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Claims Made Coverage – How Does it Work?

10:15 AM - 11:15 AM

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Claims Made Coverage – How Does It Work?

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Occurrence Form Coverage Trigger

ISO **Commercial General Liability CG 00 01 04 13** (CGL)

"Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

SECTION I – COVERAGES
COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement (excerpt)

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies...

b. This insurance applies to "bodily injury" and "property damage" only if:
***(1)** The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";*

***(2)** The "bodily injury" or "property damage" occurs during the policy period; and...*

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Claims-Made Coverage Trigger

In a claims-made policy, coverage is triggered when the claim is first made against the insured.

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What is a Claim?

Examples from an EPLI policy:

- Written demand for monetary relief
- Written demand for non-monetary or injunctive relief (e.g. reinstatement of position)
- Civil proceedings commenced by service of a complaint, summons or similar pleading
- Arbitration, mediation, or similar alternative dispute resolution proceedings
- Criminal proceedings
- Administrative or regulatory proceeding for monetary or non-monetary relief against an Insured for a Wrongful Act, which is commenced by receipt of a notice of charges; or a formal administrative, regulatory, adjudicatory or investigative proceeding commenced by the filing of a notice of charge, formal investigative order or similar document; (e.g. EEOC proceeding)
- A written request to toll or waive a statute of limitations

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Incident Reporting

SAMPLE LANGUAGE

Solely at the Insured's option, the Insured may within the Policy Period or within the Extended Reporting Period, if purchased, provide us with notice of circumstances that could give rise to a Claim…Such notice shall include the identity of the person(s) involved and the reason the Insured believes a Claim may be made. If such notice is received by us within the Policy Period, or within the Extended Reporting Period, if purchased, then any Claim subsequently arising from such circumstances shall be deemed made on the date such notice was received.

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Retroactive Date

- For an act to be covered, it must occur on or after the retroactive date and before the policy expiration date.
- The retroactive date should be maintained on any renewal or replacement policy.
- Full prior acts = no retroactive date

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Extended Reporting Period (ERP)

- a/k/a tail
- An extended period during which claims can be made/reported
- Situations when an ERP might be needed include:
  - Coverage is cancelled or non-renewed.
  - A retroactive date is advanced on renewal.
  - Claims-made coverage is replaced with occurrence form coverage.
- The ERP does not extend the policy or the time during which incidents can occur.

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Extended Reporting Period (ERP)

- Some policies include a short, automatic ERP. A longer ERP can usually be purchased only within a short window of time after expiration. (e.g. 30 or 60 days)
- The premium for the ERP is typically a percentage of the annual premium and must be paid within a short period of time after policy expiration. (e.g. 30 or 60 days)
- The policy limit is not reinstated by the ERP.
- An ERP may not be available if coverage is cancelled for non-payment of premium.
- An ERP may not help if coverage is renewed.

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Extended Reporting Period (ERP)

Sample Language

Insuring Agreement

"We shall pay on your behalf those amounts, in excess of the retention, you are legally obligated to pay as damages resulting from a claim first made against you and reported to us during the policy period or Extended Reporting Period (if applicable) for your wrongful act in rendering or failing to render professional services for others, but only if such wrongful act first occurs on or after the retroactive date and prior to the end of the policy period."

Automatic Extended Reporting Period

"If we or the named insured shall cancel or elect not to renew this policy, you shall have the right following the effective date of such cancellation or nonrenewal to a period of sixty (60) days (herein referred to as the "Automatic Extended Reporting Period") in which to give written notice to us of claims first made against you prior to the end of the policy period and otherwise covered by this policy.

The Automatic Extended Reporting Period shall not apply to claims that are covered under any subsequent insurance you purchase or which is purchased for your benefit……"

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Extended Reporting Period (ERP)

With the language on the previous slide, what would happen in the following scenarios?

- Policy is effective 1/1/23-24 and is not renewed. A claim is first made against the insured on 12/20/23, but the insured does not report it to the insurer until 1/15/24.
- Policy is effective 1/1/23-24 and is renewed for 1/1/24-25. A claim is first made against the insured on 12/20/23, but the insured does not report it to the insurer until 1/15/24.

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Extended Reporting Period (ERP)

Sample Language:

Such Optional Extended Reporting Period applies only to a claim first made against you during the Optional Extended Reporting Period arising out of any act, error, or omission committed on or after the retroactive date and before the end of the policy period subject to the Retention, Limits of Liability, exclusions, conditions, and other terms of this Policy.

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Extended Reporting Period (ERP)

EXAMPLE

Bonnie's Bakery purchased an EPLI policy with full prior acts coverage for the three years leading up to the time the business was closed. Since there is no longer the possibility of any new employment-related acts occurring, Bonnie decides not to renew her policy that was effective 1/1/2024 to 1/1/2025. She does, however, purchase a three-year ERP. If claims are made against her during that three-year period for acts occurring prior to 1/1/2025, coverage under her claims-made policy is triggered.

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Run Off

- A policy goes into “run-off” when there has been a change in control of the company or if the company ceases to exist.
- Coverage does not apply for wrongful acts committed after the date of the event.
- Coverage continues for claims arising from wrongful acts committed before the date of the event.
- Premium is often considered fully earned when such an event occurs.

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Triggering Claims-Made Policies

Step 1. Was the claim first made against the insured during the policy period (or during the extended reporting period)? If no, coverage does not apply. If yes, proceed to Step 2.

Step 2. Did the covered incident take place on or after the retroactive date? If no, coverage does not apply. If yes, proceed to Step 3.

Step 3. Did the covered incident take place before the expiration date of the policy? If no, coverage does not apply. If yes, the claims-made policy has been triggered.

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Triggering Claims-Made Policies

Claim #1
An act of the type covered by the policy occurs on 6/1/2023. A claim against the insured is made on 6/1/2024, and the insured immediately reports it to the insurer.

Claims-made policies as follows were in place:

- Policy A - Effective 1/1/22-23 – retroactive date of 1/1/22
- Policy B - Effective 1/1/23-24 – retroactive date of 1/1/22
- Policy C - Effective 1/1/24-25 – retroactive date of 1/1/22

Which policy, if any, would respond to the claim? Policy C

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Triggering Claims-Made Policies

Claim #2
An act of the type covered by the policy occurs on 8/1/2021. A claim against the insured is made on 6/1/2023, and the insured immediately reports it to the insurer.

Claims-made policies as follows were in place:

Policy A - Effective 1/1/22-23 – retroactive date of 1/1/22
Policy B - Effective 1/1/23-24 – retroactive date of 1/1/22
Policy C - Effective 1/1/24-25 – retroactive date of 1/1/22

Which policy, if any, would respond to the claim? None

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Triggering Claims-Made Policies

Claim #3

An act of the type covered by the policy occurs on 8/1/2022. The insured's first notice was a summons and complaint on 6/1/2024. The insured immediately reports the claim to the insurer.

Claims-made policies as follows were in place:

Policy A - Effective 1/1/22-23 – retroactive date of 1/1/22
Policy B - Effective 1/1/23-24 – retroactive date of 1/1/22

Coverage was not renewed or replaced after Policy B expired, but a three-year Extended Reporting Period was purchased.

Which policy, if any, would respond to the claim? Policy B

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Triggering Claims-Made Policies

Claim #4

An act of the type covered by the policy occurs on 2/1/2024. The insured's first notice was a summons and complaint on 6/1/2024. The insured immediately reports the claim to the insurer.

Claims-made policies as follows were in place:

Policy A - Effective 1/1/22-23 – retroactive date of 1/1/22
Policy B - Effective 1/1/23-24 – retroactive date of 1/1/22

Coverage was not renewed or replaced after Policy B expired, but a three-year Extended Reporting Period was purchased.

Which policy, if any, would respond to the claim? None

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Triggering Claims-Made Policies

Claim #5

An act of the type covered by the policy occurs on 8/1/2022. A claim against the insured is made on 6/1/2024, and the insured immediately reports it to the insurer.

Claims-made policies as follows were in place:

Policy A - Effective 1/1/22-23 – retroactive date of 1/1/22
Policy B - Effective 1/1/23-24 – retroactive date of 1/1/22
Policy C - Effective 1/1/24-25 – retroactive date of 1/1/24

Which policy, if any, would respond to the claim? None

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Claims-Made and Reported

Claims-made language PLUS claim must be reported to the insurer during the policy period

- Claims-made policies do not impose a specific time period during which the claim must be reported to the insurer. They typically specify only that the claims must be reported "as soon as possible" or "as soon as practical."

Potential problems with claims-made and reported coverage

- Insured delays in reporting the claim to the insurer.
- Claim is made against the insured late in the policy period, giving the insured little or no time to report it to the insurer.
- Suit is filed against the insured during the policy term, but the insured is not served until after the policy has expired.

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Extended Period to Report Claims

Example – no claims reporting window

The Company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as Damages for Claims first made against the Insured and reported to the Company in writing during the Policy Period, arising out of any act, error, omission or Personal Injury in the rendering or failure to render Professional Services by an Insured covered under this policy...

Example – claims reporting window

If a Claim is made against any Insured, the Insured shall give written notice thereof to the Underwriter as soon as practicable and in no event later than thirty (30) days after the expiration of the Policy Period, and shall immediately forward to the Underwriter every demand, notice, summons, complaint, or other process received by any Insured or his/her/its representatives. Compliance with this notice requirement is a strict condition precedent to coverage under this Policy.

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Continuity Date

- The date of the insured's first warranty application for coverage
- Usually coincides with the effective date of the first policy that is written
- The continuity date should be maintained on any renewal or replacement policy.

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Continuity Date

SAMPLE LANGUAGE

The Company will not be liable for Loss for any Claim for any fact, circumstance, situation or event that is or reasonably would be regarded as the basis for a claim about which any Executive Officer had knowledge prior to the applicable Continuity Date set forth in ITEM 5 of the Declarations for this Liability Coverage.

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Continuity Date

1. If Liability Coverage is currently purchased, but has been in place for less than 3 years, please answer the following question:
   As of the date the **Applicant** first purchased the Liability Coverage, is the **Applicant** or any person proposed for this insurance aware of any fact, circumstance, situation, event or act that reasonably could give rise to a claim being made against them under the Liability Coverage for which the **Applicant** is applying?
   If Yes, please attach an explanation.
   Yes ☐ No ☐
2. If Liability Coverage is not currently purchased, please answer the following question:
   Is the **Applicant**, or any person proposed for this insurance aware of any fact, circumstance, situation, event or act that reasonably could give rise to a claim against them under the Liability Coverage for which the **Applicant** is applying?
   If Yes, please attach an explanation.
   Yes ☐ No ☐
3. If the Requested Limit exceeds the Expiring Limit, please answer the following question:
   Solely with respect to any higher limits requested or that may ultimately be issued for the proposed insurance, is the **Applicant** or any person proposed for this insurance aware of any fact, circumstance, situation, event or act that reasonably could give rise to a claim against them under the Liability Coverage for which the **Applicant** is applying?
   If Yes, please attach an explanation.
   Yes ☐ No ☐

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PPL Date

Prior and Pending Litigation (PPL) Date a/k/a Pending or Prior Litigation Date

- There is no coverage for claims that were first made against the insured prior to the PPL date.
- Usually coincides with the effective date of the first policy that is written
- The PPL date should be maintained on any renewal or replacement policy.
  - Sometimes, when claims-made coverage is replaced on renewal, the PPL date is advanced to the effective date of the replacement policy. To maintain coverage without a gap, it is important that this not be allowed to happen. Most insurers, when presented with evidence of the current PPL date, will agree to include that date on a replacement policy.

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PPL Date

SAMPLE LANGUAGE

The Company will not be liable for Loss for any Claim based upon or arising out of any fact, circumstance, situation, event or Wrongful Act underlying or alleged in any prior or pending civil, criminal, administrative or regulatory proceeding against any Insured as of or prior to the applicable Prior and Pending Proceeding Date set forth in ITEM 5 of the Declarations for this Liability Coverage.

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PPL Date - Example

Jack's Restaurant had an EPLI policy for three years with insurance company A. The policy had full prior acts coverage and a PPL date of 1/1/2021.

In 2024, coverage was moved to insurance company B, and the PPL date was advanced to 1/1/2024.

Late in 2023, an employee initiated a lawsuit for discrimination, but Jack was not made aware of this until he was served with the summons and complaint in early 2024. Because the suit was pending prior to insurer B's PPL date, coverage will not apply under insurer B's policy. Insurer A's policy may also not apply.

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Right and Duty to Defend

Duty to Defend Policy

- The insurer chooses defense counsel and controls defense of a claim.

Non-Duty to Defend Policy

- The insured chooses defense counsel and controls defense of a claim.
- The insurer reimburses the insured for the cost of defense.

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How Are Defense Costs Paid?

Within policy limits

- This is common on many forms written on a claims-made basis.
- Defense costs will erode the policy limit, leaving less available to pay indemnity claims.
- Once the limit of insurance is paid, defense ends.
- Internal claims handling costs (e.g. salaries of those employed in the insurer claims department) are not charged against the limit.

In addition to policy limits

- Some Employment Practices Liability Policies, for example, can be written with defense costs in addition to policy limits. This is offered as an option by some insurers.

In addition to policy limits, with a cap on the defense costs paid.

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Consent to Settle/Hammer Clause

The insurer is required to obtain the consent of the insured before settling a claim. If the insured does not approve a settlement that is proposed by the insurer and acceptable to the claimant, the insurer is liable only for the initial settlement amount and defenses costs up to that point.

Example

A professional liability insurer negotiates a settlement with the claimant for $250,000. It has spent $100,000 in defense to this point. The insured, though, does not consent to the settlement. The claim finally settles one year letter for $350,000 after an additional $50,000 is spent in defense costs. The insured is responsible for the additional $100,000 in indemnity and the additional $50,000 in defense costs.

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Soft/Velvet Hammer Clause

The insured and the insurer share in any amount in excess of the original settlement offer. The percentages vary, but in the following example, the policy is written with a 50/50 hammer clause.

Example

A professional liability insurer negotiates a settlement with the claimant for $250,000. It has spent $100,000 in defense to this point. The insured, though, does not consent to the settlement. The claim finally settles one year letter for $350,000 after an additional $50,000 is spent in defense costs. The insured is responsible for $75,000: $50,000 (50% of the additional $100,000 in indemnity) plus $25,000 (50% of the additional $50,000 in defense costs)

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Incentive to Settle

Some insurers offer an incentive to the insured to provide consent, usually in the form of a reduction in the retention or deductible.

SAMPLE LANGUAGE

If the Insured and the party bringing Claim hereunder consent to the first settlement offer recommended by the Company within thirty days of being made aware of such offer by the company, the retention will be retroactively reduced by ten percent with respect to such Claim.

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The Application

- In many professional and management liability policies, the application becomes a part of the policy. The applications are often referred to as "warranty" applications.
- Any material misrepresentations on the application could void coverage for some or all of the insureds.
- Many policies include severability language, which protects innocent insureds in the event of misrepresentation on an application.

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REPRESENTATIONS AND SEVERABILITY

A. The Insured represents that the particulars and statements contained in the Application are true and agree that (1) those particulars and statements are the basis of this Policy and are to be considered as incorporated into and constituting a part of the Policy; (2) those particulars and statements are material to the acceptance of the risk assumed by the Company; and (3) the Policy is issued in reliance upon the truth of such representations.

B. An Application for coverage shall be construed as a separate Application for coverage by each Individual Insured. With respect to the particulars and statements contained in the Application, no fact pertaining to or knowledge possessed by any Individual Insured shall be imputed to any other Individual Insured for the purpose of determining if coverage is available. However, facts pertaining to and knowledge possessed by the individual(s) signing the Application and the President, Chairperson, Chief Executive Officer, Partner and Chief Financial Officer shall be imputed to the Organization for the purpose of determining if coverage is available.

Thank You for Being Here!

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