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Seven Things About Professional Liability Coverage, Part 3: Retroactive Dates

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This is the third in a series of posts from the [Federation of Defense & Corporate Counsel's \(FDCC\) Blog](#) on issues arising under professional liability policies. The aim of this series is to provide sufficient background information to allow the defense attorney to identify relevant issues frequently raised by professional liability policies and to formulate a plan for addressing them. This is not a treatise on how different jurisdictions view professional liability issues. For that, the reader should review the DRI's 2012 publication *Professional Liability Insurance: A Compendium of State Law*. There are, of course, other issues of importance not discussed here.

Too Little, Too Late: The Importance Of The Retroactive Date

Some professionals wait until they have been in business for some time before purchasing professional liability coverage. Because of the risk created by an insured who waits to buy a claims made policy until shortly before a claim is to be made, most claims made policies contain retroactive date provisions. A retroactive date provision is a provision requiring that the wrongful act happen after a specified date, the "retroactive date." For example, the ISO form quoted above requires that the wrongful act not *commence* before the retroactive date. The retroactive date matters because even if the claim is made during the policy period, it is covered only if the wrongful act giving rise to the claim happened after the retroactive date.

Insurers set retroactive dates in different ways. In many instances, it is the date on which the insured first purchased a claims made professional liability policy from any insurer, provided that the insured has had coverage continuously in force since that date. In other instances, it is the inception date of the first policy issued to the insured by the particular insurer to whom the insured reports the claim.

A troubling situation occurs when the wrongful conduct began months or years before the retroactive date – particularly when the claim against the insured is based upon the insured's general business practices or is a class action based upon distinct injuries suffered by each member of the class. Often, when some wrongful acts happened before the retroactive date, there will be no coverage even for those wrongful acts continuing past the retroactive date. For example, in *Foster v. Summit Medical System, Inc.*, 610 N.W.2d 350 (Minn. App. 2000), the insured had purchased Directors & Officers coverage using as a retroactive date the date on which it made its first SEC filing. It was later sued for issuing false and misleading financial statements, based in part on improper sales and revenue recognition for periods before the first SEC filing and retroactive date, which continued after those dates. The policy's retroactive date provision not only excluded claims based on wrongful acts occurring prior to the retroactive date, but also "any Wrongful Act occurring on or subsequent to June 21, 1995 which, together with a Wrongful Act occurring prior to such date would constitute Inter-related Wrongful Acts." 610 N.W.2d at 353. The Minnesota Court of Appeal held there was no coverage because the wrongful acts commenced prior to the retroactive date. Although *Summit* did not involve a professional liability policy, D&O policies like the policy addressed in *Summit* often include claims made and retroactive date provisions very similar to those in professional liability policies.

The lesson for insureds or prospective insureds is do not wait to buy professional liability coverage. Have that coverage in place before any professional services are performed. For the attorney, look closely at what happened. The last in a series of events giving rise to liability may not be the relevant event for purposes of applying the retroactive date provision. *Summit* is a good illustration. There, the



insured waited until it was ready to go public to buy coverage, presumably reasoning there could be no misleading statements before that time. But, when it made the allegedly misleading statements, they were based upon allegedly improper accounting practices occurring months, if not years, before the company went public and bought a Directors & Officers policy.

Next up, a discussion of related and interrelated acts.