

Ensuring Continuity of Professional Liability Policies

Professional liability insurance programs are complex contracts that must be managed with the expertise of an experienced broker. This is particularly true whenever a policyholder is considering switching carriers. Policyholders may want to switch for a lower price, or to move to another carrier for affinity or other preferences. But switching carriers without ensuring full continuity of coverage creates the risk that claims alleging negligence in prior years will not be covered. Indeed, the risk of a claim increases every year an entity is in business, so coverage must be in place today for any negligence, error or omission which took place before the current policy period.

Before switching professional liability carriers, policyholders must look to preserve the chain of continuity. The primary objective of continuity is to see that the original coverage is maintained, without gaps, as insurance is renewed from year to year. Continuity concerns arise because most professional liability insurance policies are written on a claims-made basis. This means the insurance company pays only for claims first made against the insured during the policy period – even if the alleged wrongdoing occurred prior to the policy period. The timing of professional liability claims is different from liability claims for a home or car. The latter are triggered by the date a loss or injury occurs, such as the day of an accident or weather event. With professional liability coverage however, the policy that provides coverage is the one in force when a claim is made – not the policy in force when it is claimed a wrongdoing occurred.

Because a professional can be sued today for conduct that took place in prior years, the key coverage question is whether your claims-made policy will cover that prior conduct. That is why continuity of coverage is critical. Three matters must be addressed when trying to ensure continuity: (1) the warranty on the initial application; (2) the policy's pending or prior litigation exclusion date; and (3) the prior-acts exclusion and retroactive date.

The Warranty Statement

The chain of continuity begins when coverage is written for an insured. When a D&O, EPL or other professional liability policy is initially written, the insured typically completes a long-form application, which includes warranty questions. A warranty question asks a prospective insured to disclose any exposure to potential liability. A common warranty question asks: "Is any person or entity proposed for this insurance aware of any fact, circumstance or situation which may result in a claim against the organization or any of its directors, officers or employees?" Once an executive signs the application, it becomes part of the policy. The insurer materially relies on the warranties in the application to issue coverage. Any misrepresentation or failure to disclose material information in response to the warranty question can void coverage under the policy.

When coverage is renewed with the incumbent insurer, the insured typically completes a "short form," or renewal application. If for some reason a long form must be used for the renewal, the incumbent insurer often allows the insured to strike the warranty questions in the application. The reason policyholders should not answer warranty questions in successive years is that it could jeopardize coverage. For example, an insurer could contend that the insured failed to disclose knowledge that was acquired after the initial application in a subsequent set of warranty statements. If a new long-form application with warranty questions is required by the new insurer, then continuity is broken.

Retroactive Date for Prior Acts

Contrary to common perceptions, professional liability policies provide full prior-acts coverage for wrongful acts as defined in the policy, including employment-related acts if part of the wrongful act definition, as long as the insured had no knowledge of them. Many underwriters, however, restrict this coverage with prior-acts exclusion on new business and accompanying “retroactive dates” by endorsement or the declarations page of the policy. For EPLI policies, the exclusion most often is added when the policyholder has not had prior coverage. The reason for prior act restrictions is that the insurer does not have experience or a track record with the account. A professional liability policy, however, with a prior acts exclusion has very little value, because the risk of a claim predominately relates to activities in the past.

If the previous policy provided full prior-acts coverage, and the new policy has prior-acts exclusion, with the retroactive dates set at the new policy’s inception date, continuity is broken. Of course, if the new insurer uses the same retroactive date as the previous policy, then continuity remains intact. Sometimes a new insurance company will provide full prior-acts coverage by not using prior-acts exclusion. In those cases, however, the carrier likely will require a new long-form application to be completed with warranty questions, which also breaks continuity.

Pending or Prior Litigation Date

In addition to considerations of coverage for prior acts, a coverage gap can be created with the pending or prior litigation exclusion that is common to most professional liability policies. The purpose of the pending and prior litigation exclusion date is to ensure that a new insurer does not have to pay a claim arising from active or pending litigation that an insured knew about before the effective date of the new coverage. A typical pending or prior litigation exclusion bars coverage for “any prior or pending litigation that is known, including any facts, incidents or circumstances the insured had knowledge of with respect to any ‘claims’ or ‘wrongful acts,’ including administrative or regulatory proceedings, prior to the time the policy was written and/or of which any notices were given to any prior insurers.”

The highest risk of a gap in coverage is when a policyholder does not disclose a circumstance that the carrier considers a claim, but the insured does not. The most common examples are matters involving the Equal Employment Opportunity Commission (EEOC) or the Securities and Exchange Commission. If a complaint is filed against an insured with the EEOC, the insured may not realize the insurer considers this a “claim.” The definition of “claim” varies among policies, but a claim may include non-monetary demands and usually includes administrative or regulatory proceedings, such as the EEOC. If the insured failed to report an EEOC complaint to the incumbent insurer, the carrier might not respond to a lawsuit that arises after its policy expires. Meanwhile, the new insurer could deem this to be “pending or prior litigation” and also deny coverage for any subsequent litigation.

If coverage renews with the incumbent insurer, continuity is maintained at the anniversary of the first renewal and thereafter, as long as coverage is maintained with the same insurer. But if the insured opts to renew with another insurer, continuity can be jeopardized. The risk is that an insurer will later contend that the insured acquired knowledge but failed to disclose this later acquired knowledge when the insured signed a subsequent set of warranty statements.

Ideally, to maintain coverage continuity, a new insurer should agree to use the inception date of the insured’s initial professional liability policy as the new policy’s pending or prior litigation exclusion date. In practice, however, the great majority of insurers use the date their policies take effect. A new insurer may agree to keep the expiring policy’s pending or prior litigation date, if the insured provides copies of all notices or claims given to previous insurers.

The Euclid Perspective: Our Continuity Commitment

The easiest way to maintain the critical chain of continuity is to renew with the incumbent carrier. Before considering switching insurance carriers in a claims-made policy, a policyholder should hire an experienced broker to protect against a loss of continuity. Euclid is committed to ensuring that our current policyholders maintain full continuity of coverage. Our [renewal applications](#) for fiduciary and labor professional liability coverage do not contain a warranty statement.

When we are quoting for new professional liability business, we understand how to preserve the critical chain of continuity: if an account meets appropriate underwriting criteria, we do not require warranty statements, we can quote off of the incumbent carrier renewal applications, and we will consider backdating the retroactive and pending and prior litigation dates to ensure full continuity of coverage.

Our producer partners have our commitment that we will work with you in the new and renewal underwriting process to ensure your clients maintain continuity of coverage that will not create an unnecessary gap in coverage.

The Euclid Perspective is an occasional commentary from Euclid Specialty Managers on fiduciary liability and other liability events relevant to our affinity insurance programs.

About Euclid

Founded in 1952, Euclid Insurance Services, Inc. is a family-owned, managing general agent and underwriting manager and claims administrator. The firm offers a wide range of professional liability, property, casualty, life, accident and health insurance products through agents and brokers nationwide.

The foregoing is a general discussion of policy provisions. Coverage of an actual situation cannot be determined without consideration of the full circumstances and applicable law. Please refer to the policy for its terms. This general discussion does not change the policy, waive any rights or confer any rights that are not contained in the policy.

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