

UNDERSTANDING YOUR INSURANCE COVERAGE

Your insurance coverage can be broken down into the following elements:

- The Application
- The Declaration Sheet
- The Insurance Policy, composed of:
 - Definitions
 - Coverage Agreements
 - Exclusions
 - Defense and Settlement Provisions
 - Limits of Liability
 - Conditions
- Endorsements

Only those elements contained in the insurance policy itself make up the insurance "contract." The application must, in some way, be attached to the policy before it is considered an official part of the policy. However, many companies today expressly state that the application will be included as part of the insurance contract.

Insurance contracts are usually contracts of "adhesion." In other words, because the insurance company dictates the terms of the contract, in a dispute regarding coverage you, the insured, will be looked upon more favorably than the insurance company.

The wording in the insurance policy itself is intended to provide protection for the insurance company and to eliminate loopholes in coverage. This does not necessarily mean that coverage disputes will be adjudicated in favor of the insurance company. Policy wording is open to interpretation by the courts.

Each aspect of your policy coverage is discussed below.

The Application

In the application, you provide information about yourself and your practice. It is extremely important to complete all of the application; don't leave anything blank. Be truthful. The application often becomes part of the policy; if you withhold relevant information, the company may have grounds for voiding your policy. If you encounter a broker who advises you to withhold information, get another broker.

If you have "high-risk" activities or claims and fear that these may preclude coverage, do not succumb to the temptation to avoid giving the underwriter complete information. The more information you give the underwriter, the better he or she can evaluate the risk and charge you a fair price. Cast your explanation in terms that show the underwriter why he or she should not be afraid to insure you. In other words, help the underwriter find a way to provide coverage, not decline it.

Disclose all past claims and explain any extenuating circumstances, mitigating factors, and remedies taken. Demonstrate to the underwriter an awareness of the problem and describe fully all steps you have taken to solve it. The rule of thumb should be "the more, the better."

For a list of questions typically included on the application, see the checklist *How to Fill Out an Insurance Application*.

The Declaration Sheet

The declaration sheet outlines the terms of coverage, specifies the beginning and end of the policy period, states your limits of liability on a per claim and aggregate annual basis, and specifies your deductible (either per claim or annual). The "Named Insured," which is identified on the Declaration Sheet, will be further defined in the insurance policy itself.

If the policy includes coverage for "prior acts" (that is, coverage for acts that occurred prior to the policy period), the date on which the prior acts coverage is effective (the "retroactive date") will also be stated on the Declaration Sheet. If not, look for an attached endorsement that will provide the policy's specific retroactive date.

The Insurance Policy

The insurance policy itself:

- defines terms used in the policy ("Definitions");
- specifies for what services, activities or actions coverage applies ("Coverage Agreements");
- states specific activities that are not covered ("Exclusions");
- explains your and the company's rights regarding settlement, such as whether or not your consent is required to settle and who has the right to select defense counsel ("Defense and Settlement Provisions");
- states what and how the policy will pay ("Limits of Liability"); and
- stipulates certain conditions to coverage ("Conditions").

Each policy is written differently, and the items listed above may appear in different locations with different headings in each policy. However, by reading the detailed descriptions below, you should be able to locate them no matter where they are found within a policy.

Definitions. The definitions describe for who coverage is provided. Terms to look for include:

- **Named Insured.** The "Named Insured" is usually defined as the partnership, professional corporation or individual names on the Declaration sheet. Other lawyers covered by the policy are usually listed as "additional Insures," or simply "Insures." Make sure that you have coverage for everyone who should be covered and for acts on behalf of the firm (Named Insured) or without such a limitation.
- **Predecessor Firms.** If the term "predecessor firms" is included in the definitions, coverage applies to any predecessors of the existing firm.
- Former lawyers, partners, and shareholders.
- Current lawyers, partners, and shareholders.
- Future lawyers, partners, and shareholders.
- Former, current, or future non-attorney employees.
- Attorneys serving in an "Of Counsel" capacity.
- Heirs, executors, administrators, legal representatives, and assigns of the insured.

Coverage Agreements. Services, activities or actions that may be covered include:

- professional services as an attorney;
- services as a notary public;
- services as a title agent (sometimes by a special endorsement to the policy);
- an attorney or non-attorney who causes personal injury;
- an attorney acting as trustee or executor; and
- pre-or post-judgement interest, appeal bonds, and related costs.

In addition, the policy may specify the following coverage:

- All prior acts of the firm and all members of the firm, including employees, when the insured, prior to the policy period, had not notified any previous insurer of any act and the insured had no reason to believe a breach of professional duty had occurred;
- Claims made and reported no later than 60 days after the policy terminated;
- Claims first made after the expiration of the policy, providing that the insured;
 - (1) had reasonable knowledge that a wrongful act occurred and a claim might be made and
 - (2) reported the suspected wrongful act to the insurer during the policy period;
- An optional extended reporting period (additional coverage for claims reported after the expiration of the policy for errors committed within the policy period), usually purchased within 30 days of the policy's expiration for a specific time period and for an additional premium; and
- An optional retired or non-practicing attorney's extended reporting period

Exclusions. Whereas the coverage agreements provide coverage, the exclusions take it away. If an activity is in the exclusions section of the policy, you do not have coverage for that activity, no matter what the other sections of the policy state. It is up to the company if a defense (with no obligation to pay on behalf of) will be provided.

Each company's policy differs, so it is extremely important to examine exclusions carefully. Listed below are exclusions sometimes found in professional liability insurance policies:

- dishonest acts
- fraudulent acts
- criminal acts
- malicious acts

(For the four categories above, however, coverage is usually afforded to innocent parties).

- vicarious liability (liability acquired by law or by contract for the acts, errors or omissions of others)
- claims made by or against a business enterprise owned or controlled by an insured (refers to claims by or against the business itself)
- claims arising out of or in connection with a business enterprise owned or controlled by an insured (refers to third-party claims)
- an attorney's activities as an officer, director, etc., of a business not owned or controlled by the insured
- services as a fiduciary under the Employee "Retirement Income Security Act of 1974 (ERISA)
- RICO (Racketeer Influenced and Corrupt Organization Act) claims
- activities as an elected public official
- worker's compensation claims

- advertisers' liability
- loss sustained as a beneficiary or distribute of a trust or estate
- bodily injury or property damage
- real estate claims
- claims by regulatory agencies
- notarization of a signature without the physical appearance of the signatory
- claims involving an insured versus another insured
- discrimination
- sexual harassment
- prior acts (acts committed before the policy period) where the insured had knowledge of or should have foreseen the claim
- investment advice
- securities
- punitive damages
- fines, statutory penalties and sanctions
- business enterprises liable for contamination or pollution of the environment (often contained in an "Endorsement" to the policy)
- loss related to nuclear reaction, radiation or contamination (often contained in an "Nuclear Energy Exclusion" to the policy).

Defense and Settlement Provisions. Issues covered in this section of the policy include:

- whether the insurer has the right to select defense counsel in the event of a claim. The policy language may explicitly state the right of the insurer to select defense counsel (for example, "Selection of defense counsel will be at the prerogative of the Company"). Alternatively, the right to select defense counsel may be implied in the right to defend a claim (for example, "The Company shall have the right and duty to defend any claim");
- whether the insured has a right to select defense counsel (the opposite of the situation above). In this case, however, the insurer may have the right to approve the choice of defense counsel in advance or the right to require the insured to revoke the selection;
- whether the insured's consent is required to settle a claim. If the insured's consent is required, policies often place a limit on what the insurer will pay if the insured refuses to settle.

Limits of Liability. In this section of the policy you will find the following:

- The specific limit of liability of each claim.
- The aggregate liability on a firm basis (the total limit of liability for all claims).
- The per claim deductible (that is, the deductible applies to each of every claim separately) or the aggregate deductible (the total deductible to be paid in a single year). It is possible for a policy to include both types of deductible, when there is a per claim deductible and a ceiling on the total deductible to be paid in a single year. Deductible may also be available for "damages only" which means you pay your deductible only in the event of a settlement (loss) or judgement this type of deductible, also known as a "loss only deductible" may be purchased on a per claim or annual aggregate basis.

- Whether claim expenses (defense costs and other expenses) are included in the limits of liability. Keep in mind that claim expenses are not often included within the limits of liability. The means that the cost of defending a claim, even if the claim is eventually dropped, reduces your limits of liability, effectively shrinking the amount of coverage you actually have.
- Whether the policy provides a "claim expense allowance." This provision, which is still rare, provides an allowance (e.g. \$50,000) for claim expenses, in excess of the deductible, and aggregate for all claims. Using this example, this means that after paying the deductible, you would be allowed \$50,000 in claim expenses before your limits of liability are drawn down to pay for claim expenses.
- Whether two or more claims arising out of a single act or series of acts are considered a single claim. If they are considered a single claim, the policy may state that the policy year in which the first act is reported is considered the claim reporting date.

Conditions. The section of the policy may include:

- a requirement that the insured provide timely notice to the insurer of all claims and potential claims;
- a requirement that the insured assist and cooperate with the insurer (including examination and interrogation by a representative of the insurer, attendance at hearings, depositions and trials, assistance in effecting settlement, securing and giving evidence, and obtaining the attendance of witnesses);
- a provision that, in the event the insurer makes a payment under the policy, the insurer is entitled to any rights the insured has to recover what was paid (subrogation);
- provision of coverage in excess of other available insurance. Since all insurers claim that their coverage is in excess of other coverage, defacto "sharing" arrangements exist by which each company takes a pro rata portion of the coverage when policies overlap;
- provisions regarding the arbitration of claims. Arbitration may be required or permitted, or it may be prohibited without the insurer's consent;
- at least a 30-day notice of cancellation of the policy by insurer.

Endorsements

Endorsements change coverage in some way on a firm-by-firm basis. Insurers use endorsements to change coverage on a selected basis, without changing the policy for everyone. Endorsements can either add coverage (e.g. to include coverage for work as a title agent), change coverage (e.g., to place defense costs within the limits of liability), or limit coverage (e.g., to exclude a specific lawyer from a firm's coverage or to exclude claims resulting from nuclear reaction, radiation or contamination). Typical endorsements exclude coverage for business enterprises liable for contamination or pollution of the environment and for loss due to nuclear reaction, radiation or contamination.

To evaluate specific insurance policies, see the Checklist for Purchasers of Professional Liability Insurance.