



Mind the Gap: Agent liability exposure when selling claims made insurance policies.

By Aaron Simon¹

Introduction

There are generally two common types of insurance policies that exist today, claims made policies and occurrence based policies. This article will first look at the difference between these two types of policies and then address the potential errors and omissions that could arise from selling a claims made policy. Finally, recommendations will be given to avoid making potential errors and omissions when selling a claims made policy.

Occurrence Based Policies

“[O]ccurrence policies provide coverage if the negligent act or omission occurs within the policy period, regardless of the date the claim is made or asserted.” *See Anderson v. Aul*, 862 N.W.2d 304, 310–11 (Wis. 2015). Under an occurrence policy, “[i]t is the timing of the event causing injury, not the assertion or reporting of a claim based on that injury, that triggers the initial grant of coverage.” *Id.* “An insurance company may be held liable under an occurrence policy for claims made long after the policy period has expired.” *Id.* Thus, as one can see the primary problem for an insurance company with an occurrence based policy is the long tail exposure (sometimes decades) for the insurance company.

¹**Aaron Simon** is a litigation attorney with the law firm of **Brownson & Linnihan, PLLP**. He is admitted to practice law in Minnesota and Wisconsin. A focus of Mr. Simon’s practice is defending insurance agents and agencies and handling insurance coverage cases in state and federal courts. Mr. Simon is a member of the Minnesota State Bar Association, the Hennepin County Bar Association, the Wisconsin State Bar Association, the Minnesota Defense Lawyers Association, the Defense Research Institute, and the Professional Liability Underwriting Society. To learn more about Aaron, go to <http://www.brownsonlinnihhan.com/bio/aaron-m-simon/>.

Claims Made Policies

A claims made policy “is one whereby the carrier agrees to assume liability for any errors, including those made prior to the inception of the policy as long as a **claim is made during the policy period.**” See *Pac. Employers Ins. Co. v. Superior Court*, 221 Cal. App. 3d 1348 1356-57, (Ct. App. 1990) (emphasis added). Under a claims made policy, coverage does not attach unless **the claim is made and reported to the insurer** during the policy period. *Id.* “Claims-made policies ... require that notification to the insurer be within a reasonable time.” *Id.* “**Critically, however, claims-made policies require that notice be given during the policy period itself.**” *Id.* (Emphasis added). When an insurance customer becomes aware of any event that could result in liability, then the insurance customer **must** give notice to the insurer, and that notice must be given “within a reasonable time” or “as soon as practicable”—**at all times, however, during the policy period.** *Id.*

Switch from Predominance of Occurrence Based Policies to Claims Made Policies

Prior to the 1980s, the majority of liability insurance policies were occurrence based insurance policies. Then, in the mid-1980s the insurance industry experienced an extreme surge in liability claims. During this time frame insurance companies received claims dating back decades related to latent asbestos liability and pollution liability claims. These claims were often extremely high in value and were unanticipated by the insurance industry. To address these problems insurance companies reevaluated their business practices and how they underwrote their policies. As part of this change in business practices insurance companies started using more claims made liability insurance policies. For more on the switch from occurrence based policies to claims made policies see: <https://www.nonprofitrisk.org/library/articles/insurance05002003.shtml>; See also “What is the Difference Between Occurrence vs. Claims Made Forms?” <http://www.genins.com/img/~www.genins.com/commercial%20lines%20articles/what%20is%20the%20difference%20between%20occurrence%20vs.%20claims%20made%20forms.pdf>

Strict Enforcement of Claims Made Policies

The strategy to limit the insurance company’s exposure under a claims made policy to a specific policy period worked. In fact, insurers have consistently prevailed in denying coverage when an insured fails to report a claim under a claims made policy during the claims made policy period. The following cases are but a few examples of where the court strictly enforced the reporting requirement under a claims made policy:

Gulf Insurance Co. v. Dolan, 433 So.2d 512 (Fla. 1983) (court may not, as a matter of policy, require that an unambiguous “claims made” professional liability policy be subjected to a reasonable additional period beyond the termination date of the policy for reporting claims that arise late in the contract term);

Zuckerman v. National Union Fire Insurance Co., 495 A.2d 395 (N.J. 1985) (policy provision limiting coverage to claims filed with insurer during policy period had to be **strictly enforced** so

as to bar coverage for those claims reported to insurer subsequent to expiration date of the policy, and the doctrine of appreciable prejudice had no application whatsoever to a “claims made” policy);

T.H.E. Ins. Co. v. P.T.P. Inc., 628 A.2d 223 (Md. 1993) (notice-prejudice provisions of statute do not apply to insurer's denial of coverage under claims made liability policy for a claim made and reported after policy has expired);

Gargano v. Liberty Int'l Underwriters, Inc., 572 F.3d 45 (1st Cir. 2009) (insured was not entitled to coverage, as he failed to report claim within coverage period, and alleged failure of insurers to deliver policies did not relieve insured of his responsibility to report claim within coverage period);

Anderson v. Aul, 862 N.W.2d 304, (Wis. 2015), reconsideration denied, 862 N.W.2d 901 (Wis. 2015) (notice and prejudice statutes do not apply to reporting requirements of claims made and reported professional liability insurance policies).

As one can imagine insurers generally prefer claims made policies because these policies tightly limit the insurer's exposure to a specific policy period. Additionally, an insurance customer may prefer a claims made policy because the policy premium is generally lower than an occurrence policy. In some instances an insurance company may only offer a claims made policy.

Impact on Agents Selling Claims Made Policies

So how do the strict reporting requirements of claims made policies impact insurance agents selling these policies? As we all know when there is a denial of coverage by an insurance company insurance customers often look to their agents for recovery.

Obviously an agent would be held liable for failing to promptly forward to the insurance company the timely report to the agent of a claim by an insurance customer under a claims made policy. *See Countryside Co-op. v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010):

In this case, Countryside alleged that it reported the Boden claim to [the insurance agent] Koch and that Koch undertook to report the claim to [the insurance company] American International within the time period specified in its policy but negligently failed to do so. Koch does not dispute that it had a duty to Countryside to timely report the Boden claim to American International or that it breached such duty.

Furthermore, if a claims made policy is continually renewed with one insurance company then there is not much potential for issues because there is a continuity of coverage with one insurance company. Although an insurance company could still strictly enforce a claims made policy and require reporting of the claim during the specific policy period even if the insurance company was still on the risk with the insurance customer with a subsequent claims made policy.

However, a **much more risky situation** is if the **insurance agent moves the insurance customer's claims made policy from one insurance company to another**. Under this scenario there is a **significant potential for serious problems**. For example, an insurance company who was dropped by an insurance customer would very likely take a hard line on coverage if a claim during that policy period was not promptly reported to the insurance company during that policy period. It is important to remember that an element of a claims-made policy is not only that a claim was made during the policy period, **but also that the claim was reported promptly and during the policy period**.

One can envision a claim coming in at the very end of a claims made policy period and the claim not being promptly reported to the insurance company or not being reported to the insurance company within the policy period, and then the claims made policy is switched by the agent to a different insurance company for the new policy period. Under this hypothetical there would be no coverage under the old claims made policy and no coverage under the new claims made policy. It would be highly likely that under these circumstances the insurance customer would hold the customer's agent responsible for this lack or gap of coverage and file an errors and omissions claim against the agent.

Recommendations

Special attention should be given by an insurance agent when selling claims made policies. It is advised that when selling a claims made policy that an agent specifically meet with the insurance customer to advise exactly how a claims made policy works. The agent should make it clear that if a claim (or even a potential claim) arises, the claim must be promptly (if not immediately) reported to the insurance company. The insurance customer should also be specifically informed by the agent (preferably in writing or an email) that failure to promptly report a claim under a claims made policy could result in a lack of insurance coverage, and that a claim that occurs under a claims made policy must be reported to the insurance company during the specific claims made insurance policy period. The agent should also advise the insurance customer to pay extra special attention when a claim comes in at the end of a claims made policy period. Finally, an agent selling claims made policies should always advise of the availability, and offer extended reporting period coverage in conjunction with selling a claims made policy.

For more information about claims made policies in general see:

The Ins and Outs of Claims-Made Policies by Wayne Bernstein, Insurance Journal October 3, 2005, <http://www.insurancejournal.com/magazines/features/2005/10/03/61167.htm>

CHANGING CLAIMS-MADE INSURERS: IT'S MORE THAN THE RETROACTIVE DATE
by Pamela K Haughawout, CPCU, ARM, RPLU, and Sandra Berkowitz, RN, JD, Willis White
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http://www.willis.com/documents/publications/industries/healthcare/HC_ClaimsMadeWhitePaper.pdf