

A Guide to Claims Notifications

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This is the first in a series of helpful briefings for members from the BIBA professional indemnity (PI) Insurance Initiative.

This first document is written by BIBA's PI consultant Roger Flaxman and focuses on notification of claims. We hope you find it helpful.

Complaints and claims

This guidance note is a summary of what would constitute a claim or circumstance that would require notification to professional indemnity insurers. This document also offers some general guidance regarding claims reporting procedures.

The procedures and reporting systems adopted by any firm or organisation to notify and control complaints or claims need to be thorough, but not so onerous so as to restrict the day-to-day operations of the business. This is a delicate balance for the Insured.

The system should ensure that all claims or issues that may be circumstances are notified to one nominated individual as soon as possible after the involved personnel become aware of any complaint or dispute, written or oral, alleging or suggesting any deficiency in the provision of your services.

Prompt notification to insurers is essential so as to prevent the possibility of breaching insurance policy conditions by "late notification". This could prejudice the insurer's ability to investigate properly and/or defend the claim, and could result in loss of insurance protection, in its entirety.

Late notification is rarely intended but often arises from:-

- A misconceived view that problem will eventually resolve itself.
- Embarrassment of the individual(s) and/or the firm or company concerned.
- Concern for the personal consequences of the individual(s) involved.



- Perceived swingeing premium increase penalties being imposed by insurers.
- Fear that the facts will be made public with the attendant risk to your firm's reputation.

Declaration of “No known circumstances that could give rise to a claim”

A written questionnaire should be sent periodically, not less than once a year, to everyone within the organisation who has any contact with clients, including those responsible for bad debt/credit control. The questionnaire should ask:

“Are you aware of any circumstances that could give rise to a claim against this firm? Such circumstances include any difficulties in progressing work, collecting payments due, clients causing delays for any reason, implied or expressed dissatisfaction with our services or complaints or threats of any kind for any reason.”

You should consider, with your client, the range of people to whom this questionnaire is sent. It should certainly be sent to all partners, directors and senior fee-earners, and there are good reasons for saying it should be sent to all fee-earners and managers. Each should be asked to sign and return a copy of the form with their answers to the questions.

A good time (indeed the ideal time) to carry out this exercise is in the period shortly before the renewal of the firm's insurances, thereby providing the person charged with responsibility for dealing with the return of the proposal form with the confidence of factual truth he will need in making his declaration of known claims and circumstances.

Remember, also that the firm may be vicariously liable for the acts of others in addition to their employees – for example, the acts of their agents - and it is therefore also necessary to make full enquiry of persons for whom they are/ may be vicariously liable.

This principle is also used, in verbal form, at meetings to ask members of staff whether there is anything they wish to discuss. **This is an excellent method of problem reporting.** It also proves to staff that reporting of a problem is not in itself a disciplinary offence.

Example:

After due consideration and enquiry of my close working colleagues and associates

I.....(name) confirm that I am not aware of any circumstance that could rise to a claim against the firm.

Signed.....

Date.....

Recognition and notification of claims and circumstances

Insurance is an important part of the strategic management of risk. Without it most businesses would have neither the money nor the skills to defend or pay a loss or claim.

It is *essential* that the organisation's senior management team is aware of the terms and conditions that govern their insurances because if these terms are not observed, or are breached, then the insurances can become invalid and the insurer will not pay. It is the broker's duty to ensure they have made this fact very clear to the Insured, preferably in writing, so that it can be evidenced if ever the need arises.

All liability insurance policies contain conditions requiring the Insured to notify the insurers **immediately** of receipt of any claim or threat of a claim; but what constitutes a claim?

Any of the following would be notifiable:

- Claim served upon the Insured.
- Notice of intention to serve a claim upon the Insured.
- Notice, whether orally or in writing, of an intention to commence legal proceedings.
- A demand for money or services by way of compensation or reparation for (an allegation of) negligence, breach of duty or breach of contract.

In addition to notifying the insurers of actual *claims* there is a requirement to notify them of *circumstances* that could/may/might give rise to a claim. The reason for this is that insurers need to be able to take control of the Insured's legal position, prevent it becoming prejudiced (by incorrect actions or correspondence) and so weaken the Insured's defence to the allegation.

This can easily happen if the Insured, being unfamiliar with litigation process and procedure, acts in a way that is detrimental to their defence. For example, admitting liability, offering to negotiate a settlement or even entering into discussions can prejudice the outcome. Very often the Insured is, understandably, anxious and keen to remove the threat of litigation and it becomes very easy under such circumstances to inadvertently make admissions, offers or promises by implication that later prove to be damaging to their defence.

What is a "circumstance"?

The claim process begins when the Insured becomes aware of "circumstances which might give rise to a claim". The question "what is a circumstance?" (sometimes referred to as an "event") is probably one of the most controversial and vexing questions associated with

insurance. There is no universally accepted definition of a "circumstance". However, it is the Insured's responsibility to *recognise* "circumstances" since, as with the claims condition, it is typically a condition of each policy that the insurers are notified of any circumstances immediately the Insured becomes aware of them. Failure to do so can void insurance cover.

It is essential that the insurer's legal rights and commercial claim-settling opportunities are not prejudiced by the actions (or inactions) of the Insured. In practice, of course, the Insured may not be familiar with such rights and opportunities and therefore to be sure of avoiding such prejudice, the "notification of circumstances/events" condition is put into the policy and, it must be appreciated, is *rigorously* enforced.

Recognising a circumstance is not easy, although it is often thought, with hindsight, that it must have been obvious to the Insured that such and such a series of events were indeed likely to give rise to a claim against him or her. This is an area of great danger to a broker because it is very easy for a claim against the broker to be made because the insured say the broker did not advise them properly about the notification of claims and circumstances.

Insurers will sometimes try to repudiate liability for a claim by alleging that the Insured knew of a circumstance (or a claim) and failed to notify them promptly thereby allowing them to claim that they have been prejudiced. This is because under the terms of the contract of insurance the Insurer is allowed to take over and "stand in the shoes of " the Insured giving them the Insured's legal rights and remedies in law. The technical term for this is "subrogation".

If the Insured has prejudiced those legal rights insurers can claim that the contract of insurance has been breached and so escape liability for defending and paying the claim.

There are TWO RULES

- 1 The first rule, by which everyone should abide, is IF IN DOUBT, SET IT OUT. Write a summary of the facts and view them in the cold light of day. If still in doubt, ALWAYS TAKE ADVICE.
- 2 The second rule is to ensure the Insured's personnel are are **aware** of the importance of reporting problems (that could become "circumstances") for the purpose of maintaining insurance protection. To do this a broker should make a point of:-
 - i. Explaining to the Insured what a claim and a circumstance means in insurance terms.
 - ii. Assist th Insured in preparing a means of detecting and reviewing actual or potential claims and circumstances within their organisation.

- iii. Assisting the insured in making its personnel aware of the importance of notifying matters that should be considered for notifying to insurers.

This requires the broker to commit a combination of real time advice and / or written direction to the Insured, according to the size and scale of the Insured as the broker's client.

Recognition of a “circumstance”

How is a circumstance recognised? First, there does not have to be a threat or intimation of legal action. If that happens, there is indisputably a *claim* to notify (see 'What is a claim?' above).

A circumstance is almost indistinguishable, in many cases, from an everyday business problem. Most problems are temporary, fleeting and amicably resolved. From time to time, though, there will be a problem that doesn't seem to go away. Sometimes the problem may not become manifest for a year or two.

- Every firm, from time to time, undertakes a job which 'doesn't work out'. The organisation knows it and prays that nothing comes of it.
- Every firm from time to time has a 'difficult client'; e.g. a diehard complainer; someone that always wants more and is unpleasant in the way they speak to or deal with you.
- Every office worker has experienced (or will) 'the mental block' case - the matter that lies on the corner of the desk defiantly waiting to be tackled. It is surprising how long that mental block can last; three or more years is not uncommon!

These are circumstances which, if not carefully and diligently attended to, are likely to give rise to someone making a claim for something against the firm. Recognising that these everyday events and problems are the very essence of what can lead to a claim goes a long way towards preventing them from becoming a fully fledged legal action for negligence.

It is not suggested that every problem encountered from day to day should be notified as a circumstance but, unquestionably, some of the problems should be notified; they are often the seeds of a claim.

Typical examples

A typical circumstance likely to give rise to a claim arises from the case of a client who refuses to pay fees. They may be harbouring a grievance and if a letter demanding payment is sent to them, it is very likely that it will be countered by an allegation of negligence. If this happens, notify your insurers immediately.

Another typical circumstance is a dispute between say a consulting engineer and a contractor taking place at a site meeting. The contractor may accuse the consulting engineer of having made an erroneous calculation but the consulting engineer refutes this absolutely. It is not uncommon for contractors, sub-contractors and consultants to disagree from time to time but does such an argument constitute a circumstance? There are occasions when it does. If for any reason the competence of the Insured is called into question, then there is the possibility that this could give rise to a claim.

Or, for example, a complaint by a client to a company that specifies and installs under-floor fixings for cabling is told by the owner of the building that some of the fixings have become loose and damaged and under the terms of the contract with the company they are obliged to replace them. The company finds that their specification of the fixings was correct but the supplier (not themselves) sent the wrong type of fixing and the contractor did not notice!

Whether or not the company has a legal liability for this is a moot point (to be established later) but there is no doubt that they could become involved in legal proceedings and so the matter should be notified. The broker should at his time be on the lookout for collateral damage such as loss of business revenue and rent by not being able to use the area affected. A small claim can become a very large one as a result of the knock on effects of a fault.

Everyday problem or “circumstance”?

The issue for the Insured is discerning whether an everyday commercial problem, dissatisfaction or disagreement can be described as a "circumstance". This may only be possible with hindsight. It is nevertheless important to understand how easily this can happen because insurers are entitled to repudiate liability for paying a claim if it can be shown that the Insured has breached the policy requirement to notify insurers of 'a circumstance which is likely to/ may might/could give rise to a claim'. In assisting the recognition of a potential circumstance, the following are useful points of reference:

- 1 Persistently difficult problems that defy resolution.
- 2 Acrimonious correspondence or discussions with any other party especially if it concerns services performed or not performed, or money.
- 3 Withholding of fees. This may imply an underlying dissatisfaction or grievance.
- 4 Poor personal relationships.
- 5 If a member of staff or indeed a director/owner has a continually poor relationship with a client, it is possible that this could lead to an allegation of dissatisfaction with the service performed, at the very least. In such circumstances, it is probably better, where possible, that someone else takes over the handling of the client and thoroughly reviews the file. Having done so it will usually become evident whether or not there is a potential claim in the background.

- 6 Discovery by the Insured of a mistake that has not yet been realised by the Insured's client.

The last of these is not uncommon and deserves special comment; it can happen in any professional discipline. It is sensible to advise insurers of such a discovery, in writing, and ask for their instructions. Insurers may, however, be reluctant to accept such a discovery as a notifiable circumstance without evidence that there is a reasonable likelihood of a claim ensuing.

Example:

A classic example happened in the 1970s.

In the mid-1970s the use of high alumina cement attracted national interest when a series of structures including swimming pool roofs and motorway bridges incorporating its use collapsed without warning.

For fear of being uninsured, many firms, particularly architects and consulting engineers, advised their insurers that they had specified the use of high alumina cement, believing it to be safe and sound.

Insurers were reluctant to accept these advices as notifications of “circumstances” because there was no evidence of a claim actually being made or likely to be made.

This is a moot point. In the event of a similar situation occurring again, such as, perhaps, the collapse of an investment portfolio scheme, or mis-selling of financial service products, the Insured is advised to consult their broker or insurer and take legal advice where appropriate. Brokers must be ever vigilant for this kind of occurrence. They should at least notify the insurers and keep a record of the notification and require an acknowledgement of the notification from the insurers.

NB:

It must be emphasised that the above points are intended to assist the recognition of a circumstance and do not constitute circumstances, necessarily, in themselves. It is the **AWARENESS** of how circumstances can arise and of how they will be viewed by insurers, with hindsight, that will provide the best defence against failing to report them.

The following advice cannot be over-emphasised:

- 1 There is no definition of “a circumstance”. If in doubt notify insurers. Doing so will not automatically affect the future insurance premium, but not to do so will probably affect the validity of the insurance policy.
- 2 The firm’s/senior management’s own assessment of the merits of a claim or circumstance should be disregarded for the purposes of notification. They are never the best judge because they will have a vested interest in denying its seriousness.

Examples of “claims” and “circumstances”

- 1 A letter from a client holding the organisation responsible for alleged neglect, misconduct or deficiency in the services provided, or a formal “letter of claim” received from solicitors or other professionals acting for your client. This is a “claim”.
- 2 Any claim form summons or notice of an intention to serve a claim form or summons or similar stating professional neglect, regardless of its accuracy, substance or merit. This is a “claim”.
- 3 Any internal memorandum or note which relates to conversations where oral allegations of neglect or misconduct have been made. The date of the conversation when the allegation is first made would probably be regarded by insurers as the date the Insured first became aware of the claim. This could be a claim in itself but it is definitely a circumstance.
- 4 A written or oral demand for money or services by way of compensation or reparation for an alleged professional neglect or service deficiency. This is a “claim”.
- 5 A written or oral demand or request for the organisation to waive or reduce its service fee invoices because of alleged deficiencies in the provision of its services. This is a “claim”.
- 6 A fee recovery dispute, where the basis of your client’s intention to withhold all or part of the fee is alleged or anticipated dissatisfaction with the service or professional advice provided. This is a “circumstance”.
- 7 Any occurrence or identification of a problem or dispute which the Insured considers (or a reasonably competent person would consider) exposes the organisation to a threat of litigation. This is a “circumstance”.

Discovery of “circumstances”

If you discover an error or mistake that is not yet known to your client:

- 1** This is a sensitive situation and must be treated with extreme care. The firm’s first duty is to their client with whom there may be a loyal and long term relationship. At the same time the firm must do nothing that insurers could regard as a breach of policy conditions.
- 2** Discovery of an error or mistake that is not yet known to your client could very well be regarded by insurers as circumstance. The usual expectation of the insurer would be that any such discovery of errors should not be reported to the client without the prior knowledge and agreement of the insurers.

Learning outcome statements:

- Know what is a ‘circumstance’.
- Understand correct notifications of claims and circumstances.
- Know how to discover claims and notifications

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