Claims-Made vs. Occurrence Policy Forms

Coverage Triggers
A liability policy is a handful of papers that constitute a contract or agreement. And in reality the policy does nothing but provide proof of coverage until it is “triggered” to respond to a claim. The trigger is outlined in detail in the insuring agreement and is a critical component of the policy because it:

- defines the specific events that must occur in order for the policy to become active.
- determines which policy, often in a series of policies spanning a number of years, will respond to a particular liability claim.
- outlines specifics whereby incidents are deemed covered and not excluded under the contract.

Liability contracts contain a variety of different coverage triggers. For example, the trigger on a general liability policy is usually an event or “occurrence”. In comparison, the coverage triggers on most, if not all professional liability policies are a “claim made” to the insured. When it comes to environmental or pollution liability policies, we encounter both occurrence and claims-made triggers. These are different enough that it becomes imperative for agents and insureds to understand what coverage is in place so they know that no gaps exist.

Which is Better?
There are no hard and fast rules governing which environmental risks should be written on what coverage form. And in recent years many of the policies and coverage parts that have traditionally been written on claims-made forms are now also written on occurrence forms and vice versa. Here is a comparison chart designed to assist in determining which coverage parts, and therefore which triggers, are appropriate for a particular pollution risk.

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<th><strong>CLAIMS MADE</strong></th>
<th><strong>OCCURRENCE</strong></th>
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</thead>
<tbody>
<tr>
<td><strong>COVERAGE TRIGGER</strong></td>
<td>Coverage is triggered when a claim is made and reported during the policy period.</td>
<td>Coverage is triggered when the injury or damage occurs during the policy period, regardless of when the claim is brought.</td>
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<td><strong>PREMIUMS</strong></td>
<td>Generally less expensive than occurrence policies offering similar coverage, especially in the early years where the probability of a claim is reduced.</td>
<td>Premiums tend to be more expensive because coverage is provided for acts/incidents that occur during the coverage period regardless of when the claim is made.</td>
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<tr>
<td><strong>COVERAGE LIMITS</strong></td>
<td>Claims are covered at the limits in place when the claim is made. A policy change that broadens coverage and/or raises limits will also affect past periods as well.</td>
<td>Claims are covered at the limits in place when the act/incident occurs regardless of when the claim is made. Limits generally do not change as policy changes do not benefit past years.</td>
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<tr>
<td><strong>CHANGING INSURERS</strong></td>
<td>Changing insurance carriers may be complex – the insured will need to keep the retroactive date from the expiring policy and may need to purchase a prior-acts endorsement.</td>
<td>Prior policies, though no longer in force, will still cover claims for incidents that occurred during their respective coverage period.</td>
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**Mold: A Word of Caution**

Recent court rulings have once again brought the dangers of mold to the headlines. Many experts worry that these precedents will lead to a new wave of personal-injury lawsuits for mold injuries. Here are a few cases that you have likely heard about:

- A St. Louis jury ordered a heating and cooling company to pay $786,000 to homeowners who blame the company for the mold that ruined their house and their belongings.

- The Manhattan appellate court decided that there is scientific evidence that mold causes illness, paving the way for a current case where the plaintiff is seeking $11.8 million in damages from building owners and contractors.

These examples highlight the importance of ensuring clients have “water-tight” coverage when it comes to pollution claims. And one area that we have concern over is the area of mold coverage and whether or not to have a traditional claims-made policy, or if the more recent trend of occurrence mold provides adequate coverage.

Here is a hypothetical situation that demonstrates an all too common issue that arises when mold claims are presented and how claims-made and occurrence insuring agreements respond:

Let’s say we have a contractor that is performing roofing operations. This business is covered by contractor’s pollution liability (CPL) policy that: (1) renews continuously, without breaks, over a three year period, and (2) includes mold. At the end of the second year, the business purchases identical coverage through a different but comparable carrier for the third policy year. From just a cursory look it appears that this insured is adequately protected. (See illustration)
Now let’s say our roofer replaces a roof on a commercial building in the middle of the first year, and work is completed in that same year as shown below. There are no known incidents arising from the work until the middle of the third year when mold is discovered throughout the building. Subsequently the building owner files suit against the contractor and we have a pollution claim.

**Scenario 1 — Occurrence Policies**

Let’s assume for a minute that both carriers provided CPL policies on occurrence – which policy’s coverage is triggered?

Since the pollution did not manifest until the third year, the policy offered by Carrier A is not triggered and therefore coverage for the claim would likely be denied by this carrier.

Carrier B was not providing the coverage when the work was performed, and for that reason would probably decline the claim as well.

The result – the insured may be on the hook for the claim! The main point of contention is uncertainty around when the pollution occurrence began. Was it during a policy period covered by Carrier A or Carrier B? In the case of a pollutant like mold, which grows over time, it is nearly impossible to prove when the causation took place or when the mold first appeared.

**Scenario 2 — Claims-Made Policies**

Now assume that both carriers are providing CPL coverage on a claims-made basis, with a retro date tied to the beginning of the first year. Which policy is triggered by the same third year mold claim?

- Carrier A’s policy would likely not be triggered – the claim wasn’t made during the policy period.
- Carrier B was providing coverage when the claim was made – so we would expect the claim to be covered (subject to all other terms and conditions of the insuring agreement) because:
  - the contracting operations occurred after the policy’s retro date,
  - the pollution condition is the result of contracting operations, and
  - the claim was made during the policy period

The result in this scenario shows that mold coverage can be better served with claim-made policies.

**UCPM Recommendation**

There is no clear-cut answer or guideline when it comes to which coverage form should be used for a specific risk. And in the current market, both rates and coverage continue to be competitive – so shopping and changing carriers may make sense. But when evaluating new coverage, UCPM offers the following advice to agents and their insureds:

- **Claims-made Coverage**
  1. Ensure prior retro dates are picked up without a lapse in coverage – especially when it comes to mold coverage.
  2. Make sure policy forms and endorsements do not exclude coverage for prior operations. Occasionally we see carriers who will offer to underwrite new business with aggressive rates, but that premium savings comes at the expense of the exclusion for prior operations.
  3. As much as possible, plan appropriately for cessation of coverage – ask the question, “What will we do if we need to provide for an extended reporting period or tail coverage?”
• **Occurrence Coverage**

1. As with claims-made policies, make sure policy forms and endorsements do not exclude coverage for prior operations.
2. Request a nose endorsement if changing from a claims-made to an occurrence form. This will provide coverage for work performed prior to policy inception.
3. When changing carriers, be extremely cautious. The correlation between work performed and the causation of an incident is not always clear. This becomes particularly troublesome when claims cross multiple policies and carriers – and especially when it involves mold.

And the main advice we can give is to always get expert assistance. The best course of action is to take each account and evaluate it on a case-by-case basis with the environmental specialists at UCPM. Our team of experts is here to help you make the best decision in placing the best coverage. And as always we are just a phone call away.