Claims-Made vs. Occurrence

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Relying On A CGL Policy To Cover Professional Liability Exposures

- Agents and brokers recognize that CGL policies typically do not cover professional liability exposures unless such coverage has been added to the policy by endorsement. Is it needed?
- Yes. Professionals are those that due to their special skills, experience and knowledge are held to a higher standard of care than ordinary people. Many professional liability exposures are not found in the coverages in a CGL.
- Professional liability policies cover injury sustained by a third party as a result of an act, error, or omission committed by the insured in the performance of their professional duties.

What Types Of Coverage Do They Need?

- Your goal is to understand their business and the entire scope of services they offer. Suggest the coverages necessary to protect their business and document any rejected coverages.
- Types of Professional and Executive Liability Insurance Coverage
  - Executive liability insurance
  - Medical professional liability insurance
  - Nonmedical professional liability insurance

Executive Liability Insurance

- Three Major Types Of Executive Liability
  - D&O Liability Insurance
  - Fiduciary Liability Insurance
  - Employment Practices Liability Insurance

Medical Professional Liability Insurance

- Five Specific Types Of Medical Professional Liability Insurance
  - Physicians Professional Liability
  - Hospital Professional Liability
  - Allied Healthcare Professional Liability
  - Nursing Home Liability Insurance
  - Managed Care Organization Liability Insurance

Nonmedical Professional Liability Insurance

- Five Specific Types Of Nonmedical Professional Liability Insurance
  - “Traditional” Professionals – Lawyers, Accountants, Architects & Engineers
  - E&O Liability – Insurance Agents, Real Estate Agents
  - Media Liability – Intellectual Property, Media Liability
  - Public Entity Liability – Public Officials, Police Professional, Educators Legal
  - Miscellaneous Liability – Covers a broad range of professionals for whom profession-specific policy forms do not exist.

Risk Management 101

- Recognize professional liability exposures that lie outside the scope of the CGL policy.
- Understand the types of policies that can address these exposures including the various coverage nuances, alternatives and endorsements to the basic coverage.
- Failing to suggest/offer the appropriate coverages is one of the major issues in E&O claims.

Understand The Differences Between Occurrence Versus Claims-Made

- Why?
- Claims-made coverage triggers appear in nearly all professional and management liability policies.
- Failure to understand the operation of claims-made insurance and take appropriate advantage of various coverage options is a common source of E&O claims against agencies.

Claims-Made Triggers

- Operation Of Claims-Made Coverage Triggers
  - Claim must be "first made" against an insured during the policy period
  - Claim must result from a wrongful act that took place on or after the policy's retroactive date
  - Claim must be reported to the carrier prior to the expiration of the policy (or within 30 to 60 days following expiration – known as "post-policy reporting windows")

Understanding Claims-Made

- Retroactive Date
  - For coverage to apply the wrongful act must have taken place on or after the retroactive date.
  - Purpose is to exclude coverage for possible wrongful acts committed in conjunction with some known event that took place prior to policy inception.
  - They also preclude coverage for wrongful acts that transpired in the distant past – even if unknown to the insured.
  - Retroactive dates are generally included in policies for organizations that are buying coverage for the first time.

Claim Example

Policy Period 1/1/22 – 1/1/23	Retro Date 1/1/21	Wrongful Act 8/1/21	Claim Made 8/1/22	Claim Reported 10/1/22
Wrongful Act 8/1/21	Claim Made 8/1/22	Claim Reported 10/1/22		
Wrongful act that caused the claim took place after the policy's retro date	Claim made during the policy period	Claim was reported during the policy period		
Had the wrongful act taken place prior to the retro date there would have been no coverage	Had the claim been made prior to 1/1/22 or after 1/1/23 there would have been no coverage			

Understanding Claims-Made

- Full Prior Acts
  - For a firm that already has a policy in place with another insurer, inclusion of a retroactive date should be resisted unless there is a specific underwriting reason.
  - By eliminating a retroactive date, a policy will provide what is known as “full prior acts coverage” for all acts, going back to when the company’s benefit programs were initiated.
  - At least, insurer should offer a policy with a retroactive date that coincides with the date on which the insured first began buying coverage (prior acts).
  - If the retroactive date does not coincide with the date on which insured first began buying coverage there could be a coverage gap.

Understanding Claims-Made

- Discovery Provisions
  - Circumstances often arise under which it is probable that an act, error, or omission will eventually cause a claim to be made against an insured despite the fact that litigation may not be initiated for some time.
  - Virtually all liability policies provide a “discovery provision” in which the insured advises the carrier of “incidents” or “potential claims”.
  - Discovery provision can be a “catch 22” – there are some drawbacks.
    - Higher premiums in renewal policies
    - Possible cancellations/nonrenewal
    - Problems when changing insurers
    - Possible admission of culpability

Claim Example – Discovery Provision

Policy Period 1/1/22 – 1/1/23	Retro Date 1/1/21	Incident Takes Place 8/1/21	Insurer Notified 9/1/21	Claim Made 10/1/22
Incident takes place 8/1/21	Insurer notified 9/1/21	Claim Made 10/1/22	Policy Period	
Incident occurs	Insurer was notified by the insured of an "incident" on 9/1/21	Claim was not made until after the 1/1/21 – 1/1/22 policy had expired	Coverage applies under the 1/1/21 – 1/1/22 policy due to the policy's discovery provision during the 1/1/21 – 1/1/22 policy period	

Understanding Claims-Made

- Extended Reporting Period Provisions
  - Also known as extended discovery or “tail” provisions
  - Gives the insured the right to present a claim after a policy has expired or been canceled
  - ERPs do not reinstate remaining policy limits
  - No coverage for wrongful acts during the ERP
  - Named insured must request in writing within 60 days after the end of the policy period and pay the applicable additional premium when due. This provision is fairly standard in claims-made policies.

Understanding Claims-Made

- Extended Reporting Period Provisions
  - Typically insurers offer ERPs for one year. There are a few instances ERPs may be offered for longer duration as well.
  - The policies state the premium charge for the ERP option. Typically it is a fixed percentage of the expiring policy's premium – normally 100-150 percent, depending on the policy.
  - Typically policies allow the insured up to 30 days following nonrenewal, expiration or cancellation to purchase the ERP. A few carriers allow as long as 60 days.

Claim Example – Incidents During ERP

Policy Period 1/1/22 – 1/1/23	ERP 1/1/23 – 1/1/24	Wrongful Act Takes Place 8/1/22		
Wrongful Act takes place 8/1/22	Claim Made and Reported 8/1/23	Policy Inception 1/1/22	Policy Termination and ERP Inception 1/1/23	ERP Termination 1/1/24
Wrongful Act occurs	Insurer was notified by the insured of an “incident” on 8/1/23		Coverage applies under the ERP because the wrongful act took place during the policy period and claim reported during the ERP	

Final Thoughts

- The retroactive date is one of the more important policy features and should by fully understood.
- The extended reporting period/tail option varies between carriers and policy forms. Careful review of the policy provision is necessary.
- Moving from a claims-made form to an occurrence form could cause a potential gap in liability coverage. Without the proper tail coverage, there would be not coverage.
- Moving an account from occurrence to claims-made has less potential for gap in coverage. Agent should secure a retro date on the claims-made form to cover the earliest potential wrongful act.

Final Thoughts

- Moving from a claims-made form to another claims-made form, paying close attention to securing the same retro date on the new form.
- Claims-made versus claims-made and reported – there is significant difference between these two forms. A claims-made form provides coverage for claims filed during the policy year, provided the incident occurred after an applicable retroactive date. In a claims-made and reported form, the claim must be made and reported with the policy term or within a specified short period of time following the expiration date, usually 30 days or less.

Final Thoughts

- Claims on Claims-made Coverage Form
  - A key issue with the claims-made form involves the event that triggers the coverage. In many policies, a claim is defined as a “request for money or services”. In addition, there may also be a statement requesting the notification of “facts or circumstances that could rise to a claim”. The trigger could also depend on whether it is a claims-made policy or claims-made and reported policy.
  - Ensure that insureds understand how claims are triggered under these types of policies.