

POST PRACTICE “TAIL” INSURANCE
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Akron Bar Association
Senior Lawyer Committee Retirement Seminar
Friday, October 4, 2019

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I. WHAT IS “TAIL INSURANCE”?

“Tail insurance” is the popular name for an Extended Reporting Endorsement or Extended Reporting Coverage.

This is a policy option that provides insurance protection for any claim first made and reported to the carrier subsequent to the termination date of the expiring policy for any act, error or omission occurring *prior to the termination of the policy, and otherwise covered by the policy.*

II. WHY IS IT CALLED “TAIL” INSURANCE?

Lawyers’ professional liability insurance is called a “long-tail” line of insurance because an act, error or omission may take place today, but a claim arising from that act, error or omission may not be discovered or made against the lawyer for a number of years. The claim then “tails” the actual act, error or omission.

III. WHEN WOULD I BUY “TAIL INSURANCE”?

Upon termination of the current policy, most lawyers’ professional liability insurance policies provide an option to the insured to purchase a “tail” or an extended reporting endorsement or extended reporting coverage. This endorsement or coverage extends the time within which to report any future claim arising out of a covered act, error, or omission that occurred while the insured carried claims-made and reported insurance.

If a lawyer wishes to purchase “tail” coverage it is critical to inquire about it immediately upon termination of the current policy or the option may not be available.

IV. WHAT IS THE POLICY PERIOD FOR “TAIL INSURANCE”?

An extended reporting endorsement is for a specific period of time, referred to as an extended reporting period. Typically, an extended reporting period is for one year, two years, three years, or unlimited years.

Some policies may have an “automatic” tail. This depends upon the specific policy language. Many policies provide a limited period of time in which to report a claim after a policy expiration date, usually between 30 to 60 days. Some policies offering such coverage require that the claim be first made before the expiration date of the policy, but provide additional time after expiration to report the claim to the insurer.

A few policies will provide “free” extended reporting coverage to an insured for a much longer period of time, provided certain conditions are met. These conditions usually include a certain number of years insured by the given insurer, and retirement from law practice by the lawyer. However, such policies are the exception, not the rule.

At the expiration of the “tail” there is no longer any coverage.

V. WHY WOULD I NEED “TAIL INSURANCE”?

Lawyers' professional liability insurance provides coverage on a "claims-made and reported" basis. To have coverage, the lawyer must have a policy in effect when the claim is first made and reported to the carrier. Some policies may be “claims-made” forms, where the report to the insurance company has to be provided within some reasonable time period during or after expiration of the policy period.

“Claims-made and reported” coverage is different from “occurrence” coverage. An “occurrence” policy provides coverage for claims arising from acts, errors or omissions occurring during the period of time covered by the policy, regardless of when the claim is actually made. With “claims-made and reported” coverage, there is no coverage after the expiration date of the policy, other than short periods of time that may be provided in which to report a claim, as discussed *supra*.

If a lawyer is retiring and leaving the practice of law, entering government service, changing law firms, in a law firm that merges with another firm, in a firm that dissolves or otherwise qualifies, and desires to have coverage for any claims arising from acts, errors or omissions during the time they practiced and were covered under an applicable policy, “tail insurance” needs to be purchased to extend the period of time to report such claims. Otherwise, at the expiration of the policy, there is no longer coverage.

VI. WHEN MIGHT I PURCHASE “TAIL INSURANCE”?

LAWYER LEAVES LAW FIRM FOR OTHER EMPLOYMENT

If lawyer leaves the law firm, perhaps to become a judge, enter government service or some other employment and the law firm remains an ongoing entity, the lawyer is *usually covered as a former member or employee of the firm for services rendered while with the firm*, if the firm retains its claims-made coverage. The risk here is that if after the lawyer leaves the law firm and the firm later divides or dissolves and does not buy “tail insurance” for the

firm upon its termination, then there may be no coverage for the lawyer for any claim made thereafter.

The departing lawyer may have the option to buy an “**Individual Tail**” when leaving the law firm. This option may be available when a lawyer is leaving private practice and the coverage is conditional upon there being no other coverage to respond to a claim against the lawyer.

LAWYER LEAVES ONE FIRM AND JOINS ANOTHER FIRM

In this situation, a lawyer will want to have coverage for claims arising from acts, errors or omissions of the lawyer prior to joining the new firm and the date of that firm’s current claims made and reported policy. This is sometimes referred to as “Career Coverage.” Such coverage may be limited as in most cases, the new firm’s insurance carrier will NOT agree to provide coverage for those claims.

The lawyer should carefully check if the new firm’s insurance carrier will provide this coverage. Some carriers will offer prior acts coverage under a current policy, if there was prior claims made coverage and there are no circumstances that impair offering the coverage. The new firm may not wish to cover “prior acts” of a lawyer for which the firm has no exposure.

Note: Prior Acts Coverage refers to a period going back in time for which a claims-made policy will cover claims made arising from acts or omissions that occurred back in time. This term generally has the same meaning as the “retro date” or retroactive date.

If the lawyer is not able to purchase prior acts coverage under the new firm’s policy, the lawyer going to the new firm may be able to purchase “tail insurance” when leaving the former firm.

LAWYER IS IN A FIRM THAT DISSOLVES

If the law firm is dissolved, tail coverage should be considered at the time the firm breaks up. Be aware that “tail insurance” is usually available in relation to a previously issued claims made

and reported policy and NOT as a “stand alone” policy. If a lawyer from the dissolving firm is continuing to practice, the lawyer will want to discuss how this impacts current claims made and reported coverage.

LAWYER RETIRES AND LEAVES THE PRACTICE OF LAW, BECOMES DISABLED OR IS DECEASED

For a lawyer retiring and leaving the practice of law, or who becomes disabled or is deceased, the purchase of “tail insurance” should be considered.

VII. CAN I PURCHASE “TAIL INSURANCE” WHILE I WIND UP MY PRACTICE?

“Tail insurance” only extends the period in which a claim may be reported. “Tail insurance” does not cover any active practice of law.

To purchase “tail insurance” a lawyer should have NO ACTIVE CASES, CLIENTS OR MATTERS. If a lawyer is not actively practicing as many hours or winding down the practice, it may be possible to purchase a part-time policy. This should be carefully discussed as it may impact purchase of the “tail” policy in the future.

VIII. CAN “TAIL” COVER TIMES WHEN I DID NOT HAVE INSURANCE?

Most insurers will not cover claims arising from a period of time when a lawyer practiced “bare” or without lawyers’ professional liability insurance. There is no coverage generally for such time periods under claims made and reported policies or under “tail” coverage.

IX. HOW EXPENSIVE IS “TAIL INSURANCE”

The cost of “tail” coverage should be discussed with your Underwriter. Generally, it is a multiple of your current policy

premium, determined by the number of years you decide to have the “tail” coverage.

The lawyer may want to consider the option of different limits of liability than the expiring policy, if available. Careful consideration of the potential impact of this must be given.

The limits of liability for “tail” coverage generally are reduced by any payments made under the current policy to which the extending reporting coverage or “tail” is appended. Note: OBLIC is one of the few companies that will reinstate the full limit of liability under a tail.

X. OTHER CONSIDERATIONS

“Tail” insurance can provide “peace of mind” that the lawyer will have continuing coverage for potential claims made and reported after retirement or other career changes. It can provide a measure of protection for the assets of the lawyer.

Be aware that Sale of Practice agreements often require that the lawyer maintain legal malpractice insurance. If the lawyer is retiring and leaving the practice of law, this could mean purchase of “tail insurance.”

XI. THE FINAL WORD

Any questions about “tail insurance” should be discussed with the insurance carrier providing the lawyers professional liability insurance. The lawyer should work with their Agent or Underwriter to learn how that carrier’s “tail insurance” works, the options available and the premium involved. This is an important issue which should be given adequate time and consideration. If this is something you are thinking about, please contact your lawyers’ professional liability insurance carrier soon!