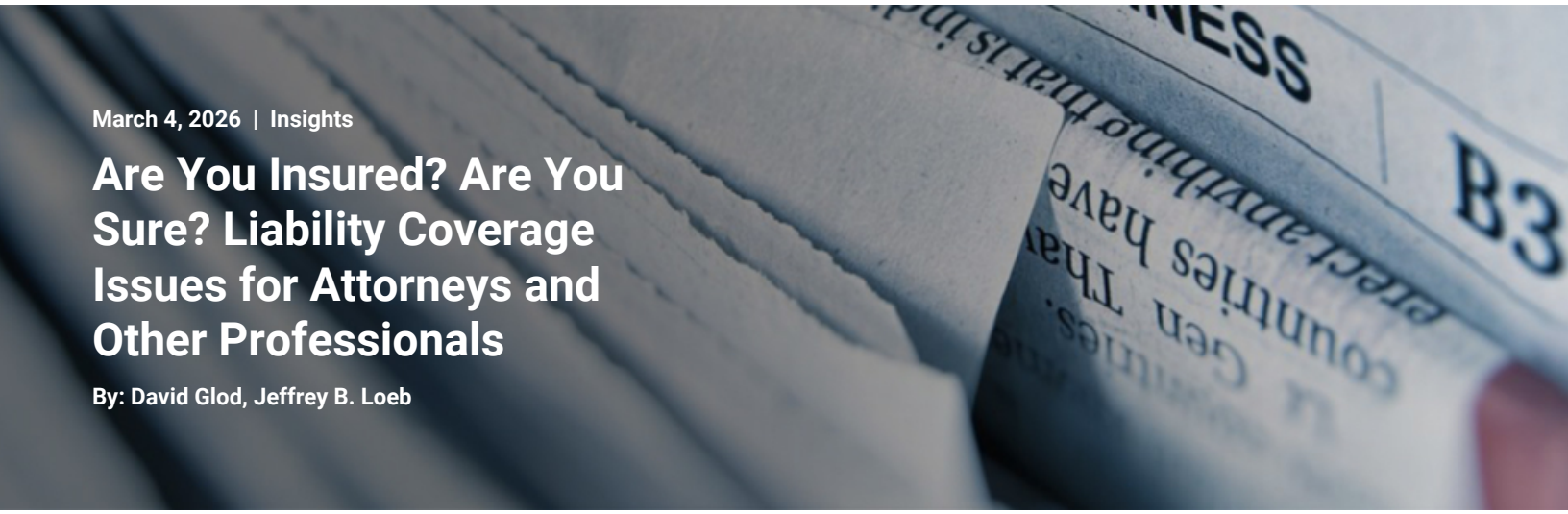


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Are You Insured? Are You Sure? Liability Coverage Issues for Attorneys and Other Professionals

By: David Glod, Jeffrey B. Loeb

Are you insured? That's a question that lawyers in Massachusetts (and elsewhere) are asked when they renew their license, by lenders when they are put on a list of approved counsel, by title insurers when they become title issuing agents, and by bar association referral services. Typical follow up questions include: what are your coverage limits, and could you please forward a copy of the declaration pages from your malpractice policy for our files. Those follow up questions are the questions that most lawyers (and other professionals) ask their insurance brokers when they obtain their insurance.

The problem is that for many purposes, they are the wrong questions. Instead of asking the face amount of the policy, it is more relevant to ask what the policy covers, and if so, what events may impact the coverage available. Of course, if there is no coverage for a particular matter, then it does not matter what the face amount of the policy is.

The problem of exclusions

Too often insureds simply look at the policy limits and assume that whatever they do short of intentional conduct is covered, without looking at the specific exclusions in the policy. But as new areas of exposure appear, so too do new exclusions.

One recent example is that with wire fraud on the rise, many professional liability policies now exclude coverage for claims related to wire fraud. Here are two examples of such exclusionary language:

- Claims arising out of any transfer, payment of delivery of funds, money or property, by anyone, which was caused or induced by trick, artifice, or the misrepresentation of a fact including, but not limited to, funds transfer fraud, social engineering, computer fraud, pretexting, phishing, spear phishing or any other confidence trick.
- Claims based upon, arising out of, directly or indirectly resulting from, in



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> consequence or of in any way involving any improper transfer, payment or delivery of funds, money, securities or property caused or induced by false, fraudulent, or unauthorized instructions.

Exclusions like these meant that in one case we handled, there was no insurance to protect the lawyers and the parties when $5,000,000 in settlement proceeds was diverted to a fraudster. The lawyers were shocked that they did not have coverage, as were the parties who, when they retained the lawyers, relied on certificates of insurance setting forth what appeared to be adequate coverage.

Most insurers do offer specific cybercrime add-ons or riders, but these must often be specifically purchased rather than assumed to be part of the base policy.

The problem of declining limits

Insureds generally think that they have the amount of the coverage set forth on the face of the policy. They assume that is what would be available if a claim has to be paid on their behalf. However under the terms of many professional liability policies, defense costs reduce the applicable coverage limits. This means that for every dollar the insurer pays to represent its insured in defending against a claim, the amount available to pay the party making the claim is reduced.

If you as the insured are confident that you did nothing wrong, then this may not be a concern. But if there is a chance that there will be a covered loss, and if your coverage amount is not substantially more than the potential loss, then this should be a concern to you and everyone else involved in the transaction.

If for example, a fraudster has absconded with $1 million in proceeds from a real estate transaction, and you as the closing attorney have $1 million in coverage, you might at first consider yourself fully covered against any malpractice claim (assuming an exclusion does not apply). But if your insurer spends $500,000 on defense counsel, and ultimately fails in the defense, then your insurance coverage for the claimant's $1 million judgment might only be $500,000.

Conclusion

When purchasing or renewing insurance, do not just focus on the limits. Review the policy in full. Understand what is covered and what is excluded. Familiarize yourself with the claims procedure and when and how your deductible is applied. Find out if legal fees will reduce your policy limits. Ask your broker to explain the policy in detail. Your insurance policy is there to protect you, but it is up to you (with the help of your broker or attorney) to make sure that it really does.

If you have questions about the scope of coverage of a professional liability insurance policy, or are involved in a dispute with your insurer, please contact Jeffrey B. Loeb or David Glod.

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