

Reporting Claims and Potential Claims Under Professional Liability Insurance Policies

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SUMMARY

Before an architect decides whether to report a professional liability claim, he or she should understand the definition of a claim under their policy and the pros and cons of reporting or not reporting a claim.

WHY FIRMS NEGLECT TO REPORT CLAIMS

From an insurance provider's point of view, it seems that design firms faced with a claim (or a potential claim) too often come close to jeopardizing their professional liability insurance (PLI) policies. Many firms resist calling their insurance provider to report the instance or ask for advice. Their reasons tend to fall within one of three categories:

1. **Ignorance.** They do not realize what their policy requires of them when they are presented with a claim or possible claim.
2. **Fear.** They fear the black mark on their claim history more than they fear the claimant.
3. **Denial.** They believe that ignoring the problem will produce the best result.

KNOW YOUR TERMINOLOGY

Claims

It is critical that insurance policyholders understand their duties, responsibilities, and benefits under their PLI contract. One of the duties is to report *all claims promptly*.

What defines a claim? Most policies refer to it as a "demand for money or services." So the telephone call from the angry client asking you to pay for damages they believe they have suffered as a result of your professional services would rise to the definition of "claim" under most policies.

Why is this definition important? Remember, you must report claims promptly. Failure to meet your obligations under the insurance policy contract may jeopardize your coverage.

Possible claims

It is important to know how your insurance policy defines a "claim" versus a "possible claim." Possible

claims typically do not rise to the definition of "claim" but could become one. Policies generally define possible claims as "a circumstance from which you reasonably expect that a claim could be made."

Are you required to report these instances to your insurance company? No. Most policies read, "if you report a circumstance," and do not state "*you must report a circumstance*." The circumstance provision in the policy goes on to say that if you follow the reporting requirements, "then any claim that may subsequently be made against you arising out of such circumstance shall be deemed to have been made on the date [the insurance company] received written notice of the circumstance."

Firms have a fair amount of discretion on whether to report a "circumstance," unlike the requirement that you promptly report all claims. Keep in mind that most PLI policies for design firms are *claims-made*, which means that insurance coverage is not retroactive to an unclaimed occurrence.

INTRICACIES OF PLI POLICIES

Virtually all PLI policies for design firms are written on a *claims-made* basis, whereas most other commercial insurance policies are written on an *occurrence* basis. A *claims-made* policy that is in effect when a claim is *made* will pay for losses regardless of when the event giving rise to the claim *occurred* (subject to limitations). Under an *occurrence*-based policy, even an expired one, a claim can still be made against it if the policy was in force when the event giving rise to the claim *occurred*.

Four conditions for coverage

Generally, a professional liability claim must meet four conditions to be considered for coverage:

1. You must have a current policy at the time a claim is made against you.
2. The services that led to the claim must have been performed after your retroactive date—the earliest date a wrongful act is afforded insurance protection.

3. You must report the claim to the insurance company in writing during the policy term (or within some relatively short window of time thereafter, usually 30 or 60 days).
4. You may not have prior knowledge of the claim, or you may not have reasonably anticipated that the claim would be made similar to a potential claim-producing circumstance. No coverage is afforded for a claim or circumstance that you knew about prior to the start of the policy term.

Some policies offer a “prior knowledge” exception

Some policy forms, including CNA and Travelers, soften this “prior knowledge” condition by adding that coverage is considered if, as found in the CNA policy, “on the knowledge date” indicated on your policy, “no officer, director, principal, partner or insurance manager knew or could reasonably have expected that a claim would be made.”

This “knowledge date” is the first date you began uninterrupted coverage with that particular insurance company. You did not violate your policy if you did not *know* about the claim or circumstance before you started with that insurer—provided you had no gaps in coverage. Some other PLI providers do not offer this enhancement, so their “prior knowledge” restriction applies year by year, not insurance company by insurance company.

For example, if you were insured with ABC insurance company last year when you became aware of a circumstance but elected not to report it and then *renewed* your policy with ABC this year and your circumstance turned into a claim, you would likely be without coverage on the loss due to a “Declination Due to Prior Knowledge.”

Know your policy, then trust your instincts

Does this mean you report every problem on every project? No. As professionals, you form a sense of which issues are likely to become claims and which need further attention. Trust your instincts. Claims personnel are not on a witch hunt to find reasons to deny coverage, but they will protect their employer’s interest if they find clear evidence you had prior knowledge of a claim and did not report it promptly or if you had prior knowledge of the circumstance or claim before the policy term began.

Fifteen to 20 different insurance companies offer PLI policies to design firms, and each company has different policy language and claim philosophy. It has become increasingly common, however, for adjusters to follow the letter of their policy obligations because failure to do so on one claim may jeopardize their ability to do so on the next.

TO REPORT OR NOT TO REPORT?

Now we know the policy requirements. You must report claims promptly, and you can decide whether to report circumstances, but failure to do so may jeopardize future insurance protection for the loss.

Your business decisions are a balance, so let’s consider the risks and rewards of reporting a claim. There is only one risk in reporting a claim or circumstance under your policy: the dreaded smudge on your record.

Who sees claims as a black mark? Your insurance company? No, it sees claims all day, every day. In fact, claims are important for evaluating clients—by reported claims or by a noticeable lack thereof. It understands that a circumstance is not a claim.

Your clients? No. They only see this information in rare cases. Even then, you should be able to weed out reports that never developed into claims.

So who are we left with? You, of course. Will failure to report bother *you*? You bet. It may downright annoy you to have to disclose the claim or incident on applications for the next 5, possibly 10, years. On the scale of risk and reward, however, “annoying” barely tips the balance. Second, will your insurance broker see a claim in a negative light? No, it gives him or her an opportunity to provide the services you have paid for in your insurance premium.

BENEFITS OF EARLY REPORTING

Early reporting has many rewards. Let’s look at an actual situation: An architect called his insurance broker to tell her that a one-ton balcony collapsed adjacent to a recreational pool area. The broker immediately notified the insurance company, who put the design firm in contact with a lawyer to start gathering information and to remind the principal of appropriate responses during the crisis. The insurer then hired a forensic engineering firm, all before the architect even pulled into the parking lot!

In addition, the broker offered her client tips on good public-relations skills when facing the media—still during their drive to the site. The architect was prepared with an alternate solution when his client wanted to sweep up and remove the debris, thereby erasing a critical part of the story should a claim be made later.

Reporting a circumstance or claim should begin your access to the power of your insurer, including its expertise, network of consultants and attorneys, and financial resources. You will not only get valuable assistance with the loss or possible loss, but you also often avoid making a bad situation worse.

What if our architect had told his client, “Don’t worry, I’ll take care of it” before his negligence was established, thereby possibly accepting financial risk without insurance coverage? Every claims adjuster has sad stories like this to tell. This is most common when a design firm receives a subpoena for testimony before being made a party to the action. Feeling they are fulfilling their civic obligation, they freely discuss matters with opposing counsel in what they may later consider an unwise fashion after they are joined in the claim and find that their casual, on-the-record comments harm their own case. Early advice from the claim adjuster can be invaluable.

Even if, later on, this policyholder discontinues their insurance or purchases coverage or options that are less favorable than they currently have, this claim will be covered under the terms and conditions of the policy in place on the date the circumstance was reported to the insurance company.

Even if you are not obligated to report a circumstance according to your policy requirements, you may still report it. By doing so, you will have more options to choose from at your next renewal. You may not ultimately decide to switch to a different insurance company, but you should have the freedom to do so. Unless the matter is reported, you are not free to consider other insurers, lest a claim arise with the new insurer from a circumstance of which you were previously aware.

And for those firms that believe that ignoring the problem will make it go away, sometimes you are absolutely right. But sometimes you are not. If you take this risk and you are wrong, you may have compromised your insurance coverage. Keep in mind that early reporting of a matter to the insurance company to avail yourself of their resources does not necessarily mean engaging the claimant in discussions. You and your insurance adjuster may mutually decide that the best course of action is to lay low until other action is necessary.

LESSONS LEARNED

As we can see, it is important to

1. Read your policy to understand the definition of claim and circumstance; your duties in the event of a claim; your rights in the event of a circumstance; and how prior knowledge of a claim or circumstance will affect your coverage
2. Report claims promptly
3. Consider your options when faced with a circumstance
4. Use your insurance broker, professional groups, colleagues, and legal counsel as resources

5. Before renewing your PLI policy, check with your partners and employees for possible knowledge of a circumstance and follow your policy duties for reporting it

Design firms spend much time and money to acquire a PLI policy. What does it do for you? Sure, it offers peace of mind, and ideally allows you to meet your client’s insurance requirements. But what is it really for? To pay claims and claim-related expenses.

About the Contributor

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RESOURCES

More Best Practices

The following AIA Best Practices provide additional information related to this topic:

- 09.02.02 Minimizing Your Professional Liability Insurance Premium
- 09.02.03 Changing Professional Liability Insurance Providers
- 09.02.04 Design-Build Insurance Considerations

For More Information on This Topic

See also “Insurance Coverage” by Lorna Parsons and Ann Marie Boyden, Hon. AIA, *The Architect’s Handbook of Professional Practice*, 13th edition, Chapter 12, page 331.

See also the 14th edition of the *Handbook*, which can be ordered from the AIA Bookstore by calling 800-242-3837 (option 4) or by email at bookstore@aia.org.



Key Terms

- Practice
- Insurance management
- Liability insurance
- Professional liability insurance