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CLAIMS-MADE MEDICAL PROFESSIONAL LIABILITY POLICIES

As a medical professional you are probably well aware that a claims-made policy is a type of policy that offers coverage for claims made (or made-and-reported) to the carrier during the policy period. For example, assume you have been purchasing claims-made policies since 2005, and your policy retroactive date is 1/1/2005. If a claim is made and reported in 2011 regarding a mammography test conducted in your facility in 2007, the claim would be covered under the 2011 claims-made policy – even though the services in question were provided four years earlier. Coverage for a particular year ends when the policy terminates –unless tail coverage is purchased or an automatic extended reporting period is allowed.

WHAT IS TAIL COVERAGE?

Tail Coverage will be referred to as *Extended Reporting Period endorsement* in your policy and it is an option you are given when you purchase your Claims Made Policy. If chosen, it allows you to report claims first made *after* a policy termination date, up to a certain time period defined in the policy. These claims must still arise from an event that occurred on or after the retroactive date, but prior to the policy termination date. The "tail" contract can extend the reporting period for different lengths of time: months, one-to-five years, or even indefinitely. If the claim is reported during the tail period, it will be covered by the insurance contract. If the claim is reported after the original reporting period or after the extended tail period, whichever period is longer, the claim will not be covered.

If an individual healthcare provider retires, takes a leave of absence, or terminates or changes employment, tail coverage is usually required for any future claims that may arise from healthcare services provided during their tenure or period of service. Without securing tail coverage, the policyholder will have no coverage for claims made after termination of the last claims-made policy which included coverage for that specific healthcare provider. If a

policyholder plans on purchasing a new policy, an alternative to purchasing tail coverage would be to purchase "prior acts" coverage (also called "nose coverage") from the new carrier to ensure that claims occurring prior to the new policy period are not left uncovered. In either case, the key to claims-made coverage, for an organization or an individual physician, is *continuity* of coverage. Consulting with your insurance broker to make sure you are covered is the key.

IT CAN GET COMPLICATED

As long as your imaging facility continues operations and remains financially viable, you can simply continue to purchase claims made policies each year for uninterrupted coverage.

But what about the physicians who work for your facility? Many radiologists may work for your firm through the years, on a full or part-time basis, and they may leave temporarily only to return later--or leave permanently for a variety of reasons.

To limit your liability and exposure, you may want to contractually obligate your physicians to carry separate Medical Professional Liability insurance. On the other hand, your ability as an organization to provide coverage for physicians while they work for you, and tail coverage afterwards, may be a strong incentive for the most desirable specialists to choose your facility as their employer. In addition, any uncovered claim of a physician due to the fact that they did not secure proper tail coverage, increases the exposure to the facility's vicarious liability or the increased liability allegations directed at the facility. Having tail issues clearly spelled out in an employment contract can protect the facility and the physicians from potential coverage gaps at the time of separation.

Regarding tail coverage, there are at least four approaches to take:

1. The facility assumes the risk and purchases claims-made and tail coverage for itself and its employed or contracted physicians.
2. The physician assumes the risk and must purchase claims-made and tail coverage for themselves.
3. The physician assumes the risk and secures prior acts coverage from a new carrier, or chooses to go bare (not recommended).
4. The issue goes unaddressed (not recommended).

In either case #1 or #2, the tail policy will typically provide coverage for claims that arise out of acts or omissions that occurred during the term of employment, even after the physician is no longer an employee. The physician who has left you to re-enter the field elsewhere may purchase a new policy with a new retroactive date. However, for the physician who must buy their own tail coverage, the cost can be significant, typically 150 to 200 percent of the price of a mature claims-made policy. For radiologists, whose exposure to "long- tail" claims is significant, the cost may be prohibitive.

In case #3, finding a replacement policy with prior acts, or "nose coverage" can be problematic at times. A new carrier may be reluctant to write coverage where a potential gap exists. There are cases where plaintiffs have managed to involve the new carrier in the litigation, even when the alleged negligence occurred during the gap period, based on a theory of "continuation of care." The argument is made that the negligence that occurred during the gap period continued through the time when the new coverage took effect. This forces the new carrier to respond to the claim, even though the initiating incident occurred during the gap period. Differences between insurance company's language, insuring agreements, coverage triggers, and claim and incident reporting requirements, can further complicate matters.

WHAT SOLUTIONS CAN INSURANCE CARRIERS OFFER?

If you want to provide professional liability protection for your physicians under your facility's policy-- while maintaining an approach that provides for administrative ease and cost savings when adding and deleting covered physicians--work with your insurance broker to identify a carrier that offers some or all of the following options on a Facilities claims-made policy:

- **Physicians Professional Liability Insuring Agreement– Limited Duty and Scope and/or 24-Hour Coverage**

Normally, you will find in the Insuring Agreement of your facility policy, under a heading like "Who is an Insured" that Physicians, and a few other specified professionals, are not insured under the policy. They can, however, be added through endorsement, if your carrier is willing to cover physicians. You may be able to get coverage for the physicians you identify and list, solo corporations (solely owned by the insured physician), and "agents" of the physician(s), that is, persons who are acting in the scope of their duties as employees of the physician or solo corporation at the time of health care event that leads to a claim being made. You will pay less if you can identify limited duty and scope of activity for these Physicians, et al., or full price for 24-hour coverage. You will need to work with your broker to determine what features are best for your organization, including whether or not you will have separate or shared limits with the physicians. Regarding Tail Coverage, it will typically be offered through the first named insured, i.e., the facility. If the facility accepts it, and pays the premium in a timely fashion, the physicians will be covered under the terms of the policy.

- **Rolling IBNR & Slot Endorsements**

If an insurance carrier can offer you and your physicians a form of *automatic* tail coverage, often referred to as "rolling IBNR" it may can be a win-win for everyone. IBNR means "Incurred but not reported," in other words, an incident may have occurred while a physician is working for you that won't turn into a claim that can be reported until later, after the physician has left your employment.

Normally, a radiologist who is part of a group with traditional malpractice coverage has to protect him or herself when they leave the group by purchasing their own tail. The insurance company schedules each physician individually with a retro date and charges premium per position.

But with a rolling IBNR policy, physicians are included as insureds. If a physician leaves the group during the policy period, the physician's IBNR exposure will remain with the Named Insured's (Imaging Center's) policy for as long as coverage is in force with the insurance carrier. Departed physicians will continue to be insured for medical professional services provided at a scheduled location while they were employed or contracted by the facility. As long as coverage is in force with the carrier, claims for medical professional services by the physician can still be reported per the provisions of the policy form. Should the facility decide to leave the carrier and is unable to buy continuous prior acts coverage under the same terms, the Facility can exercise its right to purchase an Extended Reporting Period, and the carrier will issue an endorsement for all of that policy's exposure (including active and departed physicians).

Many organizations also need flexibility in their policies to address the movement of multiple physicians on and off their payrolls, or working on a part-time basis. A "Slot Endorsement" is another option you can explore with your insurance broker. Simply put, it allows you to insure the *position* as opposed to an individual physician. If, for instance, you wanted to insure a couple of radiologists, each of whom performs the same duties for your firm for a set number of hours per week, up to a maximum of 40, you could do so utilizing a Slot Endorsement. With Slot coverage, the physicians insured in a single Slot share a limit of coverage. (Therefore, if this option is chosen, it is prudent to limit or avoid situations where two or more physicians covered by the same slot work with same patients—so that both won't be named by a single patient in a claim.)

Again, tail coverage can be provided for physicians covered by a Slot endorsement. Policy details vary, so check with your broker, but generally, when a Physician terminates employment, the carrier retains their retroactive and cancellation dates within the Slot. This means the departed Physician is still covered for the care they provided while employed by the facility and there is no requirement to purchase Tail Coverage for this physician as long as the slot remains open. When a physician leaves a Slot, it creates a vacancy to be filled by that provider's replacement. The premium for the coverage has already been paid, so the transaction is merely a matter of the carrier approving the new Physician for coverage and processing the change to the policy by placing the new physician within the Slot. The only instances where a Tail is required under the Slot coverage option are when the policy using the Slot coverage is cancelled, or if a Slot cycles through an entire policy year unoccupied or vacant. It is important to note that beyond the costs savings, Slot coverage can add cost predictability.

WHAT'S RIGHT FOR YOU?

The ownership, make-up, and goals of your organization will all affect how you approach tail coverage for your facility and physicians. In choosing your insurer and the policy options you want pay for, always consult with an insurance broker who is well-versed in medical professional liability. Your broker, in turn, can access **National Specialty Underwriters**, a professional liability specialist who, through its exclusive insurance program for Medical Imaging with Medical Protective, a Berkshire Hathaway company, offers a multitude of attractive coverage features, including:

- 60 days to purchase tail coverage vs. typical 30
- Full range of Professional Liability coverage for your physicians; separate or shared limits
- 24-hour or limited duty-and-scope coverage
- Rolling IBNR and Slot Coverage Options



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