

The Ins and Outs of Tail Coverage

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Meet Mark:

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To this day I still receive an 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. To help you avoid similar misperceptions, here’s what you need to know.

Why You Can’t Purchase a Standalone Tail Policy and Understanding What Tail Coverage Is:

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, only gives you the right to report claims to the insurer after your final policy has expired or has been cancelled.

Understanding What Tail Coverage Isn’t:

An ERE is not a separate policy that provides additional coverage. It provides no new coverage for any act, error, or omission that occurs after the ERE goes into effect. For example, if a malpractice claim were to make several years into retirement from work you did as a favor for a friend while in retirement, there would be no coverage for that claim. This is why risk managers often say never draft a will for someone during retirement. As tempting as it may be, don’t practice “a little law on the side,” because your tail coverage will not apply to any of that work.

The Risk of Reducing Policy Limits Before Retirement:

Another common misunderstanding arises when an attorney semi-retires and reduces policy limits to save money on their premium during their final years of practice. The problem with this is that insurers will not allow insureds to increase limits right before full retirement because no new policy will be issued. For many attorneys, the short-term savings from reduced limits end up not being worth it because all claims reported under their ERE will be subject to the remaining limits of their final policy in force at retirement, and those limits may not be sufficient.

How Reduced Policy Limits Impact Your Tail Coverage for Years to Come:

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 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.

When Tail Coverage May Not Be Available:

Unfortunately, the availability of tail coverage is not guaranteed. Most insurers prohibit the purchase of an ERE if a policy is canceled for nonpayment of premium or if the insured failed to reimburse the insurer for deductible amounts paid on prior claims. Failure to comply with policy terms and conditions; suspension, revocation, or surrender of a law license; or allowing coverage to lapse can also create availability issues.

Tail Coverage Considerations for Solo Practitioners:

Practice setting matters as well. For retiring solo practitioners, many insurers offer tail coverage at no additional cost if the attorney has been continuously insured with the same carrier for a specified number of years. Because tail coverage can be expensive, shopping around for the cheapest premium late in your career may cause you to lose the opportunity for a free tail. Review your policy provisions or speak with your carrier well before retirement to avoid unintentionally forfeiting this benefit.

Tail Coverage Issues for Attorneys Leaving Multi-Member Firms:

The situation is different for attorneys in multi-member firms. When an attorney retires, leaves the profession, or makes a lateral move, some insurers will not offer an ERE because the firm's policy remains in force after the attorney's departure. This is often less problematic than it sounds, as the departing attorney may be covered under "former attorney" language in the policy definition of insured. Because definitions vary among insurers, you should discuss this with

your firm's malpractice insurance representative well in advance of any planned departure. I can share that under two ALPS policies, and subject to certain conditions, we provide some of the most comprehensive tail options in the industry, including free individual EREs in the event of death or a call to active military service.

Time Limits for Purchasing an Extended Reporting Endorsement:

Be aware that the window to purchase an ERE can be quite short. Most policies provide a 30-day or shorter period beginning on the effective date of expiration or cancellation of the final policy. A few restrictive policies even require the insured to exercise the option on the date of cancellation or expiration. Review your policy language well before leaving the profession because you never want to unintentionally miss the window of opportunity to purchase an ERE.

How Long Tail Coverage Lasts:

The length of time under which a claim may be reported under an ERE varies depending upon what is purchased. Options typically include fixed or renewable one-, two-, three-, four-, or five-year reporting periods, as well as unlimited reporting periods. If available, the unlimited option is generally the most desirable, especially for attorneys who drafted wills later in their careers.

How Much Tail Coverage Costs:

The cost of an ERE is usually specified in the policy. It is often a fixed percentage of the final policy premium and can range from 100% to 300%, depending on the length of the reporting period purchased.

Why Every Attorney Should Review Their Malpractice Policy's ERE Provisions Now:

Given all the above, if you've never reviewed the ERE provisions in your policy, now is the time. Here is one reason why: if the unexpected were ever to occur, (e.g., the sudden death of an attorney still in practice), tail coverage can be obtained in the name of the deceased attorney's estate if pursued in accordance with policy provisions. This is why even attorneys who are not nearing retirement should have at least a basic awareness of ERE requirements. You never know when that knowledge may matter.

