



RISK MANAGEMENT INSIGHTS

by W. Brian Ahern, RPLU

Understanding Potential Claims, Actual Claims & Tolling Agreements

Many lawyers struggle with reporting a “potential claim” to their insurance carrier because such claims are difficult to define and may affect future insurance coverage. One piece of simple advice: Always report claims filed against you and matters that you believe have a reasonable basis to evolve into a claim.

It is important to understand how your policy defines a claim and communicate such to all members of the firm. A typical definition is: A demand for money or services, or the filing of a suit or institution of arbitration proceedings or alternative dispute resolution naming an insured and alleging a negligent act, error, omission, or personal injury resulting from the rendering of or failure to render professional services. Some policies require a “written demand,” while others require just a “demand,” which includes verbal demands.

Most policies also have a “discovery provision,” which refers to the reporting of potential claim matters. An example provision is: If during the policy period an insured becomes aware of any fact, circumstance or situation, which may reasonably be expected to give rise to a claim being made against an insured and shall give written notice to the insurer, as soon as practicable (but prior to the expiration of or cancellation of the policy)...then any claim subsequently made arising out of such fact, circumstance or situation shall be deemed to have been made when notice was first given to the insurer.

This indicates that by notifying the carrier of a potential claim during the policy period, you are actually triggering coverage for that claim under the current policy, regardless of when the actual claim is filed. An additional benefit of reporting potential claims is that you will not run the risk of a carrier denying coverage on a claim based on the issue of prior knowledge. This also allows new carriers to evaluate your risk without having to take on the liability of these potential matters.

Reporting potential claims in an abundance of caution should have little impact on a firm’s ability to secure favorable insurance terms.

Make sure you are consistent with your reporting procedures and provide detailed narratives around the facts and circumstances. In hard market conditions underwriters are looking at potential claims as closely as actual claims. It is highly recommended that you carefully evaluate matters that may have potential claim exposure. Talking to your insurance broker and/or insurance defense attorney about whether to report a potential claim is always the best course of action. Having an established, sophisticated insurance provider makes the process of reporting potential claims simple.

Lawyers also struggle with tolling agreements — an agreement to waive a right to claim that litigation should be dismissed due to the expiration of a statute of limitations. There are advantages and disadvantages to signing a tolling agreement when presented by a client who may sue for malpractice. Your carrier and defense counsel can help determine the best strategy based upon the specifics of the situation. Never sign a tolling agreement without the consent of your carrier.

A tolling agreement should contain a finite duration (with the possibility of renewal if the parties agree) and should also describe the claim that is subject to the agreement with reasonable specificity.

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W. Brian Ahern, RPLU, is President /CEO of Ahern Insurance Brokerage, one of the largest independently owned insurance brokerage firms specializing in the insurance needs of law firms. Ahern Insurance Brokerage is the Endorsed Insurance Broker for the SDCBA.