

# T&Lbulletin

CONSTRUCTION AND REAL ESTATE TECHNICAL AND LEGAL BULLETIN

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## Notification under Professional Indemnity Policies for the Construction Industry

### Introduction

Insureds should easily recognise an actual claim or a notice of an intention to make a claim, but identifying a "circumstance" that "may" or "is likely" to give rise to a claim under a Professional Indemnity policy is and always has been more difficult.

Contract Managers and others working at site level are most likely to have a first awareness of a problem; they may be tempted to be over optimistic or, for other reasons play down the potential problem. On the other hand, the Insurance Manager or others in the business responsible for reporting to Insurers have the challenging task of ensuring that the business complies with its reporting obligations under its professional indemnity policy, as well as ensuring that the duty of disclosure

is fully discharged during the renewal process.

This Bulletin focuses on the notification of "circumstances"; it provides general guidance in relation to best practice, although every case is highly fact and policy language specific.

### Key Points

Although wordings vary, professional indemnity policies will contain a condition spelling out the notification requirements. The key issues include:

- Complying with notice provisions in relation to circumstances; given that the notification triggers the coverage, this is critical. Professional indemnity policies generally cover claims made during the policy period and claims arising from circumstances properly notified.





- Assessing when a circumstance needs to be notified. This is, to an extent, art as much as science whilst the policy will often define a claim, it will rarely spell out what amounts to a circumstance. The Insured's dilemma is that, at one end of the spectrum failure to notify may produce a gap in cover; whereas, at the other end of the spectrum, a "laundry list" notification of all potential circumstances, however, remote, may be ineffective to trigger cover.
- Identifying the relevant policy trigger. Policies commonly require notice of any circumstance of which the Insured may become aware which "may" give rise to a claim; the other common wording is notice of any circumstance which is "likely" to give rise to a claim. These wordings are materially different.
- Giving notice within the correct timeframe. Different wordings may prescribe notice within a specified period, or immediate notice, or notice as soon as possible or practicable.

### **A circumstance which "may" or "is likely" to give rise to a claim**

The "may give rise to a claim" formulation is more common; it sets a lower level of expectation as the trigger for notice than that required by the alternative "is likely to" formulation.

Both formulations require a "circumstance". The courts have ruled that this means a fact, event, happening or state of affairs. Where such a circumstance is to be notified when it is "likely" to give rise to a claim, "likely" means at least a 50% chance of such a claim occurring. The courts have ruled that the simple fact of an injury does not necessarily mean that a claim is "likely" to arise. Therefore, where there is some suggestion of a breach of professional duty or activity leading to some party or parties sustaining a loss, it is far more probable that a claim is "likely" to arise, so notification should be given.

The "may" give rise to a claim formulation creates a lower threshold. The most problematic area is where the Insured becomes alive to a potential error before any claim has been intimated against it and before any third party damage has been suffered. Best practice is to err on the side of caution and notify.

### **The requirements for the notification**

Subject to the terms of the particular policy, it may be permissible to notify either in writing or orally. Best practice would always be to notify in writing. The courts will attempt to strike a fair balance when interpreting a notice. The test is not as high as to require the notification to be so clear and unambiguous so as to leave a reasonable recipient in no reasonable doubt as to how and when it is intended to

operate. However, an Insured's belief as to what it thought it was notifying is not, generally, of any relevance; rather, the courts assess what the notification communicated, objectively, to a reasonable recipient.

### The dangers of a coy notification

There may be a temptation to provide a toned down notification; an Insured might be concerned that the full details may lead to premium increases. Even if the court does, it will not often get drawn into considering the Insured's motivation, a coy notification may well be inadequate. Such a notification may either not be sufficiently particularised or broad enough to trigger coverage for all claims that do arise.

### When notification should be given

Because the notification of a circumstance is the trigger of coverage, it is likely that a notification provision will be strictly read by the courts. There are examples of the courts finding such provisions to be "conditions precedent" to cover, even though the policy did not use that actual language.

Where the policy requires immediate notice, the court will not expect notification actually to be given "immediately" upon the Insured becoming aware of the circumstance; however, very prompt action needs to be taken. In one case, an unexplained delay of four days was sufficient to strike-out the notification as not being "immediate".

Where notice is required within a specified period, that period should be observed. Courts will generally allow Insurers to take a strict approach to the meaning of such clauses and so disallow cover in respect of claims arising from circumstances notified late.

The other common provision requires a notification "as soon as possible" or "as soon as is reasonably practicable". The courts approach the meaning of such provisions set in the context of the rest of the policy wording and following an analysis of the facts of the case. Dangers here can be in relation to policies issued by excess layer insurers, whose notification provisions must be complied with, or where notice to the following market is given too late. A significant "red flag" is the approaching expiry date of the policy period. Whether or not the notice provision is expressed to be a "condition precedent" or to require all notifications within the policy period, it is advisable to review all circumstances and potential circumstances to check what has been notified to whom prior to the policy expiry date.



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## Keep notifying as matters develop

It is best practice to keep notifying as matters develop. Taking this approach is likely both to reduce the risk of an Insurer querying whether or not the particular claim that is eventually filed arises out of the original notification; it also builds in the safeguard that if the claim that is eventually filed does not arise out of the original notification, it should be captured by some intervening notification. The most difficult aspect of this is where the circumstance does develop materially: is what is then notified an update to the original notice of circumstance or a new, standalone notice of a different circumstance? This question becomes critical when dealing with strict notification provisions and, even more so, when approaching the end of the policy period, not to mention monitoring the potential erosion of the limit of indemnity or any aggregate excess provision.

## Conclusion

In conclusion, flagging up some of the many pitfalls in this area only emphasises that this is a particularly legalistic aspect of professional indemnity policies. Because the notification of a circumstance is always so closely aligned to the scope of cover, this quickly becomes a critical issue and one on which the Insured must make the right call. To do so, the Insured will often require professional advice from his brokers and, more relevantly, from his lawyers.



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