

BULLETIN

Professional Liability Insurance

“Occurrence” wordings versus “Claims Made” wordings

Two different insurance wordings are available in the Canadian underwriting market covering pharmacy professional liability risks: One of them is based on an “occurrence”, and the other on a “claims made” dynamic. From time to time there is a debate as to which, from a pharmacist’s perspective, is the best approach. Does “occurrence” give better protection than “claims made”, or vice versa?

Two fundamental facts that you should keep in mind in dealing with this debate.

First, either wording can be seriously coverage defective. Either needs to be carefully endorsed to tailor the coverage to more fully meet pharmacy risk exposures; and, second, when properly tailored to fit a pharmacy’s requirements, *there is little difference in the scope of coverage, as between the one form and the other.*

The “Occurrence” Form

In its “standard” form, an “occurrence” policy wording will not provide any coverage for a claim that was incurred prior to the effective date of the policy. (For example, a patient may have begun a medication regime which results in a cumulative injury, first discovered three years after it was first administered. . The occurrence policy in effect when the claim is reported will not cover injury that occurred prior to its inception date.)

An “occurrence” wording does provide coverage indefinitely for claims incurred while the policy is in effect, even though they may be discovered and reported long after the policy has expired. While this appears to be a desirable feature, it can lead to two types of problem. First, the pharmacist needs to keep policy documents long after they have expired in order to report the claim to (a) the insurer at risk when the claim was first incurred, and (b) to each insurer at risk as the patient’s injury developed over time. Each of these policies will have a clause that will limit or constrain coverage in the event that “other insurance” is available to cover the same event. Which policy applies? Which policy limit should apply?

An “occurrence” wording leads some to suppose that a General Liability policy, with the exclusion dealing with professional acts removed, provides all of the necessary coverage. Because store insurance composite insurance packages include a general liability section, it is tempting for some to suppose that the deletion of this exclusion is all that is needed for appropriate professional liability insurance to be brought into effect. Those who unreflectingly take this position are making a serious mistake. General liability insurance is tied to definitions of bodily injury and property damage that fall far short of protecting the pharmacist for liability arising from breaches of patient confidentiality, or for lack of treatment efficacy.

“Claims Made” Form

The basic form is extremely limited and only covers claims that are both incurred and reported while the policy is in effect. As between insurers, brokers and consultants, however, it is well understood that this “basic” form is meant to be the departure point for negotiation of additional endorsements. Additional coverage features are purchased “cafeteria style”.

The OPA professional liability wording is “claims made” but extensively broadened through negotiation, either editorially or by endorsement. Subject to certain terms and conditions, (by way of a few illustrative examples), it includes the following features:

1. Full retroactive coverage for any and all claims that have been incurred since the beginning of the store’s incorporation, provided that they are first discovered while the policy is in effect.
2. An “extended reporting amendment” option, (ERA). When a store is sold, the vendor will typically remain liable for all claims that were incurred prior to the “cut off date” of the sale. The ERA provides coverage for the vendor against such potentialities.

The ERA is also available in the event that the owner is retiring from practice, and in a situation in which it makes more sense to simply close his/her store operations.

3. The store, as a legal corporate entity, is not subject to regulation by the OCP, but its professional liability exposure is still governed to a significant extent by the OCP’s definition of “professional services”. The policy covers “wrongful acts” , which are defined as errors or omissions arising from the performance the professional services as regulated by the OCP. This fully covers breaches of confidentiality and issues arising from lack of treatment efficacy, and goes far beyond the narrow scope of “occurrence” “bodily injury” and “property damage” definitions.

So which is best? “Claims Made” or “Occurrence”?

Given skilled negotiation by consultants or brokers, there should be little coverage difference between them—but don’t take the “skilled negotiation” for granted. Everything depends on the care that has been taken to properly tailor the coverage to cover the pharmacist’s professional liability risk exposure.

Most of the insurance companies that underwrite professional errors and omissions liability coverage, and most of the insurers that we consider to be E&O insurance experts, use a “claims made” form. Lloyds, Encon, Northbridge, AIG, Royal Sun Alliance and CNA are all examples of E&O expert underwriters who provide a large percentage of Canadian E&O insurance capacity, and who will not issue an “occurrence” policy.

Because “occurrence” wordings are available from very few insurers, their use significantly limits the ability to bring competitive disciplines to bear on the development of premiums. In our opinion, it can also be more difficult to purchase the endorsements that are necessary to bring occurrence policies to the same standard of protection that is available from the “claims made” sector. Not impossible -- but much more difficult.

The professional “claims made” liability insurance that is adjunctive to the OPA store program is “best in class”, and has been subjected to continuous and careful improvement, year after year after year. It is extremely unlikely that it could be improved by changing to an “occurrence” policy wording. In the remote possibility that such an outcome might seem possible, you can depend on us to be the first to identify and take advantage of the opportunity.