

## GUIDANCE NOTE

# Professional Indemnity Claims and Circumstances

Your obligation to notify both claims and 'circumstances which may give rise to a claim' can be quite demanding. The onus is on you to ensure that the matter is notified within the time limit set in your policy and also in line with your policy terms and conditions.

It is usually easy to identify a claim as there will usually be a clear indication from a claimant of their intention to claim compensation against you. This will often take the form of clear allegations of negligence leveled at you and where possible, will establish some form of actual or potential loss.

We are here to guide and support you at all times. We strongly recommend that if you are in any doubt as to whether an incident is notifiable, or what constitutes a 'claim' or 'circumstance' that you contact your dedicated claims team for advice.

### DEFINING A 'CLAIM'

A claim is: "A demand for, or an assertion of a right to, civil compensation or civil damages or an intimation of an intention to seek such compensation or damages."

### DEFINING A 'CIRCUMSTANCE'

This is not always easily identified and is the cause of anxiety for many professionals. We can provide a general guide, but it is difficult to define a circumstance exactly. Careful consideration of the policy wording in use is needed as terms and conditions vary and impact the required timing of a notification. Some policy forms do attempt to set out a clear definition of a 'circumstance' but these are in a minority.

As a 'circumstance' is often not defined in the policy and may not therefore be as easily recognised, the following may assist but this cannot be treated as an exhaustive list:

- An intimation by a third party, whether expressed or implied, of an intention to claim against you. This may be a remark in a telephone conversation or meeting, for example.
- Criticism of your performance where it may give rise to a financial loss.
- Your discovery of a service or action provided by you which may fail to meet the standards required and could cause financial loss, even if your client is unaware of the shortcoming

### CIRCUMSTANCES 'LIKELY' OR 'THAT MAY GIVE RISE TO' A CLAIM

It is usual to find that professional indemnity policy wordings will either require the notification of circumstances "likely" or "that may" give rise to a claim and it is important to understand the difference between the two requirements as your obligation to notify a circumstance is significantly different under each. We therefore recommend that you review this guide in conjunction with your own policy wording.

Use of the words "that may give rise to" places a stronger emphasis on the obligation to notify compared to "likely" and it is generally accepted as being any issue with more than a 20% risk of giving rise to a claim. This increases the notification obligation, and generally results in more matters being lodged but can sometimes help in identifying problems earlier. "Likely" on the other hand, is accepted as being an issue with greater than a 50% chance of giving rise to a claim. Notification of matters "likely" to give rise to a claim is therefore less onerous for the Insured.

When considering a change of Insurer, differences in the wording used can have significant impact. It is especially critical when considering a change of Insurer at renewal to review the notification obligations of each policy wording carefully as there is no cross-market approach to clauses. Moving from a 'likely' to a 'may give rise to' wording with an increased notification obligation can take time and thought in order to adjust procedures. Forgetting to make the change to accommodate the new wording however, could result in claims not being met.

What if you feel that your actions are justifiable and cannot possibly result in a claim? Notification clauses do not usually contain any de minimis rules. Even if you consider the intimation of a claim or criticism to be unjustified, this does not remove your obligation to notify Insurers. The fact that you have become aware of such an occurrence triggers the notification provision of your professional indemnity policy.

### **A COMPLAINT BECOMES NOTIFIABLE TO INSURERS**

This is a little easier for you to decide if the policy wording requires notification of 'circumstances' that are 'likely' to give rise to a Claim as Insurers will expect to be advised of matters where the chance of a claim being made against you is greater than 50%. If a complaint relates to service standard issues such as delay in answering or returning a phone call or correspondence there may be little chance of a claim arising. A key consideration in deciding to notify a complaint is whether the substance of the complaint is likely to lead to the client (or any other third party) suffering financial loss?

### **WHEN YOU SHOULD NOTIFY**

There is no consistent approach among Insurers on the timing of notification provisions in policies. However, the wording is usually very strict and this is often classed as a condition precedent or a warranty of the policy (these are 'superior' policy conditions which, if breached, can leave you uninsured). We strongly recommend that all notifications are made within a 14 day period of discovery.

### **WHAT YOU SHOULD NOT DO WITHOUT YOUR INSURERS PERMISSION**

Admit liability

Take any action which could prejudice your Insurers position or their ability to investigate the claim

Enter into claims correspondence without your insurers permission

Settle or offer to settle

Disclose your Insurers involvement or details of your professional indemnity policy

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