

Retention And Preservation of Insurance Policies

published 09/30/2010

Author Paul Brett has retired from Thompson Dorfman Sweatman LLP as of March 31, 2022. Anyone wishing to contact Paul should contact Keith LaBossiere at kdl@tdslaw.com or by phone at (204) 934-2587.

Introduction

Many TDS clients, whether individuals, businesses, or not-for-profit corporations, routinely discard old records. Storing historical information indefinitely represents a significant cost and inconvenience. However, documents relating to insurance coverage should be preserved at all costs, since lost or destroyed insurance records can have devastating results. Insurers themselves quite understandably often have flawed or missing policy records, so insureds cannot always rely on their insurers to be in position to provide old policy wordings. Therefore, in addition to records of the insurer's name and summary details of the coverage, ideally a copy of each entire policy ought to be retained, either a hard copy or digitally imaged copy.

Limitation periods

Limitation periods for commencing litigation vary greatly. Many clients focus on the "standard" six year limitation period under the catch-all provision of The Limitation of Actions Act. Because of this and the "seven year rule" for income tax purposes, clients often believe that anything over seven years old can be discarded. Not so. In Manitoba, provisions of The Limitation of Actions Act permit applications for discretionary leave to bring a "late" tort action up to 30 years after the allegedly negligent act or omission, provided leave is sought within one year of learning the material and decisive facts giving rise to the particular cause of action.

As well, for clients with an extra-provincial business presence, most provinces (but not Manitoba) have a judge-made or legislated "discoverability" rule, pursuant to which a cause

of action does not even arise, and the limitation period does not therefore commence to run, until such time as it can reasonably be said that the claimant either had actual knowledge or ought to have had knowledge of the facts upon which the cause of action is based.

Ultimate limitation periods (long stops)

There can be many circumstances from which a latent tort cause of action can spring, though not until years down the road. In addition, claims for breach of fiduciary duty (i.e. vulnerable dependency) and sexual assault presently have virtually no time limits. Environmental claims (e.g. fuel leaking into wells) and sexual assault claims are common examples of cases which can arise literally decades after the events giving rise to the injury. Similarly, faulty basements or chimneys can give rise to claims many years down the road. A building collapse long after the fact may result in loss tracking back to the original construction decades earlier. If the flaw or damage is not discovered until many years after the work was done, a successful claim is possible long after six or more years have passed.

Of some comfort for such “late in the day” claims, however, the western provinces and Ontario all have long stop or ultimate limitation periods after which no action whatsoever can be commenced, as follows:

British Columbia	30 years from the date of the act or omission
Alberta	10 years from the date of the act or omission
Saskatchewan	15 years from the date of the act or omission
Manitoba	30 years from the date of the act or omission
Ontario	15 years from the date of the act or omission

Liability Coverage

Many modern liability insurance policies are “claims made” or “claims made and reported” policies. They typically only respond to claims which first come to the attention of the insured during the current 12 month policy period and are reported to the insurer while the policy, or an extended reporting period they're under, is in effect. Despite this relatively straightforward concept, if a claim relates to events which happened many years prior, insurers may have rights under certain currently used policy wordings to deny coverage, even if the claim was not discovered and therefore not reported until the present. Although Courts will sometimes order insurers to defend or pay claims, the Court's decision will inevitably depend upon the precise wording of the applicable policy, and the facts of the particular case.

Exclusions from Coverage

Modern policies also typically contain some type of environmental or pollution exclusion which may exclude those sorts of claims. Again, the outcome of a dispute over coverage will necessarily depend upon the facts of each claim and policy. But if there is no coverage, the result can be financially devastating for an individual or business. Defence costs will be substantial, typically exceeding \$100,000.00. As well, the cost of paying successful claims can be enormous.

Critically, as a general rule, older insurance policies usually:

1. do not contain environmental exclusions;
2. have wording and exclusions that are more “friendly” to the insured;
3. have generally fewer exclusions; and
4. are “occurrence based”, rather than “claims made and reported” policies.

An occurrence based policy responds to a claim for which the event creating the damage, or the damage itself, occurred during the time the policy was in force (i.e. within the start and end dates of the particular policy or renewal period). Even if the policy has long since expired, so long as the insured promptly notifies the insurer (or by then often the corporate successor of the insurer) of the claim upon learning of it, the insurer or corporate successor should respond. Such a policy typically has coverage available so long as any portion of the loss, or the wrongful act or omission giving rise to the loss, took place while the policy was in force.

Possible Stacking of Limits

Even if a current “claims made” insurance policy does respond to a particular claim, it is possible that “stacking” of old occurrence-based policies may make extra limits of coverage available to respond to large claims. If, for example, the insured’s current policy is limited to \$1,000,000.00 in coverage, but three old occurrence based policies potentially cover the same risk, each for \$1,000,000.00, there may be \$4,000,000.00 in total coverage available, on a stacked basis.

Rules to Live by

As a consequence of the foregoing, four simple rules emerge for TDS clients:

1. records of old insurance policies should be maintained indefinitely;
2. if a claim is made against you or your business, all available coverages should be professionally researched and reviewed, by coverage counsel, in conjunction with your brokers;
3. all potential insurers must be put on notice; and

4. a denial of coverage by your insurer may or may not end the matter.
5. insurance audit by TDS coverage lawyers

If some insurance records have already been destroyed or lost, auditing your files to reconstruct insurance policies is more easily done sooner rather than later. If clients conduct such an insurance review when a claim is not in existence, their broker or members of their Board of Directors or others in their organization might have duplicate records available. Waiting until an actual claim arises, simply increases the risk of no coverage becoming available amidst the chaos of a claim.

What to do When a Claim Arises

Because of the complexity of this area of law, insurance brokers and agents, though extremely helpful, cannot reasonably be expected to be the final word on coverage. While experienced brokers and agents are very effective in guiding TDS clients in this area, in our experience clients frequently require the assistance of counsel in circumstances of an emergent claim.

Often, brokers may only notify the current insurer, understandably not being aware of old policies which might respond to a particular claim, placed or effected by a client's former broker. Or they might only notify an old occurrence-based insurer, while overlooking that a current "claims made and reported" policy might well extend to either recently discovered or ongoing damage arising from old incidents. As but one example of overlooked coverage, many times clients will forget (and the current broker will not know) that they had in force "builder's risk" or "course of construction" coverage when building one of their own structures. As well, contractors and subcontractors can usually take shelter under such a policy effected by an owner or required of the general contractor by an owner. Any affected contractor or subcontractor should always seek details of such coverage and give prompt notice of any claim to the owner's carrier.

That said, each insurance policy may differ, and any coverage outcome will of course necessarily be specific to the facts of any particular claim.

Conclusion

Regular insurance reviews or audits and maintaining complete, historical insurance records are part of sound risk management for TDS clients, whether individuals, businesses or not-for-profit corporations. The insurance lawyers of TDS are ideally positioned to conduct these reviews upon request. One thing is certain. The expense incurred for a coverage review will pale in comparison to the enormous financial harm which can result from inadequate or missing insurance coverage.

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