

Accountability

Issue XIV

When is a claim a claim?

Your professional liability insurance policy is quite explicit about notification of claims or incidents that might give rise to a claim. The CPAGold™ policy states the following:

*“Claim(s)” means a written or verbal demand received by **you** for money or services, including service of suit or institution of arbitration proceeding against an Insured under this policy.*

and

Notice of Claim

*You must notify **us** as soon as practicable of an incident, occurrence or offense, which may reasonably be expected to result in a **Claim**. You must immediately send copies of any demand, notice, summons or legal papers received in connection with any **Claim** and provide authorization to **us** to obtain records and other information.*

*If during the **Policy Period** or the Extended Reporting Period hereunder **you** first become aware that **you** have committed a specific act, error or omission in the rendering or failure to render **Professional Services** for which coverage is otherwise provided hereunder, and if **you** shall during the **Policy Period** or the Extended Reporting Period hereunder give written notice to **us** of:*

- (a) the nature of the specific act, error or omission including the date of notification; and*
- (b) the damage which has or may result from such act, error or omission and the reason why such damage is anticipated; and*
- (c) the circumstances by which **you** first became aware of such act, error or omission;*

*then any **Claim** that may subsequently be made against **you** arising out of such act, error or omission shall be deemed for the purposes of this insurance to have been made on the date on which written notice was given to **us**.*

Let’s analyze this. What truly constitutes a claim or more importantly, an incident that might give rise to a claim?

Obviously, a writ or summons or suit papers which name the firm, a partner or employee alleging negligence, is a claim and should be notified immediately to your insurer.

No list can be all-inclusive, but the following may be considered grounds for notifying your insurer that something may arise from a situation:

- A fee dispute – not all fee disputes result in a counter-claim for negligence, but many do. Consequently, if you choose to litigate, make sure your files are absolutely perfect and that you are completely confident in the work.
- A telephone call from a client alleging negligence and threatening litigation. Don’t wait for it in writing. Where there’s smoke, there’s fire.
- A client files for bankruptcy or is suffering long-term financial problems. If the client is having financial difficulties, then it is likely that the shareholders and creditors may start looking for a deep pocket to make good their losses.
- Senior executives or officers of a client are the subject of a criminal investigation.

- Notwithstanding your suggestions to the contrary, a client continues to operate their business in a manner that may cause future exposure to tax liabilities and/or fines and penalties.
- You receive a call from another accounting firm or your client's attorney, requesting copies of work papers or files.
- If you have any substantial ownership interest in a client, or a relationship with an owner that goes beyond the usual CPA-client situation, your role as an independent adviser may be prejudiced and have the potential for an allegation of a conflict of interest.

There are, of course, a multitude of other hypothetical scenarios that you might consider to be an *incident, occurrence or offense, which may reasonably be expected to result in a Claim.*

Additionally, the individual specifics of any situation may dictate how seriously you believe there is a potential for a claim. The most conservative approach is to report every incident to your insurer, because your loss record will not necessarily be prejudiced. In fact, many insurers actively encourage early reporting as this provides an opportunity to mitigate the possible consequences. On the other hand, failure to report an incident, especially during a time when you change insurers, may result in a late notification dispute or worse, a denial of coverage.

As eluded to above, the consequences of failure to notify an incident to your insurer prior to changing to another carrier can have disastrous consequences. Professional Liability Insurance is written on a *claims made* basis. This essentially means that claims must be made during the policy term. If you are considering changing insurers at renewal, you have a duty to ensure that all claims and any incidents that might give rise to a claim, are reported to your insurer before the renewal date (i.e. expiry of your current policy).

There is specific language in many professional liability policies, which addresses this. The CPAGold™ policy states:

This policy excludes:

*any act, error or omission that took place prior to the effective date of this policy if **you** knew or could have reasonably foreseen that such act, error or omission might be the basis of a **claim** or suit, or to any act, error or omission where there is a prior policy which provides insurance for such liability or **claim** resulting from such act, error or omission.*

This language, and variations on this theme, can be problematic in that the decision as to whether or not to notify a particular incident is subjective. However, a saving grace is that the doctrine of *reasonable foreseeability* is well tested in the courts and governed by various judicial precedents. Nevertheless, the most conservative approach may be to notify any incidents prior to changing insurers, irrespective of your personal and subjective assessment of the risk, for the reasons outlined above. Any resultant claims are then the responsibility of their former insurer.