

The following is a general guide and does not represent a complete analysis of the issues covered. It is intended to highlight matters that may be of interest to insureds, but insureds should always seek specific guidance on particular matters.

Understanding Claims & Circumstances*

Many insureds have difficulty knowing if and when they should give their carrier notice of various “happenings” in their day-to-day professional lives. Most insureds know that a lawsuit naming them is something that they should give prompt notice of. However, a client or a Court expressing “disappointment” and/or demanding that certain actions be taken can be less-obvious examples of matters that potentially should also be notified to an insured’s carrier.

What Constitutes a “Claim”?

Liability policies typically require that an insured notify its insurance carrier “as soon as is practicable” of any “claim.” It is therefore important for insureds to know or be able to determine when a “claim” is being made. Generally, an insured can turn to his or her policy for guidance, since most claims-made policies provide a definition of claim (usually along the lines of, “a claim is any demand for monetary or non-monetary relief.”). If this does not help, or if the policy does not contain a definition, there are some guidelines insureds can use to assist. However, as will be seen, if ever in doubt insureds should always promptly seek guidance.

Two overlapping criteria that tend to demonstrate that a claim exists are: (1) an assertion of legally cognizable damage; and (2) a demand for compensation or redress, which does *not* necessarily need to be monetary. It has been held in some Courts that a “claim” must relate to “an assertion of a legally cognizable damage, and had to be the type of demand that could be defended, settled and paid by the insurer.”¹ A patient’s complaint to her physician simply that she was “not happy” with the outcome of her surgery was held not to constitute a claim when there was no demand for compensation.² An adjusting company’s client’s letter speaking of “dissatisfaction” with the company’s recent performance was held not to constitute a claim, since the letter did not contain any mention of damages or a demand for compensation. The threat of future litigation also typically does not constitute a claim. Rather, the threat of litigation is merely notice of a potential claim (in all of the above examples, however, see the notice of “Circumstance” discussion *infra*).

Conversely, the law generally does not require that a formal lawsuit be filed for a claim to exist³ (Courts have interpreted claims to require more than a request for an explanation or the lodging of a grievance without a demand for compensation, but less than the institution of a formal lawsuit).⁴ Thus, where a letter charged an insured with fraudulent misconduct and breach of fiduciary duty in connection with flipping real estate and advised that a lawsuit would be filed *if the insured did not comply with a request to compensate the complaining company within ten days*, a Court held that this letter did constitute a claim, as it demanded compensation (and also because it included a draft copy of a complaint demanding damages).⁵ Where clients demand (or Courts Order) uncompensated work by an insured, that too may be a “claim” as defined, since it has been held that a “claim” is simply a demand for something of right, or as due.⁶

¹ See *Evanston Insurance Company v. GAB Business Services, Inc.*, 132 A.D.2d 180, 521 N.Y.S.2d 692 (1987).

² See *Hill v. Physicians & Surgeons Exchange of California*, 225 Cal. App.3d. 1, 274 Cal.Rptr. 702 (Ct. App. 1990).

³ See *Strauss v. Sheffield Insurance Corp.*, 2006 WL 6158771 (S.D. Cal).

⁴ See *Charles Dunn Company, Inc. v. Tudor Insurance Company*, 308 Fed. Appx. 149 (2008).

⁵ See *id.*

⁶ See *id.*

What Constitutes a “Circumstance”?

“Circumstance” is another important term that insureds should be familiar with. Most claims-made policies will require insureds to provide notice of “potential claims” or “circumstances that may lead to a claim” and will typically make providing such notice a condition precedent to receiving coverage. “Circumstances” can be more difficult to discern than “claims.” The standards for reporting circumstances vary among policies and predicting potential future activity can be difficult.

Courts have utilized varying “objective-subjective approaches” to determining whether insureds have provided appropriate notice of potential claims. Courts typically seek to understand what a reasonable insured would have foreseen in like circumstances given the insured’s knowledge at the time.⁷ Whether someone in the same position as the insured would reasonably have believed that the circumstance would not amount to a “claim” and therefore did not need to be reported is typically a fact-sensitive inquiry.⁸ However, insureds should attempt to avoid such factual inquiries, particularly considering the potential adverse consequences (potentially the complete denial of coverage) associated with a finding of ‘late notice’ or ‘prior knowledge’ (the latter being the failure to provide adequate notice of a circumstance in a policy application). This can be done: (1) by erring on the side of caution; and (2) seeking assistance whenever an insured is uncertain.

Conclusion

There is no one-size-fits-all answer to the question, “What constitutes a claim or a circumstance?” The Courts have provided some guidelines for situations in which the answer to the question seems uncertain. It is paramount that insureds read and understand the notification provisions of their policies and appreciate when they should report certain matters. In the event of any uncertainty as to whether a particular matter, happening, development, concern, etc, should be reported, insureds would be well advised to seek immediate guidance from their insurance broker or another trusted insurance professional.

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⁷ See Chicago Insurance Company v. Lappin, 58 Mass. App.Ct. 769, 792 N.E.2d. 1018 (2003).

⁸ See James F. O’Connell & Associates v. Transamerica Indem. Co., 61 Wash. App. 103.