



Current Articles 2004 – March

Claims Made vs Occurrence Liability

In a “hard market” or for risks that have a substantial and difficult liability exposure, it is not uncommon that insurers will only offer liability coverage on a Claims Made basis. This also occurred during the term of Bill 164 for liquor liability risks, such as, bars, taverns, restaurants, etc. Under Bill 164 you could not sue the at fault driver for economic loss (income). Innovative lawyers would then attempt an action against a liquor licensed establishment who may have served the at fault driver. Many times these cases, which may have been presented some time after the accident, could not be proven and no claim was paid, but the insurer incurred substantial defense costs. Hence insurers were either not offering coverage for these risks or would offer coverage only on a Claims Made basis.

Over the past several years I have been involved with three Errors and Omissions actions involving the problems when liability coverage is switched from a Claims Made Form to Occurrence.

In a “Claims Made” policy it is the policy in force when the claim is made that will cover the loss. Conversely in an “Occurrence Policy” it is the policy in force when the claim occurred that will respond. As an example, if there is a Claims Made policy effective Jan 1, 2001 to Jan 1, 2002, only claims that are presented before Jan 1, 2002 will be covered. In an Occurrence Policy effective Jan. 1, 1999 to Jan. 1, 2000 with a claim that occurred in 1999 but reported in 2003, the claim will be honoured.

When switching from a Claims Made Policy to an Occurrence Form to a there is a huge potential for an E & O. and which relate to the three actions. To illustrate the problem, let us suppose a Claims Made policy was in force from Jan. 2000 to Jan 2001. The 2001 policy is renewed also on a Claims Made form. However in 2002 the broker switches to an Occurrence Form and continues this form for 2003 to 2004. Now a claim is reported in July, 2003 that occurred in May, 2000. There is no coverage available. For the Claims Made policy to respond the claim would have had to be reported, no later than before the expiry of the 2001 term. The Occurrence policy cannot respond as the occurrence happened before the term of any of the Occurrence policies. Although switching forms “the other way” (from Occurrence to Claims Made) may not present similar problems, it is imperative that the broker understand and explain the consequences of switching from Claims Made to Occurrence.

When a Claims Made policy is being replaced with an Occurrence form or the Claims Made is being lapsed with no replacement, it may be possible to buy a “tail” or Discovery Clause to be added (if not included) to the expiring Claims Made policy. This will allow for a claim that occurred during the term of the policy to be reported after the expiry date but during the extended reporting term of the Discovery Clause. Depending on the type of risk, the Discovery Clause may be as short as 6 months to as long as 10 years. The latter is usual to certain classes of E & O and Malpractice policies.

When a Claims Made policy is first effected the policy may have a Retro Date shown on the Declaration page. Claims must occur after this Retro date and be reported during the term of the policy or its renewal. The Retro Date should not change on renewals. In other words the Retro Date will be the effective date of the first term but that date should remain for subsequent renewals. Sound simple! But what happens if you change insurers and effect a new Claims Made policy. If the new insurer uses the new effective date as the Retro Date, claims made during the term of the new policy would only apply to claims that occurred after the inception and in this example the Retro Date of the new policy. In other words a claim that occurred prior to the inception date of the replacement Claims Made policy would not be covered. To remedy this situation you should try and make the Retro Date a term or two earlier than the inception date of a replacement policy or add a Prior Acts endorsement. If the underwriter will not cooperate, make sure you advise the client of the possible gap.

Although the Occurrence is better suited to many risks it is absolutely imperative that you advise the client of the potential gap in switching to protect yourself from a potential E & O.

Many thanks to Joe Potter for this topic idea.

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