



# E&O Edge

## Lawyers Professional Liability Retroactive date: a key component to policy coverage

In the tumultuous climate of today's economy, attorneys must be ever vigilant to protect themselves and their exposure to risk. Conditions are ripe for possible litigation against law firms and this is a perfect time for attorneys to familiarize themselves with their professional liability policy. Firms should not only be aware of what their policy covers, but when the coverage is triggered. Knowing when your coverage is triggered is key to your defense and the first step towards protecting yourself against an E & O claim.

As the phrase itself suggests, it is commonly understood that the "claims-made and reported" nature of a typical professional liability policy requires as a precondition for coverage that a claim be both first made against an insured and reported to the insurer during the relevant policy period. But these are not always the only dates an attorney needs to be cognizant of when faced with a professional liability claim. It must also be determined whether a "retroactive date" has been applied to the subject policy and, if so, what that entails.

### Retroactive date defined

A retroactive date is the date on or after which any alleged "wrongful act" that forms the basis of a professional liability claim must have occurred in order for the policy's coverage to be triggered. For instance, coverage would be denied under a professional liability policy with a retroactive date of January 1, 2009 for a malpractice claim in which it is alleged the insured missed a December 31, 2008 statute of limitations deadline on an underlying personal injury claim. Despite the fact that the claim may have been both first made and reported during the relevant policy period, and may have

otherwise constituted a covered claim, coverage would nonetheless be denied since the alleged wrongful act – i.e., failing to preserve the client's claim by filing suit or otherwise tolling the statute of limitations by December 31, 2008 – occurred prior to the January 1, 2009 retroactive date.

### Retro dates and career changes

You may have established a retroactive date with your current law firm's coverage, but what happens if your situation changes?

- How do you protect yourself and your retroactive date?
- Will you lose your prior retroactive date if you start a new firm or join another?
- Will your prior firm purchase an Extended Reporting Period Endorsement (ERP)?

It is not uncommon over the arc of a typical attorney's career for the attorney to migrate from firm to firm, or to hang their own shingle at some point and start their own practice. Moreover, in the current climate of economic slowdown, work in various sectors may be increasingly difficult to come by, which increases the pressure on firms to reduce headcount or dissolve entirely, causing even more such migration. Attorneys who change firms or start their own practice should consider not only obtaining professional liability coverage on a going-forward basis, but also making sure that coverage exists for any claims that arise from previous legal work performed while at their former firm. There is a potential pitfall involving their new firm's retroactive date which might cause a gap in coverage.

If a malpractice claim is made arising out of an attorney's work while at a previous firm, the professional liability policy of the attorney's current or new firm may not provide coverage if a retroactive date is in place; that date is usually the date the attorney began employment at the new firm. Normally, the attorney can nonetheless rely on being covered for the claim under their prior firm's professional liability policy if the prior firm has continuously renewed the subject policy or, in cases of dissolution, purchased an ERP of sufficient duration that is in place at the time the claim is made and reported. But sometimes the prior firm, for whatever reason, fails to renew their professional liability coverage or purchase an ERP or their limit may be exhausted by other claims.

### Steps to protect your retro coverage

The most obvious option is to ensure the new professional liability policy either has no retroactive date or has a retroactive date that is equal to or earlier than the attorney's existing retroactive date. However, while this option resolves the concern over reliance on the former firm to continuously renew its coverage, the premium charged for the individual attorney will likely be significantly more expensive because the insurer is being asked to cover claims that arise from work done on a going-forward basis, as well as claims arising from past work.

If the attorney is reasonably sure that the prior employer will not have an interruption or cessation of coverage, he or she may choose to risk the potential, but unlikely, gap in coverage in favor of keeping the new premiums low. Even so, such an attorney should maintain open

lines of communication with the prior employer.

Either way, prudent attorneys should take reasonable steps to protect themselves, understanding that gaps in coverage can be caused through changes in employment and the actions or omissions of previous employers.

Attorneys would be well-advised to take another look at their professional liability policy to see if it contains a retroactive date. If you plan on leaving your current firm, look ahead to protect yourself.

#### **If you start your own practice**

- Start the application process before you leave your current employer
- Don't create a time gap between your departure from your employer and the inception date of your own policy
- Secure coverage at the inception of your firm
- Request quotes for your new policy with your existing retroactive coverage

#### **If you join another law firm**

- Determine the retroactive coverage provided by the law firm's policy
- Discuss the retroactive options that may be available to you with your new employer. The interview process may be the best time to advance this discussion.

#### **Come to an agreement with your prior employer**

- Agree on deductible payment obligations, should a claim arise out of your professional services on behalf of your prior employer
- Secure the firm's agreement to continue to carry professional liability coverage at a specific minimum limit of liability for a minimum period of time

Being aware and understanding how a retroactive date would be applied in any given scenario is a relatively simple exercise for a prudent attorney to take so as to avoid potential gaps in coverage.

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