Insurance & Risk Management Services
SULLIVAN GROUP

Important Claims Information

Factors to Consider When Moving Coverage From an Incumbent Insurer

The purpose of this document is to highlight important policy provisions to consider when moving coverage from an incumbent insurer. Our Claims Management Advocacy Practice has experienced claims representatives who are familiar with all of the participants' expectations as well as the problems that typically arise - and can assist with the placement process in order to avoid these potential problems.

Given that the majority of professional and executive liability policies are written on a "claims made" basis - meaning that the policy must be in effect when the claim is made - strong consideration is given to maintaining the coverage with the incumbent insurer(s) on renewal. But there are times when it is prudent or necessary to move coverage to new insurers. While we cannot discuss every potential situation in this document, irrespective of the situation, there are four foundational policy provisions which must be evaluated when moving coverage from one carrier to another: (1) Continuity of Coverage, (2) Prior Notice Exclusion, (3) Notice Provision, and (4) Discovery / Extended Reporting Period.

CONTINUITY OF COVERAGE

As previously stated, professional and executive liability policies are typically "claims made" policies. Generally, as long as the policy provides protection for "prior acts," the policy will respond to the claims stemming from an underlying wrongful act that occurred during the policy or before policy inception. For the purpose of this discussion, we will refer to a D&O insurance policy, but this framework also applies to other types of management and professional liability policies.

When a company first buys a particular level of D&O insurance, it must represent and warrant to the insurer that no person proposed for the insurance is aware of any fact, circumstance or situation that could lead to a claim (the wording varies somewhat among insurers). This is universally referred to as a "warranty statement." Any matters disclosed in the warranty statement will be excluded from coverage.
In addition, an insurer that first provides a particular level of coverage will exclude coverage for any litigation that was brought before, or is pending at, the commencement of the policy period. This is referred to as the "prior and pending litigation" (or "P&P lit") exclusion. The prior and pending litigation date with respect to a new amount of coverage is usually the inception of the policy period in which the new level of coverage is first bound.

When a D&O policy is renewed with the incumbent insurer and with the same or lower level of coverage, the insured is not required to repeat its warranty statement, and the prior and pending litigation date remains the date on which the insured first purchased that level of coverage. If an insured moves its D&O policy from one insurer to another, the insured, of course, wants that transition to be as seamless as possible – it wants "continuity of coverage". To achieve this, the replacement insurer must agree to do two things: (1) provide coverage without requiring an updated warranty statement from the insured, and (2) rely on the prior and pending litigation date that was originally imposed for that particular level of insurance (commonly referred to as "backdating" the P&P Lit exclusion). When both of these occur, the insurer is said to have provided "continuity of coverage".

PRIOR NOTICE EXCLUSION

All D&O policies contain a "Prior Notice Exclusion" which precludes coverage for claims that are based on facts that were the subject of any notice provided under a prior insurance policy. As such, if an insured provided notice of circumstance or claim to their incumbent insurer (or any prior insurer) based on a given set of facts - and a claim arises from the facts (or interrelated facts)

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underlying the noticed circumstance or claim - the replacement insurer will likely deny coverage for it.

NOTICE PROVISION

At times, when moving coverage to a new insurer, it may be advisable or necessary to provide notice of a circumstance or list of circumstances to the incumbent insurer prior to moving to the new insurer (this is sometimes referred to as a "laundry list"). While it is reasonably self-evident that the D&O policy allows for defined Claims to be noticed under the policy, the policy's allowance for notices of circumstances which may lead to Claims warrants further discussion. As a protection to insureds, the notice of circumstance provision allows insureds to provide notice to the insurer of circumstances which they reasonably expect to lead to a Claim. If such a Claim is indeed filed against the insured, that Claim is then covered under the policy to which notice of the circumstances underlying the Claim was provided. There are intricate requirements that an insured must meet in order for the Insurer to accept the notice of circumstances and this process should always be approached with caution and diligence. There are a number of reasons why an insured would want to provide notice of circumstances to their insurer. Sometimes, it is simply a matter of an insured not wanting to file claims against a new insurer's policy at the start of a new relationship. More often, however, the decision to provide notice of circumstances is driven by the fact that coverage is not available under the new policy for all or some of the circumstances underlying the notice.

As discussed above, placing an insurer on notice of circumstances is a serious matter. Insurers' notice provisions are very particular as to what they deem to be an appropriate notice. Unfortunately, there are times when an insurer takes the position that a noticed circumstance does not fully comply with the notice provisions and denies coverage for a claim stemming from the noticed circumstances. To add to the frustration, if the insured then notices the claim to the replacement insurer, the insurer may deny the claim by citing their Prior Notice Exclusion (discussed above). This conundrum can be managed and the risk minimized by careful policy drafting and forethought.

DISCOVERY / EXTENDED REPORTING PERIOD

The Discovery / Extended Reporting Period (ERP) provides an additional period of coverage after the expiration of the policy period for claims arising from wrongful acts that occurred during the policy period. In nearly all policies, the cost and duration of the ERP is pre-set within the form. ERP durations are typically one year, but may be as long as six years. Further, most modern ERP options are available on a bi-lateral basis – meaning that the ERP option is available if either the insurer or insured non-renews. When moving to a new insurer, it may sometimes be advisable or necessary for the insured to purchase the ERP option depending on the level of prior acts coverage available under the replacement coverage.

OUR CLAIMS MANAGEMENT ADVOCACY SERVICES

The above discussion highlights the provisions to consider when moving coverage from one insurer to another. But there are many other issues that can arise when determining whether and how to move coverage. The particular facts and circumstances underlying each situation will dictate nuanced changes to the appropriate approach. To ensure the most favorable outcome, it is essential that the insured works through this process in concert with knowledgeable legal counsel and experienced insurance brokers with a dedicated claims management advocacy team.