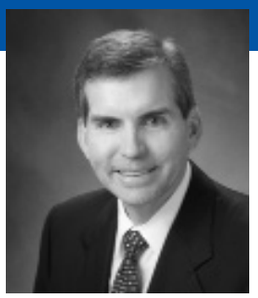
Timely Reporting of a Claim

Avoiding Liability



By Jeffrey P. Lewis

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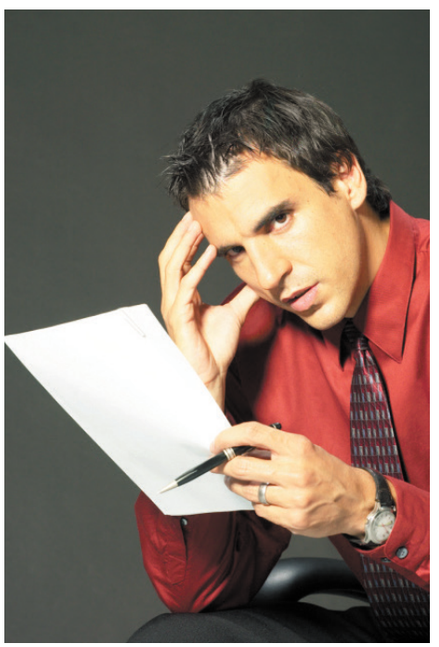
Legal professional liability (LPL) policies, without exception, or at least without exception in the experience of this author, are "claims made and reported" and not "occurrence" policies such as automobile policies. In the case of an automobile policy, the motor vehicle accident is the "occurrence" that triggers coverage under the policy then in effect. In the instance of "claims made and reported" policies, the policy in effect when the claim is first made covers the claim, not the policy in effect when the error is committed or when the client is harmed as a result. Unlike with "occurrence" policies, where untimely notice under the policy is excused if the carrier has not been prejudiced, timely notice is critical under an LPL policy because the carrier can deny the claim solely on the basis that notice was untimely, subject to certain exceptions. Carriers that issue "claims made" policies give untimely notice different treatment than carriers that issue "occurrence" policies "to allow the insurance company to easily identify risks, allowing it to know in advance the extent of its claims exposure and compute its premiums with greater certainty." *Illinois State Bar Association Mutual Insurance Co. v. Beeler Law, P.C.*, 2015 WL 1407310 (App. Ct. of Il), a non-precedential opinion.

What constitutes "timely notice" is always a defined term in the policy. Some carriers will forgive an untimely notice if there has not been a break in the coverage; that is, the insured has maintained coverage with the same carrier without interruption from the date when notice of the claim should have been given and the date that notice is actually given. This approach is not taken by the carrier because it is being "nice"; instead, it is because of the presence of a provision in the policy that expressly so provides. But subject to such an exception, timely notice of a claim under a "claims made" policy is a condition precedent for the carrier's duty to provide coverage.

In the *Illinois State* case, the carrier denied coverage for untimely reporting of a claim and that denial was sustained by the trial court, whose holding was affirmed on appeal. Within 30 days before the expiration of the policy, the carrier had offered its insured the opportunity to purchase an endorsement to extend the reporting period, but the insured declined. Instead, before the policy expired, the insured used the carrier's website to send an email noting "potential claims," then listing the names of three clients and indicating "Details to follow."

Almost seven months after the expiration of the policy, one of the named clients filed suit against the insured asserting professional liability claims, followed by a second suit two months later by one of the other clients previously identified as a potential claim. With respect to both suits, the insured sent a copy of the complaint to the carrier "and tendered the matter for a defense under the [p]olicy." The carrier commenced a declaratory judgment action in response to the first tender and later amended the complaint to seek declaratory relief with respect to the second. Eventually the trial court granted summary judgment in the carrier's favor with respect to its denial of coverage in both cases and, as noted above, a three-judge panel of the Illinois Appellate Court affirmed that grant of summary judgment.

The insured firm argued that it had given timely notice because it had informed the carrier of the clients' names as "potential claims" before the policy expired. The court noted, however, that the "[d]uties of an insured are controlled by the terms and conditions of its insurance contract" and that "the primary function of the court is to ascertain and enforce the intentions of the parties as expressed in the agreement." The court also noted that to accomplish this purpose, after "construing the policy as a whole," it "must afford [the words used in the policy] their plain, ordinary, and popular meaning" … "[i]f those words are clear and unambiguous."



Applying this standard, the court rejected the insured's argument that notice was "timely." The insured firm had timely identified the clients with potential claims, as the policy required. But the firm had failed to comply with the other notice requirements under the policy. With respect to each "act, error, or omission," the firm had not stated the following: the date on which it occurred, "the damage or injury that has or may result," "the circumstances by which the insured first became aware" and "a summary of the circumstances giving rise to the claim." In the court's view it could not ignore a condition of the policy that was written in "clear and unambiguous language," which "both parties [had] contracted to include."

Moreover, the court observed that the notice requirement is a specific provision and, as such, to ignore it would violate the "long recognized" principle of contract construction that "where both … general and specific provision[s] in a contract address the same subject, the more specific clause controls." The court concluded that "ignoring the specific notice provision would be an unreasonable construction of the policy." The court also stated that the notice requirement was "a condition precedent, not a mere promise, under the [p]olicy," being found under the " 'Conditions' section of the p]olicy and its unambiguous language specifically reads 'as a condition of insurance coverage.' " The court further observed that "unlike laypersons, as attorneys, defendants have sophistication in commerce and insurance matters and, as such, should have had a clear understanding of their contractual obligations and reporting requirements under the [p]olicy."

This case illustrates once again why it is important to review one's LPL policy at the beginning of the initial policy period with each new carrier and again when one becomes aware of the existence of a potential claim. It may be difficult to identify a potential claim, so attorneys must pay close attention to the statements and reactions of clients in order to appreciate when a matter should be reported. Here the insured firm did appreciate the potential for claims to be made but did not follow the advice to review its LPL policy so that it could properly report the claims. Had the insured firm done so, this matter never would have become a dispute between the firm and its carrier. The risk of a denial of coverage of a valid legal malpractice claim is too great to relegate reporting a claim to an email.