Supplied and sponsored by Griffiths & Armour

Industry CPD

Back to basics in troubled times – your notification obligations to your insurer

This CPD module, sponsored by Griffiths & Armour, offers guidance to engineers on when they should notify their professional indemnity insurers about potential claims on their policy.

Continuing professional development (CPD) ensures you remain competent in your profession. Chartered, Associate and Technician members of the Institution must complete a specified amount each year. All CPD undertaken must be reported to the Institution annually. Reading and reflecting on this article by correctly answering the questions at the end is advocated to be:

1 hour of verifiable CPD

It is important to act promptly and notify your broker of any claims or circumstances arising within the policy period

Introduction

It is widely known that all professional indemnity (PI) insurance policies contain strict conditions relating to notification of potential claims. Compliance with those conditions can be challenging for insured engineers because, while the relevant wording might seem clear enough on paper, in practice it can be innocently misinterpreted, sometimes with painful consequences. The problem is particularly pertinent in current market conditions for the reasons set out later in this article.

Current market turmoil

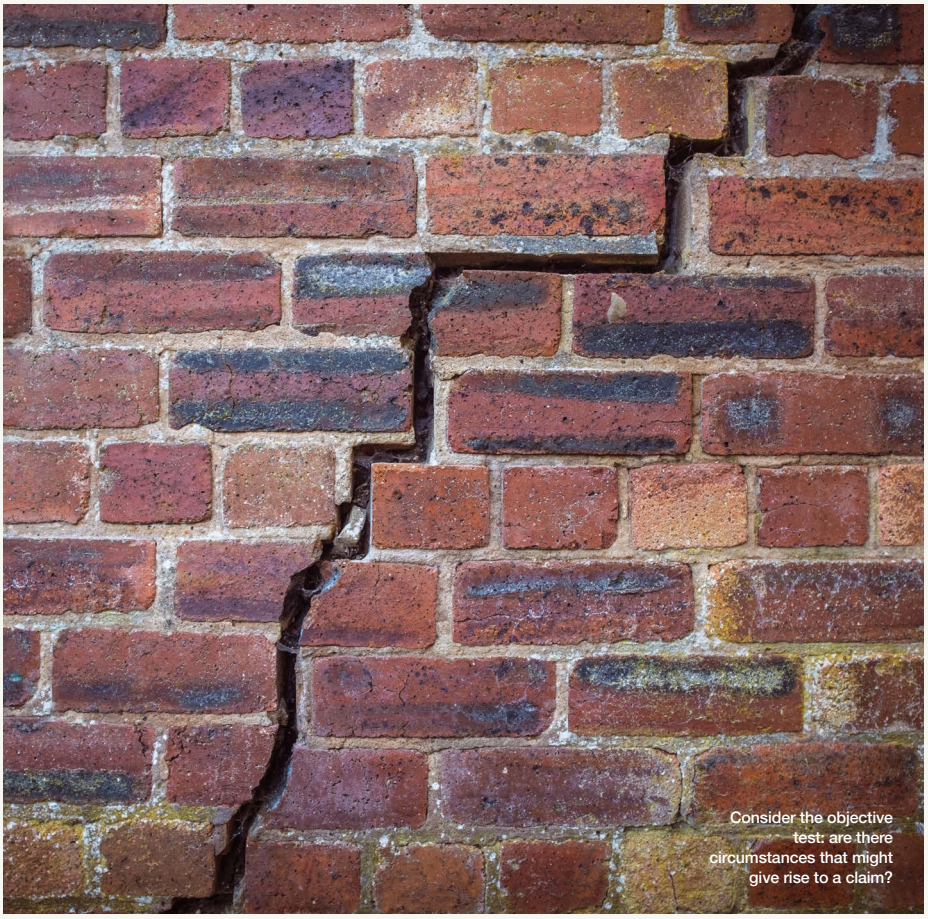
The withdrawal of capacity from the UK PI insurance market in recent periods has led most obviously to increased premium levels for engineers, higher excesses and restrictions in cover. However, it has also rendered it less likely that cover can be maintained with the same insurers from one renewal to the next. During 'soft' market conditions, it is possible for an engineer to renew cover for 10 or more annual policy periods with the same provider, fostering a strong commercial relationship with that insurer and reducing the likelihood of claims being rejected for a technical breach of policy conditions. But when those insurers withdraw from the market, that continuity is broken and the 'claims made' operation of PI policies is thrown into relief.

Claims made cover

Claims made, as a classification tag for PI insurance, is in fact shorthand for 'claims made and notified in accordance with policy conditions'. PI policies respond only to Claims (as defined) which are both made against the engineer during the policy period and also notified to the insurers during the same period. If Claims are not notified within the correct period, then the relevant condition will not have been satisfied and the insurers will be entitled to refuse indemnity.

Claims v circumstances

The definition of 'Claim' under any PI policy



Consider the objective test: are there circumstances that might give rise to a claim?

wording usually refers to the instigation or threat of some formal procedure along the lines of arbitration, adjudication or legal proceedings, but by extension it usually also encompasses any articulated form of demand for compensation. Fortunately, the definition won't usually contain any surprises and furthermore the natural reaction of most engineers upon becoming aware of any such communication would be to contact their brokers as a matter of priority. In practice, therefore, it is relatively unusual for Claims not to be reported promptly and within the relevant policy period (although see below in relation to 'Spurious allegations').

Misunderstanding is more likely to arise in relation to the separate policy obligation to notify 'circumstances which might give rise to a Claim' (there are different versions of this wording, but the variations are only minor and they amount to the same thing). Any such misunderstanding can be fatal if it leads to notifiable circumstances not being communicated to the insurers within the correct policy period.

The two-pronged test

In practice, a telephone call to their broker to discuss a specific situation will always be the best way for any engineer to decide, if they are unsure, whether their circumstances are notifiable for insurance purposes. However, and as an insight into where any such conversation might lead, it may be useful to bear in mind not only any definition of 'circumstances' that might appear in the policy wording, but also the following simple and well-established legal principles.

Essentially, there is a two-stage test, the first of which might in practice only be applicable in hindsight:

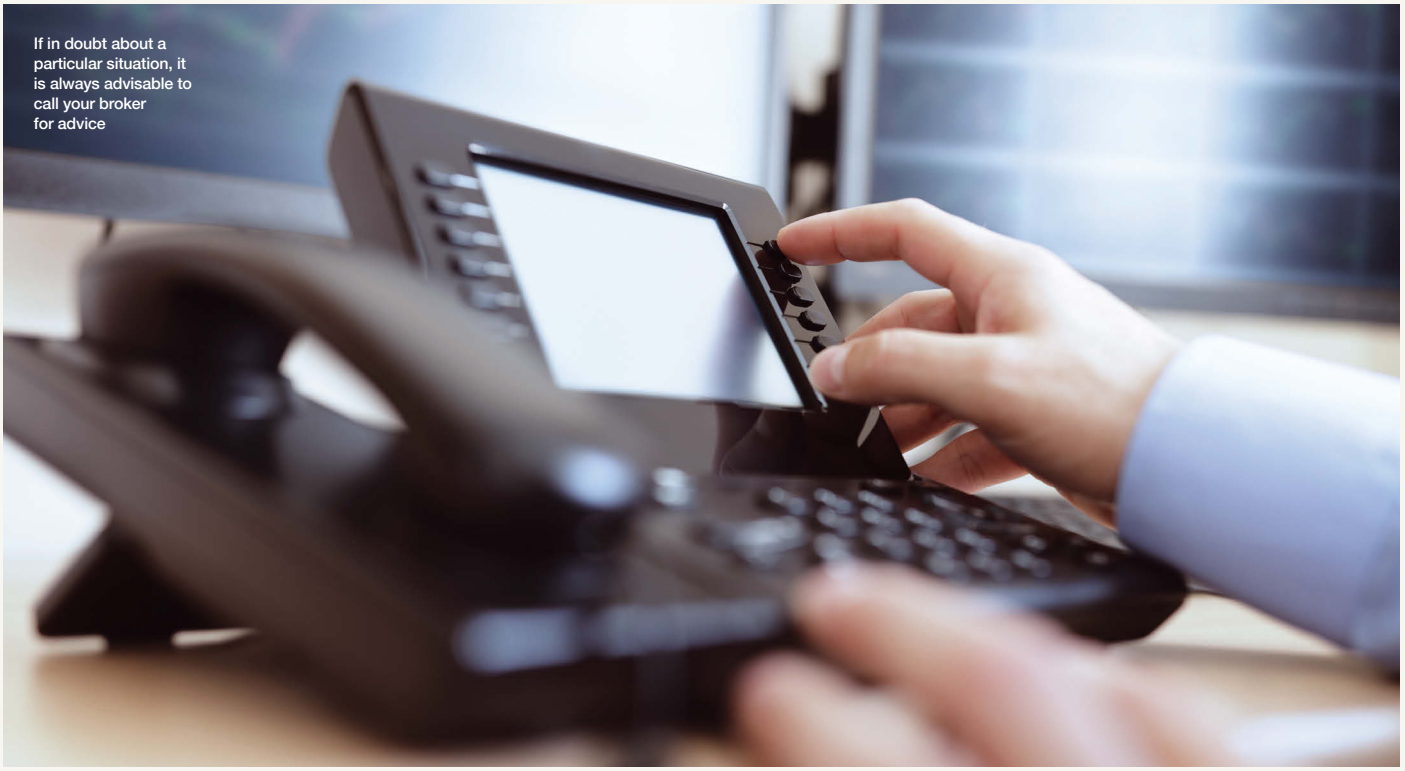
1) **The objective test** – there must be circumstances which might give rise to a Claim. This question must be approached impartially, as a matter of fact, and without considering whether or not defences might be available. All that is important under this limb is whether it could be anticipated by someone with an all-seeing eye that a Claim might be attempted against the engineer.
2) The second limb **(the subjective test)** then recognises that the engineer doesn't have an all-seeing eye or the benefit of hindsight until after the event, and it recognises that under a claims made policy wording one can only notify circumstances (considered objectively) of which one has an awareness within the policy period.

> "
> **ENGINEERS HAVE TO BE PREPARED TO ENGAGE IN A DEGREE OF SPECULATION AGAINST THEMSELVES**

Both limbs of the test have to be satisfied in order for a circumstance to be notifiable. Two examples might help to illustrate this:

- →| **An engineer's client has engaged solicitors and commissioned an independent expert witness report which is highly critical of the engineer's work.** This satisfies the objective test outlined above, but if all of the engineer's staff are oblivious to these facts, then the subjective test is not satisfied, and the circumstance is not notifiable. It will become notifiable as soon as any such knowledge reaches the engineer, whether by the arrival of the solicitor's letter or an unofficial tipoff that such a letter is in the pipeline.
- →| **An engineer discovers that one of their former employees designed foundations for a housing development based on a site investigation report that contained ambiguous or inconsistent conclusions. The correct course of action would have been to request clarification or further investigation of the ground conditions. Instead, the employee appears to have made assumptions and the development is now completed and occupied. There have been no reports of any movement to the structures, nor has there been any contact from the building owners.** Whether this scenario satisfies the objective test depends on the engineering assumption made by the ex-employee. Unless the engineer is now able to show that the assumptions were deliberately conservative and were intended to eliminate any risks associated with the inadequate site data, then the objective test will probably be satisfied – there would be a realistic risk of the assumptions turning out to be wrong, which might lead to movement in the substructure and subsequently a Claim against the engineer. The fact that the engineer has made this discovery then satisfies the subjective test. It makes no difference that the building owners and/or tenants may be oblivious to any such risk.

The second of these two examples shows that engineers have to be prepared to engage in a degree of speculation against themselves, simply as part of taking a step back and being objective for the purposes of the first test. They are not, however, required to enter the realms of fantasy and dream up farfetched possibilities,



If in doubt about a particular situation, it is always advisable to call your broker for advice

since clearly that would no longer qualify as an objective view.

Spurious allegations

A Claim is notifiable even if it is time barred, completely misconceived on its facts or defendable for any other reason – all that is important is that some assertion has been made. On the relatively rare occasions where Claims have not been notified when they should have been, the reason usually given is that the engineer didn't think it was necessary to notify Claims which appeared unlikely ever to be pursued. Unfortunately, this still technically amounts to a breach of policy conditions.

Claims within the excess

Similarly, the definition of Claim makes no mention of the policy excess and therefore all Claims are notifiable regardless of their value, but subject in practice to a *de minimis* principle.

Potential consequences of a failure to notify

An engineer's notification obligations are drafted into the policy wording as 'conditions' within the ordinary meaning of the term – they are conditions which must be discharged in order to trigger the insurer's obligation to provide indemnity. The problem is that the condition can only be discharged within the policy period and there is no opportunity to rectify any breach of this condition once the policy term has expired.

Some policies contain additional provisions by way of safety valves to allow for cases where the relevant condition was breached in all innocence, as is nearly always the case. However, those provisions operate subject to further terms and conditions which may or may not be satisfied. Everything depends on the specific facts of each case. Furthermore, those safety valves never operate to log notifications against policies that have expired. They may instead afford cover under a later policy period, possibly with restrictions in cover which would not have applied if the notification had been made under the earlier policy.

Why is this now more pertinent than ever?

As outlined at the opening of this article, a hard market implies much more than hefty premium increases. It often involves having to forge new relationships with different insurance providers where circumstances force brokers to consider carefully their options within an already limited circle.

New relationships in any context can prove to be fragile beneath the surface if put to the test too soon. One example of this would be asking an underwriter to cover a claim which should have been reported under a previous policy but wasn't, simply because the engineer misunderstood their policy obligations.

This is potentially embarrassing even at the best of times because it amounts to a U-turn on the declaration, usually signed at renewal, saying that the engineer was not aware of any circumstances which might give rise to a Claim. However, it is more palatable to an insurer to cover that claim under the current policy when there has been a continuous relationship with the engineer, meaning that the Claim would have been covered by the same insurer if it had been notified at the correct time under an earlier policy.

Where, on the other hand, continuity has been broken due to movements in the market, the equivalent situation is anything but palatable

> **"A CLAIM IS NOTIFIABLE EVEN IF IT IS TIME BARRED, COMPLETELY MISCONCEIVED ON ITS FACTS OR DEFENDABLE FOR ANY OTHER REASON**

and the possibility of cover being refused for the late notified Claim becomes more real – not to mention the negative implications in terms of risk perception for the following year's renewal.

Closing remarks

Underwriters can be easily spooked by anything they might regard as negative factors in a practice's risk profile, but nothing reduces their appetite more than surprises in the form of undisclosed material facts or matters which should have been notified in previous policy periods but weren't.

The good news is that engineers' policy obligations are generally the same as they always have been and none of the advice set out in this article should amount to new practice. Following that advice and properly understanding the obligations is, however, more important at a time when the market is continuing to evolve and a change of provider from one year to the next is a very realistic possibility.

Griffiths & Armour is a leading independent and privately owned UK insurance broker and risk management adviser. For further information visit www.griffithsandarmour.com. Griffiths & Armour is authorised and regulated by the Financial Conduct Authority.

Questions

To claim your CPD certificate, complete the module online by 31 March 2022 at: **www.istructe.org/industry-cpd**

1) Select the most appropriate option to complete the statement. An engineer's PI policy provides cover for:

→| potential claims notified by the engineer within the policy period, regardless of when the engineer became aware of the circumstances

→| potential claims notified by the engineer within the policy period, regardless of when the claimant drew the problem to the engineer's attention

→| potential claims of which the engineer first becomes aware during the policy period and which are notified to the insurers during the same period

→| any matters of which the engineer becomes aware during the policy period – the date of notification to insurers is neither here nor there

2) Based purely on the limited information provided below, which of the following is most likely to be an immediately notifiable circumstance under a PI policy with market standard terms and conditions?

→| An engineer's client has ceased paying invoices. The project is costing more than anticipated and the client appears to be running out of money. The engineer is instinctively worried that some finger pointing might ensue at some point

→| An engineer is concerned because the steelwork fabricator has gone bust prior to the completion of a project on which both parties have been working. The engineer's duties included a review of the fabricator's connection details in relevant areas, none of which the fabricator in fact ever submitted for review

→| An engineer discovers that a recent recruit to their firm was primarily responsible for a sizeable PI claim against their former employer only last year owing to fundamental oversights in their design. They appear to have left that firm under something of a cloud and the engineer now has serious concerns that there may be latent errors in their more recent work

→| An engineer's client circulates an aggressively worded email to the entire construction team complaining of a general delay and failure to meet milestone dates. No individual party is named, and the engineer doesn't feel singled out, but the wording makes clear that the client is losing money and expects to recover from whoever is responsible

3) Which of the following, based solely on the information provided here, is most likely to fall within the definition of a Claim rather than a mere circumstance that might give rise to a Claim?

→| An engineer submits an invoice for payment and in return receives a pay less notice from the client. The client asserts that as a result of the engineer's breaches of their obligations, they have incurred losses which exceed the invoiced sum. A short list of bullet points identifies the perceived breaches and the cost attributed by the client to each of these

→| A letter from an engineer's client gives notice of termination of the appointment. Contractually, they are under no obligation to give a reason for this, but they nevertheless cite irreconcilable differences that have formed between themselves and the engineer's site representative

→| A structural engineer receives a letter from solicitors who represent the employer under a design-and-build project which was completed some time ago. There is no contract between the engineer and the employer, but the letter indicates that some deflection has formed in a beam designed by the engineer. It goes on to advise that a Claim will be made under the main contract and it requests copies of drawings from the engineer to assist in that regard

→| An engineer is tipped off that their contractor client has instructed solicitors who are currently compiling what they describe as a 'claim dossier'. The strategy is to ambush the engineer with a 28-day adjudication and the engineer is expected to receive the relevant copy referral notice over the next 10 days or so

4) Which of the following best describes the most likely outcome of an engineer's failure to notify a Claim or circumstance in accordance with policy conditions?

→| The Claim against the engineer is uninsured under the current policy but may be insured under a previous policy against which it ought to have been notified

→| The Claim is insured under the current policy so long as the engineer was insured with a different insurer in previous years

→| The Claim is uninsured, subject only to any lifelines available under any applicable special conditions in the current policy

→| The Claim is insured under both the current and any relevant previous policy against which it should have been notified, in which case the two insurers will negotiate an apportionment between themselves

Supplied and sponsored by

Griffiths & Armour