Niceties of notification

It is vital that brokers correctly advise clients when it comes to claims – not only to offer good service, but also to avoid E&O problems, advises Simon Gildener.

The issue of claims notification is one which keeps rearing its head in reported cases at the moment and it is one which carries significant errors and omissions (E&O) implications for brokers.

It is my aim to review the common obligations to notify in liability business and explain the importance of getting the scope of the notification right.

An insured is often obliged to notify facts which might, at some time, lead to a claim. Failure to do so promptly may give the insurer the right either to reduce indemnity for a claim, or in many cases, to reject it outright. So, if in doubt over whether or not to notify, the best broking practice is almost always to notify. However, an understanding of what is or is not notifiable is still important. Most notification triggers require the application of an objective test (Would a reasonable person think there is something to notify?) rather than a subjective test (What did the particular insured think?).

Brokers should consider the following illustrations:

- A client instructed you to arrange insurance for two cars. One of the cars has just been in an accident. You have just realised that the policy covers only the other car. Applying the objective test, this would be a notifiable example. Circumstances which ‘are likely to give rise to claims’ require at least a 50 per cent chance of a claim at the time the circumstances arose and those which ‘may give rise to claims’ require it be ‘at least possible’ that a claim will arise.

- A surveyor client has been reading the newspapers about an increasing trend of claims against surveyors linked to collapse of the residential housing market. The client is unaware of any specific issues with its own work, but now wishes to notify all of the residential surveys it has undertaken over the past year, just in case. In general, an unreasoned concern about something is unlikely to trigger notification. Risks must be real, not imagined, so this circumstance would not be notifiable.

The next step is to get the contents of the notification right. It must be broad so as to cover the wide range of potential claims arising from the facts. But it must also be sufficiently detailed to enable an insurer to understand what is being notified and why. It can be a delicate balancing exercise. The more detailed the notification, the better the chance of getting it accepted. But greater is the risk that the notification will be too narrow to encompass connected problems which later come to light. It is important to remember that the content and scope of the notification will be tested objectively, so it does not matter what the insured actually thinks it is notifying.

For example: take a case where a broker has a binding authority. You discover that a rogue employee has been writing unauthorised risks. You make the decision to notify while you are still investigating. By that stage you are aware of five unauthorised risks. Notifying the five risks to insurers would be a valid notification. But its scope may be limited to just the five risks. A better notification might read: “We are currently aware of five risks which have been written outside the authority. However, there could be more, and we are investigating.”

This approach is both broad and detailed and provides more scope for the acceptance of a subsequent claim.

In summary, claims notification requires the use of good judgement and enshrining best practice. Getting it wrong for a client could lead to an E&O claim and getting it wrong from your own E&O perspective could mean no indemnification. In this hardening market, it is all the more important to tighten up procedures. All employees should be aware of the importance of the issue and getting it right: making the subject a regular agenda point at management meetings is a good way to keep it front of mind.

Understanding these issues and putting robust systems in place to manage them will help ensure that your house is in order when it comes to prompt and satisfactory claims notifications.

Simon Gildener is General Counsel for Howden Insurance Brokers, a BIBA-accredited PI broker.