

Understanding Malpractice Insurance Policies

Introduction

■ What Are You Buying When You Buy Malpractice Insurance?

Introduction

■ Considerations Other Than Price

- Longevity
- Financial Stability
- Claims Prevention
- Who Will Defend You
- Who Will Be Your Expert
- Attitude Towards The Unconventional
- ❖ Resolving Claims Before They Are Claims

Before The Claim

- Risk Evaluation
- Risk Management Education
- “Difficult Situation” Advice

The Basic Policy

- The Insuring Agreement-What is Encompassed?
- Meaning of “Professional Services” ?

Stated Limitations In The Insuring Agreement

- “Claim Made” During the Policy Period; From “Act or Omission” After Retro Date

Stated Limitations In The Insuring Agreement

- No Notice of the Claim to a Prior Insurer
- No Notice to Prior Insured About Act Or Omission That May Lead to A Claim

Stated Limitations In The Insuring Agreement

- No Insured Has Basis To Believe Act or Omission Has Been Committed That May Lead to A Claim

What The Insuring Agreement Means For Claim and Incident Reporting

- If your colleagues keep secret their errors, you may *never* have coverage.
- If your firms does not report acts or omissions that may lead to a claim, you may *never* have coverage.
- If you *do* report acts, incidents, omissions, and potential claims, you will get coverage under the policy in effect at time of reporting, and NOT when actual claim is made.
- Similar rule for “related claims”
- Impact of reporting on rates, renewal

Who Is Insured: “Named Insured”

- “Named Insured”
- Subsidiaries?
- Affiliates?
- Networks
- Acquired Practices?
- Merged Firms?
- Predecessor Firms?

Who Are Insured-Additional Insureds

- Professional Employees, Officers, Directors, Associates
- Persons Who Previously Were Employees, Officers, Directors, Associates, If sued for services performed for firm while they held that status
- Heirs, successors, legal representatives of the foregoing
- Independent contractors?
- Part timers?
- Outsourced contracted firms (overseas)?

When A Claim Arises, What Happens?

- Duty to Defend v. Self-Defense: Who Hires, Who Controls Defense Counsel, Defense Experts?
- Who Has Ability to Negotiate Settlements, Approve Settlements, Decline Settlements?

Duty To Defend and Reservations of Rights

- Duty to Defend vs. Duty to Indemnify
- Impact of Reservations of Rights
- Duty to settle within policy limits?
- Duty to allow insured to select defense counsel?
- Liability for excess exposure?
- ❖ Underinsured
- ❖ Multiple Claims Created By Plaintiffs to “stack” coverage
- Ineffective Reservations and waiver of policy defenses

Policyholder Duties When Claim Arises

- Timely Notice
- Duty to cooperate with defense, counterclaims and subrogation
- Attendance at key events
- Assistance in securing witnesses
- **Refuse to admit liability, errors or deficiencies without insurer consent**

Alternate Dispute Resolution (ADR)

- Early Neutral Evaluation
- Mediation Incentives
 - For Insured
 - For Insurer
- Arbitration: Pluses and Minuses

Supplementary Benefits

- Coverage for loss of revenues responding to defense needs
 - Document production
 - Service as a witness
 - Responding to subpoenas

Supplementary Benefits

- Defense of Regulatory Inquiries/ Disciplinary Proceedings
- Charitable Organization D&O Coverage
- Appeals Bonds
 - Duty to acquire or duty to reimburse when Named Insured purchases the bond

Incentives

- Use of ADR
 - Decrease deductible
- Use of Engagement Letters
 - Decrease deductible

Exclusions

- Claims Not Encompassed Within Professional Liability Coverage
 - Bodily Injury, Wrongful Death
 - Fire, casualty, loss or destruction of tangible property
 - Claims Outside of the Covered Profession
 - ❖ unauthorized practice of law
 - ❖ Sale of securities, investment advice

Exclusions

- Exclusions Based on Conduct (misconduct) the Insurer Does Not Wish to Cover
 - Insured v. Insured
 - Liability Assumed By Contract
 - Dishonest, Fraudulent Acts (but coverage for innocent insureds)
 - Claims from services to co-owned enterprises

Exclusions

- claims from service to an trust or estate where insured is both fiduciary and beneficiary
- Service as a trustee of an ERISA plan
- Service as a bankruptcy trustee
- Services for which insured is paid by a contingent fee

Electronic Media Exclusions

- Claims from loss of data, damage to data, loss of use of data, breaches of security to data, claims concerning sabotage, viruses, etc.

Policy Conditions

- Policy territory
- Agent for policy issues
 - ❖ Giving or receiving notices
 - ❖ Authority to amend or cancel the policy
 - ❖ Authority to waive policy rights
 - ❖ Authority to exercise, decline to exercise rights under the policy

Other Insurance Clause

- Primary or Excess Coverage?
- Coordination Issues: Pro rata or excess coverage?
- Does other coverage satisfy deductible?

Coverage Disputes

- When coverage disputes may be filed
- Insurer's Right to Seek Reimbursement for Excess coverage provided.

Subrogation Issues

- Against whom may the insurer seek to recoup its losses?
- May subrogation be sought by the insurer against an insured under any circumstances (example, if a partner engages in fraudulent activity)
- What are the Policyholder's duties in the event of subrogation?

Cancellation and Non-Renewal

- May either the insurer or the Policyholder cancel the policy before the end of the term?
- If so, on what grounds?
- What is the effect of cancellation on claims reported before cancellation?
- Are there restrictions on non-renewal, or on re-rating at renewal?
- Is there an advance notice requirement for non-renewal?

Liberalization Clause

- Does the policy automatically change to match language changes favorable to the policyholder adopted in new policy forms by the insurer?

Extended Reporting Period

- What is an ERP?
- Is there an automatic ERP on cancellation or non-renewal by the insurer?
- Is there an optional ERP available to the policyholder on the policyholder's nonrenewal?
- Are there any circumstances when an ERP is unavailable? (e.g., cancellation for non-payment of premium)