

ELECTRICAL AND ELECTRONICS ENGINEERS PROFESSIONAL LIABILITY INSURANCE INSIGHTS

Claim Reporting – Your First Step to a Smooth Claim Process

Many insurance policies are written on a “claims made and reported” basis. In our first bulletin, we discussed what a “claims-made-and-reported” policy is. Now, we focus on what to do when a “claim” is made, or when one might be made, against you.

When a claim is made against me, what is the reporting requirement?

- Should a claim be made against you during the policy period, you must report it to your insurer via the Notice of Claim on the policy. This is how coverage under the policy is typically triggered. It’s different from a general liability policy, for example, where coverage is usually triggered by injury or damage during the policy period. So, timely, full and correct reporting during the policy period is critical. Without that, you could lose the benefit of coverage under your professional liability policy.

What and when should I report?

- A general rule of thumb is, “**when in doubt, report**” – or at least consult with your agent or broker concerning whether you need to do so. A lawsuit involving an alleged problem with your professional services will always be considered a claim and should be reported immediately (more on that below). But even without a lawsuit, a demand against you for money or services arising out of a supposed problem with your professional services is a claim and needs to be reported timely. Keep in mind that it does not matter whether you believe it has merit. If a claim has been made against you, whether in a lawsuit or by way of a demand, you need to report it. Your insurer will evaluate the claim and, assuming it is covered, will provide you with assistance in handling it going forward.
- **An important note about lawsuits:** In some states, your response to a lawsuit is due as little as 15 days after you are served. The sooner the insurer receives the lawsuit, the sooner it can begin its review and, once coverage is confirmed, protect your interests. If you hold onto the lawsuit and the response date passes, the plaintiff can seek a default judgment against you, meaning the court will rule in the plaintiffs’ favor without permitting you to put on a defense. Service of a lawsuit means that time is of the essence and you need to report it right away.

What if no claim has been made against me, but I’m concerned about that possibility?

- Most professional liability policies also allow for the reporting of a “potential claim” or a “circumstance.” Generally, this is when a fact, event or situation arises that could reasonably be the basis for a claim later. If you become aware of such a situation, you need to report it. If you do so, and a claim ultimately is made against you, the claim is typically considered as made at the time you reported the circumstance – even if the claim is made after the policy expires.
- **Important to note:** If you do become aware of such a situation but do not report it, once a claim ultimately is made your current insurer may argue that you had “prior knowledge” of the issue, which could affect your potential for coverage.



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How to Spread Out Risks for a Win-Win Construction Contract

Construction contracts should be written “for breach” – hoping for the best but expecting that trouble may beset the project. In the same vein, it is vital to allocate risk through careful contract drafting on the front end.

What terms can be used in construction contracts to shift (or, in the case of insurance, absorb) risk?

- Indemnity clauses
- No damage for delay clauses
- Liquidated damages clauses
- Mutual waiver of consequential damages clauses
- Insurance provisions

What to look for in an indemnity clause:

- Is indemnity limited or very broad? This decides how much additional liability a party assumes or pushes off.
- Is there a duty to defend or to pay for a defense?
- Does the provision offend anti-indemnity restrictions for construction contracts in your area?

Plusses and minuses of a no damage for delay clause:

- It can be costly for the party the clause is enforced against, but beneficial to the party enforcing it.

When a liquidated damages clause functions well:

- The clause is structured correctly so it fairly compensates.
- Provisions are in place to contractually push down the loss to the responsible party or parties.

Will you benefit from a mutual waiver of consequential damages clause?

- Consider the types of damages that may beset you upon delay by the other party. If your potential attenuated damages are less than the other side’s, a mutual waiver of consequential damages clause may benefit you. For example, a contractor typically has lower risks of “consequential” damages than a project owner.

What insurance coverage is critical?

- Builder’s risk insurance covers risk of loss to buildings, structures and often related materials and equipment during construction.
- General liability insurance covers negligent acts of the insured.
- Professional liability insurance is necessary for any design professional and for any contractor who assumes responsibility for any professional service (including design) in the contract.

Construction contracts are clearly multilayered documents. Before entering a contract, avoid assuming unreasonable risks, and protect against and fairly shift risk where possible.



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