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NOTIFICATION

**THE ANSWERS TO YOUR
QUESTIONS**

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The key questions:



- (i) Can insurers reject a late notified claim, even where the minimum terms apply? What if one insured did not know of the claim - is he entitled to cover?
- (ii) If notice is late, and insurers ask for information about the underlying claim, will they waive their right to reject a claim for late notice?
- (iii) What is a valid notification of a circumstance that might give rise to a claim? Can an Insured rely upon notice to the primary layer as effective notice to the excess layer? Notification of circumstances is not usually a condition precedent, so does it matter if notice is late?
- (iv) What is the effect of scratching “noted” on a vague notification - does this waive insurers rights to later argue the notice was invalid?
- (v) Does scratching “w/p” make a difference? What happens if the subsequent claim is broader than the notified circumstance?

Can insurers reject a late notified claim, even where the minimum terms apply?



*Where the Insured's breach of or non-compliance of **any** conditions of this insurance has resulted in prejudice to the handling or settlement of any loss or claim **the indemnity afforded by this insurance in respect of such loss or claim shall be reduced** to such sums as in the Underwriters' opinion would have been payable by them in the absence of such prejudice."*

HLB Kidsons -v- Lloyds Underwriters

The minimum conditions did not apply to the conditions precedent in the policy.

What if one Insured did not know of the claim – is he entitled to cover?



It is conceivable, and indeed probable, that in a large partnership not all of the partners will be aware of claims made against the firm. When does the time run for those partners?

HLB Kidsons -v- Lloyds Underwriters.

The knowledge of the partnership's secretary will be attributed to **all** of the partnership's partners. Therefore, the time for notification begins to run for **all** partners as soon as the partnership secretary (or equivalent) has knowledge of the claim.

Fraud is a complicating factor

If notice is late and Insurers ask for information about the underlying claim, will they waive their right to reject a claim for late notice?



Kosmar Villa Holidays -v- Trustees of Syndicate.

The breach of a condition precedent automatically discharges the Insurers' liability in relation to that claim and therefore there could be no concept of waiver.

Dealing with the claim was not an necessarily inconsistent with repudiation of liability

Estoppel

If Insurers rely on a late notice defence, does the insured have to comply with the other contractual provisions?



Lexington -v- Multinacional

Insurers sought to exercise claims control under a reservation of rights.

The Insurers' denial of liability does not relieve the insured of its ongoing obligations in relation to claims

If an Insurer has rejected the claim for late notice, the Insured should be careful to continue to comply with the claims co-operation clauses

What is a valid notification of circumstances?



A typical notification and deeming provision provides:

- (i) *The insured shall give to the underwriters **notice** in writing as soon as practicable of any **circumstances** of which they shall become aware during the policy period which **may** give rise to a claim against it.*

- (ii) *Such notice having been given, any claim to which that circumstance has given rise which is subsequently made after the expiration of the policy period shall be deemed for the purpose of this insurance to have been made during the policy period.*

Notice of a circumstance that might give rise to a claim



“sufficiently clear and unambiguous ... that leaves the reasonable recipient in no reasonable doubt that the insured is by the communication purporting to give notice ... for the purposes of triggering coverage under the policy”

“fact, event, happening or state of affairs”

“objectively evaluated, creates a reasonable and appreciable possibility that it would give rise to a loss or claim against the insured”

Does notice to the primary layer insurers constitute notification to excess layers?



Sirius v Friends Provident Life

The notification condition in the underlying policy was incorporated into the excess policy but without any modification of language. The reference to “*underwriters*” was a reference to the primary layer underwriters.

The excess provision was not breached and not a condition precedent

Unless there is an express stand alone notification provision contained within the excess policy, the courts are likely to find that a valid notification to the primary layer is a valid notification to the excess layer.

What are the consequences of a delay in notifying circumstances?



The notification of circumstances is **not** a condition precedent. Does this mean there is no effective sanction for late notice?

HLB Kidsons v Lloyd's Underwriters

If the insured does not comply with the notification provision then the extension of cover cannot be triggered. It therefore follows that if the insured is in breach of the notification provision, it will not be entitled to an indemnity under the policy

It is irrelevant that this condition was not stated to be a condition precedent - the structure of the deeming provision provides the same result

How should the claims team react to a vague notice of circumstances?



Will a “noted” or “accepted” scratch bind the insurers to accept later claims and so should they scratch each vague blanket notification with “wp” or something similar?

The claims team are not expected to make an immediate decision on the validity of the notice. An insurer is not prevented from subsequently disputing the validity or effectiveness of a circumstance that has previously been “*accepted*”.

Request for information – no duty, so it is a tactical decision

Does this mean there is no point in making a “WP” scratch?



It is not possible for an insurer to waive a breach of a notification condition but it is possible for it to be estopped from relying upon this policy defence in exceptional circumstances.

An estoppel requires an unequivocal representation that the insurer is not relying upon a policy defence and also that the insured has acted in reliance on that representation to its detriment.

There is a risk an estoppel may arise from an “*accepted*” (or similar) scratch

The insured's dilemma - would it be better not to notify circumstances where the notice is likely to be rejected?



This tactical dilemma arises out of the previously notified circumstance exclusion

“Excluding claims arising out of circumstances notice of which has been given under any policy of insurance of which this policy is a replacement or renewal”

Clarification of the exclusion

*Excluding claims arising out of circumstances notice of which has been **validly given, in accordance with its terms and conditions**, under any policy of insurance of which this policy is a replacement or renewal*

What happens if the subsequent claim is broader than the notified circumstance?



Such notice having been given, any claim to which that circumstance has given rise which is subsequently made after the expiration of the policy period shall be deemed for the purpose of this insurance to have been made during the policy period

Kajima v The Underwriter.

The policy only covered claims that had a direct relationship with the notified circumstance. The argument that the subsequent damage/defects were discovered as a result of the investigations mentioned in the original notification was not enough.

Conclusions and Lessons learnt



Late notification claims

- Remedies applied strictly
- Minimum terms do not apply
- All partners affected
- Cannot be waived
- Insured must still comply with policy terms

Conclusions and Lessons learnt



Notification of circumstances

- Must be clear and unambiguous
- Advice to client must be “*notify*”
- Insurers’ immediate scratch is **not** determinative
- Continuity of cover