

The Ins and Outs of Tail Coverage

By Mark C.S. Bassingthwaighte

To this day I still get the occasional call from an attorney wanting to know how to go about purchasing a tail policy and my response is always the same. I need to make sure that the caller understands there really is no such thing as a tail “policy.” Clarification on this point is important because confusion over what a tail is and isn’t can have serious repercussions down the road.

An attorney leaving the practice of law can’t purchase a malpractice insurance policy because he or she will no longer be actively practicing law. There simply is no practice to insure. This is why an attorney can’t buy a tail “policy.” What you are actually purchasing when you buy a tail is an extended reporting endorsement (ERE). This endorsement attaches to the final policy that is in force at the time of your departure from the practice of law. In short, purchasing an ERE – which is commonly referred to as tail coverage – provides an attorney the right to report claims to the insurer after the final policy has expired or been cancelled.

Again, under most ERE provisions, the purchase of this endorsement is not one of additional coverage or of a separate and distinct policy. The significance of this is that under an ERE there would be no coverage available for any act, error, or omission that occurs during the time the ERE is in effect. So, for example, if a claim arises several years post retirement because of work done in retirement as a favor for a friend, there would be no coverage for that claim under the ERE. This is why you hear risk managers say things like, “Never write a will for someone while in retirement.” **I know it can be tempting, but don’t practice a little law on the side in retirement because your tail coverage will not cover any of that work.**

Another often misunderstood aspect of tail coverage occurs when an attorney semi-retires and makes a decision to purchase a policy with reduced limits in order to save some money during the last few years of practice. The problem with this decision is that insurance companies will not allow attorneys to bump up policy limits on the eve of a full retirement, again, because no new policy will be issued. For many attorneys, this means the premium savings that came with the reduced limits on the final policy or two will turn out not to have been worth it and here’s why: All claims reported under the ERE will be subject to the available remaining limits of the final policy that was in force at retirement and this may not be enough coverage.

By way of example, if you were to reduce your coverage limits from one million per occurrence/three million aggregate to five hundred thousand per occurrence/five hundred thousand aggregate during the last year or two of active practice in order to save a little money, you will only have coverage of five hundred thousand per occurrence/five hundred thousand aggregate available to you for all of your retirement years, assuming that there was no loss payout under that final policy. In terms of peace of mind, for many that would be an insufficient amount of coverage. Therefore, if you anticipate wanting those higher limits of one million/three million during your retirement years, keep those limits in place heading into retirement.

Unfortunately, while many attorneys hope to obtain an ERE at the end of their career, the availability of tail coverage isn’t necessarily a given. For example, most insurers prohibit any insured from purchasing tail coverage when an existing policy is canceled for nonpayment of premium or if the insured failed to reimburse the insurance company for deductible amounts paid on prior claims. An attorney’s failure to comply with the terms and conditions of the policy; the suspension, revocation, or surrender of an insured’s license to practice law; and an insured’s decision to cancel the policy or allow coverage to lapse may also create an availability problem.

An attorney's practice setting is also relevant. Particularly for retiring solo practitioners, insurers frequently provide tail coverage at no additional cost to the insured if the attorney has been continuously insured with the same insurer for a stated number of years. Given that tail coverage can be quite expensive, shopping around for the cheapest insurance rates in the later years of one's practice isn't a good idea as the opportunity to obtain a free tail policy could be lost.

The situation for an attorney who has been in practice at a multi-member firm is a bit different. Here, when an attorney wishes to retire, leave the profession, or is considering a lateral move and worried about the stability of the about-to-be-departed firm, some insurance companies will not offer an opportunity to purchase an ERE due to policy provisions. The reason is the firm's existing policy will continue to be in force post attorney departure. This isn't as much of a problem at it might seem in that the departing attorney will be able to rely on former attorney language under the definition of insured. However, because the definition of insured varies among insurers, you should discuss this issue with your firm's malpractice insurance representative so options can be identified and reviewed well in advance of any planned departure.

That said, under two ALPS policies and as long as certain conditions are met, we provide some of the most comprehensive tail coverage options in the industry, to include free individual EREs in event of retirement, death, disability or a call to active military service.

Be aware that the period in which one can obtain an ERE can be quite limited. Most policies provide a 30-day or shorter window that will start to run on the effective date of the expiration or cancellation of the final policy. There are even a few very restrictive policies in the market that require the insured to exercise the option to purchase an ERE on the date of cancellation or expiration. Given this, you should review relevant policy language well in advance of contemplating departing the profession, as the opportunity to purchase an ERE is one you can't afford to miss.

The duration of tail coverage – or more accurately, the length of time under which a claim may be reported under an ERE – varies depending upon what is purchased. Coverage is generally available with a fixed or renewable one, two, three, four, or five-year reporting periods or with an unlimited reporting period. If available to you, the unlimited reporting period would be the most desirable, particularly for practitioners who have written wills during their later years of practice. The premium charge for an ERE is usually specified in the policy. Often the cost is a fixed percentage of the final policy's premium and can range from 100 to 300 percent depending on the duration of the purchased ERE.

Given all of the above, if the ERE provisions outlined in your policy language have never been reviewed, now's the time. One final thought: Be aware that if the unexpected ever happens, such as the sudden and untimely death of an attorney still in practice, know that tail coverage can be obtained in the name of the deceased attorney's estate if timely pursued in accordance with policy provisions. Even attorneys who are not nearing retirement should still have some basic awareness of ERE policy provisions because one just never knows.