

What's Your Duty? Updates on Recent Trends in D&O, E&O and MPL



D&O TRENDS

- Mergers & Acquisitions
- Cyber Liability
- Regulatory Enforcement

Mergers & Acquisitions

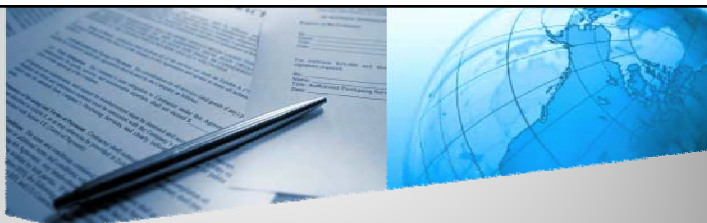
- Nearly every merger now results in litigation
 - High volume (93%)
 - low cost (essentially payoffs to plaintiff lawyers)
- SEC requiring admission of fault
 - Potential coverage implications

Cyber Liability

- Emerging area both in terms of liability and coverage
 - Liability
 - Neiman Marcus ruling (7th Circuit)
 - Coverage
 - Stand-alone cyber policies cover primarily notification and credit-monitoring costs
 - Coverage under D&O policy would vary based on policy language

Regulatory Enforcement

- Largest risk likely not from U.S. regulators
 - Less-experienced regulators
 - Less-developed body of law
 - Increased risk
- Some countries require purchase of insurance from admitted, local carriers



E&O TRENDS

What Courts Think a Professional Liability Policy Covers

- “An errors and omissions policy “generally ‘protect[s] against liability based on the failure of the insured, in his or her professional status, to comply with what can be considered in simplistic terms to be the standard of care for that profession.”

–*In re SRC Holding Corp.*, 545 F.3d 661 (8th Cir.2008) (quoting Couch on Insurance § 1:35 (3d ed.2008)).

- Who is considered a Professional?

Tougher E&O Industries

1. Law Firms
2. Financial Institutions
3. Technology
4. Medical/Healthcare Professional

Law Firms

- Claims frequency remains unchanged
- Trusts & Estates is the leading practice area for legal malpractice claims.
- Tougher practice areas: Patent, Real Estate, Collections/foreclosure and plaintiff firms
- Most frequent alleged error is conflict of interest.
- Firm Mergers & Lateral Hires continues to drive claims.
- Firms involved in Real Estate are seeing continued premium increases and limit reductions. Firms involved in the financial arena are seeing increases as well but not as dramatic as those in the Real Estate Sector.
- Cyber-related malpractice claims are an emerging risk
- ALAS (Attorney's Liability Assurance Society) Financial Strength Rating Downgraded twice over the last year.
- One Beacon sold off their entire LPL book to Argo Pro.

Innocent Insured Doctrine Inapplicable Where Application Falsified

- Illinois State Bar Association Mutual Insurance Co. v. Law Office of Tuzzolino and Terpinas, 2015 IL 117096.
- No Innocent Insured Coverage
- Exclusions & rescission applies if “any insured” fails to disclose potential claim- even former firm members.
- Former members are “insureds”

Medical/Healthcare

- Medical Billing Audits
- Recovery Audit Program est. 2010
- Billing E&O usually written on a “Reimbursement” Basis rather than “Pay on behalf of” basis.
- Continuing Trend of New Carriers entering the medical professional liability insurance marketplace

Financial Institutions

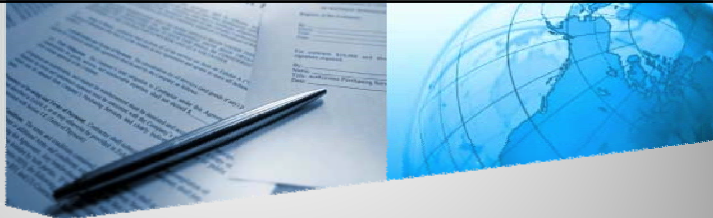
- Nature and origin of claims vary widely and are difficult to anticipate
- Retentions are increasing
- Coverage Terms are generally stable
- Consumer Financial Protection Bureau (CFPB)
 - a) Coverage for Defense Costs
 - b) Coverage for Settlement Costs

Technology

- Greater underwriting scrutiny if tech providers that generate revenue from the sale of security products or products utilized in the processing of retail transactions.
- Demand by third parties continues to drive the market.
- Being Asked to provide evidence of higher insurance coverage.
- Coverage for breach of data privacy is a hot topic in Tech E&O
- What can Technology Firms do to Mitigate their exposures?
- Some insurers will only provide coverage for software and solutions while others will include coverage for network security software.
- The “Softened Hammer Clause” is making inroads in the Tech E&O Marketplace.
- All carriers offer prior acts coverage as long as previous coverage was in place.
- Most all carriers offer worldwide coverage if a suit is brought in the U.S., Canada or possessions.

Claims Reporting, ERP Options, and Counsel

- All carriers offer a supplemental extended reporting provision, but they range in length. Carriers will sometime negotiate additional optional periods and/or cost.
- Selection of counsel
- “Softened Hammer Clause”



Claims Handling Process

- Duties of Parties

Parties

1. Brokers
2. Claim Handlers
3. Attorneys

Broker

- Serves as the initial point of contact with the Insured
- Helps the insured select the coverage, policies, and carriers
- Collects premiums
- The role has evolved: no longer just the contact for buying a policy and renewing; now advises insured with risk management policies, risk mitigation

Brokers

- Becoming more involved with active as the liaison between the adjuster/ claims handler and the insured.
- A key consideration: does broker involvement with counsel violate attorney-client privilege?
 - No consistent treatment: but, in order for the attorney-client privilege to stand challenge, the broker must be necessary to litigation
 - Play it safe: brokers should not have direct involvement with claim. Claim handlers should make reporting to the broker part of the process.

Claims Handlers

- Interacts with policy holder regarding ultimate policy questions
- In some instances, serves as liaison between the attorney/insured and the broker
- Selects an attorney to defend against the claim or challenge coverage

Claims Handlers

- Involved in the litigation process – investigation, analysis, mediation
- Values the claim
- Possesses specialized business knowledge across multiple industries

Disability

2014 Statistics

- 25,369 claims filed / 24,441 claims resolved
 - 15,074 (61.7%) – no reasonable cause
 - 893 (3.7%) – reasonable cause
- 4,981 merit resolutions
 - \$95.6M in monetary benefits

“Other” & “Regarded as” Disability

- Separate classification for growing trends in disability claims: genetic disorders; mental health
- 30.1% of Disability claims classified as “Other”
- 11.2% classified as “Regarded as”
- Genetic Disorders – recorded keeping started in 2010 (always < 1% of Disability claims)
 - 2012: 60; 2013: 80; 2014: 45
- Orthopedic – 8.9% “general” 9% back related
- EEOC litigation trends indicates an expansion into mental health conditions/awareness – application of reasonable accommodation

Pregnancy Discrimination

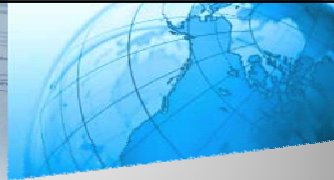
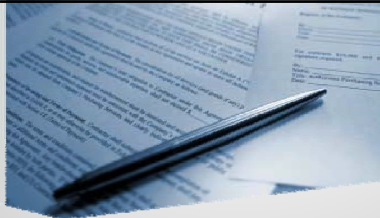
2014 Statistics

- Subset of Title VII – suggestive of EEOC focus in litigation trends
- 3,400 receipts / 3,221 resolutions
 - 1,899 no reasonable cause (59%)
 - 121 reasonable cause (3.8%)
- \$14.4 million in monetary benefits

Retaliation

2014 Statistics

- 37,955 claims filed / 36,907 claims resolved
 - 23,214 (62.9%) – no reasonable cause
 - 1,070 (2.9%) – reasonable cause
- \$140.5M in monetary benefits



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