Professional Liability Concepts

About the William T. Hold Seminars OnLine

Our promise of a distinctive learning experience.

Named in honor of William T. Hold, Ph.D., CIC, CPCU, CLU, president of The National Alliance for Insurance Education & Research, these seminars – formerly known as Advanced Learning Seminars (ALS) – are innovative courses developed especially for CSRs. They are unique, in-depth learning opportunities for insurance professionals who have earned the CISR, CIC, CRM, ACSR, or CPSR designations.

Professional Liability Concepts

A good example of a Professional Liability claim would be when a tax accountant is sued for failing to give the correct estate planning advice to avoid paying estate tax.

Heirs suffer economic loss that is not due to an accident, it is due to the advice the accountant gave the deceased. The damage in such a claim is directly caused by the conduct of the accountant’s professional service.

Professional Liability insurance refers to the broad area of specialized policies designed to handle losses due to the professional services exposure.

Although this type of insurance is very specialized, Professional Liability Policies share several common characteristics. These concepts of coverage will be the focus of our course.

How to Receive Credit

This course is designed to fulfill 4 hours of the annual (8 hour) update requirement for persons holding the CISR or CSRM designations. Additionally, you may use this course to earn continuing education credits/hours (CE) towards your state insurance license renewal.

Note: The requirements for receiving CISR or CSRM update credit are not the same as the requirements for receiving state CE credit.

If you are updating your CISR or CSRM designation only:
Complete each of the self quizzes and the review test with a score of 70% or higher for each.

- Multiple attempts are allowed for the review test.
- A proctor/monitor is not required when completing the review test.
- An affidavit of exam is not required after passing the review test.

**If you also plan to request credit/hours for state insurance license renewal:**

Complete each of the self quizzes and the review test with a score of 70% or higher. Then, complete the proctored final exam with a score of 70% or higher.

- Three attempts are allowed for the final exam.
- A proctor/monitor is required when completing the final exam.
- An affidavit of exam is required in order to receive credit for passing the final exam.

**Taking the Review Test for Designation Update Credit**

The review test is a randomized test with 20 questions, designed to let you know how well you have understood the course material. Multiple attempts are allowed for the self quizzes and review test.

- You must pass all self quizzes and the review test before taking the final exam.
- You may navigate to the **Review Test and Final Exam area** by clicking on the Course Status link above. The link to the review test will become available when all self quizzes show a score of 70 or above.
- When you have passed the review test, your CISR record will reflect 4 hours of credit towards your annual designation update.
- The review test alone does not earn continuing education credit for state license renewal.

**Final Exam For State Continuing Education Credit**

The final exam for state continuing education credit is a randomized test comprised of 50 multiple choice questions worth 2 points each. It is designed to test your ability to apply what you have learned in the course. Three attempts are allowed for Hold Seminar OnLine final exams.
Navigating to the Final Exam

- To link to the final exam, click on course status link on the top menu bar (above). If all of your self quizzes show a score of 70% or above, the link to the Review Test and Final Exam area will display.
- Click on the link to the Review Test and Final Exam area.
- Click on the start review test link to complete your review test.
- When you review test shows 70% or above, the link to the final exam log in page will display.

Taking the Final Exam

- Your proctor/monitor must be present when you link to the final exam log in page.
- The proctor/monitor will enter his or her email address twice in the fields provided.
- A form will display allowing the proctor/monitor to either update his or her address information, or enter it for the first time.
- After submitting this form, the proctor will enter the start time for the exam and click on submit.
- The first question will display for the student and the exam clock will begin.
- The exam is times for one hour, calculators are permitted.
- The student may mark a question for review and return to it before submitting the entire exam.

Grading and Certification

- Submit the exam for grading. The exam score will show immediately along with a list of the topics in which the student answered questions incorrectly.
- A copy of the score page will be sent via email to the address on record and to the National Alliance.
- The score will post to the student’s permanent record, but is not certified until an Affidavit of Exam and Continuing Education Request Form is received by the National Alliance.
- For successful exams, complete the Affidavit of Exam and follow the instructions on the cover page.
- An affidavit reminder email will be sent to the email address on record on the day after a successful exam.
- Students are not allowed to see their test questions or answers after grading.
Affidavit of Exam and Continuing Education Request Form

The final exam lasts one hour, and must be completed in the presence of a disinterested third-party proctor/monitor. Three attempts at the final exam are allowed, and a passing score is 70% or higher. You and/or your proctor are responsible for submitting the Affidavit of Exam and Continuing Education Request Form to The National Alliance. (In New York, the state approved monitor is required to fax/mail the Affidavit of Exam and Continuing Education Request Form.)

Fax the Affidavit of Exam and Continuing Education Request Form to the fax number printed on the cover sheet.

Please send the original affidavit by mail (address also printed on the affidavit cover sheet.) We strongly recommend that you keep a copy for your records.

Some students will have no need to request Continuing Education credits for an insurance license, and wish only to earn update hours for the designation. Please send the CE Request Form even if you are not requesting CE hours/credits for insurance license renewal. Check off the "No CE" box at the bottom of the form.

Note: You will receive an email reminding you to send in the affidavit if you pass your exam with a score of 70 or above. Do not submit an affidavit for an unsuccessful exam.

Curriculum Support

Faculty members from The National Alliance for Insurance Education & Research are assigned to take emails from students participating in the online courses.

Our faculty are experienced practitioners and teachers in the industry. We ask them to respond to each email within 24 hours, or before the end of the next business day.

The course mentor will be happy to clarify any portion of the curriculum for you if you need help.

Make sure you have carefully reviewed the course curriculum and clearly note the page or self quiz question number when you contact a course mentor.
Help Desk

The mentors will refer any computer issues you have to the OnLine Help desk.

National Alliance staff are available by phone or email for technical support issues.

cisronline@scic.com.

To phone the OnLine Help Desk call:

800-633-2165 and select option 2.

Monday through Friday
8:30 am to 5:00 pm
Central Standard Time

Course Study and Exam Preparation

Have you ever thought about how you learn? The study aids listed below will help you determine your progress and test your understanding of concepts and examples presented in the course.

- **Learning Objectives**: Designed for managing your own learning. The learning objectives for the course are listed at the beginning of each topic. The learning objectives are indicated throughout the course pages as well. At the end of the course, you will have the opportunity to read the learning objectives again, and see how confident you feel about each one.

- **Self Quizzes**: Another learning management tool. You are required to pass each self quiz with a score of 70 or above before moving forward in the course, and you can launch a self quiz as many times as needed. To print the score page of your self quiz, click on Assessment Results, then right click on the page. The Assessment Results page makes an excellent study aid.

- **Glossary**: Glossary terms and definitions are critical to insurance professionals, and a key study aid for your online course. To define a term, click on the Glossary link above. Definitions of newly introduced terms will also be included on the course pages.

- **Knowledge Checks**: Application level questions. By attempting to apply the concepts of the course, you will better prepare yourself for the final exam. Make sure you attempt each knowledge check in the course.
• **Course Mentor:** Don’t forget to email the Course Mentor with your questions about the curriculum. Our faculty members are distinguished producers and risk managers who currently work in the insurance industry. The mentors are happy to explain and clarify the concepts in the course. They will return your email on the next business day.

**Understanding Professional Liability Insurance**

Before the 1970’s, the number of claims associated with the professional services exposure was very low and the coverage was usually only written for medical and financial professionals.

Insurers first offered coverage by endorsing a Commercial General Liability (CGL) or by writing an Umbrella Policy with a company specific endorsement over a CGL.

The number of claims in this area has increased dramatically since the 1970’s, as our nation has moved from a manufacturing economy toward a service economy.

Many new industries have emerged. The growth of the consulting profession has in turn created the development of "nontraditional" professionals.

Coverage for the Professional Liability exposure has evolved into a wide variety of stand alone products. The traditional professionals such as doctors and lawyers still exist, and certainly have a need. But we now have a whole host of new professionals requiring Professional Liability and Errors & Omissions insurance protection.

In addition to the long written Professional Liability or Malpractice Insurance, two new terms describe policies covering the nontraditional professionals: Miscellaneous Professional Insurance, and Errors and Omissions Coverage.

In addition to traditional “professionals,” consultants such as landscape architects, beauticians, tax preparers, and even educators are advised to purchase professional coverage.

In fact, many of these service providers have contractual obligations to maintain Professional Liability Coverage.

There are many types of Professional Liability Policies designed to insure all kinds of service providers.

Your job in this course is simply to arm yourself with an understanding of the concepts which govern them.
The policy language which you will study throughout the course is taken from sample Miscellaneous Professional Policies and Errors and Omissions Policies. You can print the samples by clicking the links below.

However, excerpts of policy language will be provided as needed throughout the course.

Sample Miscellaneous Professional Liability Policy
Sample Errors and Omissions Policy

With the changes in the economic environment comes the rise of Miscellaneous Professional Liability Policies.

Some of the risk classes covered by these contracts are:

- Agricultural Consultants
- Computer and Technology Consultants
- Clergy
- Expert Witnesses
- Drug Testing Services
- Appraisers
- Land Surveyors
- Auctioneers
- Collection Agents
- Courier, Delivery, and Messenger Services
- Tax Preparers
- Foreclosures Agents
- Temp Agencies
- Title Abstractors
- Travel Agents
- Landscape Architects
- Human Resources Professionals
- Personal Trainers

**Understanding the Professional Services Risk Exposure**

If a beautician accidentally spilled a chemical on a customer causing an injury, the loss might meet the requirements of a CGL exposure.

However, when the product is used as a part of the beautician’s *professional service* and this use causes an injury and loss, the exposure usually falls *outside* the scope of the CGL.
The core problem for the day spa owner is not so different from that of an architect who, through a design flaw in his blueprints, is responsible for the collapse of a wall.

Consider this:

A day spa operator has a liability exposure because his beauticians and nail technicians might misuse a product which would cause injury to a customer.

- How does he protect his business from this type of exposure?
- Will a Commercial General Liability Policy respond to this injury?
- Answers to these and other questions will come during this course.
Course Objectives Overview

Section 1 – Foundation of Professional Liability

Once you have completed this section, you should have an understanding of why Professional Liability Insurance is needed and when a Professional Liability policy is recommended in addition to a CGL or Businessowners Policy.

Concepts of standard of care, legal liability, and defense are included in this section.

Section 2 – Claims Made vs. Occurrence Policies

In Section 2, you will learn the differences between the Claims Made and the Occurrence Policy Forms. Topics include discussion of the coverage "trigger" used in claims made policies and how claims are defined.

This section also teaches the importance of the retroactive date on a claims made policy form and the availability and use of extended reporting periods with Professional Liability Policies.

Section 3 - Common Characteristics of Professional Liability Policies

Section 3 includes a thorough discussion of the insuring agreement, definitions, exclusions, and provisions for defense and settlement commonly found in Professional Liability Policies. You will also learn how limits of liability and deductibles can be applied in a claim.

Section 4 – Lawyers Professional Liability

In this final section, you will have an opportunity to apply the concepts you've learned in previous sections by analyzing a sample Lawyers Professional Liability Policy. You will answer the questions in the Section 4 Exercises by reading the sample policy.

Course Summary Pages

Use the summary section to link back to each learning objective in the course before moving on to the review test and (if applicable) final exam.

Use the Course Status link on the top menu bar to keep track of your self quiz scores. When all scores show 70% or above on your course status page, a link to the Review Test and Final Exam area will display.
FLORIDA RESIDENTS ONLY

An entity that is required to be licensed or registered with the Florida Office of Insurance Regulation but is operating without the proper authorization is identified as an unauthorized insurer. All persons have the responsibility of conducting reasonable research to ensure they are not writing policies or placing business with an unauthorized insurer. Any person who, directly or indirectly, aid or represent an unauthorized insurer can lose their licenses or face other disciplinary sanctions. Please see section 626.901, Florida Statutes, to read the laws. Lack of careful screening can result in significant financial loss to Florida consumers due to unpaid claims and/or theft of premiums. Under Florida law, a person can be charged with a third-degree felony and also held liable for any unpaid claims and refund of premiums when representing an unauthorized insurer. It is the person’s responsibility to give fair and accurate information regarding the companies they represent.
Section 1 – Foundation of Professional Liability

By the end of Section 1, you will understand what constitutes a professional and you will be able to recognize the exposures associated with that distinction. You will know why Professional Liability Insurance is needed.

You will also be able to recognize where limited coverage is provided in the Commercial General Liability and Businessowners Policies, and when a Professional Liability Policy is recommended.

The concepts of legal liability, standard of care, and common defenses are explained in this section through illustrations, examples, and exercises.

The Need for Professional Liability Coverage

Most business enterprises rely on the Commercial General Liability (CGL) Policy to cover the majority of their liability exposures.

Does this hold true for professionals and their unique loss exposures? Why is professional liability coverage necessary?

In this section, we will answer these questions by looking at:

- the definition of professional and professional liability
- examples of professional liability exposures, and
- the overall difference in the type of coverage provided by a professional liability policy and the ISO CGL Policy.
Topic 1 Definition of Professional

Learning Objectives

1. Define Professional.
2. Define Professional Liability.
3. Recognize the Professional Liability exposures of your clients.

<table>
<thead>
<tr>
<th>Learning Objective: Define Professional</th>
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<tbody>
<tr>
<td><strong>Professional</strong> - One engaged in one of learned professions or in an occupation requiring a high level of training and proficiency. (Black's Law Dictionary Sixth Edition)</td>
</tr>
<tr>
<td>A professional is someone who has special training, skills, and experience - someone who has to know more than a regular person to do his or her job.</td>
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Often, professionals have to be trained at special schools or be certified by organizations.

<table>
<thead>
<tr>
<th>Architect:</th>
<th>Undergraduate and Masters Program, Internship, Architect Registration Examination, Certification License</th>
</tr>
</thead>
<tbody>
<tr>
<td>Beautician:</td>
<td>Cosmetology School, Cosmetology Licensing Exam, Continuing Education</td>
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</table>
Learning Objective: Define Professional Liability

While many definitions for professional liability exist, in this course we define professional liability as:

The legal liability arising out of the wrongful conduct of a professional, including the failure to perform to the expected standard of care of his or her specific profession.

We will discuss standard of care later in this section.

Learning Objective: Recognize the Professional Liability exposures of your clients

Consider four scenarios that describe the professional services loss exposure.

**Nurse:** A home dialysis nurse administered the incorrect amount of glucose to a diabetic patient. The patient was rushed to the hospital and suffered brain damage.

**Beautician:** A hair colorist decided to use a new highlighting solution on her client. The client suffered 1st-degree burns on her scalp which caused pain and hair loss. The colorist had failed to heed product warnings about the length of time that the solution could be in contact with the client’s skin.

**Agricultural Consultant:** A farmer hired a soil specialist to conduct an analysis to determine if the correct amount of fertilizer was being applied to his crops to ensure long-term yield. The consultant’s report concluded that the farmer should reduce the application of nitrogen by half. Although the farmer disagreed, he followed the
consultant’s advice. As a result, the crop yield was reduced by 25%, causing an economic loss.

**Nutritionist at a Diet Center:** A diet consultant failed to note that one of her customers was allergic to peanuts. When the customer used a sauce containing peanuts as part of the diet center’s meal plan, he went into shock and was hospitalized.
Learning Objectives

1. Distinguish the differences between overall coverage provided by the Commercial General Liability Policy and the Professional Liability Policy.

2. Understand the extent of coverage provided by the Commercial General Liability Policy and Businessowners Policy for professionals.

Learning Objective: Distinguish the differences between overall coverage provided by the Commercial General Liability Policy and the Professional Liability Policy

Commercial General Liability (CGL) vs. Professional Liability

1. Highly specialized coverage, designed for professional liability exposures
2. Pays for claims arising from providing or failing to provide professional services
3. Non-standardized policy form
4. Typically claims made form

VS

1. Broad-based coverage for liability arising from business premises and operations not designed for professional liability exposures
2. Pays claims due to bodily injury and property damage resulting from an occurrence
3. "Personal Injury" or "Advertising Injury" as defined in the policy
4. Standardized policy form
5. Typically occurrence form
The easiest way to understand the distinction between CGL and Professional Liability coverage is to remember that:

CGL coverage is designed to:

*pay for bodily injury and/or property damages, which the insured is obligated to pay due to the premises or operations of a business*

and

Professional, miscellaneous professional, and errors and omissions policies are designed to:

*pay damages due to claims based on or arising from providing or failing to provide services to the standard of care required as a professional*

CGL vs. Professional Liability Coverage - Examples

**Professional Liability Coverage**

A CPA firm fails to file a corporate client's quarterly tax reports on time, resulting in severe tax penalties to the client.

**CGL Coverage**

A customer falls in the grocery store due to a slippery floor, suffering a broken arm and a broken pair of eye glasses.
E&O Alert
As you can imagine, “gray areas” might exist in a claim as to which coverage form will respond - CGL coverage or Professional Liability coverage. The possibility exists that with the Professional Liability exclusions found in the CGL and the Bodily Injury exclusions found in Professional policies, that a gap remains. We will discuss this further in Section 3 under Exclusions.

When possible, obtaining the two coverage forms from the same carrier and addressing this at the time the policies are issued, could help to solve this problem and close the gap.

Learning Objective: Understand the extent of coverage provided by the CGL and Businessowners Policies for professionals

CGL & the Professional Services Exposure

A common misconception in the insurance industry is that the CGL Policy excludes all professional liability exposures. To the contrary, some liability exposures faced by professionals are covered under the CGL.

For example, a facial spa technician accidentally drops hot wax in a client’s eye while performing a brow waxing procedure. The client’s injured eye constitutes bodily injury and is therefore a covered claim under the CGL. The unendorsed CGL does not exclude this exposure.

However, because of this, many insurers will attach exclusionary endorsements to avoid insuring professional liability exposures such as this one.

Click on the link on Section 1 CGL vs Pro Liability p5 to look at a sample exclusionary endorsement.

This type of endorsement can be used to exclude professional liability for tanning salons, veterinarians, appraisers, health clubs, and other businesses providing professional services.

There are three areas within the Commercial General Liability (CGL) Policy where language creates an exclusion relating to professional liability.

Section II – Who is an Insured
The first exclusion is found in Section II - Who is an Insured and pertains to employees or volunteer workers. Though they are insureds under the policy, they are NOT insureds when the injury arises from providing or failing to provide health care services.
Coverage B Personal and Advertising Injury Liability
The second exclusion is found in Coverage B Personal and Advertising Injury Liability. Insureds in the business of advertising, broadcasting, publishing or telecasting; designing content of websites for others; and internet search, access, content or service providers are excluded for much of the coverage otherwise provided in this section of the CGL.

Definition of Insured Contract
A third exclusion that applies to professional services is found in the definition of insured contract within the CGL Policy. In essence, if an architect, engineer, or surveyor assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, the contract will not be considered an insured contract and no coverage will apply.

CGL Exclusionary Endorsements
It is not uncommon for underwriters to add an additional exclusion to a CGL policy where professional liability exposures exist.

There are over fifty exclusionary endorsements available, including one that is not specific to any one profession but can be added for "designated" professional services.

The sample endorsement was shown earlier in this section.

CGL Definitions
Many professional liability claims do not allege Bodily Injury or Property Damage, but allege economic loss.

The definitions of Bodily Injury, Property Damage, and Personal Injury found in the CGL create limitations for recovery from claims typically brought against professionals.

In addition, the CGL responds to loss as a result of an occurrence, meaning an accident (as defined in the policy). Often the professional liability claim is not a result of an accident.
The Businessowners Policy and the Professional Services Exposure

The same type of exclusionary policy language exists in the Businessowners Policy as was found in the CGL. In addition, the Businessowners Policy has a Professional Services Exclusion that states insurance coverage does not apply to bodily injury, property damage, or personal and advertising injury caused by any professional service. The list of exclusions is long and should be carefully considered when working with clients who provide professional services. Some examples are:

- Legal
- Accounting
- Inspections or engineering services
- Medical
- Dental
- Body piercing services

The Businessowners Policy does offer endorsements to add back coverage for certain professional services. To name just a few:

- Barber and Beauticians Professional Liability
- Optical and Hearing Aid Establishments
- Funeral Directors Professional Liability
- Printers Errors & Omissions Liability
Learning Objectives

Professional liability is rooted in legal liability concepts such as tort liability, statutory liability, and contractual liability. Although these are concepts that have been previously studied in the CISR Insuring Commercial Casualty Exposures course, a review in this area will serve as a refresher and perfect introduction to our discussion of the duties owed by professionals to their clients. Such duties are also known as the standard of care.

1. Define legal liability.
2. Distinguish between breach of duty and breach of contract.
3. Understand the four elements of negligence and the four elements of a breach of contract.

Learning Objective: Define Legal Liability

Legal Liability

Legal liability is "a responsibility or obligation to others, which courts recognize and enforce." Failure to meet this responsibility often results in the imposition of monetary damages against the wrongdoer.

The three types of legal liability that impinge upon a professional are: contractual liability, tort liability, and statutory liability.

Legal liability is created:
- When a duty is breached
- When a contract is breached
- By the laws which govern an activity

Contractual Liability

A contract is an agreement between two or more parties, which creates an obligation to do or not to do a particular thing. Contracts are action-based because the parties to the contract must perform as promised.

The cause of action in a professional liability claim might be breach of contract, if duties required or implied by the contract are not met.
Breach of contract claims usually seek special damages or compensation for actual economic losses.

**Statutory Liability**

Statutory liability is liability arising out of state and/or federal laws known as statutes. The existence of these statutes may subject a professional to duties imposed by the provisions of the laws.

A good example would be laws to protect a customer’s privacy or statutes in the medical profession relating to the treatment of patients.

**Tort Liability**

A "tort" is a civil wrong against another. Tort liability is imposed by common law; that is, law that has been developed through the application of court decisions over time. Liability claims are often brought as tort actions.

Compensatory damages resulting from tort liability can include compensation for specific economic loss (special damages) or the payment of general damages (such as pain and suffering, disfigurement, etc.) or both.
Knowledge Check

A temporary staffing company fills seasonal positions for a large corporate client on an ongoing basis. Because of changing local economic conditions, fewer temporary employees are available to fill the needs of the client. The client sues the staffing company for economic loss due to the problems this creates, citing that the staffing company had agreed to bring in workers from other areas to meet the employment needs of the corporation.

Because the corporation alleges that the staffing company broke an agreement, the type of legal liability in this cause of action is:

A. Contractual liability
B. Tort liability
C. Statutory liability

Answer

The answer is A; “Contractual liability”

Knowledge Check

An accountant fails to comply with the requirements prescribed by the Employee Retirement Income Security Act (ERISA). His client files suit for the economic damages that this failure causes. Which type of legal liability would apply to the accountant in this case?

The cause of action alleges that a fiduciary responsibility of the act was not followed. Which source of legal liability applies to the accountant in this case?

A. Contractual liability
B. Tort liability
C. Statutory liability

Answer

The answer is C; “Statutory liability”
Knowledge Check

An attorney takes a case without the necessary expertise in the area of law in question. He represents the firm as having the required background. The case is lost and the client seeks damages from the attorney alleging inadequate counsel. Which type of legal liability was invoked when the lawyer failed to prepare properly?

Because it was alleged that the lawyer did not have the expertise he claimed to possess, the type of legal liability which applies to this cause of action is:

A. Contractual liability  
B. Tort liability  
C. Statutory liability

Answer

The answer is B; “Tort liability”

The majority of professional liability claims are a result of tort actions. Negligent torts are the most common type of tort.

Let’s look closer at negligence
Negligence

Definition of Negligence

A basic definition of negligence is the failure to act as a reasonable person would under the same or similar circumstances. Failure to do so can result in a negligent tort.

You should remember that all four elements or components are required for a negligent tort. If any one element is missing, the cause of action does not exist.

Briefly stated they are:

1. Duty owed
2. Duty breached
3. Injury or loss occurs
4. Breach was the proximate cause of the injury or loss

Before we discuss these elements, we will first look at the difference between Breach of Duty and Breach of Contract.

**Learning Objective: Distinguish between breach of duty and breach of contract**

**Breach of Duty vs. Breach of Contract**

The distinction between a breach of duty and a breach of contract is important.

**Breach of Duty**

In the absence of a contract, the professional can be sued for breaching a duty owed to the client. This type of action can lead to negligence, which is a type of tort.

**Breach of Contract**

A professional can also be sued for negligently performing duties stated or implied by a contract.

A claim may have two possible causes of action: breach of duty (such as negligence) and breach of contract.

**Learning Objective: Understand the four elements of negligence and the four elements of a breach of contract**
Negligence and breach of contract concepts each require that four elements be present:

<table>
<thead>
<tr>
<th>Four Elements of Breach of Contract</th>
<th>Four Elements of Negligence</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. A contract existed between the professional and the client</td>
<td>1. A duty was owed by the professional to the client</td>
</tr>
<tr>
<td>2. The client substantially performed the obligations of the contract</td>
<td>2. The professional breached the duty</td>
</tr>
<tr>
<td>3. The professional breached the contract</td>
<td>3. The client suffered damages</td>
</tr>
<tr>
<td>4. The client suffered damages that were proximately caused by the professional's breach of the contract</td>
<td>4. The professional's breach of duty was the proximate cause of the damages</td>
</tr>
</tbody>
</table>

For both concepts, if any one element is missing, the cause of action does not exist.

**Example**

A web systems design company was hired by a campaign organization to build an online website and e-commerce system to allow voters to make contributions to a candidate. Both parties signed a detailed statement of work which determined, among other things, the date of delivery for the website and the amount of hours that the company would spend checking the site’s programming code for errors prior to making it public.

The company delivered the site two months later than promised and launched it with numerous programming errors, which caused financial transactions to be lost in the first few days of operation.

The campaign organization sued, alleging that $175,000 in initial campaign contributions were lost because:

1. The web system design company failed to deliver the project on time; and
2. They failed to complete all of the promised hours of quality assurance testing before opening the site.
Knowledge Check

Using the example, decide whether or not the stated problem represents a contractual obligation, a duty that the professional must meet, or both.

The web design company was expected to employ the appropriate persons to complete the job.

- A contract existed
- A duty existed
- Both

The web developers hired by the design company did not have the skills necessary for the job.

- A contract existed
- A duty existed
- Both

Answer

The web design company was expected to employ the appropriate persons to complete the job.

- Both

The web developers hired by the design company did not have the skills necessary for the job.

- A duty existed
Topic 4 Defining Standard of Care

Learning Objectives

1. Explain a professional's standard of care.

Learning Objective: Explain a professional’s standard of care

Standard of Care

Professionals owe a higher standard of care to their clients as we learned previously. "Standard of care" and "duty owed" mean the same thing.

The standard of care or duty owed for a professional is the expected conduct of other similar professionals in similar situations.

It can be established through:

- Statutes & regulatory bodies
- Professional industry associations
- Local customary practice
- Expert witness testimony

You may find professional standard of care...

- In laws which impose licensing requirements and similar duties upon the professional;
- In customary practices of fellow practitioners within the jurisdiction where the professional conducts his or her service;
- In standards articulated by professional associations;
- In case law (court precedent).

Examples of professional standard of care that have been established

Professional Organization

A transaction between an attorney and others that does not allow the most beneficial and expeditious outcome for the client.
Court Precedent (Case Law)

A national hospital chain changes its guidelines for anesthesia follow-up care after a major malpractice suit.

Licensing Regulations

Because an insurance agent is legally authorized to transact insurance business he must meet the standard of care imposed on licensed professionals by state regulatory bodies.

Local Customary Practice

The number of times per month that a hydrologist should measure the changes in a river elevation in a flood prone community is different from what would be appropriate as a general rule.

Standard of Care: Ordinary (Non-professional) vs. Professional

The standard of care for a professional applies the same principle of the "prudent person," but the question now becomes: What would another reasonable and prudent professional do in a similar circumstance? The professional is subject to very complex standards of care.

Ordinary Standard of Care

A lawsuit involving a claim of negligence which caused bodily injury or property damage resulting from the business operation would use the "prudent person" standard of care.

Example:

A store maintains a stairway keeping it clean and free of debris and includes secure handrails, lights, and slip resistant treads.

The prudent person standard is simply the measure of what a reasonable and prudent person would have done in similar circumstances.
Professional Standard of Care

The standard of care a professional must exhibit has the similar core as the ordinary standard of care. In addition, due to the professional's skill and knowledge they must act with a higher level standard of care - the care of a reasonable member of his/her own profession. "What would another reasonable and prudent professional do in a similar circumstance?" The professional may work in a field with a tremendously high standard of care such as the Medical Profession.

Example:

Accountants are considered to have a fiduciary relationship with a client. This is a relationship of utmost trust, with specific requirements. Furthermore, they must continually update their knowledge of statutes and laws enacted to regulate their industry.

When a standard of care is breached and damages or injuries are caused by that breach, the professional can suffer significant financial consequences.

Examples of professional standards of care:

Medical Professional Standard of Care

1. Respect human life and the dignity of every individual.

2. Refrain from supporting or committing crimes against humanity and condemn all such acts.

3. Treat the sick and injured with competence and compassion and without prejudice.

4. Apply knowledge and skills when needed, though doing so may put you at risk.

5. Protect the privacy and confidentiality of those for whom we care and breach that confidence only when keeping it would seriously threaten the health and safety or that of others.

6. Work freely with colleagues to discover, develop, and promote advances in medicine and public health that ameliorate suffering and contribute to human well-being.

7. Educate the public and policymakers about present and future threats to the health of humanity.
8. Advocate for social, economic, educational, and political changes that ameliorate suffering and contribute to human well-being.

9. Teach and mentor those who follow for they are the future of the profession.

**Attorney Professional Standard of Conduct**

1. Be committed to the client's cause, but do not permit that loyalty to interfere with giving the client objective and independent advice.

2. Advise the client against pursuing litigation (or any other course of action) that does not have merit.

3. Contribute time on a pro bono basis to community activities.

4. Become involved in organized activities designed to improve courts, the legal system, and the practice of law.

5. Donate legal services to individuals unable to afford those services.

6. Always attempt to resolve any controversy and bring the parties together.

7. Do not falsely hold out the possibility of settlement as a means for terminating discovery or delaying trial.

8. In every case, consider whether the client's interest could be adequately served and the controversy more expeditiously and economically disposed of by arbitration, mediation, or other form of alternative dispute resolution (ADR).

9. Advise the client at the outset of the availability of alternative dispute resolution and explain in simple language what the effects of the various ADR techniques (e.g. mediation, neutral evaluation, or mini-trial) might have on the case.
Architects Professional Standard of Conduct

1. An architect should take all reasonable steps to:

   I. ensure that all information and material provided is truthful, accurate, and unambiguous and relevant to the client's interests; and

   II. provide a client with information about an architectural service that is sufficient to enable the client to make decisions about the provision of the service and that clearly identifies the implications of various decisions that could be made by the client about the service; and

   III. avoid making misleading or false comparisons with architectural services provided by competitors.

2. An architect should take all reasonable steps to ensure that a client is informed of:

   I. the decisions required of the client in respect of the architectural service being provided by the architect; and

   II. the implications of those decisions for the performance of the service (particularly those implications related to timeliness, cost, and changes to the service and any building or building related work consequential to the service).

3. An architect should advise a client on the likelihood of achieving the client's stated objectives having regard to the client's stated budget and time requirements for the architectural service concerned.

4. An architect should not disclose to any person any information agreed as, or understood to be, confidential that is acquired from or provided by a client in the course of the provision of an architectural service to the architect unless authorized to do so by the client in writing or as required by law.
Accountants Professional Standard of Conduct

1. In carrying out responsibilities as professionals, accountants should exercise sensitive professional and moral judgments in all activities.

2. Accountants should accept the obligation to act in a way that will serve the public interest, honor the public trust, and demonstrate commitment to professionalism.

3. To maintain and broaden public confidence, accountants should perform all professional responsibilities with the highest sense of integrity.

4. An accountant should maintain objectivity and be free of conflicts of interest in discharging professional responsibilities. An accountant in public practice should be independent in fact and appearance when providing auditing and other attestation services.

5. An accountant should observe the profession's technical and ethical standards, strive continually to improve competence and the quality of services, and discharge professional responsibility to the best of the member's ability.

The Role of the Expert Witness

Expert witnesses frequently give testimony about the industry standards of care that a professional must meet. These witnesses provide the court with knowledge about accepted professional practices that an average person might not know.
Knowledge Check

A customer sues a day spa after she has an allergic reaction to skin products used during treatment, complaining that they breached a duty to inform her of possible allergic reactions.

Which one of the following witnesses is offering testimony to establish the standard of care present in the day spa industry?

A. A representative from the manufacturer testifies about the company’s on-going efforts to inform dermatologists and other professionals of the risks associated with using their products.

B. A skin care specialist (Aesthetician) offers testimony regarding drug reactions to skin products, disclaimers, and informed consent procedures which are typically implemented by spas.

C. The spa’s operations manager testifies about the policies the company has implemented with respect to product disclaimers, informed consent documents, etc.

Answer

The answer is B; “A skin care specialist (Aesthetician) offers testimony regarding drug reactions to skin products, disclaimers, and informed consent procedures which are typically implemented by spas.”

Knowledge Check

Which one of the following is an example of a standard of care imposed by a professional organization?

A. A national hospital chain changes its guidelines for anesthesia follow-up care after a major malpractice case.

B. A transaction between an attorney and a client violates rules set forth by the American Bar Association.

C. A court awards punitive damages to a plaintiff whose privacy was breached by his psychiatrist's office.

Answer

The answer is B; “A transaction between an attorney and a client violates rules set forth by the American Bar Association.”
Topic 5 Common Law Defenses

As we learned previously, the basis for professional liability lies in legal concepts commonly recognized as torts, statutes, and contracts. When an individual performs his professional services, he is obligated to perform to the specific standards of that profession. In failing to perform in accordance with those standards of care, the professional is exposed to the consequences of financial loss.

Any discussion of the potential threat of financial loss to a professional must include a discussion of common defenses and statutes of limitations that could impact professional liability claims.

Learning Objectives

1. Identify and explain the common law defenses a professional may use to absolve or lessen the degree of negligence in a liability claim.

2. Define statute of limitations.

In professional liability claims, often a claimant will allege that the professional breached a duty (was negligent) and that his loss was the direct result of that breach.

Many common law defenses are available to the professional. Examples include failure on the part of the client to follow the advice given by a professional or failure to disclose important information to the professional. These defenses may absolve the professional from liability or lessen the degree of negligence.

Common Law Defenses

A client may be able to establish all four of the elements of negligence; however, the professional may develop a defense based upon facts that will reduce or eliminate the professional's liability.
Types of defenses can include:

- Failure to follow advice
- Inability to determine fault
- Failure to divulge important information
- Comparative or contributory negligence – Most states follow some type of comparative negligence, typically barring recovery if a person is more than 50% at fault.
- Waivers – The voluntary, intentional relinquishment of a known right.
- Statute of limitations - A statute in the common law legal system that sets forth the maximum period of time, after certain events, that legal proceedings based on those events may be initiated.
- Statute of repose - A legislative enactment that bars a claim against a party unless the claim is brought within a specified period of time following some event described in the statute, regardless of whether or not the statute of limitations period for that claim has expired.

Learning Objective: Identify and explain the common law defenses a professional may use to absolve or lessen the degree of negligence in a liability claim.

Try to determine the types of defense a professional might use against a claim of negligence.

**Match the example given on the right with its defense on the left.**

Please go to Section 1 Common Defenses p4 to complete the exercise.
<table>
<thead>
<tr>
<th>Defense</th>
<th>Example</th>
</tr>
</thead>
<tbody>
<tr>
<td>Failure to follow advice</td>
<td>A court finds that if a patient had followed every instruction which his doctor gave him, his physical injury would not have occurred.</td>
</tr>
<tr>
<td>Inability to determine fault</td>
<td>A roof collapses and the architect is sued for poor design. However, the plaintiff does not present enough evidence that the design flaw caused the collapse.</td>
</tr>
<tr>
<td>Comparative or contributory negligence</td>
<td>The client’s actions at the time of a loss caused the loss to be more severe.</td>
</tr>
<tr>
<td>Waivers</td>
<td>A client signed a statement releasing the professional from liability for losses due to his advice and consultation.</td>
</tr>
<tr>
<td>Failure to divulge important information</td>
<td>A lawyer, defending his client at trial, loses the case after the ‘discovery’ process uncovers information that the client should have reported. The client sues his lawyer for failing to prepare adequately for a case.</td>
</tr>
<tr>
<td>Statute of limitations / Statute of repose</td>
<td>State law prohibits the client from receiving damages for a loss that has occurred in the past.</td>
</tr>
</tbody>
</table>
Statute of Limitations
Let’s take a closer look at statutes of limitations.

Keep in mind that each state’s legislature determines the length of time within which legal action can be taken so the time limit will vary from state to state. The length of time will also vary by type of negligence.

Examples of the ranges are as follows:

- **Personal Injury**: 1 - 2 years
- **Breach of Contract**: 2 - 6 years and can be much longer
- **Medical Malpractice**: 1 - 4 years from act or occurrence of injury; circumstances will extend statute

It’s important for insurance professionals to know the laws of the states where their clients do business.

**Learning Objective: Define statute of limitations**

Definition of Statute of Limitations:

Statute of Limitations
A statute in the common law legal system that sets forth the maximum period of time, after certain events, that legal proceedings based on those events may be initiated.

Statutes of limitations protect professionals by addressing the problem of lack of evidence. It becomes harder to defend against a lawsuit over time because evidence disappears and memories fade.

Earlier we discussed how negligence may arise out of tort or by contract. As we also learned, the length of the statute of limitations varies similarly. Often, the statute of limitations for tort claims is shorter than for breach of contract claims. This means that a person who alleges breach of contract often has a longer period of time in which to make a claim than one filing a tort claim. This makes sense, because without written documentation (a contract), it gets more difficult to determine what really happened as time goes by.
Example

Twelve years ago, an accountant prepared a client’s tax return. At the time, the client received a small tax refund. Now, the client has filed suit alleging that the accountant's negligent work resulted in a lesser refund than was due. The accountant is worried about defending against the lawsuit because she no longer maintains much of the original paperwork and tax laws have changed significantly since then.

In the state which the accountant operates, there is a five-year statute of limitations that applies. This statute protects the accountant, who would have had a hard time defending against this lawsuit.

Summary of Foundation of Professional Liability

After completing this section, you have learned several important facts concerning professional liability:

- Professionals have unique, complex, exposures to loss
- A higher and proper standard of care is owed by professionals
- CGL coverage is not designed to handle the highly specialized needs of professionals
- Professional liability coverage, tailored for specific professions, provides the necessary protection for a vast number of individuals performing professional services
- Professional liability coverage is typically written on a claims made coverage form versus the commonly used occurrence form

Professional Liability Policies share several common characteristics that will be discussed in the next section.

Be sure to complete Self Quiz 1 at the end of Section 1
Section 2 – Claims Made vs. Occurrence Policies

In Section 2 you will learn the differences between the claims made and the occurrence policy forms. The function of the coverage triggers will be examined to provide a thorough understanding of the differences between the two forms.

We will also cover how claims are defined, review the application and the relevance of the retroactive date. Extended Reporting Periods will be examined for their availability and use.

“Claims Made vs. Occurrence”

Professional Liability Policies are typically written as claims made policies while the CGL Policy is typically written as an occurrence policy. In analyzing Professional Liability Policies, it will be necessary to distinguish between claims made and occurrence policies.

What is an occurrence policy?

It is a policy that responds or is "triggered" by the occurrence causing damages.
It is the policy period during which the occurrence takes place that responds.
This is known as an occurrence coverage trigger.

What is a claims made policy?

It is a policy that responds or is "triggered" by a claim for damages. The policy period during which the claim is made is the policy that would respond. This is known as the claims made coverage trigger.

Let's take a closer look at claims made coverage, since most professional liability policies are written using claims made coverage forms.
Learning Objectives

1. Distinguish between claims made and occurrence policies and the relevance of the coverage trigger.

Learning Objective: Distinguish between claims made and occurrence policies and the relevance of the coverage trigger

Claims Made Coverage

The coverage “trigger” for the majority of Professional Liability Policies is the claim since most Professional Liability Policies are written on claims made coverage forms.

This means that the date of the claim, not the date of the occurrence, determines if a policy is available.

Let’s see what you already know.

Try answering the questions on the next page to see what you know about claims made policies. Don’t worry if you don’t get them right. We’ll answer the questions by the end of this section.

Knowledge Pre-Check

How much do you already know about claims made coverage? Consider what your answer would be for these questions.

1. A claim is first made just before the end of the extended reporting period. Will the policy pay this claim?

   Yes, as long as the claim first made is for a wrongful act that occurred before the expiration date of the policy, because the purpose of extended reporting period is to give additional time to submit wrongful acts that occurred during the policy period.
2. A wrongful act is eligible for coverage but it happened last year. The claim was made this year. Which year’s limits apply?

The answer is this year's limits. If the claim is first made this year, then this year's limits apply.

3. True or false: the retroactive date on a claims made policy is the same as the expiration date of the policy?

False. A retroactive date will be shown on the declarations page. The retroactive date is often the date the insurer first wrote the claims made policy.

“Claims Made” vs. “Claims Made and Reported”

Claims made policies can be written on either a claims made or claims made and reported basis.

In claims made policies the claim is considered first made on the date it is reported, usually in writing, to the INSURED.

In claims made and reported policies, the claim is considered first made on the date it is reported, usually in writing, to the INSURER.

Note: Most Professional Liability Policies are written on a claims made and reported basis.

SAMPLE POLICY DISCLAIMER

Notice: This is a claims made and reported policy, which applies only to "claims" first made and reported in writing during the "policy period," or any extended reporting period. The coverage afforded under this policy differs in some respects from that afforded under other policies. Read the entire policy carefully.
“Claims Made” Trigger vs. “Occurrence” Trigger

The coverage "trigger" for the majority of Professional Liability Policies is the date the claim is first made. This means that the date of the claim, not the date of the occurrence, determines if the policy will respond.

Read the insuring agreement for the following sample policy.

I. INSURING CLAUSE

The Company shall pay Loss on behalf of the Insureds resulting from any Claim first made against such Insureds and reported to the Company in writing during the Policy Period, or any Extended Reporting Period, for Wrongful Acts committed by the Insureds solely in the performance of or failure to perform Insured Services on or after the Retroactive Date set forth in Item 7 of the Declarations and before the Policy terminates.

Is this a claims made and reported policy?

Yes, the wording in the insuring agreement refers to a reporting period. In fact, all of the sample policies in this course are claims made and reported.

Under an occurrence policy such as a CGL, if the occurrence is a covered claim, the insurance company will pay the claim subject to the limits available under the policy in force at the time of the occurrence, regardless of when the claim is made.

The 2006-2007 policy will pay the claim because it was the policy in force at the time of the occurrence.

When coverage is written on a claims made policy, as opposed to an occurrence policy, the policy that responds to a covered claim is the policy that is in force at the time the claim is first made.
The 2007 - 2008 policy is correct because this is the policy that was in force at the time the claim was first made, regardless of the date the wrongful act occurred.

Since most Professional Liability Policies are written on a claims made basis, it is important to have a good understanding of the unique features and provisions of claims made coverage forms. 

*Note: We will discuss retroactive date a little later in the course.*

**Knowledge Check**

**Click the Policy Period that would apply.**

Let's say the wrongful act occurs in Policy Period 1, but the claim is first made in Policy Period 2.

**What limits of liability would apply?** (To answer, click on Policy Period 1 or Policy Period 2.)
Answer

Policy Period 2; Available limits for year 2 apply, because the claim is first made during Policy Period 2 and the retroactive date of the policy was before the date of the wrongful act.
Topic 2 Definition of Claim

Learning Objectives

1. Understand how a claim may be defined under a Professional Liability Policy.

2. Understand the concept of Related Claims and how the Professional Liability Policy responds to Related Claims.

Learning Objective: Understand how a claim may be defined under a Professional Liability Policy

The Definition of Claim in a Professional Liability Policy

The simple definition of a professional liability claim is a demand made to the insured for monetary damages which occurred as a direct result of the insured's professional service.

A. "Claim" means any civil action, suit, proceeding or demand by any person or entity seeking to hold the Insured responsible for monetary damages as a result of a Wrongful Act actually or allegedly committed by the Insured or by any other person for whose Wrongful Acts the Insured is legally responsible.

When is a claim considered to have been made?

Does it have to be in writing?

Does it have to be reported to the insurer to be considered a claim?

When reviewing a Professional Liability Policy, be sure to understand what is required. Must the claim be in writing and is it only considered to be a claim when the insurer receives the notice?
The definition of a claim may be more complex:

B. **Claim** means
   
   1. any of the following:
      
      a. a written demand for monetary damages or non-monetary relief;
      
      b. a civil proceeding commenced by the service of a complaint or a similar pleading; or
      
      c. an arbitration proceeding, against an **Insured** for a **Wrongful Act**, including any appeal therefrom; or
   
   2. a written request to toll or waive a statute of limitations relating to a potential **Claim** described in paragraph (1) above.

   Except as may be provided in Section IX Reporting, a **Claim** will be deemed to have been first made when such **Claim** is commenced as set forth in this definition (or, in the case of a written demand or request, including but not limited to a demand for arbitration, when such a demand or request is first received by an **Insured**).

A claim may also include a notification of actions such as shown in the sample policy language in the box. This may be a civil investigation or administrative proceeding. It may include an alternative dispute resolution which includes a mediator or arbitrator rather than a court hearing or trial.

Many Professional Liability Policy forms include language such as "written demand or suit" and may require written notice of the claim to the insurer.

To understand what constitutes a claim requires knowledge of both the definition of claim and when and how a claim must be reported to the insurer. Reporting requirements determine the date of the claim and which policy will respond.

**Claim Notice & Reporting**

Now let’s examine the provision found in Claims Made, Professional Liability Policies that addresses Notice of Claims or Reporting of Claims. This provision is often found in the Conditions section of the policy and provides the requirements for proper reporting of claims that have been made against the insured. In many policies, though not found in all, an additional reporting option for potential claims exists. We will look at both.
First, as a condition to the right of coverage provided by the policy the requirement of timely notice is stated. This may be shown as “must give written notice . . . as soon as practicable” or it may state “shall immediately give written notice”.

Sample #1

IV. CONDITIONS

B. Notice:

1. As a condition precedent to any right to coverage afforded by this Policy, the Insured must give written notice to the Company of any Claims as soon as practicable after such Claim is first made and, subject to IV (C) below, during the Policy Period or Extended Reporting Period, if applicable.

Sample #2

V. CONDITIONS

A. Notice of Claims and potential Claims

1. The Insured, as a condition precedent to the obligations of the Company under this policy, shall immediately give written notice to the Company during the Policy Period:

   a. of any Claim made against the Insured;

   b. of the Insured’s receipt of any notice, advise or thread, whether written or verbal, that any person or organization intends to hold the Insured responsible for any alleged breach of duty.

This language offers the insured the opportunity to report incidents which may give rise to a future claims, to the insurer before a claim is ever made against the insured.

2. If the insured becomes aware of any circumstances which may subsequently give rise to a Claim against the Insured and, during the Policy Periods or if applicable, the Extended Reporting Period, give the Company written notice of

   a. the nature and date of the specific Wrongful Act, and

   b. the names of potential claimants, and

   c. the injury or consequences which have or might result therefrom, and

   d. the manner in which the Insured first became aware of the potential for a Claim therefrom,

   then any Claim subsequently made against the Insured arising out of such Wrongful Act shall be deemed to have been made during the Policy Period or, if applicable, the Extended Reporting Period.
Example

The early notice allows the insurer to investigate the incident in a timelier manner while memories are sharp and facts are more readily available. The insured may report the incident during a policy period which might not have had any other claims reported and greater policy limits are then made available. It also allows renewal policy limits to be preserved for future unrelated claims.

Let’s look at policy language which allows for additional time for claims to be reported when they first become known late in the policy period. The reference to this additional policy language was made previously while reviewing the Notice provision.

This provision also allows for the current policy limits of liability to be used to pay the claim while preserving the renewal policy limits for future claims. It provides for up to 28 days after notice is received by the insured when it occurs at the end of the policy term.

C. Additional Time to Report Certain Claims
If a Claim is first made against the Insured during the last fourteen (14) calendar days of the Policy Period, such Claim will be deemed to have been reported to the Company during the Policy Period if:
1. the Insured makes reasonable efforts to report such Claim immediately, and
2. the Insured gives the Company written notice of such Claim no later than fourteen (14) calendar days after the Policy Period.

Learning Objective: Understand the concept of Related Claims and how the Professional Liability Policy responds to Related Claims

Related Claims

Many wrongful acts result in only one claim being made. Sometimes multiple claims will result from a single wrongful act. Subsequent claims will be treated as reported when the initial claims is first made. These subsequent claims are known as related claims.

D. State of Related Claims: Related Claims shall be deemed to have been first made at the earlier of the following times:
1. at the time the earliest of the Related Claims was first made, or
2. at the earliest time at which notice was given under any policy of insurance of any act, error, omission, fact, circumstance, situation, transaction, event or decision underlying any of the Related Claims.

As Related Claims, they share the date of claim, per claim limit, and applicable deductible.
Example

Mary, an architect, designs a balcony that due to inadequate structure and support falls, injuring five people. Over time, five claims are made. All of them will have the same claim date as the first claim reported. Only one deductible will be applied. All five claims are subject to the one per claim limit even if the limit is exhausted before all claims are paid.

You may find this concept expressed in provisions titled Interrelationship of Claims.

Knowledge Check

Which policy limits will be used to pay the 3rd claim?

a. 2007
b. 2008

Answer

The answer is A; 2007.
Topic 3 Retroactive Date

Learning Objectives

1. Explain how the retroactive date is applied under a claims made policy and why it is important.

The Retroactive Date and Extended Reporting Period are two very important features of claims made policies. You will learn how to:

- define them,
- apply them, and
- explain them to your clients.

Learning Objective: Explain how the retroactive date is applied under a claims made policy and why it is important.

Retroactive Date

When a retroactive date is stated on the declarations page of a claims made or claims made and reported policy, it means that the wrongful acts occurring prior to that date are ineligible for coverage. The retroactive date is often the date that the insurer first wrote the claims made policy. For each new policy period, the retroactive date must remain the same as the retroactive date on the first claims made policy.

Some policies have a retroactive date that is prior to the inception date of the policy. Notice in this example the retroactive date remains March 1, 2000.

Claims Made Policy effective date
March 1, 2000
Retroactive date: March 1, 2000
Some claims made policies do not have a retroactive date. In essence, policies without a retroactive date provide coverage for prior acts. Such policies are outside the scope of this course.

The illustration on the previous page demonstrates the maintenance of the retroactive date when a policy renews. It is not as likely that a retroactive date would be changed when a policy is renewed with the same carrier.

However, when changing insurance companies, there is more likely possibility that the new carrier will not issue their policy with the original retroactive date. Instead, they may use a new retroactive date equal to their new policy effective date. This is often referred to as "advancing the retroactive date".

This would create a loss of coverage for wrongful acts that occurred during the prior policy periods, if reported during the new policy period. A request may be made to the new carrier to maintain the retroactive date of the first claims made policy. This would allow for no gap in claims made coverage. This should be carefully reviewed when considering a change to a new carrier.

If the retroactive date is advanced, it will become necessary to purchase an Extended Reporting Period from the old carrier, at the time the new carrier’s policy is written. We will review Extended Reporting Periods in the next topic.
E&O Alert
Advancing the retroactive date as the policy renews can cause coverage gaps whether renewed with the same insurance carrier or a new insurance carrier. This means that wrongful acts occurring before the retroactive date will not be covered unless the extended reporting period of a prior claims made coverage form applies.

Carefully review Retroactive Dates on each policy renewal.
Topic 4 Extended Reporting Period

Learning Objectives

1. Explain an extended reporting period and describe when it becomes necessary.

What is an Extended Reporting Period and how does it work?

Let's take a look.

Learning Objective: Explain an extended reporting period and describe when it becomes necessary.

Definition of Extended Reporting Period (ERP)

An Extended Reporting Period (ERP) is the window of time allowed by the policy to report claims after the policy expiration date for wrongful acts committed prior to the policy expiration date. They extend the time allowed to report claims. The Limit of Liability for the ERP shall be part of the Limits for the policy period and not in addition to them.

An automatic ERP may be offered on some Professional Liability Policies as an "automatic" reporting window, typically 30 to 60 days after the policy expiration at no additional premium charge.

Supplemental Extended Reporting Period

A supplemental (also referred to as optional) ERP of a longer duration, typically 1 to 3 years, can be purchased. This may be accomplished by written request of the insured to the insurer within a limited amount of time following the termination of the policy as required by the insurer.

A supplemental or optional ERP is often referred to as "tail" coverage.
This "tail" coverage is added to the policy offering the supplemental ERP and will allow the policy to respond for a claim *first made* after the expiration date but before the end of the "tail" period, so long as the wrongful act occurred after the retro date but before the expiration date of the policy.

Consideration of a supplemental ERP becomes necessary when a policy is terminated or not renewed for reasons other than non-payment of premium.

Let's look at the Professional Liability coverage history of Bob, an architect, in order to understand how extended reporting periods and retroactive dates work to maintain consistent coverage. Click on each career event below.

**1980: Bob starts his career working for a medium sized company of architects**

Claims made for wrongful acts by Bob while he was working as an architect for the first company are covered under the firm's Professional Liability Policy. The policy includes coverage for his wrongful acts.

**1992: Bob starts his own architectural consulting business**

Claims from services performed for his previous employer will be paid under his previous employer's policy as that policy covers past employees.
In order to have coverage going forward, Bob purchases his own Professional Liability Policy with a retroactive date the same as the policy start date.

1995: Bob switches to a new insurer for his Professional Liability coverage

In order to have continuous coverage, it is recommended that Bob request the retroactive date on his new policy to be the same as his old, which would be the date he first purchased his own claims made policy.

However, Bob may also purchase "tail" coverage (supplemental Extended Reporting Period) from the Insurer of his first policy. If the insurer of his new policy does not want to retain his original retroactive date, he must purchase the "tail" in order to have the extended reporting period for claims for wrongful acts occurring in the previous policy period.

2018: Bob sells his business and retires

Bob needs to maintain his right to report claims that may be made after his retirement from wrongful acts occurring prior to his retirement.

Bob should consider buying a supplemental (or optional) extended reporting period or "tail."

Knowledge Check

We learned that a Supplemental ERP may be purchased when a policy is terminated or not renewed. The ERP becomes the extended reporting period for that policy period - in essence it becomes the extension of that policy period for the purpose of accepting claims made after the actual policy expiration. The ERP does not create a new policy limit. The limits for the ERP are a part of the limits of the last policy period and not in addition to them. Let's look at a scenario below.

A wrongful act occurred in Policy Period 2 and the claim is first made after the policy expires but before the end of the ERP.
Which Policy Period and limits will respond for this claim? (To answer, click on Policy Period 1, Policy Period 2, or Policy Period 3.)

Answer

Policy Period 3; An ERP extends the period of time to report the claim. The limits that are available from the last policy period, $2M limit, apply to claims made during the ERP. The ERP does not provide for any additional policy limit.

Knowledge Check

The owner of a consulting firm has decided to place his professional liability coverage with a new insurer. His previous policy showed a retroactive date equal to the start date when the insurer first wrote the coverage.

The new agent requests a retroactive date equal to the start of the new policy.

The insured was offered the opportunity to purchase an extended reporting period when he did not renew his previous policy, and he declined. His new policy started on January 1, 2008. There was no lapse in coverage.

On July 31, 2008 he receives a claim from an incident that took place in October 2007.

Which policy will pay for this loss?

a. The policy in force back in November.
b. The policy in force in May.
c. Neither
Answer

The answer is C; “Neither”. The wrongful act is not eligible for his current policy because it occurred prior to its retroactive date. The wrongful act is not eligible under his old policy because no extended reporting period is available. This is why advancing the retroactive date can cause coverage gaps.

Summary of Claims Made vs. Occurrence

As we conclude our discussion of the claims made coverage form, it becomes clear that Professional Liability Policies have special features that require careful analysis and treatment.

The Retroactive Date and Extended Reporting Period can be very important considerations for the professional client.

You are now prepared to carefully explain both coverage features and their application. Additionally, you can now use a simple illustration of a claim under claims made coverage to explain how this type of coverage works.

Be sure to complete Self Quiz 2 at the end of Section 2
Section 3 – Common Characteristics of Professional Liability Policies

Every insurance policy has provisions that must be recognized and understood to properly understand the benefits, limitations, and exclusions of the policy.

We will examine many of the provisions and key definitions found in Professional Liability Policies.

Common Characteristics of Professional Liability Policies

Every insurance policy has provisions that must be examined to properly understand the benefits, limitations, and exclusions of the policy. The provisions we will discuss include:

- Insuring Agreement
- Definitions
  - Insured
  - Wrongful Act
  - Insured Services
  - Damages
- Exclusions
- Limits of Liability
- Defense and Settlement
Topic 1 Insuring Agreement

Learning Objectives

1. Recognize the key concepts found within the insuring agreement of a Professional Liability Policy.

The Insuring Agreement

Let's begin by looking at some examples of insuring agreements taken from Professional Liability Policies. Bolded words have special meaning and are defined in the policy form.

I. INSURING AGREEMENT

The Company will pay on behalf of the Insured, Damages which the Insured shall become legally obligated to pay and Defense Expenses as a result of any Claim first made against the Insured during the Policy Period and reported in writing to the Company during the Policy Period for a Wrongful Act first committed on or after the Retroactive Date stated in ITEM 7 of the Declarations. As part of and subject to the applicable limits of liability, the Company shall have the right and duty to defend any such Claim, even if the Claim is groundless.

I. INSURING CLAUSE

The Company shall pay Loss on behalf of the Insureds resulting from any Claim first made against such Insureds and reported to the Company in writing during the Policy Period, or any Extended Reporting Period, for Wrongful Acts committed by the Insureds solely in the performance of or failure to perform Insured Services on or after the Retroactive Date set forth in ITEM 7 of the Declarations and before the Policy terminates.

There is a lot stated in the insuring agreement. To fully understand this agreement (or clause as shown in some policies), we must look at key definitions and provisions found in the policy. Some of the concepts such as legal liability, claims made, and retroactive dates have been discussed previously.

Learning Objective: Recognize the key concepts found within the insuring agreement of a Professional Liability Policy
Points made in the insuring agreement:

- Pay on behalf
- Legal obligation
- Includes defense expenses
- Resulting from claim first made
- Must be for a wrongful act
- Involving insured services
- Occurring after retroactive date
- Reported during the policy period (or if applicable Extended Reporting Period)

At the conclusion of this course, you will have an understanding of the importance of the insuring agreement within a Professional Liability Policy.

We will now look at examples of policy language to help understand characteristics of the Professional Liability Policies.

Insuring Agreement – Pay on Behalf

I. INSURING AGREEMENT

The Company will pay on behalf of the Insured, Damages which the Insured shall become legally obligated to pay and Defense Expenses as a result of any Claim first made against the Insured during the Policy Period and reported in writing to the Company during the Policy Period for a Wrongful Act first committed on or after the Retroactive Date stated in ITEM 7 of the Declarations. As part of and subject to the applicable limits of liability, the Company shall have the right and duty to defend any such Claim, even if the Claim is groundless.

Some Professional Liability Policies use the term "Indemnify" rather than "Pay on Behalf" as it relates to payment of sums the insured is legally obligated to pay. This means that the insured must first incur the expenses and/or damages and then be made whole or reimbursed by the insurer, rather than the insurer paying the expenses and damages directly. Written consent by the insurer is required prior to the insured incurring the expenses. Further discussion goes beyond the scope of this course.
Topic 2 Key Definitions

Many defined terms are found in an insuring agreement.

In this topic we will define **Insured** and determine **Who is an Insured** in a typical Professional Liability Policy. We will answer the question: What is a **Wrongful Act**? We will also examine the importance of the **Insured Services** (may also be seen as Professional Services or Legal Services) as defined in the policy.

**Learning Objectives**

1. Be able to identify Who is an Insured.
2. Understand the definition of a Wrongful Act.
3. Know the importance of Insured Services (may also be shown as Professional Services or Legal Services).

**Learning Objective: Be able to identify Who Is An Insured**

**Who is an Insured?**

When reviewing a Professional Liability Policy to determine Who is an Insured it is important to read the entire policy. Coverage to an Insured may be extended, limited, or require specific notification due to policy language found in definitions, exclusions, and other policy provisions.

Consider:

1. Covered Organizations/Entities/Firms and Covered Persons
2. Named Insured(s)
3. Newly Acquired Organizations/Entities/Firms
4. Employees - Past, Present, Future
5. Directors and Officers - Past, Present, Future
6. Predecessor Firms
7. Estates, Heirs, Representatives

Named Insured (as stated in the Declarations) may be referred to as Organization, Firm, Company, Insured or by a term that has been included in the definition of Insured.
"Insured" means the person or entity stated in ITEM 1 of the Declarations, and any natural person who was, is or shall become a director, officer, employee or partner thereof, but only while such person was, is or shall be acting within the scope of his or her duties as such.

Other individuals who are also insureds include: past, present or future directors, officers, employees or partners.

Note that these others are only an insured while acting within the scope of their duties.

Maintaining Professional Liability coverage for past employees can be very beneficial for a firm. The company may need the support of the past employee if a lawsuit is brought after a service has been completed.

Example

Jason is an engineer who worked for ABZ Engineering, Inc., an engineering firm that specializes in dam and bridge construction. Jason was the lead engineer constructing a medium-sized dam for a county in Louisiana. Jason had completed the job for ABZ Engineering when he decided to take a job at Acme Oil to work on the Alaska pipeline.

Four years after construction was completed, the Louisiana dam developed a crack and required over $2 million in repairs. The County Construction Commission filed suit against ABZ Engineering. To help with this case, ABZ Engineering called Jason and asked him to testify. Since ABZ Engineering maintains professional liability coverage, even after four years, Jason is an insured and is happy to defend his past work and the integrity of ABZ Engineering.

If you think about it, Jason would have very little incentive to cooperate with ABZ Engineering if no coverage was provided for him. In fact, if Jason had no coverage, he could cooperate with the County (the plaintiff) in return for having any charges against him dropped.

Some Professional Liability Policies contain a definition of Insured that is more complex than at first glance. Let's examine who is an Insured in this policy.

G. Insured(s) means the Insured Organization and any Insured Person.
From this definition, it becomes necessary to look at two more defined terms. The first of which is Insured Organization.

**H. Insured Organization** means the **Parent Organization**; any **Subsidiary** created at any time; and any **Subsidiary** acquired before the Policy inception date set forth in Item 2(A) of the Declarations or, subject to Section XIII Changes in Exposure, during the **Policy Period**. **Insured Organization** shall also mean any such entity as a **Debtor in Possession** or in an equivalent status under the law of any country other than the United States.

This means the Named Insured (as stated in the Declarations) is an Insured. All its Subsidiaries are insureds. In the case of bankruptcy, the Debtor in Possession is an insured.

Let's move on to see others that are insureds.

Continuing our look at Who is an Insured, the second defined term we must consider is Insured Person:

**I. Insured Person(s)** means any past, present or future natural person director, officer, partner, or Employee of the **Insured Organization**, but only while such person was, is or shall be acting within the scope of his or her duties as such. Coverage under this Policy shall also extend to:

1. the lawful spouse of an **Insured Person**, if named as a co-defendant with such **Insured Person** solely by reason of such spouse’s status as a spouse, or such spouse’s ownership interest in property that is sought by a claimant as recovery for an alleged **Wrongful Act** of such **Insured Person**; and

2. in the event of the death, incapacity or bankruptcy of an **Insured Person**, the estate, heirs, legal representatives or assigns of such **Insured Person**

but any such coverage shall apply only with respect to a **Wrongful Act** of such **Insured Person**. All terms and conditions of this Policy including, without limitation, the Retention Amount applicable to **Loss** incurred by the **Insured Person**, shall also apply to **Loss** incurred by the **Insured Person’s** spouse, estate, heirs, legal representatives or assigns.

Once again we see that past, present, or future directors, officers, partners, or employees of the Insured Organization are Insureds while acting in the scope of their duties.
With this policy language, we see that the policy will also extend to others, under specified circumstances, when they become involved for the wrongful act of an Insured Person:

- A lawful spouse of the Insured for being a spouse or having ownership interest in property that is at risk
- The estate, heirs, or legal representatives in the event of death, incapacity, or bankruptcy of the Insured

If the insured dies, is declared incompetent, or files bankruptcy, coverage is extended to his heirs, estate, or legal representative.

Example:
An attorney dies. A claim is made within the required reporting period of his Professional Liability Policy. The claim is from a client who alleges inadequate counsel, which resulted in severe economic loss to the client.

The attorney's wife is his heir. The deceased attorney's Professional Liability Policy will be available for the wife for the purpose of defending and settling the claim to the same extent that it would have been for him.

Our discussion of Insured should also include the term Predecessor Firms as this term is found in many Professional Liability Policies. Let's look at the policy language which addresses Predecessor Firms in the definition of Insured.

F. "Insured" whenever used in this policy means:

1. The entity listed in the Declarations as Named Insured, such entity to be known as the Firm but only for Claims arising out of legal advice or legal services provided on behalf of the Firm or any Predecessor Firm by any other Insured; and...

I. "Predecessor Firm" means any entity which has undergone dissolution and is named as such on the Declarations.

Predecessor Firms may be included within the definition of "Insured" (and thereby provided coverage within the Professional Liability Policy). It is critical to recognize that the Predecessor Firm must be named in the Declarations. No automatic coverage exists.
Newly Acquired or Created Entity

Like other liability policies, a Professional Liability Policy can include coverage for newly acquired entities for a certain length of time before the acquisition must be reported to the insurer.

**XIII. ACQUISITION OR CREATION OF ANOTHER ENTITY**

This Policy is issued and the premium computed on the basis of the information submitted to the Insurer as part of the Application. If, after the beginning of the Policy Period, the Insured Company;

- acquires substantially all of the assets of another entity;
- acquires voting securities in another entity or creates another entity, which as a result of such acquisition or creation becomes a Subsidiary; or
- acquires another entity by merger such that the Insured Company is the surviving entity,

then the coverage as is afforded under this Policy shall apply to such new creation or acquisition but only with respect to Wrongful Acts occurring or allegedly occurring after the acquisition, merger or creation. As a condition of the above, if the revenues of the newly created or acquired entity exceed 10% of the current annual revenues of the Insured Company as reflected in Question number 7(b) of Application, then coverage for such newly created or acquired entity or asset acquisition will cease ninety (90) days after the effective date of such creation or acquisition unless, within such ninety (90) days period:

1. the Insured Company provides the Insurer with written notice of such creation or acquisition;
2. the Insured Company provides the Insurer with such information in connection therewith as the Insurer may deem necessary;
3. the Insured Company accepts any special terms, conditions, exclusions, or additional premium charge as may be required by the Insurer; and
4. the Insurer, at its sole discretion, agrees by written endorsement to provide such coverage.

Nothing contained in Section XIII shall provide coverage for the newly created or acquired entity for Wrongful Acts occurring or allegedly occurring prior to the effective date of such creation or acquisition.

In this policy example, the length of time is 90 days. This time limit applies if the revenues of the newly created or acquired entity exceed 10% of the current annual revenues of the Insured Company.
Other Professional Liability Policies do not give a specific time period and instead use the phrase "immediately report to the company." Often the policy will refer to a "Material Change" which is then defined and often refers to an increase or decrease in the total number of individuals offering the "insured services" of the acquisition, merger, or dissolution of the Named Insured.

An important point about acquisitions or newly created entities is that the policy will not provide coverage for Wrongful Acts occurring prior to the effective date the acquisition or creation. Let's look at the sentence found in the policy that makes this clear.

**XIII. ACQUISITION OR CREATION OF ANOTHER ENTITY...**

Nothing contained in Section XIII shall provide coverage for the newly created or acquired entity for Wrongful Acts occurring or allegedly occurring prior to the effective date of such creation or acquisition.

**E&O Alert**

Be sure to check the policy form for specific language regarding newly acquired or newly created entities and necessary reporting periods. Some policies give specific time periods, such as 90 days, while others use terms such as "as soon as practicable."
Knowledge Check

Look at the policy language in order to answer the question below.

### XIII. ACQUISITION OR CREATION OF ANOTHER ENTITY

This Policy is issued and the premium computed on the basis of the information submitted to the **Insurer** as part of the **Application**. If, after the beginning of the **Policy Period**, the **Insured Company**;

A. acquires substantially all of the assets of another entity;
B. acquires voting securities in another entity or creates another entity, which as a result of such acquisition or creation becomes a **Subsidiary**; or
C. acquires another entity by merger such that the **Insured Company** is the surviving entity,

then the coverage as is afforded under this Policy shall apply to such new creation or acquisition but only with respect to **Wrongful Acts** occurring or allegedly occurring after the acquisition, merger or creation. As a condition of the above, if the revenues of the newly created or acquired entity exceed 10% of the current annual revenues of the **Insured Company** as reflected in Question number 7(b) of Application, then coverage for such newly created or acquired entity or asset acquisition will cease ninety (90) days after the effective date of such creation or acquisition unless, within such ninety (90) days period:

1. the **Insured Company** provides the **Insurer** with written notice of such creation or acquisition;
2. the **Insured Company** provides the **Insurer** with such information in connection therewith as the **Insurer** may deem necessary;
3. the **Insured Company** accepts any special terms, conditions, exclusions, or additional premium charge as may be required by the **Insurer**; and
4. the **Insurer**, at its sole discretion, agrees by written endorsement to provide such coverage.

Nothing contained in **Section XIII** shall provide coverage for the newly created or acquired entity for **Wrongful Acts** occurring or allegedly occurring prior to the effective date of such creation or acquisition.


Assuming that the insurer is notified of the merger on March 1, 2008, can the claim be paid under Company 1's Professional Liability Policy?
Answer

The answer is B; “No”. The wrongful act which occurred before the acquisition is not covered under Company 1’s Professional Liability Policy.

Company 2’s wrongful acts occurring before Company 1 acquired them are not covered on Company 1’s Professional Liability Policy regardless of when the notification of the acquisition takes place.

Knowledge Check

An insurance agent’s E&O policy includes the policy language shown below.

<table>
<thead>
<tr>
<th>1. Insured Person(s) means any past, present or future natural person director, officer, partner, or Employee of the Insured Organization, but only while such person was, is or shall be acting within the scope of his or her duties as such. Coverage under this policy shall also extend to:</th>
</tr>
</thead>
<tbody>
<tr>
<td>a) the lawful spouse of an Insured Person, if named as a co-defendant with such Insured Person solely be the reason of such spouse’s status as a spouse, or such spouse’s ownership interest in property that is sought by a claimant as recovery for an alleged Wrongful Act of such Insured Person; and</td>
</tr>
<tr>
<td>b) in the event of the death, incapacity or bankruptcy of an Insured Person, the estate, heirs, legal representatives or assigns of such Insured Person,</td>
</tr>
</tbody>
</table>

but any such coverage shall apply only with respect to a Wrongful Act of such Insured person. All terms and conditions of this Policy including, without limitation, the Deductible Amount applicable to Loss incurred by the Insured Person, shall also apply to Loss incurred by the Insured Person’s spouse, estate, heirs, legal representatives or assigns.

The agent, who is insured under this policy, passes away. His son inherits his business at his death and calls to ask about coverage for an E&O claim that has just been made. (Assume that the claim is made during the policy period.) The claimant alleges a wrongful act was committed by the father two months prior to his death.

Is the son eligible for coverage under the described policy?

Answer

Yes; as the heir of the deceased insured, the policy will extend coverage when the son is named as a result of a covered wrongful act of his father.
Learning Objective: Understand the definition of a Wrongful Act

What is a Wrongful Act?

The sample policy language defining Wrongful Act is typical of many Professional Liability Policies.

Notice some key points found in the definition:

(T) **Wrongful Act(s)** means any actual or alleged negligent act, error or omission committed, attempted, or allegedly committed or attempted, solely in the performance of or failure to perform **Insured Services**, by an **Insured Organization** or by an **Insured Person** acting in his or her capacity as such and on behalf of an **Insured Organization**.

- Actual or alleged
- Negligent act, error, or omission
- Committed or attempted
- Performance of or failure to perform
- Must happen in connection with an insured service

Example

An insurance agent fails to secure an insurance policy with an adequate limit of property coverage for his client who notified the agent that he purchased a new building valued at $900,000 and furnished it with $2,000,000 of medical testing equipment.

Learning Objective: Know the importance of Insured Services (may also be shown as Professional Services or Legal Services)

How is Insured Services Defined?

The CSR or Producer has the important task of making sure that the professional services to be covered are defined at the time of application for coverage, according to underwriting requirements.
In order to fully cover the professional, the underwriter must be aware of all the services the professional plans to offer. If a service is not listed on the application form, it will not be included in the policy's scope of covered services/acts.

J. **Insured Services** means only services that (i) are performed for others for a fee and (ii) are identified in Item 6 of the Declarations, including any such services that are performed electronically utilizing the internet or a network of two or more computers.

To help you understand where you may have to look in the policy and on the Declarations page for language regarding insured's services/professional services, let's look at some examples.

When reviewing an existing Professional Liability Policy, Insured Services (often referred to as professional services) are typically described on the Declarations page.

**DECLARATIONS**

**Item 6. INSURED SERVICES**

Advice Re: Availability of Alternative Means to Settle Dispute;
Evaluation of Client's Self-Diagnosis/Advice as to Legal Rights;
Service Problems: Needs Assistance with Service By Posting or Publication;
Review of Correspondence and Court Documents;
Preparation of Documents to be Prepared;
Factual Investigation: Contacting Witnesses, Public Record Searches, Interview of Experience;
Legal Research and Analysis;
Assistance with or Preparation of Preliminary or Evidentiary Motions;
Pre-Mediation/Pre-Settlement Conference Legal Consult;
Post-Mediation Agreement Review;
Backup and Troubleshooting During Trial;
Assistance or Negotiation of Discovery Issues/ Disputes During Litigation;
Counseling or Procedural Assistance with Appeal;

**Example**

Imagine reviewing an existing Professional Liability Policy for renewal for a Day Spa. You find out the business is now offering laser hair removal, but the policy declaration page does not indicate that laser hair removal is an insured service.
If a claim is made for damages related to the insured's laser hair removal service, how is the current policy likely to respond?

It is possible that the insurer would deny coverage?

It’s important for the insured to understand that the scope of professional services is defined. Defining the insured services starts with the new or renewal application.

If a change occurs during the policy period as to the services the insured offers, the company underwriter must be notified and the policy endorsed which may include additional premium. If not, a dispute may arise when the insured makes a claim due to an undisclosed service or act.

A description of the insured service may also be found in a policy’s definitions section.

The example below refers to an accountant's insured professional services.

1. Advice given or service performed by whatsoever nature for others by or on behalf of the insured firm by any insured or by any affiliated firm or any other person or entity for whose conduct the insured firm is legally responsible (whether assumed by contract or otherwise), provided that all or any portion of the fee accruing from such work issues to the benefit of the insured firm (unless such work is performed on a pro bono basis with the knowledge or consent of the insured firm); and

2. Advice given or services performed by an insured solely in connection with the evaluation, by members of any institute of accountants or any formal, duly constituted standards board or similar professional body, or any individual or entity, whether or not on behalf of the insured firm.
Topic 3 Damages

Learning Objectives

1. Understand the difference between compensatory damages and punitive damages.

2. Given a definition of damages found in Professional Liability Policies, recognize the types of payments that may be excluded by the policy.

Learning Objective: Understand the difference between compensatory damages and punitive damages.

Understanding Damages

What are the types of damages are recoverable under a professional liability claim? They may be recoverable, but they are not necessarily covered by a Professional Liability Policy.

In liability, we refer to the money awarded in a suit or claim as damages. There are two basic types of damages that are awarded in liability claims:

1. **Compensatory damages**

   Amount of money that compensates for actual loss

2. **Punitive damages**

   Amounts awarded to the plaintiff and designed to either punish the wrongdoer or make an example out of the wrongdoer

**Compensatory Damages**

Compensatory damages are sums of money that will compensate for the actual loss. There are two types of compensatory damages: Special Damages and General Damages.

**Special Damages**

Special damages are measurable dollar amounts that cover specific costs. Examples of special damages are medical bills, lost income, rehabilitation expenses, repair or replacement property, and loss of use of the damaged property.

**General Damages**
General damages are subjective in nature. It is more difficult to determine an actual dollar amount because these losses are intangible in nature. Examples of special damages are pain, suffering, and loss of consortium.

Learning Objective: Given a definition of damages found in Professional Liability Policies, recognize the types of payments that may be excluded by the policy

When you look at the policy language here, notice the definition of damages.

Certain expenses incurred by the insured are frequently excluded by the policy definition of damages. Examples of these are: fines, punitive damages, or loss of the insured's own fees for services.

SAMPLE POLICY DEFINITION OF DAMAGES

**Damages** means judgments or settlements negotiated with the approval of the Company, however, damages shall not include:

- **Fines**, taxes or penalties
- **Fees** or other charges of the insured;

**Punitive or exemplary damages** or the multiplied portion of any multiplied damage award, except where permitted by law. Damages shall include, in an amount not exceeding ______, the multiplied portion of a multiplied damages award or an award of punitive or exemplary damages, which sum shall be part of and not in addition to the applicable limits of liability.

Example of a fine:

The professional is fined for operating outside his state of licensure.

Example of a fee:

The insured will not be indemnified for his own billable hours with respect to a claim.

Example of punitive or exemplary damages:

The jury in a professional liability suit has awarded damages, in excess of the amount sued for, in order to set an example.
Some states don’t allow insurance companies to pay for punitive damages, many policies pay for them where permitted by law.

If the insured is sued in federal court, punitive damages may be paid by the insurance company.

**Another Sample Definition of Damages**

Notice the policy language which states that punitive damages will not be included as damages except where permitted by law. The complexities of punitive damage awards are outside the scope of this course. Still, it is worthwhile to understand the following:

- Some states restrict or prohibit insurance policies from paying punitive or exemplary damages.
- A policy may exclude the payment of punitive or exemplary damages except where permitted by law.
- A policy may exclude the payment of punitive or exemplary damages regardless of the state’s position.

B. **"Damages"** means judgements or settlements negotiated with the approval of the Company; however, Damages shall not include:
   1. fines, taxes, or penalties;
   2. fees or other charges of the Insured; or
   3. punitive or exemplary damages or the multiplied portion of any multiplied damage award, except where permitted by law.

**Damages** shall include, in an amount not exceeding the sum of $25,000, the multiplied portion of a multiplied damages award or an award of punitive or exemplary damages, which sum shall be part of and not in addition to the applicable limits of liability.
Knowledge Check

A Professional Liability Policy is designed to cover which of the following types of damages?

Read each description of damages, then select yes or no.

<table>
<thead>
<tr>
<th>Description</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>The parents of a minor sue his psychiatrist for the cost of follow-up counseling and hospitalization, alleging that he misdiagnosed their son and prescribed medication that increased the boy's symptoms.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>A professional is fined by a judge for operating with a revoked license.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>A claimant sues a professional who refuses to refund his fees despite contract language offering a satisfaction guarantee.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Answers

1. Yes. As in this example, Professional Liability insurance is designed to cover losses from errors, omissions and wrongful acts which occur in the conduct of a professional's service.

2. No. Damages typically do not include fines and penalties.

3. No. Professional Liability Policies typically exclude the insured's professional fees from the definition of damages.
Topic 4 Exclusions

Learning Objectives

1. Recognize exposures which are typically excluded under Professional Liability Policies

**Learning Objective: Recognize Exposures which are typically excluded under Professional Liability Policies**

Excluded Exposures

Exposures which are typically excluded by Professional Liability Policies can be described in several ways:

1. The exposure and resulting claim is better addressed by another specifically designed policy.
2. The exposure is uninsurable or within the insured’s control.
3. The exposure exists for a select group and should be approached individually. It is excluded because of the need for additional premium necessary to provide coverage.

The Loss is Better Insured by Another Policy

The first type of exclusion is based upon or arises from activities that fall outside the scope of a Professional Liability Policy.

The risk is better insured by another policy, such as work related injuries. Workers Compensation policies are written to address injuries arising out of and in the course of employment.

Claims arising from employment practices liability exposures such as wrongful termination are better handled by the coverage provided by an Employment Related Practices Insurance Policy.

- Employment Practices Liability
- Bodily Injury / Property Damage
- Personal Injury
- Related / Affiliated Entities
- Work Related Injuries
• ERISA Responsibilities
  • Motor Vehicles, Aircraft, Watercraft

**Employment Related Practices Liability**

Professional Liability Policies exclude coverage for employment practices liability (EPL) claims.

EPL claims generally are centered around the employment process, not professional work related services.

The demand for stand alone EPL policies is increasing. EPL coverage may also be available by endorsement with a few carriers.

**Bodily Injury / Property Damage**

Professional Liability Policies generally exclude incidents involving bodily injury or property damage (e.g., slip and fall claims in a professional's office).

Commercial General Liability (CGL) and Umbrella Liability policies are better suited to cover these types of exposures.

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**E&O Alert**

**This exclusion is critical for many professionals.** Earlier in the course we identified the various ways the CGL eliminates coverage for some professionals. In addition, we addressed the Businessowners Policy (BOP) and the Professional Services exclusion it has.

Therefore, with this BI / PD exclusion in the Professional Liability Policy, it is possible that the insured would not have coverage under either liability policy.

**Example:** Consider a wrongful death lawsuit at an apartment building where smoke detectors are allegedly nonfunctioning. A Property Manager's professional liability policy contains a BI/PD exclusion. Maintaining the smoke detector is considered a professional service provided by the property manager and therefore excluded under the BOP. Gap exists – no response to the claim by either policy.

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**Personal Injury**
Professional Liability Policies exclude claims involving libel, slander, false arrest, invasion of privacy, malicious prosecution, and other standard personal injury perils.

However, as you'll learn in Section 4, Lawyers Professional policies may include coverage for some types of personal injury.

This coverage is also found in the CGL Policy.

Related / Affiliated Entities

Sometimes, professionals own related businesses outside of their regular practice. Often, an exclusion exists that prohibits coverage for claims resulting from an insured performing "insured services" for a related entity or individual.

It could be argued that this is to deter an attempt to profit by suing one's own company.

### III. EXCLUSIONS

A) No Coverage will be available under this Policy for any **Claim** against an **Insured**:

7. based upon, arising from, or in consequence of the performance of or failure to perform **Insured Services** for:
   a. any **Insured**;
   b. any entity which is owned or controlled by, or is under common ownership or control with, any **Insured**;
   c. any natural person or entity which owns or controls any entity included within the definition of **Insured**;
   d. any entity of which any **Insured** is a director, officer, partner or principal shareholder;

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**Work Related Injuries**

Obligations based on any workers compensation, disability, unemployment, or similar laws are excluded in Professional Liability Policies.

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**ERISA Responsibilities**
Coverage for alleged or actual violations of the responsibilities or obligations imposed by the Employee Retirement Income Security Act (ERISA) of 1974 or by similar laws is also excluded.

III. Exclusions

(A) No Coverage will be available under this policy for any Claim against and Insured:

6. for any actual or alleged violation of the responsibilities, obligations or duties imposed by the Employee Retirement Income Security Act of 1974, or any amendments thereto or any rules or regulations promulgated there under, or any similar provisions of any federal, state, or local statutory law or common law anywhere in the world;

Motor Vehicles, Aircraft, Watercraft

Professional Liability Policies typically exclude claims for bodily injury or destruction of tangible property including its loss of use. By their nature, automobile, aircraft, and watercraft claims are the result of injury to persons and/or damage to property and thereby not covered by Professional Liability Policies.

Policies such as the Personal Auto Policy, Business Auto Policy, or Watercraft Policies are intended to cover the exposures created from owning or operating automobiles or watercraft.

Those who own or operate aircraft have an even greater need for very specialized coverage not provided by the Professional Liability Policy.

The Exposure is an Uninsurable Risk

The second type of exclusion is for professional exposures which are under the control of the insured.

For example, criminal activities, intentional injury, or improper business or economic activities. We'll discuss four of these types of exclusions.

- Intentional Acts
Prior Claims

Antitrust Violations

Nonmonetary Relief

Intentional Acts

If the intentional act was performed maliciously or with the intent to injure, the Professional Liability Policy will not cover the exposure.

When an intentional act causes unintentional or unexpected consequences often the exclusion will not apply. We will discuss this further in Section 4 when discussing Personal Injury.

Prior Claims

The following three exposures are not covered or receive restricted coverage in a number of policies:

1. Claims reported to prior insurers.
2. Claims reported under prior policies with the same insurer.
3. Claims arising from incidents that were, prior to the inception of the policy period, known by the insured to have the potential for resulting in claims.

III. Exclusions

This policy shall not apply to any Claim:

G. based on or directly or indirectly arising out of or resulting from any act, error, omission, fact, circumstance, situation, transaction, event or decision which is the subject of any notice or claim under any prior policy; or any other act, error, or omission, whenever occurring, which is logically or casually connected by reason of any common fact, circumstance, situation, transaction, event or decision, with any act, error or omission which is the subject of such notice of such claim.

Antitrust Violations

Professional Liability Policies generally do not cover antitrust violations because these acts are against public policy in some jurisdictions, and they are within the control of the insured.

13. based upon, arising from, or in consequence of allegations of price fixing, restraint of trade monopolization, unfair trade practices or any actual or alleged violation of the Federal Trade Commission Act, the Sherman Anti-Trust Act, the Clayton Act, or any other federal statutory provision involving anti-trust, monopoly, price fixing, price discrimination, predatory pricing or restraint of trade activities, or any amendment to or any rule or regulation promulgated under or in connection with any such stature; or any similar
Non Monetary Relief

Professional Liability Policies often exclude claims based on nonmonetary and injunctive relief.

Nonmonetary claims are requests for remedial action or non-cash items, rather than payments.

Injunctive relief is a judicial process or order requiring a person to do something or refrain from doing something.

III. EXCLUSIONS

B. No coverage will be available under this Policy for Loss, other than Defense Costs, based upon, arising from or in consequence of any Claim (or portion of a Claim) for non-monetary relief or for enforcement of any order for, grant of or agreement to provide non-monetary relief.

The Exposure is Excluded Because of the Need for Additional Premium

The third type of exclusion is designed to remove coverage for specific exposures, often related to the insured's profession. These are activities of the profession which tend to generate a higher number of claims, which may be insured for an additional premium.

Examples:

- The Professional Liability Policy for an insurance agent might exclude claims due to his services as an excess and surplus lines agent, or when he writes reinsurance agreements.
- An architectural firm both designs and constructs its projects. The architect's Professional Liability Policy may exclude losses from services related to building projects, such as poor workmanship.
- An attorney also provides collection services for clients. The Professional Liability Policy may exclude losses that result from this additional service without an additional premium charge.

We learned earlier in this course that all services provided by the insured must be included within the "Insured Services" in order to be considered for coverage.

E&O Alert
Gray areas definitely exist between CGL coverage and Professional Liability coverage. While the CGL is not designed to cover the professional exposures, underwriters often attach endorsements to specifically exclude the exposure.

Placing both types of coverage with the same carrier helps avoid a conflict when a question exists as to whether a loss is a premises and operations loss, or a loss associated with a professional service.
Topic 5 Limits of Liability

Learning Objectives

1. Know the various ways that Limits of Liability may be written on Professional Liability Policies.

2. Recognize when Defense Costs are included within Limits of Liability and understand the impact that has on those limits.

Learning Objective: Know the various ways that Limits of Liability may be written on Professional Liability Policies

There are multiple ways that Limits of Liability may be offered and written on Professional Liability Policies. It is important to recognize the options and be able to explain them to the client.

Variations include:

- One single policy aggregate limit
- Identical per claim and policy aggregate
- Non-identical per claim and policy aggregate limit
- One per claim limit with no policy aggregate limit

We will examine two of the most common ways the Limit of Liability is written.

Learning Objective: Recognize when Defense Costs are included within Limits of Liability and understand its impact on the limits.

Common options: a single policy aggregate limit and a per claim limit with a higher policy aggregate limit.

Example 1
One Single Aggregate Limit of Liability (all claims with no per claim or related claim limit)

ITEM 3. LIMITS OF LIABILITY (Inclusive of Defense Costs):
$3,000,000 maximum aggregate limit of liability

Example 2
A Limit of Liability per Claim or Related Claim with an Aggregate Policy Limit of Liability
ITEM 3. LIMITS OF LIABILITY (Inclusive of Defense Costs):

A. $1,000,000 maximum limit of liability each Claim or Related Claims, but not to exceed;
B. $3,000,000 maximum aggregate limit of liability under this policy for all Claims.

When defense costs are included in the Limits of Liability, the amounts available to pay damages will be reduced or possibly exhausted by the defense costs. We will review this in more detail shortly.

Caution - A lower each claim limit reduces the amount available for payment of damages and defense for each claim or related claims.

NOTE: The words “Inclusive of Defense Costs” that are shown on the previous page in the examples of Limits of Liability make it clear that this policy would not pay defense costs or expenses in addition to the Limit of Liability.

It is very important to recognize when Defense Costs are within the Limit of Liability and when they are provided in addition to the Limit of Liability. This is often referred to as “inside the limits” or “outside the limits”. It is more common in Professional Liability Policies to find Defense Costs inside the Limit of Liability whereas in the CGL policy we find Defense Costs are in addition to the Limit of Liability.

Occasionally you may see this as “duty to defend” or “no duty to defend.” We will discuss this further under the topic Defense & Settlement.

E&O Alert

Adequacy of Limits - Professional liability claims can be very costly in both defense and damages.
Supplementary Payments

The sample policy language below illustrates the expenses that many Professional Liability Policies offer as supplementary payments and that they are available in addition to the limit of liability.

Supplementary Payments

The Company will pay the reasonable expenses incurred by the Insured, including loss of wages, if the Insured is required by the Company to attend arbitration proceedings or trial in the defense of a covered claim. Such payments made by the Company are subject to the following:

1. The maximum reimbursement for such expenses shall not exceed $250 per day for each insured who attends such proceedings at the Company's request.
2. The Company's maximum liability for such reimbursement shall not exceed $5000 per claim regardless of the number of insureds who attend such proceedings at the Company's request.
3. Such payments shall not reduce the available Limit of Liability.
4. The Deductible amount applicable to each claim including expenses shall not apply to payments described above.

When defense costs and damages are paid within the limits of insurance, any applicable per claim limit further reduces the amount an insurer will have available to pay toward a single claim or its related claims.

If an increased aggregate limit exists, additional limits will be available for non-related future claims.

ITEM 3.

LIMITS OF LIABILITY (inclusive of Defense Costs):

A. $1,000,000 maximum limit of liability each Claim or Related Claim but not to exceed:

B. $3,000,000 maximum aggregate limit of liability under this Policy for all Claims.
Topic 6 Defense & Settlement

Learning Objectives

1. Understand and be able to explain the difference between defense costs inside or outside the limits of liability.

2. Recognize settlement clauses and explain their provisions.

3. Understand the consent to settle provisions.

Costs to defend an insured in a professional liability claim can reach into the millions.

For this reason, the growing trend in Professional Liability Policies is to design the policy in a way which gives the insurer control over the payment of defense costs. There are two major characteristics to consider.

First, the duty relating to defense:

- Duty to defend
- No Duty to defend

A second important consideration is whether defense costs are within the limits of liability or in addition to the limits of liability.

Let's first discuss Duty.

“Duty to Defend” Policies

This type of policy language gives the insurer the responsibility to defend the insured against any allegation of a covered wrongful act.

As long as the alleged wrongful act would be covered, defense is provided even if it is proven that the insured is not negligent or legally liable.

With a duty to defend policy, the insurer typically selects counsel and maintains control over the investigation and settling of the claim.
XI. DEFENSE AND SETTLEMENT

A. We have the right and duty to appoint counsel to defend any claim against the insured seeking amounts that are payable under the terms of this policy.

B. We are not obligated to defend any claim or pay any amounts after the applicable limit of insurance has been exhausted.

“No Duty to Defend” Policies

The insurer must pay eligible defense costs, but the insured selects counsel and exercises considerable control over the conduct of his own defense.

The insurer still requires notification of the claim, remains involved, and must give consent prior to any assumption of liability, settlement or judgment, and prior to incurring any defense costs.

Though this type of policy is less common in Professional Liability Policies, some larger organizations have the resources and skills to manage their own defense.

Many smaller organizations can actually benefit from a "duty to defend" policy which allows them to utilize the expertise offered by the insurer.

XI. DEFENSE AND SETTLEMENT

A. The company does not, under this policy, assume any duty to defend. The Insureds shall defend and contest any claim made against them.

B. The Insureds shall not admit or assume any liability, enter into any settlement agreement, stipulate to any judgement, or incur any defense costs without prior written consent of the Company.

C. Only those settlements, stipulated judgements and defense costs which have been consented to by the Company shall be recoverable as a loss under the terms of the policy.

D. The company will have no obligation to pay Loss, including Defense Costs, or to defend or continue to defend any Claim after the Company's applicable Limit of Liability with respect to such Claim has been exhausted by the payment of Loss. If the Company's Limit of Liability is exhausted by the payment of Loss prior to expiration of this policy, the policy premium will be deemed fully earned.

E. The Insureds agree to provide the Company with all information, assistance and cooperation which the Company may reasonably require and agree they will do nothing that may prejudice the Company's position or its potential or actual rights of recovery.
Learning Objective: Understand and be able to explain the difference between defense costs inside or outside the Limits of Liability

Next, let's discuss how defense costs may be limited. How are defense costs handled under a Professional Liability Policy?

In most general liability policies, defense costs have been paid in addition to the limits of liability. In Professional Liability Policies the trend has moved toward applying the limits of liability to defense costs.

This can vary with the type of Professional Liability Policies.

Example:

A law firm that wants coverage to provide for defense, in addition to limits, may be able to find one through a state bar association program. The association provides the desired provision by requesting an endorsement to the policy.

This can also vary with the type of organization seeking coverage.

Example:

A small personal lines agency shopping for their own errors and omissions policy may find it easy to get defense in addition to the limits. A large agency that writes a great deal of specialty business through Managing General Agencies may not.

The growing trend is to limit defense to encourage the courts to move the parties more quickly to settlement as there are no "unlimited" funds available to drag out litigation.

Example

An architectural firm, Sticks Design Inc., has a contract with a large university, which keeps the small company busy all year long.

The firm's Professional Liability policy uses the single aggregate limit method for applying the limits of liability in the event of a claim. The annual aggregate amount is $3M. Defense costs are paid within the limits of insurance.

There is no limit, other than the aggregate limit, with respect to the amount paid per claim.

Sticks Design drafted the blueprints for the student union building at the university. The roof of the building suffered a partial collapse two years after construction was complete. Sticks Design faced lawsuits based on an architectural flaw in the roof supports.
Example

The first in a cascade of claims against the company was a $2M lawsuit filed by the university. Defense costs began. Eventually a $1,500,000 settlement would be paid.

The general contracting firm which built the student union was sued as well. They in turn sued Sticks and settled for $850,000. In addition, large defense costs were incurred.

Claim #3 rolled in to the tune of $500,000 but, eventually, the case was determined to have no merits, and no damages were awarded. Even though no damages awarded, there were still substantial defense costs.

Sticks Design Inc. had to draw upon their own assets to pay defense costs associated with these claims. Defense expenses are within the policy limits of liability and the limits had been exhausted before final outcome of all claims.

E&O Alert

It cannot be stressed enough the need to discuss with clients the subject of adequate limits of insurance. Defense costs within the limit of insurance reduces or can eliminate the availability of funds to pay damages.

A careful review of all provisions of the policy is necessary to fully understand its limitations.

Are Defense Costs Subject to a Deductible?

In addition to defense costs being limited by a per claim limit of liability, can defense costs also be affected by the deductible?

Frequently, yes.

The simplest deductible option applies the deductible to the total of defense and damages payments for a claim.
Deductible Options

No Deductible for Defense Costs
Defense costs may be paid from "dollar one" while damages are paid subject to the deductible. This can be achieved by endorsement or be built into the policy language.

Early Settlement Incentive
Some policies offer incentives for settling the claim by reducing or eliminating the deductible under certain circumstances. Professional liability claims, most frequently, are settled out of court. Claimants, insureds and insurers may use alternative dispute resolution as a formal process for resolving a claim.

Batch Clauses
Professional Liability policies can include anti-stacking provisions which allow only one deductible to be applied to claims related to the same covered act. These are also referred to as batch clauses.

Knowledge Check
An insured faces an initial demand for damages of $500,000. Claimant, insured and insurer employ an alternative dispute resolution team to assist with the claim. Within 2 weeks, this negotiation process results in a settlement of $380,000 which is acceptable to all parties.

The insured's policy offers a deductible discount of 50% if a claim is settled by arbitration or similar means within 60 days of the first claim notification.

If the insured's per claim limit is $500,000 and the deductible is $20,000 how much will the policy pay?
- a. $340,000
- b. $350,000
- c. $360,000
- d. $370,000

Answer
The answer is D; "$370,000". We will assume that there have not been other claims that would have reduced the limit and that the defense costs have not exceeded the remaining limit. Because the claim was settled early the deductible discount of 50% or $10,000 is applied.

$380,000 - $10,000 = $370,000
Understanding Batch Clauses

Next we'll work an exercise to look at how a claim is handled when the policy has a batch clause.

From our discussion in Section 2, we know that reporting provisions and how the policy defines “claim” both have a bearing on which policy is in force to pay the claim. So, with this exercise, we will practice those concepts as well.

- The policy allows 30 days to report claims that came in late in the previous policy period.
- The policy defines a claim as “notification of any wrongful act which might result in a claim.”
- The policy has an anti-stacking provision or batch clause which states that only one deductible will be paid for all claims related to one wrongful act.

(The Batch clause, the reporting window and the definition of a claim provisions remain consistent with each renewal.)

Which policy term’s deductible and limits will apply?

a. 2006
b. 2007
c. 2008
Answer

The answer is B; “2007”.

Learning Objective: Recognize settlement clauses and explain their provisions

Settlement Provisions

There are three points to remember about settlement provisions under Professional Liability Policies:

1. **Cooperation**
   
   Professional Liability policies contain settlement provisions which typically require the insured to cooperate in the investigation and defense of a claim.

2. **Consent / No Consent**
   
   Professional Liability policies may or may not require an insured's written consent to settle a claim.

3. **Consent to Settle**
   
   Admitting to liability or settling a claim without obtaining the insurer's agreement is prohibited under a Professional Liability Policy.

Cooperation

Virtually any Professional Liability policy will contain language which gives the insured the duty to cooperate with the insurance company while investigating and defending a claim.

This is consistent with all liability insurance forms, whether commercial or personal lines.

XI. DEFENSE AND SETTLEMENT

E. The Insureds agree to provide the Company with all information, assistance and cooperation which the Company may reasonably require and agree they will do nothing that may prejudice the Company's position or its potential or actual rights of recovery.
Consent

What about the insured’s cooperation with a settlement agreement?

An allegation of professional wrongdoing is a matter of serious consequences to your insured. If the insured thinks he is not negligent, he may feel that a settlement will be considered an assumption of wrongdoing. He may be worried about harm to his future reputation and future clients.

Reputational harm can be a very strong influence when the insured considers a settlement offer. The insured may not wish to settle the case, but rather, find a way to exonerate himself in court. Some Professional Liability policies are similar to other liability policies with respect to settlement of claims. The insurer has the right to settle a claim in a manner they deem appropriate and is not required to obtain the consent of the insured.

Learning Objective: Understand the consent to settle provisions

Consent to Settle

A consent to settle provision, often called The Hammer Clause or the Blackmail Provision, is found in many Professional Liability Policies. If an insurer seeks to obtain the permission or consent of the insured to settle the claim, the insured is unwilling to give consent, and additional defense costs or increased damages are incurred, the insured may be liable for those additional costs. Let's look at some examples:

- The claimant agrees to settle for an amount that the insurer is willing to pay, but the insured does not give consent. The claim is finally settled for the same amount but additional defense costs are incurred, the insured is liable for those costs.

- An insurer seeks consent from an insured for an amount to settle, but the insured does not give consent. The case goes to court and is ultimately settled for a higher amount. The increased defense costs and the increased damage award will not be paid by the insurer.

- An insurer seeks consent from an insured for an amount to settle, but the insured does not give consent. The case goes to court and ultimately no damages are awarded. Additional defense costs are incurred but are still lower than the original offer to settle. The insurer pays the additional defense costs.
Sample Hammer Clause Language

The Insured shall not admit any liability for or settle any Claim or incur any costs, charges or expenses without the written consent of the Company. The Company shall have the right to make investigations and conduct negotiations and, with the written consent of the Insured, enter into such settlement of any Claim that the company deems appropriate. If the Insured shall refuse to consent to a settlement acceptable to the claimant in accordance with the Company's recommendation, the Insured shall thereafter negotiate or defend such Claim at the Insured's own expense independently of the Company, and, subject to the applicable limits of liability of this Policy, the Company's liability for such Claim shall not exceed the amount for which such Claim could have been settled plus Defense Expenses incurred with the Company's consent up to the date the Insured refused to settle such Claim.

Knowledge Check

The insured faces a demand for damages from a client for an economic loss which is covered under the insured's Professional Liability Policy. The policy contains a Hammer Clause.

After investigation, the claimant and the insurance company reach an agreement to settle for $700,000. Defense costs up to the point of the agreement total $55,000. The insured declines to give consent for the settlement. Eventually, his case is heard in court. A jury finds for the claimant and awards damages of $700,000. The defense costs incurred after the consent to settle was rejected by the insured are $35,000.

The per claim limit is $1M, so limits are adequate in this case.

Disregarding deductibles, how much will the policy pay for defense costs in this claim?

a. $35,000  
b. $55,000  
c. $20,000

Answer

The answer is B; $55,000.

The insured assumes the risk of any additional defense costs that accrue after the settlement refusal. So the insured is liable for the additional $35,000 in defense costs.
Voluntary Payments

Any voluntary payment or admission of liability without the consent of the insurer can jeopardize coverage.

The concern with professional liability incidents is that claims can "snowball." An insured might decide to pay an amount that falls within the deductible to a claimant. Later several more claims arise as a result of the same incident. Having paid the first claimant could be considered an admission of liability which violates this provision of the policy.

E. Defense and Settlement of Claims:

The Insured shall not admit any liability for or settle any Claim or incur any costs, charges or expenses without the written consent of the Company. The Company shall have the right to make investigations and conduct negotiations and, with the written consent of the Insured, enter into such settlement of any Claim that the Company deems appropriate. If the Insured shall refuse to consent to a settlement acceptable to the claimant in accordance with the Company's recommendation, the Insured shall thereafter negotiate or defend such Claim at the Insured's own expense independently of the Company, and, subject to the applicable limits of liability of this Policy, the Company's liability for such Claim shall not exceed the amount for which such Claim could have been settled plus Defense Expenses incurred with the Company's consent up to the date the Insured refused to settle such Claim.

Be sure to complete Self Quiz 3 at the end of Section 3
Section 4 – Lawyers Professional Liability

Your goal for this section will be to practice some of the concepts we’ve worked on earlier in the course. You will answer questions about the coverage provisions under the sample Lawyers Professional Liability Policy.

We will also define some additional terms and look at the risks which are insured by Lawyers Professional Liability. Personal Injury is a coverage often not included in miscellaneous Professional Liability, while most often offered in Lawyers Professional Liability.

Knowledge Check

The causes of action brought against lawyers are based on the same types of liability we discussed in Section 1.

Click a Type of Liability below, then click the matching example.

<table>
<thead>
<tr>
<th>Type of Liability</th>
<th>Example</th>
</tr>
</thead>
<tbody>
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<td>Breach of Contract</td>
<td>A lawyer violates a privacy law while handling the business affairs of a client.</td>
</tr>
<tr>
<td>Breach of Duty</td>
<td>A lawyer is sued for alleged inadequate counsel by his client who he unsuccessfully defended in a criminal case.</td>
</tr>
<tr>
<td>Statutory Liability</td>
<td>The law firm's faulty &quot;docket&quot; (calendar) control system causes the team of attorneys to miss important court filing deadlines.</td>
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</tbody>
</table>

Rev. 8/21/09
The concepts of liability that we studied in Section 1, applied to Lawyers Professional Liability:

**Statutory Liability**

An attorney has access to a great deal of confidential and private information for clients. He must abide by privacy statutes and protect this information at all times.

**Breach of Contract**

While a claim against an attorney alleging missed deadlines due to a faulty document control system may be brought as negligence as well as Breach of Contract, it is far more frequent to be by Breach of Contract. The Statute of Limitation based on contract usually runs longer and the presence of a contract provides evidence for a clearer argument.

**Breach of Duty**

Four Elements of Negligence:
- A duty was owed by the professional to the client
- The professional breached the duty
- The client suffered damages
- The professional's breach of duty was the proximate cause of the damages
Topic 1 Types of Exposures

Learning Objectives

1. Describe examples of two types of exposures for law firms: transactional services and litigation services.
2. Define Fiduciary Negligence.
3. Define Personal Injury.

Learning Objective: Describe examples of two types of exposures for law firms: transactional services and litigation services.

Lawyers have exposures due to two types of services: litigation (trial) services and transactional services.

Litigation Services:
Representing the client in a court of law.
- Advice
- Research
- Investigation
- Preparation
- Docket Control
- Document Review
- Discovery
- Trial Presentation & Summary

Transactional Services:
Actions performed on behalf of the client.
- Estates and Wills
- Tax Preparation
- Title Transactions
- Deeds & Warranties
- Business Affairs

Knowledge Check

Which of the following scenarios do you think are due to a lawyer’s transactional service?

Choose all that are correct.

a. The lawyer failed to safeguard the privacy of documents pertaining to the client’s financial assets.
b. The lawyer failed to file court documents before trial.
c. The lawyer paid a tax liability on behalf of the client 10 days late.
d. The lawyer failed to prepare adequately before a trial.
Answer

The answers are A and C. Scenarios A and C pertain to the handling of a client's financial affairs which are transactional services.

Learning Objective: Define Fiduciary Negligence

Fiduciary Negligence

Lawyers handle the business affairs of others and are required to conduct these services according to the very high standard of care for fiduciaries. Fiduciaries are required by both common law and statute to put the clients’ interests before their own.

The word "fiduciary" is defined by Webster's as:

Of, relating to, or involving in trust and confidence

- Held or founded in trust or confidence
- Holding in trust of, relating to, or involving a confidence or trust.

A fiduciary Has a Duty to Prevent:

Breaches of Privacy

- Arising from his duties to two or more clients
- Arising between his personal interest and his duties to a client
- Arising from personal gain due to his services to a client without the express consent of that client

Conflicts of Interest

- Safeguarding of documents containing personal information
• Security of electronic transactions
• Hiring/Supervision of employees

How Does a Lawyer Have a Fiduciary Exposure?

A simple error or omission in a law firm can create a breach of fiduciary duty.

An example would be the communication of privileged information about a client to another person who is not authorized to have the information.

Learning Objective: Define Personal Injury

Personal Injury

Unlike most other Professional Liability Policies, Lawyers Professional Liability typically offers coverage for personal injury. This type of legal liability is known as an intentional tort.

An attorney is not a disinterested third party with respect to his client. He or she is expected to be a strong advocate of the client’s interests, and winning the case is the goal. To discredit the opposing party or to create the reasonable doubt, an attorney may have to be aggressive in his case. This creates a Personal Injury exposure.

The definition of intentional tort is:

An intentional or voluntary act which results in injury or loss to another party. The person committing the act can be held legally liable for the injury or loss.

Lawyers Professional Liability insures for specific personal injury losses.

J. "Personal Injury" is an injury resulting from an act or omission arising out of: false arrest, false imprisonment, malicious prosecution, malicious abuse of process, wrongful detention, wrongful entry or eviction or other invasion of private occupancy, libel, slander or breach of privacy by the insured all while rendering legal advice or legal services for others.
How Does a Lawyer Have a Personal Injury Exposure?

One example of a personal injury exposure is a malicious prosecution claim.

Black's Law Dictionary describes malicious prosecution as “[prosecution] begun in malice without probable cause to believe the charges can be sustained.”

Example: An attorney represents a woman who is divorcing her husband. The attorney files a domestic violence petition for restraint, which is thrown out for lack of sufficient cause. The husband sues for malicious prosecution.
Topic 2 Application

Learning Objectives

1. Recognize the purpose of application questions for Lawyers Professional Liability.

2. Identify areas of risk exposure in a law firm.

Lawyers Professional Liability exposures are numerous and often complex. Types of questions on an application for coverage include the following areas:

- What are the firm’s areas of practice?
- Does the firm use standard forms and wording when documenting communications with clients?
- Does the firm have ways of identifying and preventing conflicts of interest?
- What is the number of employees who are paralegals or nonprofessionals?
- Does the firm have a docket (court calendar) control system?
- How does the firm collect unpaid bills?

Learning Objective: Recognize the purpose of application questions for Lawyers Professional Liability

The application form for a Lawyers Professional Liability Policy identifies the exposures and the professional services to be insured.

Please refer to the sample application form on page 3 of Section 4 Application

Learning Objective: Identify the areas of risk exposure in a law firm

The purpose of the application is to assist the agency and carrier with the decision of placement and underwriting.

Clearly, a law firm’s areas of practice will dictate its levels of risk for a Professional Liability claim.

But the firm’s management of client acceptance standards provides a way to exert control over the possibility of taking a case in which the firm has only limited expertise.
Services disclosed in the application tie directly to the insured services (professional services) listed on the Declarations and covered by the policy.

Engagement and disengagement letters establish the dates and purpose of a lawyer’s services.

For example, an attorney hired to draw up a will should start with a letter of engagement, a summary of services to be performed, and fees to be charged. When the same attorney is later hired to settle the estate, a new letter of engagement should be created.

7. Does the applicant use:
   a. Engagement letters (e.g., retention letters, contract letters, fee letters, etc.)?
      Yes ☐ No ☐
   b. Non-Engagement Letters (decline letters, turn down letters etc.)
      Yes ☐ No ☐

A frequent “wrongful act” in a Lawyers Professional Liability claim is conflict of interest. A lawyer who has an obligation to one client which would make it difficult to provide equally fair services to another client has a conflict of interest. Document management systems at law firms typically cross reference clients to identify potential conflicts of interest.

6. Does the applicant have established procedures for identifying potential or actual conflicts of interest?
   Yes ☐ No ☐

The application includes questions about the number of nonprofessionals and paralegals. From the law firm’s perspective, careful considerations must be given to the types of tasks delegated to paralegals and nonprofessionals in order to avoid a claim due to failure to supervise.
9. Give the number employed of the following: (There is no additional charge for non-lawyers)
   Law Clarks_________
   Paralegals_________
   Clericals_________

An application for Lawyers Professional Liability will include questions about docket control.

**A docket is:**

“a minute, abstract, or brief entry; or the book containing such entries. A formal record, entered in brief, of the proceedings in a court of justice….”

“The name of “docket” or “trial docket” is sometimes given to the list or calendar of causes set to be tried at a specified term, prepared by the clerks for the use of the court and bar.” (Black’s Law Dictionary)

The law firm should implement a tracking system for court dates, deadlines, appearances, judgments, etc.

6. Docket Control
   
   a. Does the applicant have Docket Control procedures with at least two independent date controls (e.g. desk calendar, day timer, computer calendar, wall calendar, personal data assistant or other device) Yes ☐ No ☐

   If yes, please describe:______________________________________________________________

   b. Who is responsible for the independent controls and how frequently are they cross-checked?
   ____________________________

   c. Are all open calendar entries circulated to all responsible lawyers or departments?
   Yes ☐ No ☐
When attorneys file suit against a client to recover unpaid fees, they face an increased risk of a claim of negligence.

Law firms are often encouraged by insurance professionals and risk managers to create payment programs and avoid collection lawsuits.

11. Has the applicant filed suit or referred a file for the collection of fees in the past 5 years?  
   Yes ☐ No ☐
   
   If yes, what are the total number of suits or files referred for collections?__________

If a law firm has a "collection" service, an increased exposure exists. This is a service that requires an additional premium by many carriers and must be disclosed in "Insured Services."

15. Does the applicant's practice include Consumer Debt Collection? Yes ☐ No ☐
    
    If Yes, please attach a sample of the Notice sent to the debtor before filing a complaint.

(Note: Insured Services was discussed in Section 3.)
Topic 3 Policy Study

We’ve defined some terms and completed an overview of the types of risk exposures that law firms face. Hopefully, you should feel a little more comfortable with the definitions and coverage provisions relevant to Lawyers Professional Liability.

Now let’s return to the Professional Liability Concepts we’ve worked on, and answer questions about our sample Lawyers Professional Liability Policy.

Learning Objectives

1. Apply what you have learned so far to find answers to questions and situations presented to you.

Print the Sample Lawyers Professional Liability Policy and read through it.

Keep the policy with you and answer the questions on the next few pages.

Find the answers to the questions by reading the policy.

Please refer to the end of Section 4 to go over the section exercises.

Be sure to complete Self Quiz 4 at the end of Section 4
Review the learning objectives for each section.

Section 1 Foundation of Professional Liability

1. Define Professional.
2. Define Professional Liability.
3. Recognize the Professional Liability exposures of your clients.
4. Distinguish the differences between overall coverage provided by the Commercial General Liability Policy and the Professional Liability Policy.
5. Understand the extent of coverage provided by the Commercial General Liability Policy and the Businessowners Policy for professionals.
6. Define legal liability.
7. Distinguish between breach of duty and breach of contract.
8. Understand the four elements of negligence and the four elements of a breach of contract.
9. Explain a professional's standard of care.
10. Identify and explain the common law defenses utilized to absolve or lessen the degree of negligence used by professionals in a liability claim.
11. Define statute of limitations.

Section 2 Claims Made vs. Occurrence Policies

1. Distinguish between claims made and occurrence policies and the relevance of the coverage trigger.
2. Understand how a claim may be defined under a Professional Liability Policy.
3. Understand the concept of Related Claims and how the Professional Liability Policy responds to Related Claims.

4. Explain how the retroactive date is applied under a claims made policy and why it is important.

5. Explain an extended reporting period and describe when it becomes necessary.

**Section 3 Common Characteristics of Professional Liability Policies**

1. Recognize the key concepts found within the insuring agreement of a Professional Liability Policy.

2. Be able to identify "Who is an Insured."

3. Understand the definition of a Wrongful Act.

4. Know the importance of Insured Services (may also be shown as Professional Services or Legal Services).

5. Understand the difference between compensatory damages and punitive damages.

6. Given a definition of damages found in Professional Liability Policies, recognize what types of payments that may be excluded by the policy.

7. Recognize exposures which are typically excluded under Professional Liability Policies.

8. Know the various ways that Limits of Liability are offered on Professional Liability Policies.

9. Recognize when Defense Costs are included within Limits of Liability and understand the impact that has on those limits.

10. Understand and be able to explain the difference between defense costs inside or outside the limits of liability.

11. Recognize settlement clauses and explain their provisions.

12. Understand the consent to settle provisions.

**Section 4 Lawyers Professional Liability**

1. Describe examples of two types of exposures for law firms: transactional services and litigation services.

2. Define Fiduciary Negligence.
3. Define Personal Injury.

4. Recognize the purpose of application questions for Lawyers Professional Liability.

5. Identify areas of risk exposure in a law firm.

6. Apply what you have learned so far to find answers to questions and situations presented to you.