Professional Liability Insurance Claims Made and Reported Policies

BY STEVEN STRANG

The Supreme Court of Ohio requires that attorneys and law firms maintain "adequate" professional liability insurance, with exceptions for government attorneys and in-house counsel. Gov. Bar. R. III(4)(A). All professional liability policies in Ohio are written on a "claims made" basis. These policies have become widespread due, in part, to an easily identifiable coverage trigger. This article will discuss the application process, notice issues including relevant case law, tail coverage, and conclude by offering some practical tips for attorneys in purchasing and navigating their professional liability policies.

Application Process

A typical application requires information about prior and current insurance, a law firm profile including information about the firm's finances and areas of practice, internal procedures such as whether the firm maintains an electronic calendar system and system for detecting conflicts, and finally the big question — past discipline and claim information.

It is important to fill out the application completely and candidly because it can affect the rights and responsibilities of the policyholder and the insurer. Indeed, failing to disclose information in the policy can, and does, void coverage. Be sure to explain any past claims or disciplinary proceedings carefully and completely — doing so can actually lead to lower rates by making you and your firm appear less risky. Do not simply attach the court records, as this forces the insurer to wade through voluminous legal documents and focuses the insurer on the plaintiff's allegations. Rather, simply summarize the relevant facts and resolution of the matter. An applicant may also include tangible reasons why the incident will not happen again.

Notice Issues

Professional liability policies are written on a "claims made" as opposed to occurrence basis. An occurrence policy, such as a typical auto or commercial general liability policy, provides coverage for acts during the policy period, regardless of when the claim is brought. Claims made policies, however, only provide coverage for claims made against the insured during the life of the policy. Accordingly, coverage under a claims made policy is triggered only by the presentation of a claim during the policy period. If the insured does not give notice within the contractually required time period, courts invariably find that there is no coverage under the policy.

Ohio courts, and federal courts applying Ohio law, enforce strict compliance with the claims made requirements because these policies are designed to limit liability to a fixed point of time. *See, e.g., Hedmond v. Admiral Ins. Co.,* 10th Dist. No. 02AP-910, 2003-Ohio-4138. To allow coverage for claims made beyond the policy period would grant the insured more coverage than the insured bargained and paid for, and require the insurer to provide coverage for risks not assumed.

There are two kinds of claims made policies, and each has different reporting requirements. Many policies are actually "claims made and reported" policies as opposed to pure "claims made" policies.

A "claims made" policy generally requires that the claim be made against the insured during the policy period, and that the insured report the claim "as soon as practicable" or within a specified time period. Notification to the insurer does not necessarily have to be within the policy period, as long as the notice is given in accordance with the reporting requirement. Although in most cases notice should still be given within that period, circumstances may justify a reasonable delay in providing notice beyond the policy period, in which case there would still be coverage.

A "claims made and reported" policy, on the other hand, has a two-part trigger for coverage — first, that a claim is made against the insured during the policy period, and second, that the insured reports the claim to the insurer within the policy period. With this type of policy a claim could be made against the insured in the last days of the policy period, and the insurer could deny coverage if the insured did not report the claim before the last day of the policy period.

In fact, courts have found no coverage under claims made and reported policies where the claim was made against the insured during the policy period, but it was not reported to the insurer until after the policy expired. In *U.S. v. A.C. Strip, 868* F.2d 181, 187 (6th Cir. 1989), an insurer, Pacific, issued a policy of insurance to an attorney named Strip that provided coverage for claims "first made against the insured and reported to the Company during the Policy Period…." *Id.* at 185. The claim was made against Strip "well within the policy period," however the insured did not notify Pacific until more than two weeks after the policy period had expired. *Id.* Applying Ohio law, the Sixth Circuit ruled that there was no coverage under the policy as a matter of law. The court found that the policy "clearly states that a claim must be made and reported within the policy period. It is exactly this aspect of a claims made policy that distinguishes it from an occurrence policy." *Id.* at 187. Because Pacific was not provided with notice of the claim before the policy expired there was no coverage. *See, also, Asp v. Ohio Med. Transp., Inc.,* 10th Dist. No. 00AP-958 (June 28, 2001) (also finding there was no coverage under a claims made and reported policy when the claim was made within the policy period but not reported to the insurer until after the policy expired).

Many polices also impose a requirement that notice to the insurer must be made in writing, and case law shows that clauses requiring written notice of a claim will be given effect. *See Elkins v. Am. Internatl. Special Lines Ins. Co.,* 611 F. Supp.2d 752, 768 (S.D.Ohio 2009). Even if not required by your policy, though, submitting a claim in writing is advisable

because you will have proof of the date and content of your submission.

Some policies impose a requirement that you give notice to the insurer of a claim, lawsuit, or circumstance that might "reasonably be expected" to give rise to a claim when renewing or changing the policy. So what qualifies as a circumstance that may "reasonably be expected" to give rise to a claim? It can include a grievance, even if dismissed, a fee dispute, or a mistake the insured knows he or she made, even if the client has not yet noticed.

Generally, though, courts have held that when the phrase "reasonably be expected" is left undefined, as it often is, the phrase is "ambiguous" and the policy will be strictly construed in favor of coverage. In *Prof'ls Direct Ins. Co. v. Wiles, Boyle, Burkholder & Bringardner Co., LPA,* No. 2:06-CV-240 (S.D. Ohio Nov. 24, 2009), the court, applying Ohio law, interpreted a policy that required that the insured had "no knowledge of facts which could have reasonably been expected to result in the claim, or any knowledge of the claim, prior to the effective date of this policy." The insurer moved for summary judgment, arguing that the insured had knowledge of facts that could have "reasonably been expected to result in a claim" before the policy went into effect. Because the phrase was undefined, the court looked to a dictionary definition of the phrase and ultimately found that the phrase required the insured to report claims that were "reasonably probable, reasonably likely to happen, or reasonably certain." The court concluded that whether the claim was reasonably to be expected was a question of fact.

In summary, it is critical that you be aware of your policy's reporting requirements. Ignorance of the policy terms is not a defense. An insured has a duty to read the insurance policy, and a court will assume the insured knows the policy terms and requirements. *See MBE Collection, Inc. v. Westfield Cos., Inc.,* 8th Dist. No. 79585, 2002-Ohio-1789, ¶ 35.

Tail Coverage

Another issue to consider is what a lawyer should do when he or she retires or stops practicing law. Remember, with a claims made policy you need coverage not for the error, but the resulting claim. You may not receive notice of a claim until well after you have stopped practicing, and do not want to be caught without insurance.

One option is to continue your coverage by purchasing a "tail." Tail coverage is optional protection that allows you to report claims for a specified period after your policy has ended for alleged incidents that occurred while your policy was in force. In *Pemco, Inc. v. Tiarks,* 8th Dist. No. 36285 (July 28, 1977), the insured purchased a claims made policy and chose not to renew at the end of the policy period. Significantly, he chose not to purchase tail coverage even though it was available. He was then presented with a third-party claim after the policy expired. He filed a declaratory judgment action against his insurer, arguing that claims made policies should be void as against public policy because they force the policyholder to continue coverage with the insurer indefinitely out of fear that some past incident will result in a future claim. *Id.* at *11. The court rejected this argument, in part because tail coverage was available to assure continuing protection from the claim. *Id.* at *16.

Summary and Practical Tips

1. Your application needs to be accurate, or you stand a real chance of voiding coverage. You are better served by paying a slightly higher premium than risking your insurer denying coverage based on an inaccurate application.
2. Be aware of your reporting requirements. Report a claim to your insurer *as soon as you are aware of it.* Submitting notice to your insurer in writing is advisable whether your policy requires written notice or not.
3. When re-applying for or renewing a policy, be sure to fully disclose possible claims. While courts generally find an issue of fact as to whether a policyholder had knowledge of an incident that could "reasonably be expected" to have given rise to a claim, it is better to avoid the possible declaratory judgment action altogether.
4. Remember that changing or discontinuing your policy can cause a gap in coverage. This gap can be closed by purchasing tail coverage.

Steven Strang is a litigation associate at Gallagher Sharp, where he is a member of the Insurance and Professional Liability Practice Groups. He can be reached at (216) 522.1037, or sstrang@gallaghersharp.com.