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Claims made – the policy maze

In this talk, we will set out what a claims made policy is, and the rationale behind the difference between claims made and occurrence policies.

The recent Court of Appeal judgment in *HLB Kidsons v Lloyd's Underwriters* gives guidance on errors and omissions claims made policies. The earlier case of *Rothschild v Collyear* related to a similar policy and also merits detailed examination.

Adjusters should be aware of notification requirements in order to assess whether a policy provides cover for certain losses.

What is a 'claims made' policy?

- Under claims made policies, the insured is normally provided with cover against claims made during the policy period and subsequent claims which arise out of circumstances notified to the insurer during the policy period.
- In order to obtain cover the policy requires the insured to notify its insurer of claims made against it during the policy period. The policy also requires the insured to notify the insurer of any circumstances during the policy period as a requirement for any subsequent claim arising out of those circumstances to be covered.
- The notification requirement is to enable the insurer promptly to investigate the evidence connected to the claim and to provide reserves accordingly.

Interpretation of the claims made cover

- The key to interpretation of claims made cover lies in the notification clause.
- In *Kidsons v Lloyd's Underwriters* the Court of Appeal provided guidance in the interpretation of claims made cover and the notification clauses in professional indemnity insurance policies.

When does a liability arise thereunder?

- A claims made policy typically provides the insured with cover in two scenarios – when a claim is made during the policy period, and when a claim is made which arises from circumstances notified to the insurer during the policy period.
- The insurer's obligation to provide an indemnity only arises if and when the insured notifies the insurer in accordance with the requirements of the policy that it has received a claim or become aware of circumstances. The insured usually has a duty to notify the insurer at the time a claim is made or at the time that the circumstances arose.
- The ability to obtain cover for claims made after the policy period has expired but arising out of circumstances notified during the policy period provides a critical and necessary extension of cover to the insured.

Application of the cover

- When a claim is made during the policy period, notification of the claim is almost always required as soon as possible after the insured itself receives the claim.
- It is normally a policy condition that notification of circumstances is also made as soon as possible, although the claim itself may be notified to insurers some time after the end of the policy period.
- Very frequently notification clauses are stipulated to be a condition precedent to the insurer's obligation to provide an indemnity.
- The definition of a claim and how such should be notified is relatively uniform in professional indemnity policies. However, there are different forms of policy wording as to the obligation to notify a circumstance:
 - A circumstance *likely* to give rise to a claim
 - A circumstance which *may* give rise to a claim
- In *Rothschild* and *Kidsons* the policies defined a *circumstance* as one which 'may' or 'might' lead to a claim.
- Other policies, such as that in *Layher v Lowe*, or the recent case of *Laker Vent v Templeton* define a circumstance as one which is 'likely' to lead to a claim.
- In *Rothschild* Rix J was clear that the hurdle presented by a notice provision in this form was not high.
- In *Layher* and *Laker Vent* the notification provision required the insured to give notice immediately it was aware of any cause, event or circumstance which is *likely* to give rise to a claim. It was agreed by all parties that this meant more probable than not.
- The test as to whether circumstances *may lead* or were *likely to lead* to a claim is an objective one.

Exclusions – how and when do they apply?

- An exclusion is a term of the insurance contract that reduces the extent of cover which, but for the exclusion, would be covered. Generally, exclusion clauses are construed strictly against the insurer.
- Examples – implied / express: Implied exclusions are those such as an 'all risks' policy does not cover deterioration. An express exclusion which is particularly relevant to this subject is one which would operate to exclude any subsequent claims arising out of circumstances notified to a prior policy, or claims arising out of negligence of which the insured is aware prior to the current policy commencing.
- An adjuster needs to be aware of the express exclusions set out in each policy, and whether the actions of the insured prevent it from making certain claims.
- If an insurer is successful in pleading an exclusion this excludes the claim but leaves the insurance in force for the remainder of the policy period.
- The operation of contractual exclusions (or the operation of the duty of disclosure) may lead to a gap in cover for an insured where the expiring policy notification clause provides an extension of cover for notified circumstances 'likely' to lead to a claim. An insured with knowledge of a circumstance which objectively viewed is not likely to lead to a claim may be in difficulty. A notification clause in these terms in the expiring policy does not provide the insured with cover for any subsequent claim. However, the insured is aware of the circumstance and will have to disclose it to insurers when placing the renewal. Those insurers (either consciously or by virtue of standard terms) are likely to exclude cover for any subsequent claim arising from such a circumstance.

Case law review

- *Rothschild v Collyear* [1999] Lloyd's Rep IR 6: Rix J analysed the notification of circumstances which may lead to a claim and held that there was an objective test as to whether a communication amounted to a notification.
- *Kajima UK Heavy Engineering v Underwriter Insurance Co Ltd* [2008] EWHC 83 (TCC): Akenhead J considered the common problem of determining whether the claim made against the insured arose from the earlier notified circumstances
- *HLB Kidsons v Lloyd's Underwriters*: the Court of Appeal gave guidance on the importance of the notification clause in considering whether various communications made by the insured amounted to notifications of circumstances for the purpose of the policy extension.

- *Laker Vent Engineering v Templeton* [2009] EWCA Civ 62: The Court of Appeal gave further guidance on the construction of a notification clause and the objective test whether a circumstance the insured is aware of has given rise to or is likely to give rise to a claim.

Occurrence wordings – difference of the claim “bite point” v claims made wordings

- An occurrence policy provides cover for the insured for liability arising out of occurrences which arose during the policy period, but the claim need not be made during the policy period. Notification clauses requiring the notification of circumstances are not necessary.
- The occurrence or event that triggers liability will vary from policy to policy depending upon the wording.
- Example of an occurrence policy: *Rodan International v Commercial Union* [1999] 1 Lloyds Rep IR 495.
- In a claims made policy an insurer undertakes a more limited risk than in an occurrence policy. An insurer would typically charge a significantly higher premium for an occurrence policy as such policies may expose the insurer to indefinite future liability.
- A good example of the difficulties of an occurrences policy might be a policy providing cover for an industrial employer against claims from employees who have suffered illnesses at work. Many claims relating to illnesses caused by asbestos have been made where the exposure (one trigger for liability) was 30, 40 or even 100 years before notification of the claim.

Reinsurance wordings – is there such thing as a claims control clause that works?

- There are two principal ways in which reinsurers seek to influence the conduct of claims handling by their reinsureds – claims control clauses and claims co-operation clauses
- Which of the two are used is generally a function of the trust that the reinsurer places on its reinsured and the bargaining power of the parties.
- Claims control clauses do work in the sense that a well drafted clause can transfer the entire claims handling rights to the reinsurer. This will often be the best approach where the reinsured is fronting the risk for reinsurers.
- The draw backs to claims control clauses:
 - not just the rights are transferred to the reinsurer but also the obligations. It is very difficult to control the claim and still maintain any independent coverage position against the reinsured
 - the costs of controlling the claim fall upon the reinsurer – this undermines one of the key cost advantages enjoyed by reinsurers over the direct insurer
 - often the reinsurer lacks the experience of claims handling in the particular location where the claim arises
 - conflicts can and do arise between the reinsurer and the reinsured who may have different interests

John Rowland QC

jrowland@4pumpcourt.com

George Woods

gwoods@4pumpcourt.com

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