



CURRENT COVERAGE ISSUES

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- **Can the firm withdraw from the case if the insured doesn't pay?**

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An accounting firm has a \$1 Million E&O policy with a \$50,000 deductible. The carrier refers the file to defense counsel, who defends for two months, bills the insured for the deductible, and doesn't get paid.

- **Can/should the firm look to the carrier for payment of the deductible?**

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- **If the firm withdraws, can/should the carrier refer the file to another defense attorney without disclosing the problem with collecting the deductible from the insured?**

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- **If the carrier does disclose the payment issue to the new defense attorney, can/should the new attorney condition his or her acceptance of the referral on the insured's willingness to pay its deductible upfront?**

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- **Does the insured's failure to pay its deductible extinguish the carrier's obligation to defend?**

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- **Does a bankruptcy filing, which renders the insured unable to pay a deductible, extinguish the duty to defend or indemnify?**

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- **From a practical standpoint, should the carrier's position be affected by the exposure on the E&O claim?**

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- **Are there practical reasons why the firm should let the carrier know about the insured's non-payment?**

Scenario 2:

A law firm has consecutive, 2008 and 2009, E&O policies with the same carrier, with no gap in coverage. The law firm receives a letter in June, 2008, from an unhappy client who asks the firm to reimburse legal fees, and the firm does so. The law firm doesn't report the "potential claim" to the carrier. In 2009, the unhappy client files suit, and the firm tenders the suit to the carrier.

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- **Did the letter from the unhappy client put the insured on notice of a potential claim?**

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- **Did the firm have a contractual duty to notify the carrier?**

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- **Assuming the firm had a duty to report, is the claim covered by both policies, by one policy, or by neither policy?**

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- **Is the answer different if the firm reported the claim in January, 2009, as opposed to December, 2009?**

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- **Should any practical considerations affect the analysis?**

Scenario 3:

A real estate agent, insured under an E&O policy, is sued for malpractice. Without consulting his carrier or the attorney retained by the carrier, the insured agent agrees to settle the case for \$25,000, which is \$20,000 higher than his \$5,000 deductible.

Scenario 3:

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- **Is this a violation of the "cooperation clause" in the policy?**

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- **Does the carrier have the right to withdraw the defense and/or deny coverage ?**

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- **Does it matter if it's a "good" settlement?**

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- **Assuming the insured's agreement to settle is binding, who pays?**

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- **What if the insured doesn't actually settle the case, but through his negotiations, effectively establishes a "settlement floor"?**

Scenario 4:

An attorney, with E&O coverage for the 2009 calendar year, is sued for malpractice that appears to have occurred in February, 2009. The carrier provides defense without reserving rights. During the litigation, the carrier learns that the malpractice suit was related to a prior claim, which arose prior to the policy year and was in fact covered and defended by another carrier.

Scenario 4:

An attorney, with E&O coverage for the 2009 calendar year, is sued for malpractice that appears to have occurred in February, 2009. The carrier provides defense without reserving rights. During the litigation, the carrier learns that the malpractice suit was related to a prior claim, which arose prior to the policy year and was in fact covered and defended by another carrier.

- **Does the absence of a reservation of rights bind the carrier to keep defending and to indemnify?**

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- **Does it matter if the carrier, had it done a reasonable investigation, would have discovered that the claim was related to a prior claim?**

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- **Can/should the carrier simply deny coverage?**

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- **What are the advantages and disadvantages of a Dec action?**

Scenario 5:

A law firm is contacted by out-of state (or out-of-country) "attorney" who wants to retain the firm to help a client collect a debt. The law firm agrees to help, but before doing any work, is advised that the debtor has agreed to pay the debt. The "debtor" sends the firm a cashier' check for \$100,000, and the firm is asked to deposit that check into its trust account, and to then wire \$90,000 to the "creditor". For its trouble, the firm gets to keep \$10,000. The firm deposits the check and wires the money, but a few days later, the bank advises that the check was fraudulent, and that \$90,000 has been deducted from the firm's trust account.

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- **Is the bank's claim covered by firm's E&O policy?**

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- **Is this a covered E&O claim?**

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- **What if the \$90,000 subtraction from the trust account wipes out a client's retainer, and the client makes a claim against the firm?**

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- **Should you immediately try to sell some Florida swamp land to this firm ?**

QUESTIONS?