The Attorney's Professional Liability Policy: Tools and Techniques to Protect Your Coverage

Seminar Topic: This material provides an in-depth examination of critical areas of concern and litigation within the lawyer's professional liability policy. This seminar is designed to provide a review of the policy for the benefit of a policyholder. This seminar is not designed as a comprehensive review for purposes of insurance coverage litigation. Rather, it is intended to provide a general discussion for non-insurance coverage attorneys.

This material is intended to be a guide for insurance issues in general. As always, if you have any specific question regarding the state of the law in any particular jurisdiction, we recommend that you seek legal guidance relating to your particular fact situation.

The course materials will provide the attendee with the knowledge and tools necessary to identify the current legal trends with respect to these issues. The course materials are designed to provide the attendee with current law, impending issues and future trends that can be applied in practical situations.

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Disclaimer: The views expressed herein are not a legal opinion. Every fact situation is different and the reader is encouraged to seek legal advice for their particular situation.

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After working as a partner in a national insurance law firm, David Roe now provides aggressive, focused representation in insurance coverage, general liability, automobile insurance, rental car insurance and professional liability coverage issues to insurance companies, business and individuals. As author of Illinois Automobile Insurance Law published by Thomson/West, David wrote the book on insurance coverage in Illinois.

From detailed coverage opinions to declaratory actions, David represents clients in Chicago, Illinois, and other states in insurance matters including general liability, car insurance and complex toxic tort litigation involving duty to defend, high limit insurance coverage, allocation and priority of payment issues, ranging from under $1 million to over $600 million.

Clients have included insurance companies, businesses in insurance disputes, attorneys seeking coverage under professional liability policies, individuals with homeowner insurance, automobile insurance, rental car insurance issues, and others facing insurance coverage issues.

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Course Description

This course examines the attorney's professional liability policy; state reporting requirements; attorney liability coverage requirements across the U.S. and professional liability market analysis.

The course discusses how to read the professional liability policy; claims made coverage vs. occurrence coverage; the grant of coverage; coverage for wrongful acts; prior acts coverage and exclusions; the hammer clause and what is a claim?

The course examines the notice requirement under a professional liability policy; how courts apply an objective standard to policy holder knowledge; subjective belief of an abandoned claim and how it may be unreasonable where a policy only requires reasonable foresight; prejudice to the insurance company and when do malpractice claims arise? The course examines how an attorney's side business may jeopardize insurance coverage.

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Course Learning Objectives and Outcomes

This course is designed to provide the following learning objectives:

Participants will explore the insurer and insured relationship created through the contract of insurance.

Participants will learn to recognize the rights and obligations as they pertain to the attorney's professional liability policy.

Participants will explore the attorney's professional liability policy; state reporting requirements; attorney liability coverage requirements across the U.S. and professional liability market analysis.

Participants will learn to read and understand the professional liability policy; claims made coverage vs. occurrence coverage; the grant of coverage; coverage for wrongful acts

Participants will learn and understand prior acts coverage and exclusions; the hammer clause and what is a claim.

Participants will learn and understand the notice requirement under a professional liability policy; how courts apply an objective standard to policy holder knowledge; subjective belief of an abandoned claim and how it may be unreasonable where a policy only requires reasonable foresight.

Participants will learn and understand prejudice to the insurance company and when do malpractice claims arise.

Participants will gain skills to understand how an attorney's side business may jeopardize insurance coverage.

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Timed Agenda

Presenter Name: **David Roe**
CLE Course Title: **The Insurer's Duty to Defend an Insured Under A Commercial General Liability Policy: An Examination of The Policy's Grant of Coverage**

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The Attorney's Professional Liability Policy: Tools and Techniques to Protect Your Coverage

As a professional, a malpractice judgment is collectable against an attorney's own personal assets. The risk to assets may be reduced but, insurance has no value if coverage is lost. It is likely that most attorneys may never read their own malpractice policy; those that do discover an overabundance of nearly incomprehensible clauses or conditions. For example, when does an attorney have knowledge of facts which could reasonably support a claim? It remains undecided what "having knowledge" means and what may "reasonably support a claim." Understanding what is a "claim" and when to provide "notice" will reduce financial exposure and provide a small piece of mind.

Not knowing when to report a claim may jeopardize coverage and put the attorney's own personal assets at risk. CLE seminars can provide invaluable practical education. ApexCLE provides a variety of CLE seminars addressing insurance coverage that provide legal resources and guides for managing a legal practice, understating liability policies and reducing risk. In addition, when there is a change from one insurance company to another, there is the potential for "gaps" in coverage to exist. An in-depth risk analysis combined with a comprehensive policy analysis should be performed whenever there is a change between insurance companies.

Professional Liability Insurance Is Not Required In Illinois But, Reporting Professional Liability Coverage Is Required

In addition to statutes and rules with generally broad application, attorney conduct in Illinois is governed by the Illinois Supreme Court under the Illinois Supreme Court Rules. These include Article VII - Rules on Admission & Discipline of Attorneys, Rule 701 – 799 and Article VIII - Illinois Rules of Professional Conduct of 2010 - Effective January 1, 2010, Rules 1.0 thru 8.5.

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The Illinois Rules of Professional Conduct provide the "mandatory, minimum rules to which attorneys are expected to conform."[1] Essentially they "constitute a safe guide for professional conduct..." [2]

Aside from the rules regarding insurance for professional service corporations and similar entities addressed in detail within Sup. Ct. Rule 721 and 722, (these Rules address minimum insurance limits and are beyond the scope of this presentation) and the rules addressing the Licensing of Foreign Legal Consultants Without Examination within Sup. Ct. Rule 712, in general, there is no requirement that individual attorneys purchase or maintain professional liability insurance.

Rule 756, Registration and Fees provides in part that:

> ***(e) Disclosure of Malpractice Insurance.***
>
> ***(1)Each lawyer, except for those registering pursuant to (a)(2), (a)(3), (a)(5), (a)(6), and (k)(5) of this rule, shall disclose whether the lawyer has malpractice insurance on the date of the registration, and if so, shall disclose the dates of coverage for the policy. The Administrator may conduct random audits to assure the accuracy of information reported. Each lawyer shall maintain, for a period of seven years from the date the coverage is reported, documentation showing the name of the insurer, the policy number, the amount of coverage and the term of the policy, and shall produce such documentation upon the Administrator's request.***
>
> ***(2) Every other year, beginning with registration for 2018, each lawyer who discloses pursuant to***

[1] In re Yamaguchi, 118 Ill.2d 417, 515 N.E.2d 1235, 1239, 113 Ill.Dec. 928 (Ill.1987)

[2] Commission on Professionalism, Professionalism CLE Guidelines, http://www.ilsccp.org/guidelines

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> ***paragraph (e)(1) that he or she does not have malpractice insurance and who is engaged in the private practice of law shall complete a self-assessment of the operation of his or her law practice or shall obtain malpractice insurance and report that fact, as a requirement of registering in the year following. The lawyer shall conduct the self-assessment in an interactive online educational program provided by the Administrator regarding professional responsibility requirements for the operation of a law firm. The self-assessment shall require that the lawyer demonstrate an engagement in learning about those requirements and that the lawyer assess his or her law firm operations based upon those requirements. The self-assessment shall be designed to allow the lawyer to earn four hours of MCLE professional responsibility credit and to provide the lawyer with results of the self-assessment and resources for the lawyer to use to address any issues raised by the self-assessment. All information related to the self-assessment shall be confidential, except for the fact of completion of the self-assessment, whether the information is in the possession of the Administrator or the lawyer. Neither the Administrator nor the lawyer may offer this information into evidence in a disciplinary proceeding. The Administrator may report self-assessment data publicly in the aggregate.***

This provision requires only that attorney disclose and maintain records regarding professional liability coverage. This provision does not require that an attorney obtain liability coverage. Consequently, an attorney may elect to purchase coverage or "go bare" and risk their personal assets in the event of a malpractice claim.

In the event an attorney does not have liability coverage, they are required to take a four hour PMBR Self-Assessment Course. This course qualifies for continuing legal education credit. The course covers:

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- The Intersection of Technology & Ethics: Protecting Client Information
- Conflicts of Interest: Ensuring Undivided Loyalty
- Fees, Costs & Billing Practices: Getting Paid Ethically
- Attorney-Client Relationships: Effectively Connect and Communicate with Clients
- Client Trust Accounts
- Attorney Wellness
- Civility & Professionalism
- Diversity & Inclusion: Culturally-Competent Lawyering

Attorney Liability Coverage Requirements Across the U.S.

Several states now require attorneys to carry legal malpractice insurance. A recent analysis of attorney professional liability insurance found a steady shift toward liability coverage and advocated for more insurance. [3] Twenty-four states require attorneys to disclose whether they have professional liability insurance. [4]

By 2019, multiple states examined whether to require malpractice insurance. Oregon and Idaho required insurance and California, Washington, Nevada, New Jersey, and Georgia studied the issue of mandatory insurance coverage for attorneys. [5]

It would appear that the trend now is to require either disclosure or mandatory professional liability coverage for attorneys.

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[3] Susan S. Fortney,Mandatory Legal Malpractice Insurance: Exposing Lawyers' Blind Spots, 9 St. Mary's Journal on Legal Malpractice & Ethics 190 (2019). Available at: https://commons.stmarytx.edu/lmej/vol9/iss2/1

[4] Susan S. Fortney,Mandatory Legal Malpractice Insurance: Exposing Lawyers' Blind Spots, 9 St. Mary's Journal on Legal Malpractice & Ethics 190, 225 (2019). Available at: https://commons.stmarytx.edu/lmej/vol9/iss2/1

[5] Susan S. Fortney,Mandatory Legal Malpractice Insurance: Exposing Lawyers' Blind Spots, 9 St. Mary's Journal on Legal Malpractice & Ethics 190, 193 (2019). Available at: https://commons.stmarytx.edu/lmej/vol9/iss2/1

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Professional Liability Market Status In Illinois

As reported by the Illinois Department of Insurance, The Illinois lawyers' professional liability insurance market has followed the professional liability insurance over the past few years. In 1998, 95 lawyers' professional liability policies were written through the surplus lines market. These 95 policies accounted for $3.1 million of premiums, making the surplus lines market 4th in overall premiums for this coverage. Lawyers' professional liability is one of the smallest markets in the state.

In 2006, Continental Casualty Company was the top writer of lawyers' professional liability insurance, writing in excess of $21.7 million of direct written premium. The Underwriters at Lloyds London wrote approximately $20.8 million and the ISBA followed with premium in excess of $16.4 million. The next seven companies each wrote in excess of $1 million in premium. In 2006, the surplus lines market wrote 152 policies and $11,031,596 in premium, representing an increase of 25 policies and just over $ 4 million in premium from 2005. In total, the premium market for lawyers' professional liability insurance was over $74 million. By comparison, the homeowner market in Illinois was $2.2 billion and auto market was $5.5 billion in 2006.[6]

The lawyers' professional liability market is dominated by a few companies and is one of the markets watched closely by the Illinois Department of Insurance.[7]

[6] http://insurance.illinois.gov/Reports/ccreport/CC_AnnualRpt08.pdf

[7] http://insurance.illinois.gov/Reports/ccreport/CC_AnnualRpt08.pdf

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Top Ten Attorney Professional Liability Insurance Companies, 1998 through 2020

1998	2006 Market
1. Continental Casualty Co 2. Underwriters at Lloyd's London 3. National Union Fire Insurance Company of Pittsburgh 4. Coregis Insurance Company 5. National Casualty Company 6. First Reinsurance Company of Hartford 7. St. Paul Insurance Company of Illinois 8. Evanston Insurance Company 9. American Zurich Insurance Company 10. American Home Assurance Company	1. Continental Casualty Co 2. Underwriters At Lloyds London 3. ISBA Mutual Insurance Co 4. Chicago Insurance Co 5. American Guarantee & Liability Insurance 6. Executive Risk Ind Inc 7. Great American Insurance Co 8. General Star National Insurance Co 9. St Paul Fire & Marine Insurance Co 10. Medmarc Casualty Insurance Co

Almost 20 years later, in 2017, the market was:

Lawyers Professional Liability Insurance Companies[8]	**2017 Market**
Illinois State Bar Assn Mut Insurance Company	29.3%
Continental Casualty Company	21.4%
Underwriters at Lloyds London	18.8%

[8] http://insurance.illinois.gov/reports/ccreport/CC_AnnualRpt19.pdf

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Great Divide Insurance Company	5.6%
AXIS Insurance Company	5.0%
Minnesota Lawyers Mutual Insurance Company	3.5%
Argonaut Insurance Company	2.2%
American Zurich Insurance Company	2.2%
Illinois National Insurance Company	2.0%
Aspen American Insurance Company	1.7%

Around the world, the majority of jurisdictions require attorneys to carry malpractice insurance, many with liability limits of 1 million dollars in the local currency. [9]

Reading The Professional Liability Policy Is Critical

One key to understanding an attorney's notice obligation under a policy is to examine the notice provisions within a policy. There are several notice requirements within a typical malpractice policy that require the attorney to inform the insurance company upon the happening of an event or the discovery of facts that may lead to a claim. The failure to carry out these obligations may jeopardize policy coverage. While the receipt of a summons and complaint for malpractice presents a seemingly obvious example of a time to provide notice, there are many subtle facts that may indicate a need to provide notice of a claim to an insurance company before a complaint is filed.

[9] Susan S. Fortney,Mandatory Legal Malpractice Insurance: Exposing Lawyers' Blind Spots, 9 St. Mary's Journal on Legal Malpractice & Ethics 190, 197 (2019). Available at: https://commons.stmarytx.edu/lmej/vol9/iss2/1

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A typical malpractice policy provides coverage for damages due to a claim arising out of any act, error or omission resulting from rendering or failing to render professional services. Malpractice policies are issued on a "claims made" basis. A claims made policy is characterized by coverage for negligent acts or omissions only if the acts are discovered during and brought to the attention of the insurer within the policy term.

Notice to the insurer becomes a substantial requirement under the policy. Policy coverage is triggered when two events occur: (1) the claim is made during the policy period, and (2) the claim is reported during the policy period. The notice requirement in an insurance policy enables an insurer to make a timely and thorough investigation of a claim and is considered a valid condition precedent to coverage.

For a variety of reasons ranging from embarrassment to fear of a premium increase, many attorneys are reluctant to report a potential claim before suit is received. This may prove to be a mistake. After a policy is issued, there are two primary notice requirements within a malpractice policy. An attorney is normally required to notify the insurance company when they have knowledge of facts which could reasonably support a claim and to give immediate written notice of the claim to the insurance company.

Claims Made Coverage Vs Occurrence Coverage

Liability policies are generally issued under one of two difference coverage options, claims made or occurrence. One way to describe the difference is in reference to the specific date of the injury.

UNDER A CLAIMS MADE POLICY, the date of injury is not material; coverage is triggered from a claim arising during the policy period and reported during the policy period regardless of the date the injury.

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UNDER AN OCCURRENCE POLICY, the date of injury is controlling; coverage is triggered from events occurring (an "occurrence") during the policy period regardless of the date that the occurrence is reported to the insurance company.

The standard professional liability policy provides coverage on a "claims made" basis. The date of the occurrence is not directly material to the determination of coverage under the policy. A claims made policy is characterized by coverage for negligent acts or omissions only if the acts are discovered during and brought to the attention of the insurer within the policy term.[10]

The significant difference between a claims made policy and an occurrence policy is in the risk insured. In the occurrence policy, the risk is the occurrence itself. In the claims made policy, the risk insured is the claim brought by a third party against the insured.[11]

A professional liability policy will often include some form of extended reporting period or the option to purchase an extended reporting period which allows for the reporting of a claim within a set period of time following the policy term.[12]

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[10] Graman v. Continental Casualty Co., 87 Ill. App. 3d 896, 899, 409 N.E.2d 387 (1980), cited in Continental Casualty Co. v. Coregis Ins. Co., 738 N.E.2d 509 (Ill. App. 1 Dist., 2000).

[11] General Insurance Co. of America v. Robert B. McManus, Inc., 272 Ill. App. 3d 510, 514, 650 N.E.2d 1080 (1995), citing Central Illinois Public Service Co. v. American Empire Surplus Lines Insurance Co., 267 Ill. App. 3d 1043, 1048, 642 N.E.2d 723 (1994).

[12] Graman v. Continental Cas. Co., 87 Ill.App.3d 896, 409 N.E.2d 387 (Ill.App. 5 Dist., 1980).

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Claims Made Coverage Vs Occurrence Coverage Comparison Chart

	Claims Made Coverage	Occurrence Coverage
Policy Limits	The insured can select a limit per **claim** (ie, $1,000.000 per claim) and an aggregate under the policy.	The insured can select a limit per **occurrence** (ie, $1,000.000 per occurrence) and an aggregate under the policy.
Trigger of Coverage	**The date reported. The date the "claim" is made.** The policy is triggered by events that are reported during the policy period regardless of the date of injury ("occurrence").	**The date of injury. The date of "occurrence."** The policy is triggered by an occurrence that takes place during the policy period regardless of the date it is reported.
Prior Acts Coverage **(Policy Retroactive Date)**	If previous coverage was maintained, each policy term may provide coverage for claims that arise from events that took place before the inception of the present policy term.	Prior Acts Coverage is not required because occurrence coverage exists regardless of the date that the occurrence is reported to the insurance company. The policy does not cover "acts" ie occurrences that took place prior to the inception date of the policy.
The Extended Reporting Period **(aka "Tail Coverage")**	The extended reporting period allows the reporting of an event after the termination of the policy period. It is unrealistic to assume that a claim that arises on the last day of the period could be reported immediately. Every policy normally contains an extended reporting period for 60 – 90 days. Additional extensions are available (usually at additional cost) and are advantageous if an attorney is retiring.	No extended reporting period is required because an occurrence policy is, in effect, an unlimited extended reporting period policy. ie, a claim may be reported many years after the end of the policy period.

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What The Attorney Bought – The Grant of Coverage

A typical lawyer's professional liability policy will provide coverage as set forth within the grant of coverage. This provision sets forth the general scope of insurance and the damages insured. It will typically state the defense duty and reference terms that are defined at another location within the policy. It may state as follows:

We will pay on behalf of an insured "damages" and "claims expenses" for which "claim" is first made during the "policy period" and reported within the "policy period".

Such "damages" must arise out of a "wrongful act". The "wrongful act" must occur on or after the retroactive date stated in the Schedule, if any.

We will have the right and duty to defend any "suit" against an insured seeking "damages" to which this insurance applies, even if any of the allegations of the "claim" or "suit" are groundless, false or fraudulent.

This provision grants coverage for a "wrongful act" and provides that the insurance company is obligated to defend (the duty to defend) any suit seeking damages covered under the policy.

When a policy specifically defines "wrongful act," courts are not at liberty to search for other possible definitions in order to create an ambiguity where none exists.[13]

Negligence in a legal malpractice action involves an attorney's breach of his duty to represent his client in a prior case, and the analysis of damages for such negligence is governed by the "attorney's conduct and its consequences.[14] The damages are pecuniary injury to an intangible property interest caused by the

[13] Illinois State Bar Ass'n Mut. Ins. Co. v. Cavenagh, 2012 IL App (1st) 111810, ¶ 17, 983 N.E.2d 468, 476

[14] Illinois State Bar Ass'n Mut. Ins. Co. v. McNabola Law Group, P.C., 2019 IL App (1st) 182386, ¶ 24. NOT REPORTED as of Dec. 19, 2019.

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lawyer's negligent act or omission. In other words, a client must demonstrate that he or she has sustained a monetary loss proximately resulting from the attorney's negligent conduct. [15]

Coverage for Wrongful Acts

A professional liability policy usually only provides coverage for a "wrongful act" or "error or omission" in rendering or failure to render professional services. Each policy will likely contain a different definition of a "wrongful act" or may even avoid the term entirely and state its coverage in terms of "legal services" or even a "negligent act."

A broad definition favors the policy holder. A policy may define a "wrongful act" as an error, omission or negligent act including a personal injury offense. These may include any actual or alleged "wrongful act" committed or attempted, solely in the performance of or failure to perform "professional services." The collection of defined terms is as varied as the number of insurance companies offering coverage. The policy will typically exclude all damages based upon a claim of bodily injury or property damage.

Therefore, it is important for each attorney to read and understand exactly what is covered under their policy. It is only through a review of the definition of a wrongful act that a policyholder will fully appreciate the coverage afforded under their policy.

Prior Acts Coverage and Exclusions

Often, a policy will contain a specific endorsement expanding or limiting coverage for prior acts. A Prior Acts Exclusion may limit coverage before a specific point in time such as:

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[15] Illinois State Bar Ass'n Mut. Ins. Co. v. McNabola Law Group, P.C., 2019 IL App (1st) 182386, ¶ 24. NOT REPORTED as of Dec. 19, 2019.

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This policy excludes coverage for damages and claim expenses resulting from claims brought against any of the Insureds listed below based on an act or omission that occurred or is alleged to have occurred prior to the dates listed for each of the Insureds.

Insured	*Prior Acts Exclusion Date*
John Smith	*05/01/2018*

This clause both expands coverage to include prior acts back to May 1, 2018 and also limits coverage by excluding claims arising from acts before the stated date.

The Hammer Clause

One clause to examine is the option to settle a claim under the policy. This is known as the "consent to settlement clause" or the "blackmail settlement clause." This clause in a professional liability insurance policy requires an insurance company to seek the insured's approval before settling a claim.

If the insured refuses to settle the case, the Hammer Clause may force the insured to settle the case. Under the Hammer Clause, the insurer's exposure to the loss is limited to the amount that would have been paid if the insured had accepted the settlement. In other words, if an insured does not accept the settlement offered by the insurance company, then the insured is personally responsible for any additional costs if a judgment is entered over the amount of the settlement.

Sample Hammer Clause

We may investigate and solicit settlement offers for any "claim." No offer to settle a "claim" will be accepted without your written consent.

If we recommend that you accept the settlement offer, and you are not willing to accept the settlement, our liability for the "claim" shall not exceed the

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amount we would have paid for "damages" and "claim expenses" incurred up to the time we made the recommendation.

What is a "Claim"?

It is critical for an attorney/policyholder to understand what constitutes a "Claim" under a professional liability policy. Knowing how a claim is defined within a policy is perhaps the single most important piece of information an attorney learns from their policy. If an attorney were to read only one section of their policy, they would be wise to read the definition of a "claim." With this knowledge, the attorney has the tools to decide when to examine the policy further or provide notice of a claim to the insurance company.

A "claim" will likely have several alternative definitions that are operative at the same time such as a demand communicated to the attorney for damages for professional services, a lawsuit served on the attorney seeking damages for professional services; or, an act, error or omission by an attorney which has not resulted in a demand for damages but which an insured knows or reasonably should know, would support such a demand; the last definition posing the most difficult interpretation. Policies may provide slightly different definitions but, generally define a "Claim" as

1) A demand communicated to the insured for damages or professional services;

2) A lawsuit served upon the insured seeking damages; or

3) An act, error or omission by any insured which has not resulted in a demand for damages but which an insured knows or reasonably should know, would support such a demand.

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Depending on the jurisdiction, a policyholder may not be required to provide notice of every possible event out of which coverage may arise, but only of claims made."[16] Whether a claim is within a policy's coverage is determined by the nature of a third party's claim.[17]

The Notice Requirement Under a Professional Liability Policy

Each policy and fact situation may present a different outcome. The important point to remember is that in a claims made policy, quick and written notice of a claim preserves the coverage while delay and procrastination jeopardizes coverage paid for by the attorney. A review of a professional liability policy with a goal of learning the definition of a "claim" and notice requirement will preserve coverage and protect an attorney's personal assets.

A professional liability policy almost always requires notice of a "Claim" within the policy period or within any extended reporting period. Notice provisions may vary between policy but, generally require notice of "Claims" and also notice of any disciplinary actions brought against the attorney. A policy will often require notice pursuant to a provision similar to the following:

> In the event of a "Claim," disciplinary action, disciplinary investigation or notice to appear before any review board, the policyholder must:
>
> (1) Give immediate written notice to the insurance company; and
> (2) Forward every demand, notice, summons or other communication received by the attorney or his or her representative to the insurance company.

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[16] University of Illinois v. Continental Casualty Co., 234 Ill. App. 3d 340, 364, 606 N.E.2d 1235 (Ill.App., 4 Dist., 1992).

[17] . U.S. Gypsum Co. v. Admiral Insurance Co., 268 Ill. App. 3d 598, 624,, 648 N.E.2d 1220 (Ill.App., 1 Dist., 1994); Dayton Independence School District v. National Gypsum Co., 682 F. Supp. 1403, 1406 (E.D. Tex. 1988), cited in Continental Casualty Co. v. Coregis Ins. Co., 738 N.E.2d 509 (Ill. App. 1 Dist., 2000).

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A notice requirement in an insurance policy enables an insurer to make a timely and thorough investigation of a claim.[18] Notice provisions in insurance policies are considered valid conditions precedent to coverage and not mere technical requirements.[19] Although the issue of whether notice was reasonable or sufficient is usually a question of fact, it may be a question of law when the facts are not in dispute.[20]

A claims made policy imposes a more rigid notice requirement, because it links coverage to the claim and notice rather than to the injury. The timing of a suit and notice determines which policy applies--if any does.[21]

Courts look to the language of the particular policy's claims made provision, which indicates the degree of awareness on the insured's part which will constitute "notice."[22]

These time qualifications control the coverage provision; they state there will be no coverage unless they are complied with. In *Graman v. Continental Cas. Co.*,[23] the court found that the insurer was not required to defend or indemnify an insured under a claims made policy because the insurer was not notified of the

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[18] Employers Insurance of Wausau v. Ehlco Liquidating Trust, 292 Ill.App.3d 1036, 1047, 227 Ill.Dec. 159, 687 N.E.2d 82 (Ill.App. 1 Dist., 1997).

[19] See Kerr v. Illinois Central R.R. Co., 283 Ill.App.3d 574, 219 Ill.Dec. 81, 670 N.E.2d 759 (Ill.App. 1 Dist., 1996).

[20] Employers Insurance of Wausau v. Ehlco Liquidating Trust, 292 Ill.App.3d 1036, 1047, 227 Ill.Dec. 159, 687 N.E.2d 82 (Ill.App. 1 Dist., 1997).

[21] Home Ins. Co. of Illinois v. Adco Oil Co., 154 F.3d 739 (C.A.7, Ill., 1998).

[22] Gibraltar Cas. Co. v. A. Epstein and Sons, Intern., Inc., 562 N.E.2d 1039, 206 Ill.App.3d 272 (Ill. App. 1 Dist., 1990); Stiefel v. Illinois Union. In Stiefel v. Illinois Union Ins. Co., 452 N.E.2d 73, 116 Ill.App.3d 352 (Ill. App. 1 Dist., 1983); Hoyt v. St. Paul Fire & Marine Insurance Co., 607 F.2d 864 (9th Cir., 1979); Bensalem Township v. Western World Insurance Co. 609 F.Supp. 1343 (D.C.Pa., 1985).

[23] Graman v. Continental Cas. Co., 87 Ill.App.3d 896, 409 N.E.2d 387 (Ill.App. 5 Dist., 1980).

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claim until more than three years after the expiration of the policy at issue. The insured must notify the insurer of such a claim within the time constraints listed in the policy or there is no coverage for the acts, omissions or negligent acts of the insured, no matter when they occurred.[24]

Although rather rigid in a claims made policy, there is some leeway in a general liability policy that requires immediate notice of a suit or claim. Under Illinois law, a provision calling for an insured to provide notice "immediately" under an occurrence policy requires notification within a reasonable time.[25] Whether reasonable notice was given by the insured depends on the facts and circumstances of the particular case.[26]

Coverage under a typical claims made policy with no extended reporting period is triggered when two events occur:

(1) the claim must be made during the policy period, and

(2) the claim must be reported during the policy period.

Unless these two conditions occur, no coverage is provided under a claim made and reported policy.[27] An insurer may raise the defense of untimely notice when an insured fails to notify the insurance company of a claim corresponding

[24] Graman v. Continental Cas. Co., 87 Ill.App.3d 896, 409 N.E.2d 387 (Ill.App. 5 Dist., 1980).

[25] Zurich Insurance Co. v. Walsh Construction Co. of Illinois, 352 Ill.App.3d 504, 512, 287 Ill.Dec. 834, 816 N.E.2d 801 (2004), as cited in IMC Global v. Continental Ins. Co., --- N.E.2d ----, 2007 WL 4562888, (Ill.App. 1 Dist., 2007).

[26] Northbrook Property & Casualty Insurance Co., 313 Ill.App.3d at 465, 246 Ill.Dec. 264, 729 N.E.2d 915 (Ill.App., 1 Dist., 2000).

[27] Continental Cas. Co. v. Cuda, 715 N.E.2d 663, 306 Ill.App.3d 340 (Ill. App. 1 Dist., 1999).

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to an earlier policy period under a claims made policy. The subsequent policy is not triggered and the insured is not entitled to coverage under the later policy.[28]

Courts Apply an Objective Standard to Policy Holder Knowledge

A policy may define a claim broader than an allegation or formal demand. A claim may also include "an act, error or omission by any insured which has not resulted in a demand for damages but which an insured knows or reasonably should know, would support such a demand."

In order to establish that an insured could have reasonably foreseen circumstances which might result in a claim, a court will normally apply an objective, rather than a subjective, evaluation of the facts. [29]

In *Ratcliffe v. International Surplus Lines Ins. Co.*,[30] an application misrepresentation case, the plaintiffs brought an action seeking a declaration of the scopes of coverage under two claims made professional liability policies underwritten by International Surplus Lines Insurance Company. The trial court determined that plaintiffs had made a material misrepresentation because they had not disclosed a dispute with a construction company in their application. The plaintiffs argued on appeal that the trial court erroneously applied an objective standard in determining whether a misrepresentation occurred.

The plaintiffs contended that they honestly and subjectively believed that no circumstances existed at the time of application that might have given rise to a claim. The court in *Ratcliffe* relied upon *Evanston Insurance Co. v. Security*

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[28] Continental Cas. Co. v. Cuda, 715 N.E.2d 663, 306 Ill.App.3d 340 (Ill. App. 1 Dist., 1999).

[29] Ratcliffe v. International Surplus Lines Ins. Co., 194 Ill.App.3d 18, 550 N.E.2d 1052 (Ill. App. 1 Dist., 1990); Gibraltar Cas. Co. v. A. Epstein and Sons, Intern., Inc., 562 N.E.2d 1039, 206 Ill.App.3d 272 (Ill. App. 1 Dist., 1990).

[30] Ratcliffe v. International Surplus Lines Ins. Co., 194 Ill.App.3d 18, 550 N.E.2d 1052 (Ill. App. 1 Dist., 1990).

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Assurance Co.,[31] and considered the facts known to the plaintiffs at the time of the policy application. By applying an objective standard, the *Ratcliffe* court determined that the facts known to the plaintiffs were circumstances that might have given rise to a claim against them and affirmed the trial court on the issue of material misrepresentation.

In *Evanston Insurance Company v. Security Assurance Company*,[32] the court considered an errors and omissions policy application question asking whether the applicant knows of "any fact, circumstance or situation indicating the probability of a claim against which indemnification is or would be afforded by the proposed insurance." The court concluded that the question "calls for no judgmental or subjective evaluation, but in traditional objective language requires the disclosure of any facts indicating the probability of a covered claim."

In *Zuckerman v. National Union Fire Ins. Co.*,[33] the insured had been served with a summons and complaint three months before his policy expired but did not give notice of the claim until ten months after the policy expiration date. The insurance company denied coverage upon several policy provisions that limited the insurer's liability to only those claims that were reported to the company during the policy period.

The insured did not report the claim because he viewed it as minimal and believed that he could settle it within his deductible. The court conducted an extensive review of opinions throughout the country and found little support for the claim that the policy notification requirement could be extended. It held that the insured failed to provide immediate notice as required by the policy. Further, the court opined that "an extension of the notice period in a "claims made" policy constitutes an unbargained-for expansion of coverage, gratis, resulting in the

[31] Evanston Insurance Co. v. Security Assurance Co., 715 F.Supp. 1405 (N.D.Ill.1989).

[32] Evanston Insurance Co. v. Security Assurance Co., 715 F.Supp. 1405 (N.D.Ill.1989).

[33] Zuckerman v. National Union Fire Ins. Co., 100 N.J. 304, 495 A.2d 395 (N.J., 1985).

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insurance company's exposure to a risk substantially broader than that expressly insured against in the policy."[34]

Allegations within a complaint of breach of fiduciary duty and violations of the Rules of Professional Conduct may be sufficient to put an attorney on notice of a malpractice claim.[35]

A similar issue was reviewed ins *Gibraltar Cas. Co. v. A. Epstein and Sons, Intern., Inc*.[36] But, this decision turned on specific policy language requiring actual knowledge. In *Gibraltar*, a claim arose due to roof repair work. The insured received a letter in July from the claimant's attorney prior to the effective date of the policy, "indicating that a preliminary investigation revealed that [claimant] had been "substantially damaged" due to [the policy holder's] "negligence, nonfeasance and malfeasance." The court held that the letter did not constitute notice of a claim sufficient to void the policy. The claimant's attorney sent a second letter in September stating that suit would be file. The policy holder provided notice of the claim to its insurance company.

The policy application used the term "for claims of which [it] had prior knowledge." Therefore, in order to establish that the July letter provided sufficient notice of a claim so as to bar coverage under the claims made provision, the insurance company was required to establish that the letter imputed actual "knowledge of a claim" to the policy holder, not just a reasonable expectation of a claim.

Subjective Belief of an Abandoned Claim Unreasonable Where Policy Only Requires Reasonable Foresight

[34] Zuckerman v. National Union Fire Ins. Co., 100 N.J. 304, 495 A.2d 395 (N.J., 1985).

[35] Continental Cas. Co. v. Cuda, 715 N.E.2d 663, 306 Ill.App.3d 340 (Ill. App. 1 Dist., 1999).

[36] Gibraltar Cas. Co. v. A. Epstein and Sons, Intern., Inc., 206 Ill.App.3d 272, 562 N.E.2d 1039, 150 Ill.Dec. 236 (Ill.App. 1 Dist., 1990).

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In *Stiefel v. Illinois Union Ins. Co.*[37], the insured received a letter from an attorney retained to prosecute a former client's claim for damages arising out of the insured's advice. The insured responded with a detailed explanation of his activities regarding the transaction and concluded that the losses "were not of his making" and he resented the "attempt to recoup the losses by making untrue allegations of professional malpractice." A malpractice suit was filed one year later.

In the coverage action with his insurance company, the insured claimed he was of the reasonable belief that the claim of the clients and their attorney had been long forsaken and abandoned. The policy clearly and unambiguously provided that a claim must actually have been made during the policy period. The letter clearly and unmistakenly exhibited the intention of the claimants to press a legal claim against plaintiff for damages based on alleged professional malpractice.

The court found that the letter justified the trial judge in determining that the attorney should have reasonably foreseen circumstances under which a suit for malpractice might very well be filed against him.[38] This can be compared with a letter written to an attorney by another lawyer questioning legal advice given by the addressee in a particular instance, which did not constitute a "claim" under an insurance policy, only an inquiry.[39]

In *Stiefel*, the policy provided that it applied "to negligent acts, errors, omissions or offenses which occur anywhere in the world: * * * prior to the effective date of the Policy if claim is first made during the Policy period and providing no insured had knowledge nor could have reasonably foreseen any

[37] Stiefel v. Illinois Union Ins. Co., 452 N.E.2d 73, 116 Ill.App.3d 352 (Ill. App. 1 Dist., 1983)

[38] Stiefel v. Illinois Union Ins. Co., 452 N.E.2d 73, 116 Ill.App.3d 352 (Ill. App. 1 Dist., 1983).

[39] Hoyt v. St. Paul Fire & Marine Insurance Co. (9th Cir.1979).

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circumstance which might result in a claim at the effective date of the Policy * * *."

In order to establish that the attorney's letter provided sufficient notice of a claim to the insured, the insurance company had only to prove that, based upon the letter, the insured could have reasonably foreseen circumstances which might result in a claim. Proof of this degree of awareness is based upon an objective, rather than a subjective, evaluation of the facts.[40] The objective, reasonably foreseeable standard can be compared with the actual knowledge standard wherein coverage is barred for claims of which the insured had prior knowledge. The later requiring imputed actual knowledge of a claim to the insured, not just a reasonable expectation of a claim.[41]

Under an occurrence policy requiring notice of a claim as soon as practicable, it was reasonable for a contractor to conclude, prior to service of summons, that no covered claim would be asserted against it by the plaintiff. The contractor was not directly involved in the incident and thought that it would not develop into a claim against him. Under an occurrence policy, an insured is not required to report every injury it is aware of, it is only required to report those injuries which a reasonable person would understand is likely to lead to a claim.[42]

Subjective Belief Is Generally a Factual Question

[40] Gibraltar Cas. Co. v. A. Epstein and Sons, Intern., Inc., 562 N.E.2d 1039, 206 Ill.App.3d 272 (Ill. App. 1 Dist., 1990); See also, Ratcliffe v. International Surplus Lines Ins. Co., 194 Ill.App.3d 18, 550 N.E.2d 1052 (Ill. App. 1 Dist., 1990).

[41] Gibraltar Cas. Co. v. A. Epstein and Sons, Intern., Inc., 562 N.E.2d 1039, 206 Ill.App.3d 272 (Ill. App. 1 Dist., 1990).

[42] American Country Ins. Co. v. Efficient Const. Corp., 587 N.E.2d 1073, 225 Ill.App.3d 177 (Ill. App. 1 Dist., 1992) (applying an objective standard to the knowledge of the insured).

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In *Medical Protective Company v. Kim*,[43] an application misrepresentation case decided by a jury, Dr. Kim operated on Ms. Jennings in January 2001, learned of complications due to his surgery in March, applied for coverage in June and received a summons and complaint in August 2001. Dr. Kim testified that when he was filling out the insurance application, he did not think Ms. Jennings's treatment and complications were likely to produce a claim. The court noted that Dr. Kim first received written notice of the Jennings claim when he received the summons and complaint on August 22, 2001.

The insurance company argued that Dr. Kim's knowledge of Ms. Jennings's injury and course of treatment, including her stay in Evansville, suggested that Dr. Kim knew a lawsuit was highly likely. Dr. Kim participated in a peer review session triggered by Ms. Jennings's second admission to the hospital and Dr. Kim met with the hospital's CEO to discuss whether Ms. Jennings should be billed. The jury found no misrepresentation and the court enforced the policy.

Commenting on the harshness of the outcome from an "immediate notice" requirement, the court in *Home Ins. Co. of Illinois v. Adco Oil Co*.,[44] stated that "If it is proper to practice law without insurance, then it is also possible for lawyers to purchase claims-made policies with inflexible notice requirements…"

Prejudice To The Insurance Company Is Irrelevant

When the giving of notice is a condition precedent to a right of action against the insurance company, the prejudice resulting from the delay in giving notice is often deemed immaterial.[45]

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[43] Medical Protective Company v. Kim, No. 05-2038 (7th Cir., 2007).

[44] Home Ins. Co. of Illinois v. Adco Oil Co., 154 F.3d 739 (C.A.7 (Ill.), 1998).

[45] University of Illinois v. Continental Cas. Co., 234 Ill.App.3d 340, 599 N.E.2d 1338 (Ill. App. 4 Dist., 1992), cited with approval in Continental Cas. Co. v. Cuda, 715 N.E.2d 663, 306 Ill.App.3d 340 (Ill. App. 1 Dist., 1999).

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The Controlling Law – Choice of Law Analysis

In order to address the relevant coverage issues under the applicable law, it is necessary to first determine what law will be applied to interpret the professional liability policy. If a policy does not contain a choice of law provision, the general choice of law rules of the forum state, Illinois, will control and determine the applicable law.[46] The Illinois Supreme Court established that, in the context of a group health insurance policy, "[I]nsurance contract provisions may be governed by the location of the subject matter, the place of delivery of the contract, the domicile of the insured or of the insurer, the place of the last act to give rise to a valid contract, the place of performance, or other place bearing a relationship to the general contract."[47]

While all these factors must be considered in the choice of law analysis, the location of the insured risk is given special emphasis. The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local laws of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in §6 to the transaction and the parties, in which event the local law of the other state will be applied.[48]

Restatement (Second) of Conflict of Laws §193 recognizes that the "location of the insured risk will be given greater weight than any other single contact in determining the state of the applicable law provided that the risk can be located,

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[46] Diamond State Ins. Co. v. Chester-Jensen Co., Inc., 611 N.E.2d 1083, 243 Ill.App.3d 471 (Ill. App., 1 Dist., 1993).

[47] Hofeld v. Nationwide Life Insurance Co., 59 Ill.2d 522, 322 N.E.2d 454 (Ill., 1975).

[48] Restatement (Second) of Conflict of Laws §193 (1971); Society of Mount Carmel v. National Ben Franklin Ins. Co. of Illinois, 643 N.E.2d 1280, 268 Ill.App.3d 655 (Ill. App. 1 Dist., 1994).

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at least principally in a single state."[49] This is so even where the policy in question covers multiple risks located in several states.[50]

The significance of each of the factors depends upon the issue involved. For example, "[t]he state where performance is to occur under a contract has an obvious interest in the nature of the performance and in the party who is to perform."[51]

When considering the controlling law of a professional liability policy, the most relevant factors include the location where the attorney practices, location of the issuing insurance company and location of the asserted claim. In most situations, it is likely that the location of the attorney will provide the most guidance as to the controlling law.

When do Malpractice Claims Arise?

Although the coverage under a professional liability policy does not turn on the date the client's malpractice claim arose, it is instructive to understand the trigger of an attorney malpractice cause of action. The elements of a cause of action for attorney malpractice are an attorney-client relationship, a duty arising from that relationship, a breach of that duty, and actual damages or injury

[49] Restatement (Second) of Conflict of Laws §193, comment b, at 611 (1971).

[50] See Diamond State Insurance Co. v. Chester-Jensen Co., 243 Ill.App.3d at 489-90, 183 Ill.Dec. at 446-47, 611 N.E.2d at 1094-95; cf. Restatement (Second) of Conflict of Laws §193, comment f (policy insuring against risks located in different states treated as separate policies each insuring a separate risk)).

[51] Restatement (Second) Conflicts of Law 188, Comment e, at 580 (1971); Employers Ins. of Wausau v. Ehlco Liquidating Trust, 309 Ill.App.3d 730, 243 Ill.Dec. 384, 723 N.E.2d 687 (Ill.App. 1 Dist., 1999).

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proximately caused by that breach.[52] Actual damages are an essential element of the cause of action: with no damages, no cause of action has accrued.[53]

In *Romano*, Romano was involved in an automobile accident August 1990. She retained the services of defendant for all aspects of her claims until March 1993. John Munday became plaintiff's attorney and proceeded to settle plaintiff's claim against the driver of the other car involved in the accident.

Munday demanded arbitration on the underinsured motorist coverage. The UIM policy required that a written demand for arbitration be filed within two years of the accident or of the claimant's reaching majority. In this case, plaintiff reached majority on January 14, 1991. By letters dated August 3, 1994, Country notified both Munday and plaintiff that it denied UIM coverage on the basis that the arbitration demand was untimely. Munday received this letter on August 6 or 8, 1994. Country then filed a declaratory action in the circuit court on September 21, 1994. Plaintiff filed a malpractice case on August 2, 1996. The declaratory action was decided in Country's favor in December 1998.[54]

In its written ruling, the trial court held that it "must have been painfully, as well as plainly obvious" to Munday, upon receipt of plaintiff's file, that the UIM coverage was lost by defendant's failure to submit a timely written demand for arbitration. According to the trial court, Munday should have known of the injury on April 27, 1994, when he sent the letter demanding arbitration, and he certainly should have known no later than June 29, 1994, when he received the letter from Country questioning the timeliness of the demand. Thus, citing *Lucey v. Law*

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[52] Romano v. Morrisroe, 326 Ill. App. 3d 26, 28 (2001); Tri-G, Inc. v. Burke, Bosselman & Weaver, 222 Ill.2d 218, 856 N.E.2d 389, 305 Ill.Dec. 584 (Ill., 2006).

[53] Profit Management Development, Inc. v. Jacobson, Brandvik & Anderson, Ltd., 309 Ill. App. 3d 289, 308 (1999).

[54] See Country Mutual Insurance Co. v. Romano, No. 2--98--0296 (1999); Romano v. Morrisroe, 759 N.E.2d 611, 326 Ill. App.3d 26 (Ill. App. 2 Dist., 2001).

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Offices of Pretzel & Stouffer, Chartered,[55] the court found this to be a case where it was plainly obvious prior to an adverse ruling that the plaintiff was injured as a result of professional negligence. The trial court held that the cause of action existed, and the statute of limitations began to run, no later than June 29, 1994, when Country notified Munday that it was forwarding the arbitration demand to legal counsel.[56]

The absence from the file of a written demand for arbitration is not sufficient to cause someone, even an attorney, to realize that a breach of duty has occurred, let alone that an injury was wrongfully caused.

On appeal, the court found that at the earliest, it was the August 6 or 8, 1994, receipt of the August 3 letter that indicated a possible injury, as it was not evident until Country denied coverage that any injury occurred and that the injury was caused by defendant's failure to file the arbitration demand in a timely fashion. Until Country denied coverage, the possibility existed that Country would waive the limitations period.[57]

Consequently, the malpractice claim did not arise until a clear denial of coverage was presented. For purposes of a malpractice claim, the attorney did not know or should have known that the attorney suffered actual damages at the time that a DWP order was entered. Damages are speculative when uncertainty exists as to the fact of damages.[58]

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[55] Lucey v. Law Offices of Pretzel & Stouffer, Chartered, 703 N.E.2d 473, 301 Ill.App.3d 349 (Ill. App. 1 Dist., 1998).

[56] Romano v. Morrisroe, 759 N.E.2d 611, 326 Ill. App.3d 26 (Ill. App. 2 Dist., 2001).

[57] Romano v. Morrisroe, 759 N.E.2d 611, 326 Ill. App.3d 26 (Ill. App. 2 Dist., 2001).

[58] Goran v. Glieberman, 276 Ill.App.3d 590, 659 N.E.2d 56 (Ill. App. 1 Dist., 1995), as cited in Brite Lights, Inc. v. Gooch, 713 N.E.2d 155, 305 Ill.App.3d 322 (Ill.App. 2 Dist., 1999).

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An Attorney's Side Business May Jeopardize Insurance Coverage

During the course of most every lawyer's career, opportunities arise to start or invest in a business. Aside from the ethical prohibition that may exist in some cases involving clients, there are few barriers to exercising a little entrepreneurial spirit. Whether due to economic reasons, an opportunity revealed, or downsizing, attorney business ventures may include simple venture capital for a new business, funding a family member's business, or starting their own part time side business with involvement in the daily operations.

With each of these options, there is an unseen personal financial danger looming in the shadow of the attorney's professional liability insurance coverage. The attorney-turned-entrepreneur may unsuspectingly wander from the course of business owner back to the role of attorney advisor and thereby expose themselves to personal liability excluded under a professional liability policy or a possible ethical violation.

Attorneys are experienced and comfortable with providing advice and professional opinions; naturally seeking out a position to assist in solving problems and offering counseling. As a business owner, the attorney must detach the role of attorney from the role of owner but, many will find that other members of the business repeatedly turn to them due to the attorney's expertise and legal background. It is the overlap of the dual roles that brings about an unforeseen and unwanted risk exposure.

When an attorney begins to fill dual roles, as business owner and counsel, specific provisions within a professional liability policy may become operative and potentially exclude coverage. Professional liability insurance typically provides coverage for the actions of an attorney within the practice of law that are conducted on behalf of a client, separate and distinct from an enterprise owned by the attorney. Personal financial exposure can occur when a

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professional liability policy excludes coverage for actions or activities outside the practice of law, or when the attorney policyholder provides advice for a business of which they are an owner.

The attorney conduct that may create this personal financial exposure under a professional liability policy is addressed within the original insurance application and several "business enterprise exclusions" found within the policy that carve out coverage for: 1) claims arising out of the insured's capacity as an officer, partner, shareholder or employee of an entity other than the firm listed on the policy's declarations page, and; 2) that exclude coverage for legal services or advice rendered to a business owned by the attorney or by a family member.

Virtually every professional liability application inquires about business ventures, equity interests or positions held as an officer, director or employee in a client company or similar outside interest or business owned or operated by the applicant. The disclosure of a business venture will normally result in the issuance of a Specific Entity Exclusion Endorsement accompanying the policy. The endorsement bars coverage for claims arising out of a wrongful act involving the specific entity. In addition, the business enterprise exclusions serve to bar coverage for advice provided to a side business.

The First District Appellate Court recently reviewed just such a side business in *ISBA Mut. Ins. Co. v. Mondo.*[59] In *ISBA v Mondo*, the court reviewed an insurance company's duty to defend an attorney under a professional liability policy. The claimant alleged that the attorney-policyholder represented that he was an expert in the field of insurance, he owned an insurance consulting business and provided insurance advice regarding a medical plan. Suit was filed against the attorney under theories including fraud and negligent malpractice. The policy excluded coverage for claims arising out of legal services or advice

[59] ISBA Mut. Ins. Co. v. Mondo, (No. 1-08-2347, June 30, 2009, 1 Dist., 2009).

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rendered by the attorney in connection with any business enterprise owned by the attorney or in which the attorney was a partner or employee.

The court offered guidance to attorneys engaging in side businesses and noted that the business enterprise exclusion barred coverage for actions not related to professional services and held that, despite a complaint alleging professional negligence, the true nature of the complaint was related to the attorney's position as an insurance expert, not as an attorney.

As a result, the insurer was not required to defend the attorney and the attorney was required to pay for his own defense and risked personal financial exposure for any judgment that may be entered directly against him on an individual basis.

Illinois courts have reviewed an exclusion for lawyer owned businesses such as:

> Exclusion E explicitly states that the policy "shall not apply to any Claim based upon or arising out of, in whole or in part" "[t]he alleged acts or omissions by any Insured * * * for any business enterprise * * * in which any Insured has a Controlling Interest."[60]

The language of exclusion E explicitly precludes coverage of "alleged acts or omissions by any Insured * * * for any business enterprise * * * in which any Insured has a Controlling Interest."[61] The court found that the attorney had a controlling interest in a business that would benefit from his actions and therefore there was no coverage under the policy.

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[60] Am. Zurich Ins. Co. v. Wilcox & Christopoulos, L.L.C., 2013 IL App (1st) 120402, ¶ 36, 984 N.E.2d 86, 98.

[61] Am. Zurich Ins. Co. v. Wilcox & Christopoulos, L.L.C., 2013 IL App (1st) 120402, ¶ 42, 984 N.E.2d 86, 99.

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PRACTICE POINT: attorneys engaged in a side business must carefully review the service or advice that they provide to the business enterprise and, ideally, consider hiring outside counsel to render any legal advice sought by the business. Even a small ownership in a business may prove problematic. In *Continental Casualty Co. v Flomenhoft*,[62] the court determined that a 3% ownership in a limited partnership was enough to trigger the business enterprise exclusion and negate coverage for the attorney under their professional liability policy.

[62] Continental Casualty Co. v Flomenhoft, 263 Ill.App.3d 22 (1 Dist., 1994).

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Appendix I Illinois Professional Liability Case Summaries

ANDREOU AND CASSON, LTD. v. LIBERTY INSURANCE UNDERWRITERS, INC., 377 Ill.App.3d 352 (Ill.App. 1 Dist. 2007).

Insurer had no duty to defend under the insured versus insured exclusion.

Kurtz, an attorney, filed a complaint against A & C and their representatives alleging that she had been ousted from the firm, where she had been a partner, and that after being ousted, A & C and its various representatives "publicly disparaged her professionalism and integrity." On March 25, 2003, A & C tendered its defense of the Kurtz suit to Liberty, which refused the tender of defense and denied coverage on March 31, 2003.

At the underlying trial, A & C claimed that Kurtz was an employee of A & C, had never been a partner, and had been terminated from her employment in March 2003.

Policy exclusion:

5. ***Insured versus Insured.*** For the purpose of this sub-section, the term 'insured' shall mean 'you'. The policy does not apply to any **claim** made by one or more insured against another insured unless an attorney/client relationship exists."

Insured is defined as:

"b. if the **named insured** is a partnership or limited liability partnership, such partnership or limited liability partnership and each lawyer who is a partner thereof including any incorporated partner and each shareholder of any such incorporated partner;

c. if the **named insured** is a professional corporation, limited liability corporation or professional association, such professional corporation, limited

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liability corporation or professional association and each lawyer who is a shareholder or member thereof;

d. each lawyer employed by the **named insured;**

e. any person

1. who qualified prior to the **policy period,** but who no longer qualified as of the first day of the **policy period; or**

2. who during the **policy period** qualifies as an **insured** under b., c., or d., immediately above, but only to the extent such person performs or has performed **professional legal services** on behalf of the **named insured.**"

Kurtz's signature appears alongside both Andreou's and Casson's signatures on a signature line that is entitled "Signature of Partner, Member, Owner, or Sole Proprietor," leading to the conclusion that Kurtz was a partner in A & C and an insured under the Liberty policy.

The trial court did not err in concluding that the *insured versus insured exclusion* operated to preclude coverage to A & C in the Kurtz suit, since Kurtz was an insured under the Liberty policy at the time of the alleged defamation

CONTINENTAL CASUALTY COMPANY, v. McDOWELL AND COLANTONI, LTD, 282 Ill.App.3d 236 (Ill.App. 1 Dist. 1996)

Negligence in managing client trusts (allowing lawyer to steal from trust) falls under duty to defend

Professional liability insurer brought suit seeking determination that it had no duty to defend law firm and partners in lawsuits brought by a former client alleging negligence in failure to properly supervise client trust accounts and failure to prevent another partner's misappropriation of funds.

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Holding: that the dishonest act exclusion did not preclude coverage for a negligence claim against a law firm and partners which was independent of conduct of attorney in misappropriating funds.

Colantoni, as Watkins' attorney (Watkins = plaintiff in underlying suit for negligence etc.), received the first installment check of $600,966.12 in August of 1990 and had it placed in the Law Firm's clients' trust account. Subsequently, and nine other times, he directed the transfer of the Watkins' funds to the Law Firm's overhead and bank loan accounts, as well as for some of his personal expenses.

the partners were unaware of Colantoni's improper transfers of clients' trust funds and Colantoni was the only attorney working on the Watkins' file.

The insured contended that the dishonesty exclusion of the Policy invoked by Continental clashed directly with other Policy provisions and was invalid. Continental, asserted that all claims articulated in the underlying lawsuit against the Law Firm arose from the dishonest act of Colantoni and, therefore, were excluded from coverage under the Policy's dishonesty exclusion.

The Florida trial court ruled that the Law Firm was liable to Watkins on counts I (breach of contract) and II (breach of fiduciary duty). The court held that the Law Firm breached its duty of care "by negligently supervising [its] trust account so as to prevent and discover the unauthorized handling" of money by Colantoni.

Policy:

The dishonesty exclusion provides:

"We will not defend or pay, under this Coverage Part for:

D. any claim arising out of:

any dishonest, fraudulent, criminal or malicious act or omission by you or any of your partners, officers, stockholders or employees. This exclusion does

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not apply to an act or omission which is the basis of a malicious prosecution claim."

The underlying case does not seek recovery for Colantoni's criminal acts, which would be excluded, but rather seeks recovery for the Law Firm's negligent omissions, which are not excluded.

Defendants' negligence, therefore, was independent of Colantoni's misappropriation. The negligent supervision of its clients' trust fund clearly falls within Continental's coverage for wrongful acts in the Law Firm's rendering or failure to render professional services.

Illinois State Bar Ass'n Mut. Ins. Co. v. Mondo --- N.E.2d ----, 2009 WL 1905176 (No. 1-08-2347, June 30, 2009, Ill.App. 1 Dist. 2009)

Side-Business exclusions

The issue raised before this court is whether the trial court properly granted summary judgment in favor of defendants, holding that plaintiff had a duty to defend or indemnify them pursuant to the terms and conditions of the professional liability insurance policy it issued to Robert J. Mondo, Jr., where the underlying action incorporated allegations that his acts were intentional, willful, and fraudulent into counts purporting to allege negligence and malpractice.

The Illinois State Bar Association policy covered Mondo Jr. for professional liability as a sole practitioner. Specifically excluded from coverage was any claim resulting from or arising out of any wrongful act involving Executive Fidelity in the "Specific Entity Exclusions Endorsement."

Applicable exclusions read:

"This Policy does not apply to any CLAIM:

A. arising out of any criminal, dishonest, fraudulent or intentional act or omission committed by any of YOU.

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C. arising out of YOUR capacity as:

1. an officer, director, partner, shareholder or employee of any entity other than the NAMED INSURED, its PREDECESSOR FIRM or any bar related professional association;

2. a fiduciary under the Employment [sic] Retirement Income Security Act of 1974, its amendments, or similar provisions of any state statutory law or common law, except if YOU are deemed to be a fiduciary solely by reason of legal advice rendered with respect to an employee benefit plan[.]

D. arising out of legal services or advice rendered by YOU in connection with any business enterprise not shown in Item 2 of the Declarations:

1. which is, was, or will be owned by YOU or any member of YOUR immediate family;

2. which is, was, or will be in any way controlled, managed or operated by YOU or any member of YOUR immediate family including the ownership, maintenance or use of any property in connection therewith; or

3. in which YOU were, are, or will be a partner or employee.

K. arising out of the performance or nonperformance of any investment that was recommended, directed, or made by YOU."

"NAMED INSURED" is defined as "the person or law firm identified in Item 2 of the Declarations."

In the case at bar, the underlying complaint alleges causes of action against Mondo Jr. for breach of a fiduciary duty under ERISA (count I), prohibited transactions in violation of ERISA (count II), providing unsound investment advice (count III), breach of fiduciary duty to the trust in his capacity as an administrator (count V), fraud (count VI), negligence regarding the performance of his fiduciary and contractual duties with regards to the Insurance Trust (count

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VIII), malpractice in his capacity as an insurance broker (count IX), and malpractice in his capacity as an attorney (count X). In reading the complaint as a whole (United Fire & Casualty, 105 Ill.App.3d at 1050, 61 Ill.Dec. 799, 435 N.E.2d 496), it is clear that the true nature of the complaint is related to Mondo Jr.'s performance of duties related to his capacity as an insurance expert and not in any capacity related to his status as an attorney despite the inclusion of counts VIII and X. As this court found in Steadfast, 359 Ill.App.3d at 761, 296 Ill.Dec. 537, 835 N.E.2d 890, and in Atlantic Mutual, 315 Ill.App.3d at 565-66, 248 Ill.Dec. 342, 734 N.E.2d 50, the factual allegations in the instant underlying action make clear that Mondo Jr.'s failure to disclose information was allegedly part of his overall scheme to mislead and defraud the Insurance Trust and not based upon any negligent or potentially negligent conduct.

Moreover, even if the argument could adequately be made that negligence applies, the specific exclusion endorsement and the general exclusions would still control. the policy specifically excludes from coverage any action related to the insured's capacity as a fiduciary under ERISA (counts I and II), any action related to providing unsound investment advice (count III), any action based on fraud (count VI) and any actions not related to professional services rendered as an attorney (counts V, VIII and IX).

In short, the policy excludes each and every cause of action raised against Mondo Jr. in the underlying action and cannot be said to fall, or potentially fall, within coverage of the policy as they arose out of his relationship with the Insurance Trust as an insurance expert and not as an attorney.

Continental Cas. Co. v. Law Offices of Melvin James Kaplan,345 Ill.App.3d 34 (Ill.App. 1 Dist. 2003).

Duty to defend

In count I of underlying complaint, Chubko sought relief against Kaplan for a violation of the automatic stay provisions of section 362 of the Code (11 U.S.C. §

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362 (1998)) by reason of Kaplan having collected, after Chubko's bankruptcy petition was filed, fees for services rendered to him prior to the filing of the petition. (installment payment agreement of attorney's fees).

It seems fairly clear that the theories of recovery asserted in counts I and III of Chubko's second amended complaint arise out of Kaplan's actions as a creditor collecting a debt. Neither of the theories pled in these counts arise out of an act or omission by Kaplan in rendering, or failing to render, legal services. As such, neither count constitutes a claim under the terms of the Policy and neither count would trigger Continental's duty to defend.

In count II, Chubko asserted a negligence claim against Kaplan for having failed to obtain a discharge of a pre-petition obligation of his; namely, the fees which he owed Kaplan for pre-petition services. Count III sought a finding of contempt against Kaplan and an award of actual damages, punitive damages and attorney fees predicated upon Kaplan's alleged violation of the injunction imposed under the provisions of section 524(a)(2) of the Code (11 U.S.C. § 524(a)(2) (1998)), prohibiting the collection of a pre-petition debt after discharge.

An event is the consequence of another when the former follows the latter as a natural or necessary result. See Webster's Third New International Dictionary, "consequence," 482 (1981). The fact that the damages sought by Chubko in count II may well be measured by the sums paid to Kaplan, post-discharge, for legal services rendered prior to the filing of Chubko's petition in bankruptcy does not mean that the injury suffered is a consequence of the fees charged.

Rather, the injury suffered is a consequence of Kaplan's alleged negligent failure to secure a discharge of Chubko's obligation to pay those fees. We believe that count II of Chubko's second amended complaint in the underlying action alleges facts and a theory of liability against Kaplan which potentially fall within the coverage afforded under the Policy and, as a consequence, Continental is obligated to defend Kaplan.

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Continental Cas. Co. v. Cuda 306 Ill.App.3d 340 (Ill.App. 1 Dist. 1999)

Holding: (1) the suit alleged a "wrongful act" involving "professional services" which trigger coverage under the policy, however (2) the attorney's failure to report the suit to the insurer during the policy term barred coverage under the policy's claims-made provisions.

The underlying allegations:

Count I sought an accounting of the partnership, count II sought a dissolution of the partnership, and count III sought damages for breach of various fiduciary duties alleged to have been owed by both defendants to plaintiff.

Relevant language:

"Your professional liability insurance is written on a 'claims-made' basis and only applies to those claims first made against you while this insurance is in force. No coverage exists for claims first made against you after the end of the policy term unless and to the extent an extension of coverage applies."

Under "coverage agreements," the policy states:

"A. We will pay all amounts, up to our limit of liability, which you become obligated to pay as a result of a wrongful act by you or any entity for whom you are legally liable.

B. The wrongful act, as described above, must happen before the end of the policy term stated on the Declarations and the claim therefore must first be made against you and reported to us during that policy term. Any claim or claims arising out of the same or related wrongful acts, shall be considered first made during the policy term in which the earliest claim arising out of such wrongful acts was made.

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C. We have the right and will defend any claim. We will do this even if the charges of the claim are groundless, false, or fraudulent.

D. We have no duty to defend any claim not covered by this Coverage part."

The policy also contained the following relevant definitions:

" 'Claim' means the receipt of a demand for money or services, naming you and alleging a 'wrongful act.'

'Wrongful Act' means any negligent act, error or omission in the rendering or failure to render professional services."

According to the policy, defendant was required to report the claim to plaintiff within the same policy period. Because defendant failed to report the September 15, 1995, complaint until October 4, 1996, plaintiff alleged the complaint was not a claim made and reported within the same policy period. Consequently, plaintiff alleged it was relieved from defending and indemnifying defendant against the claim.

To allege a wrongful act under this professional liability policy, a party must assert a "negligent act, error or omission in the rendering or failure to render professional services." Here, the omission complained of was that defendant failed to inform Bielarz of the conflict of interest involved with defendant acting as the attorney for Bielarz, the attorney for Nortown, attorney for the partnership, and as a partner in the partnership.

When paragraphs 28 and 56 of the September 15, 1995, complaint are considered together, they allege defendant owed Bielarz, as his attorney, a fiduciary duty to disclose any actual or potential conflicts of interest and to withdraw from representation if any such conflicts arose. Thus, the plain language of plaintiff's policy defining "claim" and "wrongful act," as well as the clear allegations of the Bielarz complaint, demonstrates that the Bielarz lawsuit

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was a claim that alleged wrongful acts in the performance of professional services.

We conclude that the complaint was clear and unambiguous in its allegations against defendant in his role as an attorney.

(2) Plaintiff further argued using caselaw from an occurrence policy that insurer was on notice.

The court was not fooled:

The professional liability policy in this case was a claims-made policy. Coverage under plaintiff's claims-made policy is triggered when two events occur: (1) the claim must be made during the policy period, and (2) the claim must be reported during the policy period. Unless these two conditions occur, no coverage is provided under the claims-made policy.

Continental Cas. Co. v. Flomenhoft, 640 N.E.2d 290 (Ill.App.1.Dist. 1994)

Two main issues: 1. Time period (which court basically ignored)

2. Business enterprise exclusion application, precluding coverage

Insured was Howard C. Flomenhoft, Ltd. The prof corp Flomenhoft practiced under

Policy provided coverage for acts arising out of performance of professional services as an attorney "because of an error, negligent omission or negligent act."

Excluding acts or omissions occurring while performing professional services for a business enterprise owned, controlled, managed, or operated; or in which Flamenhoff was a partner.

Flomenhoff set up a Limited Partnership (LP) to invest in coal mines while the IRS was offering tax benefits for investment (tax shelter operation).

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-Flomenhoff organized/negotiated the investment details with a mineral rights provider

-Flomenhoff was GC for the L.P.

-Flomenhoff gave legal advice, including tax advice regarding the L.P to L.P. members.

-Flomenhoff filed the articles of incorporation and prepared returns for the L.P.

Flomenhoff also had a 3% interest in the L.P. (even though he was GC and giving advice as a professional to the L.P.

Even though L.P.s are "passive" investors in sharing the losses and profits of the L.P., he was deemed a partner and therefore coverage exclusion applied.

Regas v. Continental Cas. Co., 139 Ill.App.3d 45 (Ill.App.1.Dist. 1985)

Duty to defend arises where a law firm/attorney issued a check to a bank on clients' escrow account, even though the client had no funds in the account at that time, in order to assist in transfer of client's funds for real estate closing- that conduct amounted to practice of law

-when bank sued, the insurer breached its duty to defend the bank's action.

Very short case, insurer was trying to argue a legal malpractice policy does not apply to situations where plaintiffs are sued in a contract action by a non-client.

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