

**AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON LAWYERS' PROFESSIONAL LIABILITY**

EXTENDED REPORTING ("TAIL") COVERAGE

APRIL 2013

Section A: Terms to know regarding Extended Reporting, or "tail," Coverage:

Bare, "going bare": Not what you do in the bathtub, but rather, a lawyer who practices for a period of time without professional liability insurance coverage.

Career Coverage: A policy or policy provisions that provide coverage for claims arising from the acts, errors or omissions of an insured when providing legal services at any law firm during or prior to the current policy period. Most professional liability policies for law firms of size only provide coverage for claims arising from work done on behalf or in the name of the insured law firm, but career coverage covers claims arising from work done at any prior point in a lawyer's career, irrespective of where the lawyer worked. Such coverage may be limited or non-existent if the lawyer is joining another firm, as that firm's insurance carrier (or the firm itself) may not wish to cover such exposure when it doesn't have to do so.

Claims-Made and Reported Coverage: Most professional liability policies are written on this basis. In order for a claim to be covered, the claim must be first made against the insured lawyer and reported to the insurance company during the policy period. Some policies may be "claims-made" forms, where the claim must be made during the policy period, but the insured's requirement to report the claim to the insurance company may extend to a time period beyond the expiration of the policy period (such as "within a reasonable period of time" or "as soon as practicable").

ERC: An acronym for extended reporting coverage. Coverage is provided for claims made and reported after the expiration of a claims-made policy, if such claims arose from acts or omissions occurring during an insured period of time, before the ERC was issued or effective.

ERP: Extended reporting period. May be used interchangeably with the term ERC, although this term more accurately refers to the length of time ERC is provided. The period of time during which a claim arising from an act or omission occurring prior to the inception date of the ERP can (in most cases) be reported and covered. Most professional liability policies provide the insureds with options to purchase ERPs of varying length.

Occurrence Coverage: A policy that provides coverage for claims arising from acts or omissions occurring during the period of time covered by the policy, regardless of when the claim is actually made. This form of coverage is very familiar to most consumers, and while it is used for many casualty insurance products (such as auto and homeowners insurance), it is rarely used for professional liability coverage.

Extended Reporting (“Tail”) Coverage

Prior Acts Coverage: Coverage for claims arising from acts, errors or omissions occurring at some point prior to the inception date of the policy. A policy providing “full prior acts” coverage covers claims arising for work done in the name or on behalf of the insured firm without a time limitation. Some policies have a “retro date” or retroactive date, which limits prior acts coverage to claims arising for work done in the name or on behalf of the insured firm on or after the retro date. Whether or not prior acts coverage is limited only for work done on behalf of or with the named insured firm will depend upon the policy provided by the particular insurance company.

Retro Date: See Prior Acts Coverage, *supra*.

“Tail” Coverage: A lawyer’s exposure for claims arising from work done during a particular policy period extends well past the expiration of the policy period, since such a claim may not be made for several years after the work is performed. This exposure is often referred to as “tail exposure”, because it trails the attorney like a tail trails an animal. “Tail coverage” is generally referred to as the coverage for this exposure provided under an Extended Reporting Period (ERP) or ERC, *supra*.

Section B: FAQ’s Regarding Extended Reporting Coverage, and coverage for “prior acts.”

This topic may be important to you if any of the following occur during your legal career:

- You change firms;
- A law firm you work for merges with another firm;
- The lawyers in your firm decide to dissolve the firm; or
- You retire from practice, or permanently leave the practice of law.

What is extended reporting coverage (ERC), sometimes referred to as an extended reporting period (ERP) or “tail” coverage?

As with most forms of errors and omissions insurance, almost all lawyers’ professional liability insurance (LPL) is written on a claims-made basis. With many policies, in order for a claim to be covered, the claim has to be first made against the policyholder *and* reported to the insurance company during the policy period (claims-made and reported coverage). If a policy expires, and a claim is thereafter made, the lawyer or firm will not have coverage under that policy. Some policies will provide coverage for claims made during the policy period, provided that the claim is reported within a reasonable time after the policy expiration date. These policies are known as “claims made” policies. ERC provides coverage for claims arising from work performed prior to the expiration of the policy period that are made and reported after the time in which to report a claim has expired.

Why is this coverage sometimes referred to as “tail” coverage?

Lawyers’ professional liability insurance is often called a “long-tail” line of insurance. An act or omission may take place today, but a claim arising from that act or omission may not be discovered or made against the lawyer for a considerable period of time, sometimes years later. Compare such claims to the typical auto accident or property damage insurance claims. The vast

Extended Reporting (“Tail”) Coverage

majority of those claims are reported to an insurance company within a relatively short period of time after the event giving rise to the claim. A significant percentage of LPL claims are not made, and therefore not reported, for some time after the act or omission giving rise to the claim, hence the term “long-tail” line of insurance.

Is such coverage automatically provided after a claims-made and reported policy expires?

The answer to this question depends upon the specific policy language. Many policies provide a *limited* period of time in which to report a claim after a policy expiration date, usually between 30 to 60 days. Some policies offering such coverage require that the claim be first made before the expiration date of the policy, but provides additional time after expiration to report the claim to the insurer. A few policies will provide “free” ERC to an insured for a much longer period of time, provided certain conditions are met. These conditions usually include a certain number of years insured by the given insurer, and retirement from law practice by the lawyer. Such policies are by far the exception, not the rule.

Most insurers will, for additional premium paid at the time of exercise, offer an optional ERC. The insured typically may purchase ERC for a period of one year, two years, three years, five years, and, under some policies, an unlimited time period. The cost is generally a multiple of the last annual policy premium, and depends upon the length of time selected for the ERC.

Furthermore, most insurers require the purchase of ERC to take place within a certain number of days from the date of policy expiration, or the option to purchase this coverage will be lost.

Some policies require that ERC be purchased, if at all, by the law firm, and it is not available to individual attorneys

If a lawyer leaves a law firm for other employment, how can the lawyer be certain that she or he remains covered for what she/he did while working for the law firm?

If the law firm remains an ongoing entity, the lawyer is usually covered as a former member or employee of the firm for claims arising from services rendered while she/he was with the firm, assuming the firm retains its claims-made coverage. However, if the firm divides or dissolves at some point thereafter, and does not buy ERC for the firm upon its termination, then there may be no coverage for the lawyer for any claim made thereafter.

If a lawyer leaves one firm and joins another, is it possible to purchase coverage for acts or omissions that occurred prior to joining the new firm, thus avoiding any issue with respect to having ERC for prior acts or omissions?

In most cases, the new firm’s insurance policy will by its terms cover only the lawyer’s acts on behalf of the new firm. Most carriers will *not* agree to provide coverage for claims arising from acts or omissions of the lawyer prior to joining the firm (“career coverage”), even if the new firm wishes to secure this coverage for its new attorney. There are exceptions to this rule, however, with some commercial insurers and state bar-related insurers either providing career coverage in

Extended Reporting (“Tail”) Coverage

the policy form or willing to endorse the policy (with or without additional premium) to provide such coverage. The lawyer may also be able to cover prior acts or omissions by purchasing ERC when leaving a firm, if the option for an individual ERC is available in the prior firm’s policy.

Example: Lawyer Jones leaves law firm Blood, Swet & Howe and joins firm Silver & Gold. The policy for Blood, Swet has no provision for the purchase of an individual tail. The insurer for Silver & Gold only agrees to cover claims arising from acts or omissions of Jones after joining that firm. “Career coverage” for Lawyer Jones is not available with Silver & Gold. In the event that Blood, Swet dissolves or merges with another firm without purchasing ERC that covers lawyers in the firm or formerly in the firm, Jones may have no coverage for any claim later made arising out of her work while employed with Blood, Swet.

A lawyer wishes to purchase ERC, but the cost is prohibitive. Are there possible options to assist with the purchase?

Some insurers may allow the premium for the ERC to be paid in installments over time. If an installment premium is not paid, the ERC will be cancelled. It may also be possible to purchase an ERC with lower limits of liability than was provided by the expiring policy, thus reducing the cost of the ERC. Of course, the lawyer or law firm should determine if it is prudent to do so. This option may not be widely available, but some insurers are willing to negotiate such modification of limits.

If a lawyer does work after the ERC is in place, and a claim arises from the services performed after the claims-made and reported policy expiration or termination date, but within the ERC period, is that claim covered by the ERC?

No. The ERC only covers claims arising for professional services rendered prior to the expiration or termination of the policy that are made and reported subsequent to the policy expiration or termination date and prior to the end of the ERC termination date.

Can a lawyer buy his/her own ERC coverage when leaving a firm, or at some point after leaving the firm, if it becomes necessary to have ERC in place for services rendered while with the firm?

The answer depends in part upon what the firm’s policy provisions allow. Most often, the lawyer will not be able to buy his/her own ERC when leaving the firm (unless the attorney thereafter ceases to practice law, discussed below), in part because the insurer continues to cover the lawyer under the firm’s policy, and to provide additional coverage to the lawyer could create additional exposure for the insurer for a claim, when no such additional exposure was contemplated. Insurers may sell some form of individual ERC to a departing lawyer, but this coverage may be conditioned upon the lawyer’s retirement from private practice, disability, or death. Some policies may also provide for individual ERC if the lawyer leaves the private practice of law, such as becoming a judge, or becoming employed in a non-legal or “in-house” capacity.

Furthermore, ERC is generally not commercially available to a lawyer or law firm as a “stand alone” insurance product. As a rule, ERC is only available in conjunction with a previously issued claims-made policy. There are select markets that may provide stand-alone ERC, but this is not common, and typically applies to larger law firms facing dissolution or merger.

A lawyer decides to leave a law firm, but do some limited amount of solo private practice. Can that lawyer purchase coverage for his/her prior acts or omissions while with the firm?

There may be several options for a lawyer to secure coverage for his/her prior acts in this particular circumstance. *First*, it should be remembered that for so long as the lawyer’s prior firm remains covered under a typical claims made policy, that lawyer will have coverage for claims arising from work performed while at that firm. *Second*, a lawyer leaving a firm and going solo may be able to purchase his/her own “prior acts” coverage in connection with a policy issued to cover his/her solo activities (see below). Some insurers that provide “prior acts” coverage in these cases may refuse to do so, if the lawyer left a large law firm where a self-insured retention, or deductible amount, was very high, often six-figures or possibly even greater. The new insurer may consider such retention to be the equivalent of having been uninsured. *Third*, there may be an option under the lawyer’s former firm’s policy to purchase an individual ERC.

Some insurers may offer a “part-time” policy to lawyers who are doing a limited amount of work. Even though the policy is issued on a part-time basis, at least one state bar-related insurer will cover full-time prior acts under such a policy.

Example: Lawyer Smith leaves a law firm, and begins his own solo practice. Whether or not his prior firm maintains coverage for claims arising from acts or omissions while with the firm, Lawyer Smith may be able to find insurance coverage that will cover claims arising from acts or omissions prior to the start of the solo practice. Note a possible exception: where prior acts coverage is conditioned upon the insurer having provided coverage for the prior firm.

Is the length of ERC always limited in time to a certain number of years, or can such coverage be purchased that never expires?

The answer to this question depends upon the policy purchased. Many insurers will provide an option of ERC for a limited period of time, but some also provide the option of an “unlimited” period of time in which a claim can be reported. In other words, the ERC never terminates.

A lawyer has practiced “bare,” or without insurance, for a period of time. Can that lawyer buy a claims-made policy that will cover prior acts or omissions, in a sense, ERC, even if they have not been previously insured?

Most insurers will not agree to cover claims arising from services performed during a period of time for which the lawyer had no insurance in place. There may be exceptions to this general rule.