

CLAIMS MADE POLICIES and RIGHTS & RESPONSIBILITIES IN NOTIFYING A CLAIM



Professional Indemnity policies fall into the 'Professional Risk' category of Insurance policies. Uniquely these types of policies operate on a 'claims made and notified' basis. This means that the policy provides cover for claims made against you and notified to the insurer during the period of insurance, that is, the policy needs to be in place when the claim is first made against you and notified to the Insurer during that period. The 'Claims made' basis varies from "losses occurring" policies where the date of the incident determines the policy. A reason that claims made policies are used for 'Professional Risk' policies is that it can be difficult to pin down the exact date relevant to financial loss that can occur over a period of time, therefore the date of claim is the key trigger.

The definition of a 'claim' can vary from one wording to another however one commonly used definition is 'a written or verbal demand by a third party for compensation or damages, or a civil proceeding brought by a third party for recovery of compensation or damages in respect to an actual or alleged breach of professional duty.' Whether they eventuate or not, it is important to notify all potential circumstances to your Insurer during the current period in order that cover is afforded. This point cannot be stressed enough in order to meet the conditions of the 'claims made and notified' basis of coverage, further the insurer may be prejudiced if the claim escalates and they are not able to be involved at the early stages to mitigate loss.

Let's look at an example:

Ed is an architect and has a Professional Indemnity policy for the period 1.1.11 to 1.1.12. He makes an error in his role during the policy period on 3.5.2011. Ed receives a writ in respect to the error during the policy period on 9.11.11. Therefore Ed is aware of the fact that a claim has been made against him, however Ed thinks the matter is small and fails to report the matter to his Insurer until after the policy period expired on 3.2.2012 when he receives further demands from his client. Ed changes Insurer at renewal. No coverage would apply as Ed reported the matter too late, he had changed Insurer and already knew of the circumstances.

It is important to notify circumstances to your Insurer prior to the end of the period, even if you feel they are unlikely to eventuate or cause significant costs

due to the 'claims made and notified basis' of coverage, further you may not have foreseen the extent of the error, determination of the other party to pursue compensation or legal costs in defending the matter. If you don't notify claims or circumstances when you first become aware of the matter, the later insurer may not cover them under their policy, as 'known claims and circumstances' are excluded.

Some policies provide an additional benefit that if you were insured with them when the facts first become known to you during the previous policy period and have continued to Insurer with them from then till the actual date of notification and, but for your failure to notify the facts during the policy period, you would have been entitled to indemnity under the policy. This is known as a continuous cover clause for on-going policy holders.

Another example:

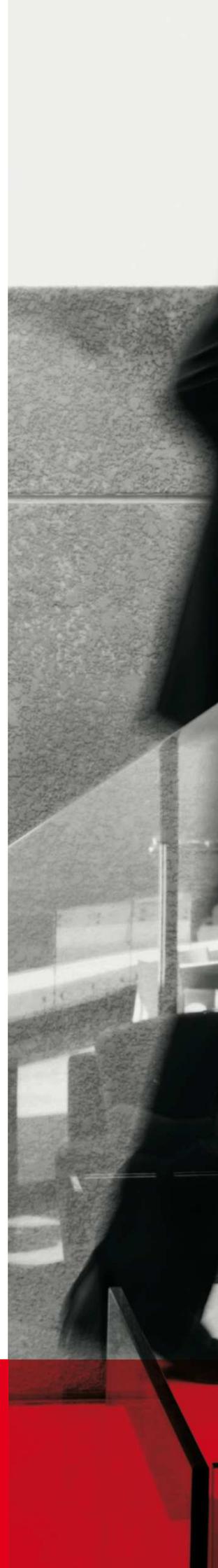
You performed work for a client in 2009 and you have just received a writ citing errors in design causing the client loss. If you currently have a 'claims made' policy with an unlimited retroactive date then you would report the claim to the insurer immediately. If you had a 'claims made' policy in place in 2009 and have failed to keep the policy renewed, then there is no current policy in force and thus no insurance to cover the past. You must have a policy in place at the time of the claim under this basis of coverage.

Any set of facts, circumstances or a claim against a professional that a business considers may be worth notifying should be discussed with your broker. It is most likely that the broker will recommend notifying the matter to the appropriate Insurer. On receipt of the notification the insurer will review the facts and either ask for more details by way of a completed claim form or if the matter is purely a notification without legal action underway the Insurer will make a note of the circumstance and the business will continue as before with the knowledge that they have notified the matter should anything further arise.

In other cases the insurer may appoint solicitors or specialist insurance loss adjusters to gain a better understanding of the facts and/or legal issues involved and to represent you in the matter. Specialist legal representation is a relief to policy holders in the event of a claim against them as Insurance Companies have a panel of solicitors well versed in Insurance Law and the policy holder's occupation waiting to defend the Insured party. Finding suitable legal advice independently and within your field of expertise can be both difficult and costly at short notice.

There are some other important points to remember if you become involved in a claim or circumstance:

- Never make an admission of liability or culpability for loss prior to seeking advice from your Insurer/Solicitors;
- In verbal discussion or written correspondence with the claimant never disclose information about your professional indemnity insurers, solicitors or legal advice you have received;



- Immediately notify insurers if proceedings, or any similar legal document is served and provide them with documentation;
- Never make any deals or enter into any agreement to resolve the complaint without your insurer's consent unless you do not wish to have insurance involvement and are aware that you may have prejudiced your Insurers rights under your policy.
- Inform your Insurers of any offer by the claimant to resolve the complaint.

In summary you should notify every circumstance to your Insurer. Whether the claim is justified or not, your insurer will assist in mitigating and resolving the dispute and if necessary provide the best legal team to represent you and this is an advantage to your business.

This advice and comments are provided in the capacity as your insurance broker and should not be construed as legal advice. Separate legal advice relating to the interpretation and implication of this article for your individual contracts should be obtained.

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