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Avoid a Sad Tale: Why Retiring (and Other) Lawyers Need Tail Coverage

With the influx of baby-boomer retirements, understanding and appreciating the option to purchase tail coverage a/k/a an extended reporting period endorsement is vitally important. Many lawyers fail to read their errors and omissions policy and are completely unaware of the coverage afforded by, or the risks entailed in failing to understand the intricacies of, their policy. The dangers are magnified when attorneys switch insurance companies, move from one law firm to another, merge practices, or retire from the active practice of law. Many retiring attorneys, for example, believe that since they are no longer practicing law, there is no need for continuing insurance coverage. This misconception regarding the need for continuing coverage following retirement is often based on an attorney's confusion over how insurance policies work and the potential coverages available to them.

What is tail coverage? This particular endorsement provides coverage for claims reported *after* the expiration of the original policy period, subject to the terms and conditions of the policy. It allows an attorney to make a claim for events that happened while the original policy existed but are reported after its cessation. That is, while tail coverage does not extend the policy period, it extends the time to report or make claims for alleged acts, errors or omissions that occurred during the policy period. Thus, tail coverage serves to mitigate the risk of malpractice claims arising from past conduct.

Tail coverage for attorneys who cease or will soon cease practicing law has become essential as lawyers' errors and omissions policies have shifted from being written on an "occurrence," as opposed to "claims-made," basis. Under an "occurrence" policy, an attorney received coverage for acts, errors or omissions which occurred during the period in which the policy was in effect. Thus, it was irrelevant when the claim or suit was advanced against the lawyer; there was coverage so long as the alleged act, error or omission "occurred" during the period in which the policy was in force and effect. As a result, there was no need for a retiring attorney to purchase insurance after retirement.

With the proliferation of the discovery rule for statute of limitations purposes, it became not only possible, but inevitable, that an error might lie dormant for years, or even decades, before being "discovered" and advanced against an attorney. This created an extremely difficult situation for insurance companies because they were unable to calculate, to any reasonable degree of certainty, the proper premiums for the risk. This was especially so in the fields of Estates and Trusts, real estate, business transactions, and the representation of minors, where claims might lie dormant and not be asserted until several years (or even decades) after the occurrence.

As a result, insurance carriers stopped writing polices on an "occurrence" basis, and instead adopted the "claims-made" approach, whereby a claim must be made against the insured attorney during the policy period. This largely rendered the date of the occurrence irrelevant, enabling insurance companies to more accurately predict the risk being accepted. Moreover, once the policy year expired, the insurance company, knowing that

no future claims chargeable to that policy would be forthcoming, could quickly analyze claims history and adjust premiums as warranted. The pure "claims-made" policy, however, was not without issue. Most notably, since a claim is generally deemed "made" when a demand for damages is asserted against an insured, this resulted in some instances where the claim was not being reported to the insurance company until *after* the policy period expired.

A number of states across the country, by statute and common law, take the position that insurance companies cannot deny coverage as the result of an insured failing to promptly report a claim in the absence of actual, appreciable and/or substantial prejudice. Thus, in a number of jurisdictions, insurance companies cannot generally rely upon late notice conditions, alone, to deny coverage. For example, pursuant to statute in Maryland:

> An insurer may disclaim coverage on a liability insurance policy on the ground that the insured or a person claiming the benefits of the policy through the insured has breached the policy by failing to cooperate with the insurer or by not giving the insurer required notice only if the insurer establishes by a preponderance of the evidence that the lack of cooperation or notice has resulted in actual prejudice to the insurer.[1]

While the majority of states follow the "notice-prejudice rule" whereby the onus is on the insurer to establish that it suffered prejudice as a result of the untimely report of a claim, others presume prejudice and place the burden on the insured to prove a negative, and demonstrate that the untimely report did not result in actual prejudice to the insurance carrier.[2]

Most insurance companies, therefore, altered the pure "claims-made" form to require that the claim not only be made, but also reported to the insurance company, within the policy period to trigger coverage. Thus, most policies in current use should more properly be characterized as "claims-made and reported" policies. It should be noted that distinguishing between a "claims-made" and a "claims-made and reported" policy can be difficult, and some courts have been reluctant to uphold the denial of coverage where the claim was made against the insured during the policy period, but not reported until after the policy expired.

While the legal requirements of the "notice-prejudice rule" for "claims-made and reported" policies are jurisdiction and case specific, and depend on the language of the applicable insurance policy, the fact remains that an attorney faces a significant risk of not having coverage if a claim is not both made *and* reported during the applicable policy period. One way to mitigate this risk is through tail coverage. These "tails" do not provide coverage for new acts, errors or omissions, but as explained above, allow an insured attorney to report claims based on prior acts, errors or omissions following the normal expiration of the policy term. The precise terms of the extended claims reporting options differ from policy to policy, so it is important to be cognizant of the applicable provisions that may best suit an individual's needs. For example, tail coverage can be purchased for a fixed or unlimited reporting period, involve upfront, fixed or variable premiums, etc. For these reasons, retiring attorneys, or attorneys switching firms or policies, are strongly encouraged to consult with an insurance broker with a practice concentrated in the realm of professional errors and omissions insurance.

1. Md. Code, Ins. § 19-110; *see Sherwood Brands, Inc. v. Great Am. Ins. Co.*, 13 A.3d 1268 (Md. 2011).

2. *Compare Century Sur. Co. v. Jim Hipner, LLC*, 377 P.3d 784 (Wyo. 2016);
Estate of Gleason v. Cent. United Life Ins. Co., 350 P.3d 349 (Mont. 2015);
Rent-A-Roofer, Inc. v. Farm Bureau Prop. & Cas. Ins. Co., 869 N.W.2d 99 (Neb. 2015);
Graciano v. Mercury Gen. Corp., 179 Cal. Rptr. 3d 717 (Cal. App. 4th Dist. 2014);
Whelan v. State Farm Mut. Auto. Ins. Co., 329 P.3d 646 (N.M. 2014);
Indian Harbor Ins. Co. v. City of San Diego, 972 F. Supp. 2d 634 (S.D.N.Y. 2013);
Vanderhoff *v. Harleysville Ins. Co.*, 78 A.3d 1060 (Pa. 2013);
Arrowood Indem. Co. v. King, 39 A.3d 712 (Conn. 2012);
Las Vegas Metro. Police Dep't v. Coregis Ins. Co., 256 P.3d 958 (Nev. 2011);
Union Pac. R.R. v. Certain Underwriters at Lloyd's London, 771 N.W.2d 611 (S.D. 2009);
Gazis v. Miller, 892 A.2d 1277 (N.J. 2006);
Jackson v. State Farm Mut. Auto. Ins. Co., 880 So. 2d 336 (Miss. 2004);
Hardwick Recycling & Salvage, Inc. v. Acadia Ins. Co., 869 A.2d 82 (Vt. 2004);
State Farm Mut. Auto. Ins. Co. v. Green, 89 P.3d 97 (Utah 2003);
Atchison, Topeka & Santa Fe Ry. Co. v. Stonewall Ins. Co., 71 P.3d 1097 (Kan. 2003);
Parr v. Gonzalez, 669 N.W.2d 401 (Minn. Ct. App. 2003);
Johnston v. Sweany, 68 S.W.3d 398 (Mo. 2002);
Liberty Mut. Ins. Co. v. Pennington, 573 S.E.2d 118 (N.C. 2002);
Koski v. Allstate Ins. Co., 572 N.W.2d 636 (Mich. 1998);
Carl v. Or. Auto. Ins. Co./North Pac. Ins. Co., 918 P.2d 861 (Or. Ct. App. 1996);
Avco Corp. v. Aetna Cas. & Sur. Co., 679 A.2d 323 (R.I. 1996);
Gordon v. Ky. Farm Bureau Ins. Co., 914 S.W.2d 331 (Ky. 1995);
Goodman v. Am. Cas. Co., 643 N.E.2d 432 (Mass. 1994);
Nationwide Mut. Ins. Co. v. Starr, 575 A.2d 1083 (Del. 1990);
Lanzo v. State Farm Mut. Auto. Ins. Co., 524 A.2d 47 (Me. 1987);
Finstad v. Steiger Tractor, 301 N.W.2d 392 (N.D. 1981);
Lindus v. N. Ins. Co., 438 P.2d 311 (Ariz. 1968),
with Kelley v. State Farm Mut. Auto. Ins. Co., 2013-Ohio-585 (Ohio Ct. App. 2013);
Sheehan Constr. Co. v. Cont'l Cas. Co., 938 N.E.2d 685 (Ind. 2010);
Grinnell Mut. Reinsurance Co. v. Jungling, 654 N.W.2d 530 (Iowa 2002);
Am. Justice Ins. Reciprocal v. Hutchison, 15 S.W.3d 811 (Tenn. 2000);
Bankers Ins. Co. v. Macias, 475 So. 2d 1216 (Fla. 1985).

It is noteworthy that, in certain jurisdictions, the standard depends on whether a first- or third-party claim is involved. *See, e.g., Prior v. S.C. Med. Malpractice Liab. Ins. Joint Underwriting Ass'n*, 407 S.E.2d 655, 657 (S.C. Ct. App. 1991).

Likewise, "claims-made" policies are treated differently in some States.
See, e.g., Craft v. Phila. Indem. Ins. Co., 343 P.3d 951 (Colo. 2015);
Webb Operating Co. v. Zurich Am. Ins. Co., 2011 U.S. Dist. LEXIS 73675 (E.D. Mich. July 8, 2011);
Westport Ins. v. Ray Quinney & Nebeker, 2009 U.S. Dist. LEXIS 69203 (D. Utah Aug. 7, 2009);
Ace Am. Ins. Co. v. Underwriters at Lloyds & Cos., 939 A.2d 935 (Pa. Super. Ct. 2007);
Wallace v. Gen. Star Indem. Co., 2007 U.S. Dist. LEXIS 40202 (E.D. Tenn. June 1, 2007);
Catholic Med. Ctr. v. Exec. Risk Indem., Inc., 867 A.2d 453 (N.H. 2005);
Paint Shuttle, Inc. v. Continental Cas. Co., 733 N.E.2d 513 (Ind. Ct. App. 2000);
Wittner, Poger, Rosenblum & Spewak, P.C. v. Bar Plan Mut. Ins. Co., 969 S.W.2d 749 (Mo. 1998);
State v. Indem. Underwriters Ins. Co., 943 P.2d 1099 (Okla. Civ. App. 1997);
Safeco Title Ins. Co. v. Gannon, 774 P.2d 30 (Wash. Ct. App. 1989).

For a solo practitioner who decides to retire, the choice seems pretty straightforward. Simply put, the solo practitioner contemplating retirement should seek either an unlimited or long-term tail provision. While the cost may seem high at a time when income may be limited, the risks are too great to forego the protection(s) afforded by tail coverage. For those individuals retiring from a stable law firm that is likely to carry-on indefinitely, the decision can be more complicated. Most errors and omissions policies include a provision making a retired partner or attorney an "additional insured." Thus, so long as the firm stays in business and continues to purchase insurance from the same insurance company, without a break, the retiring attorney should be covered without the need to purchase additional tail coverage. There are, however, no guarantees that a firm will continue indefinitely. The firm could dissolve after the attorney's retirement, switch to a new insurer whose policy does not afford coverage, or drop its insurance altogether. For example, even if the firm continues in business and maintains insurance coverage after the attorney's retirement, the firm might switch to a new insurance carrier and accept a very restrictive prior acts exclusion or other limiting language in order to save on premiums. This could leave the retiring attorney in a vulnerable position. Even worse, should the firm dissolve, or cease to buy coverage of any type, the retiree could be left wholly uncovered. Thus, in a subsequent lawsuit, even if the former law firm is named as one of the defendants, the retiree could bear the brunt of an adverse judgment and the defense costs associated therewith, especially if the firm is judgment proof following its dissolution.

The most important aspect of any determination as to what coverage one needs is a firm grasp of the options available. It is imperative that when planning for retirement, an attorney obtain and carefully review his or her insurance policy to ascertain the options available. It is also highly recommended that he or she discuss the various policies available with an experienced insurance professional. The time to evaluate one's options and to purchase appropriate tail coverage is before, and not after, the attorney retires, changes firms and/or switches insurance carriers.

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