The Cobbler’s Children Have No Shoes:
What Insurance Coverage Attorneys Need to
Know About their Professional Liability Insurance
Policies

2017 Annual Meeting
May 11-12, 2017
Chicago, IL

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What Constitutes a Claim?

• Is the term "claim" defined in the policy? If not, how do you determine whether a claim has been made?

• If the term "claim" is defined in the policy as a demand for money or services, how do you determine if the letter you receive from a potential claimant qualifies as a demand for money or services?

• Is a request for your insurance information or records without more a claim?

• To report or not. What happens if you conclude that a claim has not been made and the insurer concludes otherwise?
What are “Professional Services”?

Courts’ descriptions:
• Arises from “a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill”
• “Predominantly mental or intellectual”
• “Evidenced by the need for specialized learning or training” and distinguishable from “the ordinary activities of life and business”

Frequently debated issues:
• Fee disputes
• Business pursuits with clients

The Related Acts Exclusion

Badges of relatedness:
• Same or different parties
• Same or different time periods involved
• Similar or different alleged wrongful acts
• Same or different duties, and if the same, are the people or entities to whom the duties were owed the same or different
• Same or different causes of action, and if different, do the causes of action arise out of the same core of operative facts
• Same or different damages or remedies sought

Recent application of test: *National Union Fire Ins. Co. v. Zillow, Inc.*, No: C16-1461JLR (W.D. Wash. April 13, 2017) (finding in trademark dispute that demand letter requesting removal of photographs from Zillow website before policy incepted to be related to later lawsuit)
Prior Knowledge Provisions and Related Acts Provision

Each wrongful act, in a series of wrongful acts, will be deemed to have occurred on the date of the first wrongful act.

  
  Court held that a related acts provision together with prior knowledge provision is ambiguous as applied to facts of that claim.

- Litigating prior knowledge and related acts can be difficult – developing a complete record is critical

What Is The Prior Knowledge Provision?

The policy only provides coverage when **no insured** had a basis to believe that any such act or omission or interrelated act or omission might reasonably be expected to give rise to a claim.

If any insured had a basis to believe an act or omission might lead to a claim, there is no coverage.
Prior Knowledge – Sample Policy Provision

This Policy does not apply to and We shall have no obligation to pay any Damages, Claim Expenses or Supplemental Payments for any Claim:

D. based upon or arising out of any actual or alleged Wrongful Act that:

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3. You had knowledge of prior to the Policy Period and had a reasonable basis to believe that such Wrongful Act could give rise to a Claim; provided, however, that if this Policy is a renewal or replacement of a previous policy issued by Us providing materially identical coverage, the Policy Period referred to in this paragraph will be deemed to refer to the inception date of the first such policy issued by Us.

Prior Knowledge Provisions

- *Truck Ins. Exch. v. Ashland Oil, Inc.*, 951 F.2d 787 (7th Cir. 1992); *Bryan Bros., Inc. v. Cont’l Cas. Co.*, 660 F.3d 827 (4th Cir. 2011).

Knowledge - Objective or Subjective?

• Courts have held that a mixed subjective/objective analysis applies. There must be actual subjective knowledge of the facts related to the act or omission. And the objective component must be met – a reasonable professional in the insured’s position would expect it to give rise to a claim. *Cohen-Esrey Real Estate Services, Inc. v. Twin City Fire Ins. Co. and Hartford Fire Ins. Co.*, 636 F.3d 1300 (10th Cir. 2011)


Evaluating the Insured’s Knowledge - Extrinsic Evidence Considered

• *Westport Ins. Co. v. Albert*, 208 F. App’x 222 (4th Cir. 2006) (prior pleadings in a related matter established knowledge)


• *Eisenhandler v. Twin City Fire Ins. Co.*, 2011 WL 5458180 (Conn. 2011) (extrinsic evidence relevant to whether insured knew his client would sue him considered)
Evaluating the Insured’s Knowledge - Extrinsic Evidence Not Considered

- **M.D. Sass Investors Servs., Inc. v. Reliance Ins. Co.,** 810 F. Supp. 1082 (N.D. Cal. 1992) (court refused to consider extrinsic evidence because prior knowledge provision was an exclusion)


Failure to Disclose/Misrepresentation in Application for Insurance

A standard application provision reads:

It is understood and agreed that failure to provide true and complete response to any of the questions, statements or request for information in this Application or to provide any other information material to this Application may, at the sole option of the insurer, result in the voiding of the insurance policy issued in reliance on this Application and/or denial of coverage for specific claims asserted against us (the Applicant) or any other insured under the policy. The undersigned on behalf of the Applicant and all other insureds under this policy issued by the insurer, hereby waives any defense to an action by the insurer for voiding or revoking of the policy based upon misrepresentation of fact or failure to disclose material information in connection with this Application. The Applicant agrees to hold the insurer harmless from all loss as a result of any such misrepresentation or failure to disclose, including, without limitation, all costs and attorney fees incurred by the insurer in connection with said action for voiding or revoking the policy.

I HEREBY DECLARE that the above statements and particulars are true to the best of my knowledge, that I have not suppressed or misstated any facts and I agree that this application shall form part of the insurance policy. I also acknowledge that I am obligated to report any changes that could affect the disclosures in this application that occur after the date of signature, but prior to the effective date of coverage.
Failure to Disclose/Misrepresentation in Application

  Failure to disclose circumstances of a claim is material information.

  Misrepresentation was a representation, not a warranty, and does not void the policy.

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Failure to Disclose/Misrepresentation in Application

• Rescission actions vary by state law
• Standard is typically more onerous than prior knowledge coverage defense
• Fully developed record is important
Personal Profit Exclusion

Limits coverage for “any Claim based on, or arising out of, or in any way involving any Insured having gained any personal profit or advantage to which he or she was not legally entitled.” Berkley Ins. Co. Lawyers Professional Liability Policy, LPL 39450 (10-14) at IV.K.

Application of exclusions requiring:
• Wrongful profit or advantage
• Profit “in fact”

Questions?

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