

# Understanding Your Professional Liability Policy: What You Need to Know

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We all get them—professional liability renewal applications. Every year we complete them, send in the premium, receive back a new policy, and stick it in our drawer, safe in the knowledge that we are protected from our mistakes for another year.

But are we?

As with many of life's questions, the answer is—it depends.

Professional liability (PL) policies—popularly referred to as malpractice or E&O policies—have some unique (i.e. tricky) provisions. Understand them and your level of protection increases; ignore them at your peril.

## **These Are Claims Made and Reported Policies**

Most people are familiar with homeowner policies, auto policies, and perhaps commercial general liability (CGL) policies. These policies all share one trait—they are “occurrence” based. That is, the trigger of coverage is an occurrence or accident within the policy period. A claim or lawsuit may not follow for several years, and in some cases (think asbestos, toxic torts) the injured person may not even realize that he has been injured for many years. When the injured person discovers the injury, reports the injury, or files a lawsuit is irrelevant; the trigger is the event itself.

PL policies are different. They are not triggered by an accident or injury, but instead depend on two distinct events happening within the policy period—(1) a claim must be asserted against the policyholder, and (2) the policyholder must report that claim to the carrier. Both events must occur in the same policy period; if they do not, coverage is not triggered. When the injury giving rise to the claim occurred is irrelevant, and, in fact, most often the event occurred before the policy period in which the claim is made.

Lawyers think in terms of lawsuits, and although a lawsuit is a claim, not all claims are lawsuits. So, an important way a lawyer can increase the chances of being protected by a PL policy is to think in terms of **claims being made or threatened against the lawyer**—not just lawsuits being filed.

### **What is a Claim?**

Since we need to be on the lookout for claims, we need to know what we are looking for. “Claim” is a technical term typically defined in a PL policy. Usually it means simply a demand for money or services, but all PL policies are not alike. Here are some typical definitions:

**Claim** means a demand that seeks damages.

**Claim** means a request or a demand, including the institution of a **suit** or arbitration proceedings against any insured, received by us and seeking the payment of damages by an insured.

**Claim** means receipt of a civil action, suit, proceeding, or demand naming the **Insured** seeking **Damages** and/or **Professional Services** arising out of a **Wrongful Act** by the **Insured** or any **Entity** for whom the **Insured** is legally liable.

**Claim** means a demand for money or services, or the filing of suit or institution of arbitration proceedings or **Alternative Dispute Resolution** naming an **Insured** and alleging a negligent act, error, omission or **Personal Injury** resulting from the rendering of or failure to render **Professional Services**.

Consider whether these are “claims”:

- A notice from the local disciplinary board that a client has registered a complaint;
- A letter from a client's new lawyer stating that he is "looking into" your handling of the client's legal matters;
- A client's refusal to pay your bill, asserting that the work was unsatisfactory;
- A disgruntled client demanding that you return fees that have already been paid;
- A letter from a former client asking for the identity of your malpractice carrier;
- A telephone call from a client complaining about the outcome of a lawsuit or transaction;
- A client complains to the news media about your representation of the client;
- You miss a statutory deadline and inform the client;
- You miss a court-imposed deadline for a dispositive motion and inform the client.

These may or may not be claims depending on the language of the policy and the case law in your jurisdiction. But don't take a chance. Think claim or potential claim—not just lawsuit. And don't overlook the "supplementary" coverages in your policy. These are things like disciplinary defense coverage, subpoena coverage, and spousal coverage, just to mention a few. Read your policy, from back to front, or even front to back. If you do, just one time, odds are you just might learn some things that may be valuable to you someday.

### **The Claim Must Be Reported**

Once a claim is made or a potential claim arises, the clock is ticking on the second event needed to trigger coverage. You must report the claim within the same policy period as when the claim was made. PL policies may contain other more demanding conditions such as providing "immediate notice" of a claim or notice "as soon as practicable", but these are nebulous standards that can often be argued around.

What cannot be so easily dismissed is the requirement that the claim be reported within the same policy period as it was made. If a lawyer does not recognize a “claim” when it is made, then it stands to reason that the claim will not be reported as needed to trigger coverage.

The safest course of action is to report any omission, act, or circumstance that *might* result in a claim. The old mantra applies of ‘Better to be safe than sorry.’ But lawyers are reluctant to do this because

- The claim is not meritorious—“It’s a bunch of BS!”
- The client is “crazy.”
- “I was trying to work it out.”
- Fear of an increased premium.

Lawyers are in the business of trying to resolve conflicts, and so their natural inclination is to try to resolve a conflict with a client. Perhaps this is advisable for minor conflicts, but we need to be aware of the time deadline (end of the policy period) to make a decision on whether a minor conflict is going to turn into a major one. Err on the side of caution and increase your chances of being able to utilize the benefits of your PL policy. Act on your own for too long and you may end up being on your own for the long run.

### **What About Claims Made Near the End of the Policy Year?**

These happen. Consider this fact pattern in a situation where a PL policy is issued on a calendar year:

- Client signed up on 5/3/2011
- Attorney commits negligent act on 8/15/12
- Client asserts a claim on 12/10/12
- Claim reported to carrier on 1/10/13

The policy expired on 12/31/12, so the claim was made in one policy period and reported in the next. Is the lawyer out of luck? Fortunately, no. PL policies have extended reported periods of 30-90 days after the date the policy ends. A claim reported in this limited timeframe is deemed to have been made and reported in the earlier policy period.

But notice that this window is fairly small. If the lawyer in the fact pattern above has a PL policy with only a 30-day extended reporting period and he dawdles and does not report the claim (because it's not a lawsuit) until 2/25/13—he is out of luck.

So the next way to increase your chances of being protected—get a policy with a longer extended reporting endorsement and then, when your policy comes up for renewal, think about whether you need to report any claims before the end of the extended reporting endorsement.

### **What If I Report an Event Before It Is a Claim?**

There is generally no harm in reporting an event that is not technically a claim. PL policies typically contain a provision stating that once an event is reported, if it later results in a claim being made, then the claim will be deemed to have been made and reported in the policy year in which the event was first reported.

Do this especially if you are switching insurance companies.

The general rule still applies—report, and report early.

### **Handling Renewal Applications**

PL policies require a written renewal application every year. The insured must report any facts that may give rise to a claim. A typical question is:

Do you or any member or employee of your firm have knowledge of any incident, act, error, or omission that is or could be the basis of a claim under this proposed professional liability policy?

Here's the rub. If you answer 'Yes', then the carrier may exclude that incident on the renewal policy. If you answer 'No', then the carrier may deny any claim later made under the policy based on a misrepresentation in the application, or even rescind the entire policy.

What to do?

The answer is simple. Report to the insurance company any potential claim *before* mentioning it on an application. By doing so, you will be deemed to have reported the claim—even if it's not really a claim, but only an incident that "could be the basis of a claim"—in the earlier policy period. The insurer cannot exclude the incident from coverage because the policy being triggered is already in place. The insurer cannot deny the claim for an application misrepresentation because you reported the incident on your renewal application.

### **Conclusion**

Follow these rules and you will increase your chances of being protected by the PL policy the you bought and paid for:

- Think claim—not lawsuit.
- Report any event that might constitute a claim.
- Remember that claims must be reported in the same policy year as they were made.
- Get a policy with a longer extended reporting period.
- Report any claim before putting it on a renewal application.