A Primer on Prior Acts Coverage

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Let's start at the beginning. Prior to the 1970's, legal malpractice policies were occurrence-based. In short, that meant that if a malpractice policy was in force during the time the alleged malpractice occurred, then the attorney had coverage for that occurrence. This created a significant problem for the insurance industry due to the difficulty of trying to determine the appropriate price for the risk they were taking on. Under these policies, insurance companies were perpetually obligated to indemnify insureds for claims that could arise from any issued policy period and this wasn't good. This situation led to the abandonment of occurrence-based policies and now legal malpractice policies are virtually all claims-made.

Traditional claims-made policies were intended to address situations where claims would become known immediately. They provided coverage for any covered event that occurred and was reported during a policy period. The switch to this policy form allowed the insurance industry to more accurately determine an appropriate price for the risk taken on. The insurer's liability was no longer open-ended. This created a new problem, however, because lawyers need coverage that is somewhat open-ended. After all, claims may not arise until years later. To address this shortcoming, the insurance industry introduced prior acts coverage, which establishes a retroactive coverage date for each attorney covered under a claims-made policy. With prior acts in place, any alleged malpractice that occurs after the retroactive coverage date would be covered as long as the alleged malpractice is reported in compliance with policy provisions and is a covered error, act or omission according to policy terms. Note that this does mean that any alleged malpractice that occurred prior to the retroactive coverage date would be excluded from coverage even if reported during a current policy term.

The retroactive date is usually the same date from which continuous coverage was first obtained by the current or predecessor firm. This is why it is so important to obtain malpractice coverage when first starting out in the practice of law. You can't wait two years to buy your first policy and expect to obtain retroactive coverage for those first two years. Coverage will begin on the effective date of the first policy and run forward from there. There is one additional caveat worth mentioning. Typically, prior acts coverage will not be provided for any acts, errors or omissions (the alleged malpractice) that the insured attorney knew of or reasonably should have known of prior to the inception date of the current policy. Stated another way, don't wait until a potential claim arises and then try to hide awareness of this potential claim as you now try to first obtain coverage. The same would hold true for anyone in the process of reapplying for continued coverage. The fallout could be disastrous as not only is a denial of coverage for that claim possible once it's reported, but the policy itself may be rescinded due to the attempted fraud.

The availability of prior acts coverage is not a given. Most insurance companies will not offer prior acts coverage if the prospective insured has not been continuously insured in the recent past. This is explains why having coverage rescinded is such a disaster because a gap in coverage will be the outcome. As a result of this coverage gap, the next insurance company will reset the retroactive coverage date and make it the same as the new policy's inception date. Thus coverage for work done up until this new policy is in place is now gone. Also, prior acts coverage is typically not available to any firm that has been cancelled or not offered continued coverage by their current carrier due to claims activity. Here, the only option would be to purchase tail coverage or more accurately an extended reporting endorsement (ERE) from the current carrier who is about to cancel coverage or has elected to not offer continued coverage. Underwriters may also decide to not offer prior acts coverage when they deem a prospective insured's past practice as an unacceptable risk, but view the current and prospective practice as insurable.

A lateral move can also create a coverage gap if the issue of prior acts coverage has been ignored. For example, suppose an attorney leaves a small firm that is dissolving and joins a larger established firm in the area. The new firm has a standard malpractice policy. Eighteen months into his new practice the attorney is sued by a client of his prior firm for work done while at that prior firm. To make sure that all the bases are covered, the attorney reports the claim to the prior firm's insurance carrier as well as the current firm's carrier only to find that both insurance companies deny the claim. What happened? The prior firm failed to purchase an ERE and the current firm's policy (as a standard policy) afforded no prior acts coverage to lateral hires. When the attorney made the move, his retroactive coverage date was reset to the date he joined the new firm. By ignoring the issue this attorney unintentionally found himself bare for all work done up to the date he was added to his new firm's policy. This is a serious situation that could have been easily avoided if simply looked into.

Law firms can purchase a special endorsement that provides retroactive coverage for lateral hires and thus is something that should be asked about prior to making a decision to move laterally. Understand, however, that firms may also refuse to provide prior acts coverage out of a desire to avoid assuming any of a lateral's prior firm liability as this liability could negatively affect the new firm's risk profile from an underwriting perspective should a claim concerning work at the prior firm ever arise. The good news is that attorneys have two options if prior acts coverage will not be available at the new firm. If the firm from which the attorney is about to depart will remain a viable entity and will continue to be insured, the departing attorney will have coverage for work done while at that prior firm under former attorney language in that firm's policy. The decision would then be to rely on that coverage. If this isn't the case, the only other option would be that the dissolving prior firm will need to purchase an ERE, or if available and it often isn't, the departing attorney could try to purchase his own ERE. Regardless, don't wait until post departure to look into the availability of an ERE as the opportunity to decide to purchase one can be as short as having to be made no later than the day the dissolving firm's coverage ends.

Prior acts coverage is all about preventing insurance gaps. Whether transitioning into private practice, moving between firms, or changing insurance companies, a proactive approach to addressing the coverage issues that surround prior acts will prove well worth the effort and it all starts with understanding just what it is.

Risk Management Questions?

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