



ALPS

Practice Management Pointers

The Ins-n-Outs of Tail Coverage

Mark Bassingthwaighe, Esq.

mbass@alpsnet.com

Some attorneys still ask about purchasing a tail policy or tell me that they have purchased a tail policy to cover their retirement years. Truth be told, there is no such thing as a tail “policy;” and unfortunately the confusion over what a tail is and what it isn’t can lead to serious repercussions down the line.

Prior to discussing tail coverage, one must first understand a few malpractice insurance basics. All legal malpractice insurance policies are claims-made products. When a claims-made policy is purchased, the attorneys named as insureds under that policy will have coverage for claims that arise and are reported to the insurance company during the year that the policy is in force. Further, and this is important, any act, error or omission upon which a claim is based would have had to occur after the policy’s retroactive date. This date is usually the inception date of the first claims-made policy purchased provided that there has been no gap in coverage since obtaining that first policy.

Malpractice policies only provide coverage for one year. Thus, in order for an attorney to have coverage in force at all times, a policy must be purchased every year. A failure to timely purchase a new policy each year could allow a gap to arise which would often mean that once a new policy is eventually purchased, your retroactive date will move forward to the inception date of that new policy. The outcome of having your retroactive date reset like this is that you now no longer have coverage for any claim that arises out of any work done up until the point this new policy went into effect. In other words, you have lost coverage for your prior acts and this is something most lawyers want to avoid. Finally, and most importantly for this discussion, an attorney can only purchase a malpractice policy while in active practice which is what creates a problem for an attorney going into retirement. A retiring attorney can no longer purchase a policy because he or she will no longer be actively practicing law. This is where tail coverage comes into play.

To the insurance industry the word “tail” actually means extended reporting period. The purchase of tail coverage adds an extended reporting endorsement (ERE) to an expiring policy. The ERE simply extends the time in which a claim may be reported to the insurance carrier. There is no new tail policy. In short, the purchased endorsement (commonly referred to as tail coverage) provides an attorney the right to report claims to the insurer after a policy has expired or been cancelled. Again, under most ERE provisions, the purchase of the endorsement is not one of additional coverage or of a separate and distinct policy. The significance of this is that under an ERE there would be no coverage available for any act, error, or omission that occurs during the time the ERE is in effect. So for example, if a claim were to

arise several years post retirement out of work done in retirement as a favor for a friend, there would be no coverage for that claim under the ERE. This is why you hear risk managers say things like never write a will for someone while in retirement. I know it can be tempting, but don't practice a little law on the side in retirement because your tail coverage will not cover any of that work.

Another oft-misunderstood downside to the endorsement aspect of tail coverage arises when an attorney decides to semi-retire and purchases a policy with reduced limits in order to save a little money during the last few years of practice. The problem here is that insurance companies will not allow an attorney to bump up policy limits on the eve of a full retirement, so you will be forced to live with the policy limits that were in place on the last policy of your career. Thus the premium savings that come with reduced limits on the last policy or two of your career are often not worth it. Why? Because all claims reported under the ERE will be subject to the available remaining limits of the final policy that was in force and this may not be enough coverage.

By way of example, if you were to reduce your coverage limits from one million per occurrence/three million aggregate to five hundred thousand per occurrence/five hundred thousand aggregate during your last year or two of active practice in order to save a little money, you will only have coverage of five hundred thousand per occurrence/five hundred thousand aggregate available to you for all of your retirement years and that may not be enough for your peace of mind. Therefore, if you anticipate wanting those higher limits of one million/three million during your retirement, keep those limits in place as you head toward retirement.

Unfortunately, while many attorneys hope to obtain an ERE to cover their retirement years, tail coverage is not available to everyone. Most insurers prohibit any insured from purchasing tail coverage when an existing policy is canceled for nonpayment of premium or if the insured failed to reimburse the insurance company for deductible amounts paid on prior claims. An attorney's failure to comply with the terms and conditions of the policy, the suspension and/or revocation of an insured's license to practice law, and an insured's decision to cancel the policy or allow coverage to lapse may also create an availability problem.

An attorney's practice setting can create problems as well. For the retiring solo practitioner, insurers frequently provide tail coverage at no additional cost to the insured if the attorney has been continuously insured with the same insurer for a stated number of years. Given that tail coverage can be quite expensive, shopping around for the cheapest insurance rates in the later years of one's practice isn't a good idea as this free ERE benefit can be easily lost. Talk with your carrier well in advance of contemplating retirement in order to not unintentionally lose this type of benefit.

The situation for an attorney retiring from a multi-member firm is quite different from that of a solo attorney as a number of insurance companies will not provide an opportunity for this retiring attorney to purchase an ERE due to policy provisions. The reason is that the firm's existing policy will continue to be in force post attorney retirement. The firm will continue to remain insured. This isn't all bad however, as the retiring attorney will be able to rely on former attorney language under the definition of insured. Because the definition of insured varies among insurers, it is important to review the issue with your firm's insurance representative so that options can be identified and reviewed well in advance of any planned retirement. One option may be that if and when the firm eventually does dissolve, the retired attorney may have the option of purchasing an ERE at that time.

Be aware that the period in which one can purchase an ERE can be quite limited. Most policies allow either a 10-day or a 30-day window that starts to run on the effective date of the expiration or cancellation of the existing policy; but a few very restrictive policies require the insured to exercise the option to purchase an ERE on the date of cancellation or expiration. Review relevant policy language at the time of policy purchase as the opportunity to purchase an ERE comes just once and no attorney can afford to miss it.

The duration of the tail coverage or more accurately the length of time under which a claim may be reported under an ERE varies depending upon what is purchased. Coverage is generally available with a fixed or renewable one, two, three, four, or five year reporting period or with an unlimited reporting period. If available, the unlimited reporting period would be the most desirable, particularly for practitioners who have written wills during their later years of practice.

The premium charge for an ERE is usually specified in the policy. Often these costs are a fixed percentage of the expiring policy's premium and can range from 100% to 300% depending on the duration of the purchased ERE. Some companies will offer a renewable ERE that declines in its cost at each renewal and effectively allows for the costs of an ERE to be spread out over time. This option can be an attractive way to make the cost of tail coverage more affordable.

Given all of the above, if the ERE provisions outlined in your policy language have never been reviewed and retirement is not too far off, now is the time. As retirement approaches, contact your insurance representative in order to understand if ERE coverage will be available and how it can be obtained. Finally, be aware that if the unexpected ever happens such as the sudden and untimely death of an attorney still in practice, know that tail coverage can be obtained in the name of the deceased attorney's estate if timely pursued in accordance with policy provisions. This is why even attorneys who are not nearing retirement should still have some basic awareness of ERE policy provisions because one just never knows.



Risk Management Questions?

Mark Bassingthwaighte, Esq. is the Risk Manager for ALPS Property & Casualty Insurance Company. He is available to answer risk management questions and can be reached at 1-800-367-2577 or mbass@alpsnet.com.

Disclaimer:

ALPS presents this publication or document as general information only. While ALPS strives to provide accurate information, ALPS expressly disclaims any guarantee or assurance that this publication or document is complete or accurate. Therefore, in providing this publication or document, ALPS expressly disclaims any warranty of any kind, whether express or implied, including, but not limited to, the implied warranties of merchantability, fitness for a particular purpose, or non-infringement.

Further, by making this publication or document available, ALPS is not rendering legal or other professional advice or services and this publication or document should not be relied upon as a substitute for such legal or other professional advice or services. ALPS warns that this publication or document should not be used or relied upon as a basis for any decision or action that may affect your professional practice, business or personal affairs. Instead, ALPS highly recommend that you consult an attorney or other professional before making any decisions regarding the subject matter of this publication or document. ALPS Corporation, as well as any of its subsidiaries, affiliates and related entities shall not be responsible for any loss or damage sustained by any person who uses or relies upon the publication or document presented herein.