

## EMPLOYMENT PRACTICES LIABILITY INSURANCE CASE

The presenting allegations in a complex insurance case may be misleading. What appears to be the precipitating cause of an uninsured loss may, after an expert review and analysis, in fact be only coincidental, as this case illustrates.

An employer, insured under an Employment Practices Liability (EPL) claims made policy, sued the retail broker, the surplus lines broker, and the insurer, after the insurer denied several EPL claims. The wholesale broker was accused of leaving the insured without coverage by canceling Insurer A's policy and binding replacement coverage with Insurer B. Our review and analysis in defense of the wholesale broker, however, showed that all the claims were or would have been covered by Insurer A, but for the failures of the retail broker and the insured.

The time line shows the key dates in the transaction. Insurer A sent a 60-day notice of nonrenewal 15 days prior to the policy's expiration date. Rather than instructing the insured to pay additional premium and extend coverage to the end of the 60-day period (6/15/2004), the retail broker instructed the wholesale broker to find replacement coverage. When the wholesaler found coverage with Insurer B, the retail broker instructed the wholesaler to bind the coverage effective 5/1/2004. Insurer B bound coverage with a prior acts exclusion, pending receipt of an acceptable application from the insured. When Insurer B bound coverage on 5/1/2004, the wholesaler informed Insurer A that its policy would expire on the original expiration date.

On 5/6/2004 the retail broker supplied Insurer B's application to the insured to be completed and signed. Initially, the insured returned the application without proper signatures, which was not acceptable to Insurer B. Eventually, on 6/16/2004, the insured submitted a signed application. In the meantime, on 5/18/2005, the insured began filing claims with the retail broker under Policy B. Insurer B denied those claims, rejected the insured's application, and cancelled its binder.

The receipt of the non-renewal notice triggered several options under Policy A, but the retail broker failed to advise the insured of those options. The insured could have:

- paid additional premium and extended Policy A's coverage to the end of the 60-day non-renewal period
- filed, within the 60-day non-renewal notice period, notice of any incidents that might give rise to claims under Policy A
- submitted any actual claims to Insurer A within the 60-day non-renewal notice period

- paid additional premium and exercised the Extended Reporting Period (ERP) option, giving it an additional year in which to report claims that arose prior to the end of the 60-day non-renewal notice period

Despite Insurer B's prior acts exclusion, the retail broker ordered the replacement coverage bound, even though the insured had neither reported incidents or claims within the non-renewal notice period nor exercised the ERP provision of Policy A. This closed off coverage under Insurer A's policy and left the insured subject to the prior acts exclusion of Insurer B's policy.

Another complicating factor was that the insured, in completing Insurer B's application, omitted knowledge of existing incidents of harassment. Insurer B, therefore, was also able to rely on the awareness provision in rejecting the insured's application. It was also able to rely on its policy's awareness exclusion in denying coverage for the claims submitted.

The retail broker ordered replacement coverage bound on 5/1/2004, the original date on which Insurer A's policy was to expire. The wholesaler notified Insurer A that its policy would expire on the original expiration date because replacement coverage had been bound with Insurer B. Such notification is standard industry practice. Not only was the wholesale broker not responsible for the uninsured claims, I demonstrated that the retail broker fell below the standard of care in its duties to advise the insured and in instructing the wholesaler to bind Insurer B's coverage before the insured exercised its options under Policy A.

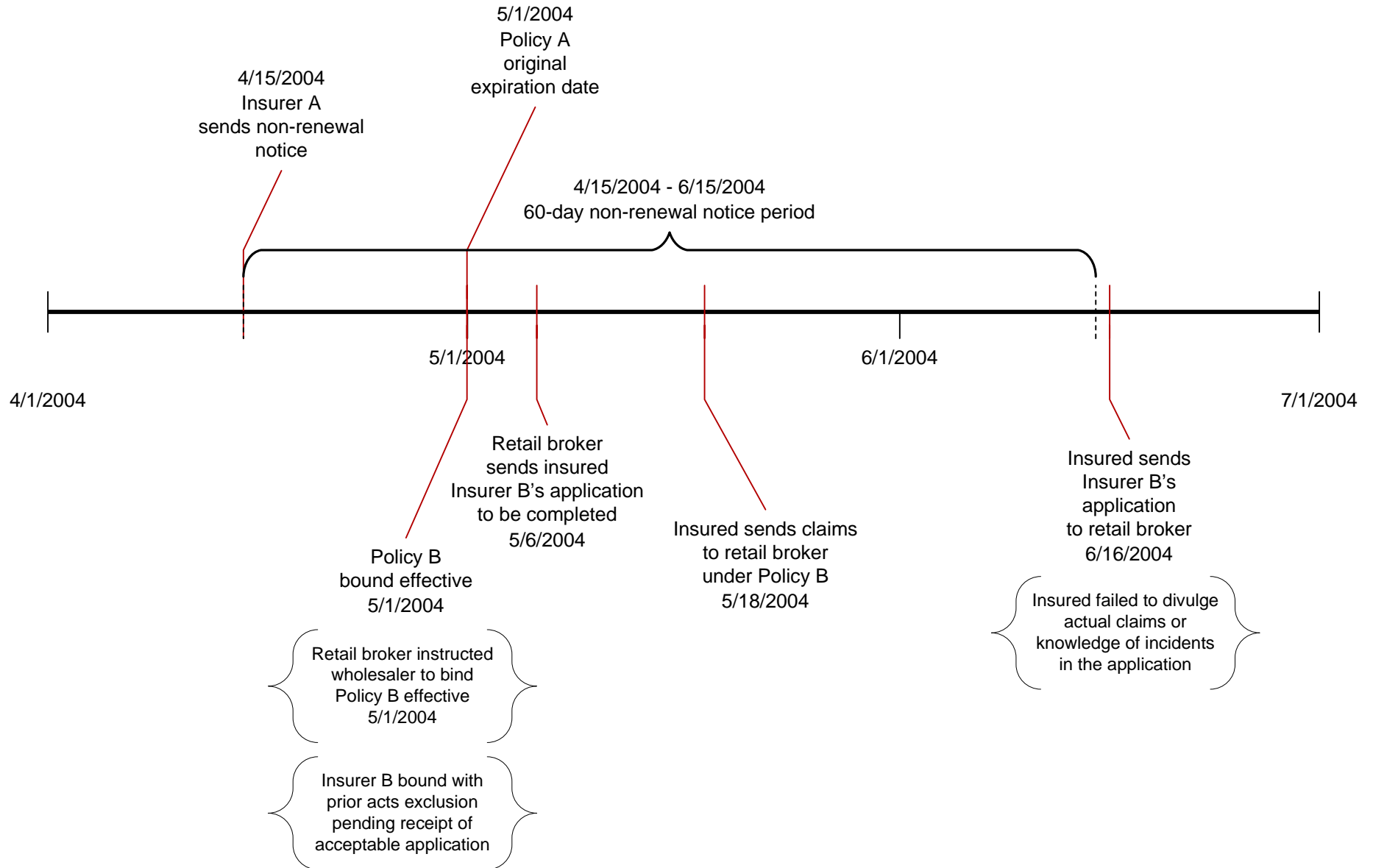
When changing insurance companies, claims made policies present special issues vis-à-vis the more common 'occurrence' policy forms. I explained how these important issues affect claims made coverage:

- notice to the insurer of any incidents that might give rise to claims
- notice to the insurer of any claims
- Extended Reporting Period provisions
- material representations in insurance applications

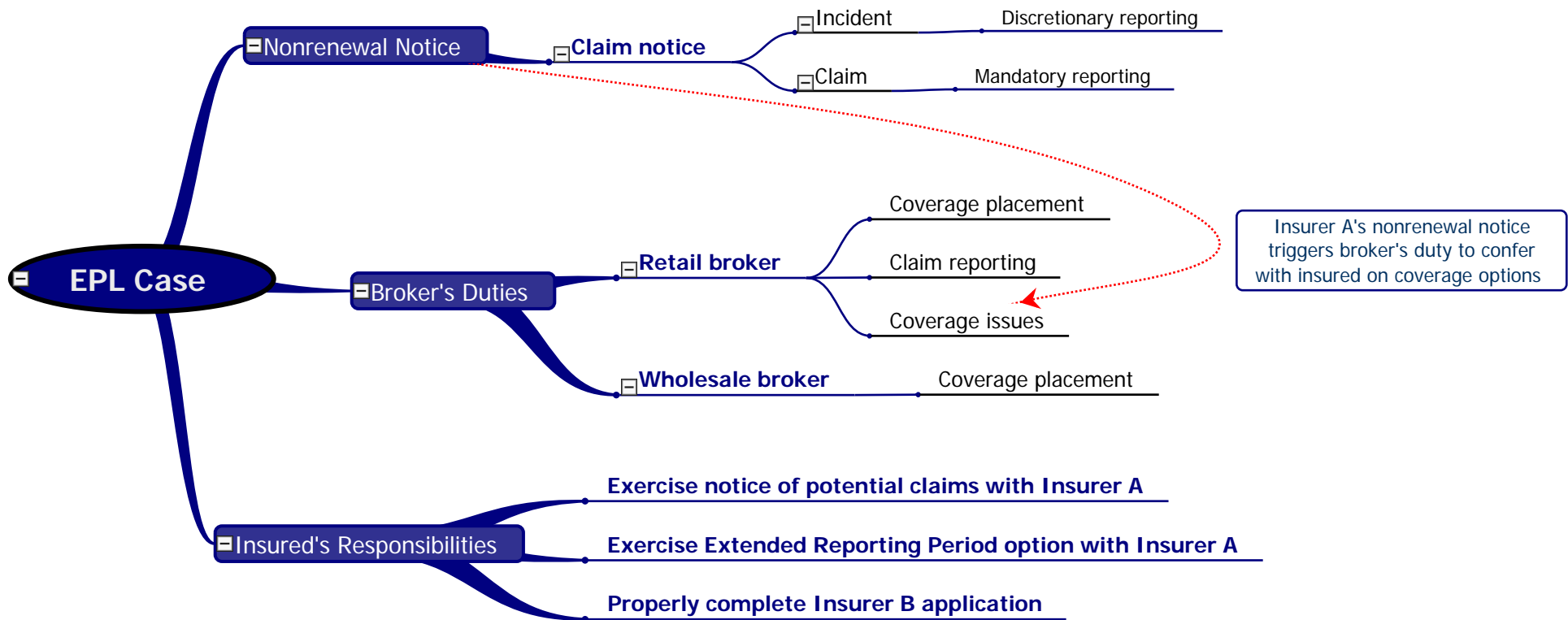
The retail broker did not address these issues with the insured, which resulted in the loss of valuable coverage. Further, the insured materially misrepresented its knowledge of incidents and claims in its application to Insurer B. This enabled defense counsel to shift the burden onto the retail broker and the insured, resulting in a much more favorable settlement for the wholesale broker.

The graphic associated with this case is an outline depicting certain aspects of the case and is not intended as a complete description of the facts or of my testimony.

# Employment Practices Liability Insurance Case



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