to the insurance producer? Is that producer an agent of the insurer whose knowledge will be imputed to the insurer? Were the circumstances of a potential claim disclosed on a renewal application?

Next up, a discussion of retroactive dates.