



CIRCUMSTANCE & PRIOR NOTICE EXCLUSION

SPECIALTY RISK LINES

Potential Pitfalls of Blanket Reporting of Notice of Circumstances Which May Give Rise to a Claim

There is a common misconception for D&O, E&O, Employment Practices, Fiduciary and Cyber liability 'Claims-Made' policies that there is no downside to the Insured in reporting "circumstances" which may give rise to a future "Claim" but have not yet risen to such formal definition in the Policy.

However, before giving Notice of a Circumstance that could give rise to a Claim, Insureds need to be made aware of the double-jeopardy coverage situation that may be created by Claims-Made management liability policy wording. This issue has taken on added importance with the current COVID-19 crisis in the context of preservation of insurance policy assets.

Coverage for a Claim in a subsequent policy period could be denied based on the Prior Notice Exclusion if the circumstance that was noticed in the previous policy period was not affirmatively accepted by the Insurer as meeting that Policy's required level of circumstance notice specificity. While this may not seem intuitive or equitable (after all the same Insurer would otherwise be responsible for such Claim under one policy or the other anyway), this is to prevent Insureds from blanketly providing notice under Claims-Made policies for anything that could possibly happen in the future ("laundry-listing") and then non-renewing or moving coverage thereby sticking the insurer with all future risk. There is also substantial Claims-Made case-law supporting Insurer's to deny this.

Let's look at the following example to illustrate the issue:

An Insured is going to eliminate several positions in the organization in the next month, all of which are currently held by individuals who are over 55 years old. The Insured is concerned that this may possibly lead to an age discrimination or ADEA claim and want to report the circumstances to their Employment Practices Liability insurance carrier as soon as possible.

Note that the policy terms and conditions are typically written so that Notice of a Circumstance is optional to the Insured. Only notice of actual Claims (as defined by the policy) is required during the policy period or post-policy reporting period.

Claim is most commonly defined as:

1. **A written demand for monetary damages or non-monetary relief;**
2. **A civil, criminal or administrative proceeding**
3. **An arbitration, mediation or similar alternative dispute resolution proceeding**
4. **The service of a subpoena on an Insured Person**
5. **A written request to toll or waive the statute of limitations relating to a potential civil or administrative proceeding**



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So in this case, if the Insured decides to provide Notice of Circumstances which may give rise to a future Claim or Claims (vs an actual Claim or Claims), they have the ability to do so, however, such notice must meet the following common specific details to be accepted:

1. **Full particulars of the potential Claim;**
2. **All facts related to the Wrongful Act;**
3. **The identity of the people involved;**
4. **The dates of the alleged events;**
5. **The reasons for anticipating a Claim**

In this example, it is likely that only #3 would be known at this time and the Insurer would not accept such notice as meeting the required specificity to preserve the limits and coverage of the current policy. Mere acknowledgement of the correspondence is not enough. The Insurer must also affirmatively state that such notice meets the required specificity of the Notice of Circumstances provision of the policy and that any future Claim (regardless of when made) will be covered under the current policy. If the Insurer either: 1) does not provide an affirmative acceptance of the notice of circumstance meeting the policy specificity requirements; or 2) ignores the analysis; or 3) denies notice as meeting the specificity requirements, then the Prior Notice Exclusion of the subsequent policy may negate coverage when the actual Claim(s) comes in:

Prior Notice Exclusion

A common policy amendment to the Prior Notice Exclusion wording to remedy this issue is below:

The carrier will not be liable for Loss for any Claim based upon or arising out of any fact, circumstance, situation, event, or wrongful act which before the inception date of this policy was the subject of any notice of claim or potential claim given by any Insured and accepted by the Company under any policy of which this is a renewal or replacement.

Note however that this amendment would need to be on the subsequent policy for which the Claim is actually made. Specific policy wording should be reviewed in advance to determine if an event should be reported as a Notice of Circumstances which may give rise to a Claim in order to avoid this potential coverage trap. In such case, it may make more sense to wait until the situation actually becomes a "Claim" before sending notice to the carrier.

Please contact Melissa Selke, Rob Darby or Doug Miller if you should have any questions or comments.



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