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THE INSURANCE NEWSLETTER

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Occurrence and Claims Made policies

Liability insurance policies come in two basic flavors, occurrence and claims made. The distinction refers principally to how coverage is triggered under a policy. There is a significant difference between the two types.

Occurrence policies are by far the most common. Your standard general liability, auto, workers compensation and most umbrella policies are almost always occurrence policies. If an accident or injury takes place (occurs) during the term of one of these policies, then any claim that subsequently arises from that occurrence is covered under the policy in force at that time. Years, or even decades, might pass, but when a suit is finally filed or a claim finally presented, the policy in force on the date of occurrence responds; hence the name, "occurrence" policy.

Occurrence policies make sense when it's possible, as with most tangible injuries, to determine with reasonable certainty when an injury actually took place. Auto accidents, slips and falls, defective products and suchlike usually result in specific injuries or damage which are pretty definite in terms of both space and time. Some liability policies, though, cover types of losses where it might be difficult or impossible to pinpoint a specific time when a loss actually occurs. If you can't do that, you could have trouble triggering coverage under an occurrence policy.

That's why claims made policies were developed. In these, the trigger for coverage is the claim itself (hence, again, the name "claims made"). The claims

made policy solves the problem of indefinite occurrence dates...you'll always know when you are sued.

Most likely you are buying at least one or two claims made policies. Directors & Officers, Employment Practices, Fiduciary Liability, Errors & Omissions, Professional Liability, Malpractice...all are usually written on claims made forms. Even the Employee Benefits Liability coverage section found as part of so many general liability policies is usually on a claims made form. Insurance buyers of any size can rarely avoid some use of these forms.

You need to understand them. With occurrence policies you only concern yourself with two dates, when they are effective and when they expire. With claims made policies you also need to deal with a "retro date" (which may also be called a "prior acts" date or some similar term), and possibly an extended reporting period (known as the "tail"). For coverage to apply a claim must be made during the policy term (or the tail, if you have one), but must also arise from an event that took place sometime *after* the retro date.

This is dry stuff, but important to understand. Let's try a simple example: Someone suffers an insurable injury sometime in late 2007. You buy liability policies that run on a calendar year basis, January to January. In April, 2009 the injured party sues you. You have renewed your liability policies twice since the original injury, on January 2008 and again in January, 2009.

With an occurrence form, the policy that responds to the claim is the one in force in 2007, the date of the

injury. This is true no matter how far in the future any claim might subsequently be made. You'll always go back to that policy for coverage.

Let's suppose, though, you are buying claims made policies, and there was a policy in force in each year from 2007-2009.

- As long as the retro date for each policy is set to some time prior to the date of the injury, the policy that responds is the one in force when the claim is made in April, 2009.
- Suppose that in January 2009 you moved to another claims made policy with a different insurance company. You quite properly told the new insurance company about the 2007 injury. They did not want to cover it, so they refused to set the retro date back and instead moved it up to coincide with the new policy effective date of January, 2009. When the claim is made in April 2009 it falls within the policy period...OK so far. But the injury took place before the retro date of January 2009...whoops, no coverage from that 2009 policy.
- But, you were careful. When you left your old insurance company you bought an extended reporting endorsement (the "tail") on the expiring 2008-2009 policy. That gave you extra time to make a claim under the expired policy. When the claim came in, in April, 2009, it was covered...under the extended reporting provision of the 2008-2009 claims made policy.

Sounds confusing? All this means is that buying, and especially changing, claims made insurance policies is not nearly as simple as changing an occurrence policy. One occurrence policy picks up where the last one left off, and they all continue to provide protection for events that took place during their term. Occurrence policies live forever; an expired claims made policy is only useful as wallpaper.

When buying a claims made policy it is most important to pay attention to the retro date (however it's termed). This is pretty easy if moving from an occurrence policy to a claims made form or buying a claims made policy for the first time; you just set the retro date to the date of the first claims made policy,

and make sure it never changes in the future, even if you change insurance companies.

Sometimes you can't do that, if you have claims for instance, or adverse underwriting issues that make buying a policy difficult; you might also be cancelling a claims made policy or moving to an occurrence form. Things get much trickier; you will need to buy a tail, for as long a period as you can. The tail does not give you any more protection or additional limits of liability; all it does is give you more time to file claims under an expired claims made policy.

One last caveat: if you understand how the retro date works, it's apparent that premiums for first year claims made policies (where the retro date equals the effective date) can be substantially lower than for so called mature claims made policies (where the retro date is set several years in the past). This is common sense; in a first year claims made policy when the retro date equals the effective date, an event must take place and the injured party must also file a claim almost immediately for coverage to apply. Things don't usually move that fast with the types of liability claims these policies would typically cover, so underwriters really don't expect many claims that first year. As a result, they may price their policy accordingly (that is, much cheaper), possibly as much as half the price of a mature policy. There is obviously much room for mischief by unskilled or unscrupulous insurance agents peddling claims made policies.

Buying and managing claims made policies can present many problems. We will help you with all this, of course.

Vacancy conditions in property insurance policies

It's a sign of the times that more buildings of every type (commercial, residential, mercantile, etc.) are becoming vacant these days. This has implications for any property insurance policies covering these structures. The standard building and personal property policy form has specific conditions that directly apply to vacant buildings.

RV Insurance

First, a definition: what does “vacant” mean? In the case of a building insured by the owner or general lessee, the standard policy says a building is vacant unless at least 31% of its total square footage is being used by the owner or a lessee to conduct normal operations. There is an exception to this condition in the case of buildings under construction or renovation.

Temporary vacancy is allowed, but if a building is vacant under the preceding definition for more than 60 consecutive days before any loss or damage occurs, coverage is subject to new limitations. The policy no longer covers the perils of vandalism, sprinkler leakage (unless the system has been protected against freezing), glass breakage, water damage and theft. For all other perils still covered, there’s another twist: the policy will only pay 85% of what it would otherwise be required to pay.

The next section of the policy conditions, valuation, also comes into play here. It’s common to find buildings insured to full replacement cost value, defined as the cost to repair or replace a building with one of comparable material and quality and used for the same purpose. The kicker with this is that you have to actually replace the building “as soon as reasonably possible”. A building owner or general lessee who finds himself with a vacant building on his hands may not want to, or be in a position to, rebuild, which means that any covered claim reverts to actual cash value, defined as replacement cost less physical depreciation. Try having a conversation with a property claims adjuster about how much depreciation should apply to a vacant building.

In summary, at minimum vacancy means 1) some things that used to be covered aren’t anymore, and 2) you’ll only get 85¢ of a depreciated dollar for any claims that are covered.

Last thought: as a practical matter all of this may only apply during the first few months of vacancy. Once that property policy comes up for renewal, you are obligated to disclose the condition of vacancy (concealment or misrepresentation of material conditions could be grounds for voiding coverage). Insurance can be had for vacant buildings, but it is expensive and limited. Let us know early if this is a situation you may find yourself in.

Vacation time is coming, here is something to watch out for.

We recently learned of a story about a family on vacation out west. Father and son rented an all terrain vehicle for a few hours, and had an accident on it. There were no serious injuries, but the ATV was damaged to the tune of approximately \$3,000.

The rental contract made him responsible for this; unfortunately, the father soon found out there was no coverage under his Homeowners policy. The rental agency also did not have physical damage coverage available for him to purchase. Result: a vacation that turned out to be somewhat more expensive than planned.

It’s not uncommon for folks on vacation to rent a variety of vehicles, or vessels. For the most part, you should assume that there is no coverage for either liability or physical damage under your homeowners or auto policy unless you took the time to check with us and arrange for it in advance. And you should always carefully read the rental agreement you are offered for the item in question, and inquire what protection, if any, you can get from the rental company.

Insurance and Indemnification in Service Contracts

Businesses sign contracts every day, and it’s common to find hold harmless or indemnification provisions in them. The nature and scope of those provisions can vary widely.

Tenants renting space find that landlords in almost every case will want to be held harmless and protected from liability in case they becomes involved in a lawsuit resulting from injuries arising out of the tenant’s activities or occupancy of the premises. Businesses hire contractors, and normally expect that if someone is injured due to the contractor’s activities on a project the project owner will be protected and indemnified. All these agreements typically have a requirement that some amount of liability insurance be carried and that it protect the owner or contracting

party, but regardless of the amount of insurance the tenant or contractor in these examples are required to carry, there is typically no cap or limit to their liability.

Service contracts are often quite different. Payroll or credit card processing companies, advertising agencies, website hosting companies and similar service organizations will often have contracts that will either omit any hold harmless or indemnification provisions, or will severely limit the liability they assume, very often to just the amount of fees or revenue they derive from the contract.

Few businesses look at these contracts closely, but you should. By allowing no or limited indemnification, in effect you are saying, “OK, I’ll hire you to perform this service for me, but I won’t hold you accountable if you mess up...I’ll bear the risk”. It doesn’t seem quite fair, looked at that way.

And in truth, it’s probably not. There are some situations where liability limitations make sense, for instance, if you hire a computer programmer who

will actually be writing or modifying programs. Neither he nor you can possibly know how his work will interact (or not) with your existing programs...he’ll want you to share that risk, and that’s fair. But if you hire a company to come in and manage your payroll, they control that process and use their own proprietary tools and software. They should be responsible for it.

This is especially important because so many of these services can lead to claims that are not covered by standard liability insurance policies, a topic we’ve explored in the past. Your vendors probably (and certainly should) carry some form of errors and omissions insurance, of a type that would be impractical or expensive (or both) for you to buy.

Bottom line, look at these types of contracts the same way you would look at the one from the company that mows your lawn or repairs your plumbing. Insist on being protected from your vendor’s goofs, and ask for proof that they are properly insured to cover themselves, and their obligations to you.