

Professional Liability and Insurance for "Prior Acts"

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Did you know that a law suit can be brought against you for something that happened several years ago?

If a claim were to be discovered and reported today for something that happened years ago, your current insurance policy would only respond if it includes "prior acts" coverage. Accordingly, you should ensure that your Professional Liability policy always provides retroactive coverage, without limit with respect to time for claims arising from "prior acts" that are newly discovered, and that have not been previously reported. Prior acts amendment is now part of the OCP's revised by-law regarding Professional Liability insurance requirements. Without "prior acts" coverage, you could be faced with a nightmare scenario as in the following case:

In 2000, RJ, a 51 year old male, started Rofecoxib (Vioxx) 12.5 mg, once daily, for the treatment of osteoarthritis. By 2001 his dose had been increased to 25 mg daily with good effect and tolerability. In 2002, reports surfaced in the news suggesting an association between Vioxx and certain cardiovascular events (e.g. myocardial infarction and stroke). After hearing of these reports, RJ asked both his physician and his pharmacist if he should continue to take this medication. In the absence of any history of heart disease in either RJ or the members of his family, both assured him that it was perfectly appropriate for him to do so.

So RJ continued to take the medication until it was withdrawn from the market in 2004. Five years later, in 2009, he has now suffered a stroke which has left him without the use of his left arm. The pharmacist has received notice that RJ has commenced a liability suit, naming both his physician and the pharmacist as joint defendants. RJ's stroke has left him unable to continue with his employment, and he is seeking substantial damages.

Fortunately, the pharmacist is able to locate all of the insurance policies that were in effect, year by year, from 2000 through 2009, as follows:

Years Policy Issued	Insurance Carrier
2000 - 2001	ABC Indemnity Co.
2002 - 2007	DEF Fidelity and Guarantee
2008 - 2009	Amity Insurance Co.

The pharmacist must now decide which of these three insurance companies should be advised of the RJ claim.

ABC's 2000 policy coverage was in effect when the medication was first prescribed, and this could be deemed to be the decisive event that ultimately became the subject of RJ's suit. But RJ's injury is presumably cumulative and continuous throughout the period 2000 to 2004, and this might then include the period during which DEF's policies for 2002 and 2004 were in force.

One must also consider that DEF's policies were in effect when adverse Vioxx consequences were first made public. If the advice of the physician or the pharmacist is proven to have been defective, it would presumably be at a time when these adverse effects became widely known in 2002, during DEF's coverage regime. For these reasons, perhaps the triggering event could more properly be said to have happened in 2002, and not in the year 2000, since it could be alleged that it was in 2002 that the pharmacist failed to act on the new information. .

Or perhaps the claim should be reported to Amity Insurance since, after all, the first discovery and reports of RJ's injury, and of his intention to sue, are all taking place in the 2009 policy year that is covered by Amity.

Given this sort of background, the simple task of reporting a professional liability claim to the pharmacist's insurer has suddenly taken on a somewhat problematical aspect. Which of the three insurers will respond to the claim? Which should respond to the claim?

ABC denies the claim because its coverage was written on a "claims made" form that specifies that the events giving rise to a covered claim must arise, and must be discovered and reported, within the period during which the policy is in force.

DEF also denies the claim. DEF considers that the events giving rise to the claim took place before its policy came into effect. The DEF policy is based on an "occurrence" wording, and it does not provide any coverage for "prior acts".

The Amity insurance policy is also written on an "occurrence" basis. It is Amity's position that its policy, too, does not cover any claim directly triggered by and arising from events that not only took place, but which were concluded, long before its coverage came into effect.

Will these three denials stand up under challenge?

It is very likely that the ABC and Amity denials will be successful, but DEF's refusal could lead to an extended process of arbitration with an uncertain outcome. In the meanwhile, the pharmacist would have two legal suits that he or she must finance – one against DEF to overcome the coverage denial, and another to defend against RJ's allegations.

As we have just seen, there are very good reasons why this "prior acts" coverage amendment is now a part of the OCP's revised professional liability requirements. Insurance policies are difficult documents to understand when read by non-specialists. We strongly recommend that you ask your insurance broker to confirm to you, in writing, that your Professional Liability policy includes prior acts coverage, unlimited with respect to time, and then make sure that this letter is kept in your permanent insurance file.

OPA's program provides the "prior acts" coverage that we have been discussing, and it is fully compliant with the OCP's requirements in this, and in all other respects.

If you require additional information, please contact Shaki Mohammed, HKMB HUB International at 416-597-4654 or 1-800-232-2024, ext. 226. If you require an application, please contact Eija Kanninen, OPA, at 416-441-0788, ext. 4226 or 1-877-341-0788.