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Timing Is Everything: E&O Policy Exclusions

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Imagine this: Your company runs a call center that takes incoming calls from customers of a nationwide corporation. Two years ago, a customer wrote a letter to your legal department stating that his call had been recorded without his knowledge or consent in violation of state law and demanding the payment of damages to resolve the matter. Your company made a small nuisance payment to the customer, but did not report this claim under the errors and omissions (E&O) policy in effect at the time. This year, your legal department was served with a class action lawsuit alleging the company violated the laws of a number of states by not advising customers that their calls were being recorded. Your company's E&O carrier denied coverage of the lawsuit. It says the claim isn't covered under the policy in effect when the earlier claim was made, because it wasn't reported at the time, and it isn't covered under the current policy because it is related to the earlier claim and therefore deemed a claim made during the earlier policy. Is the insurance company right? E&O policies in general are claims-made-and-reported policies, meaning a claim is only covered by the policy if it is made against the insured and reported to the carrier during the policy period. Such policies often contain claim aggregation provisions under which only one policy – and one self-insured retention and single policy limit – applies to a set of related claims made over multiple policy periods. These provisions say multiple factually related claims are a single claim based upon when the first of those claims was made. But what if the earliest claim was not reported at the time? Can an insurance company interpret a claim aggregation provision to act as a policy exclusion? Courts have not been consistent in addressing this issue. Some courts take a literal approach, and hold that if a newly reported claim is considered to have been made on a date that falls before the policy period, there can be no coverage under the policy. Other courts look to the context of the claim aggregation provision to determine whether the provision allows a claim outside of coverage. For example, when the claim aggregation provision is part of a notice designed to pull a related claim from a subsequent policy period back into an earlier policy, courts have held that the purpose of the provision is to expand coverage to claims made after the policy period – not to exclude coverage of claims made within it. The key takeaway, as is so often the case, is that whether a claim aggregation provision can \ exclude coverage depends on how it is worded, where it is placed in the policy, and how the jurisdiction is inclined to construe the importance of context over wording. There also might be doubts about whether the original item was a claim in the first place, calling into question whether the provision applies at all. The devil truly is in the details.

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