

Claims Reporting Guideline for Contractor's Professional Liability Claims

I. Background

Many contractor's professional liability (CPrL) claims are denied simply on the basis that the insured or construction organization reported the error, incident, circumstance or claim later than required by the insurance policy. This guide outlines recommended practices for identifying CPrL claims and potential claims or circumstances, when to report such events and what should be reported.

The goal in identifying reportable incidents or claims is to prevent the insurer from denying coverage on the grounds that some early communication to the policyholder concerning a loss, or the possibility of a loss, was actually an unreported "claim." As a general rule, err on the side of reporting, in writing, the circumstances that may be considered a claim under the policy.

As with any insurance claim, attention to the language of the policy at issue is paramount and determinative. Although this guide contains advice for assessing and reporting CPrL claims, it is critical to follow the specific reporting requirements in the organization's specific CPrL policy upon which you are making the claim. If there is an inconsistency between this guide and what is required by the specific policy you are dealing with, do what the policy says.

II. Understanding Your Professional Liability Insurance

First and foremost, you should understand what type of professional liability insurance your company purchases. There are a variety of different professional liability insurance programs available in the marketplace, but most consist of the following three coverages:

[] Professional liability. Provides coverage for third party damages arising out of negligent acts, errors and omissions resulting from professional services performed by or on your organization's behalf (i.e. subcontractors or sub-design professionals).

[] Rectification or Mitigation (R/M). Unlike professional liability, R/M coverage pays for first party costs to provide a remedy or "rectify" a design or engineering error identified during the course of construction that would otherwise lead to a liability claim against the insured. Early reporting under this coverage is essential to ensure the full benefit of such coverage.

[] Protective indemnity (PI). Like R/M, PI coverage is a first party coverage. However, PI pays for damages the organization incurs excess of the hired design or engineering firm's professional liability insurance. In other words, the engineer's professional liability policy pays first, and the PI coverage of the organization pays the difference between total damages incurred and what the designer's or engineer's professional liability insurance paid.

(Check each of the above of that is applicable to your organization's professional liability insurance program)

Each of the above come with separate triggers that activate the insurance. As you will see in this guide, each requires specific reporting provisions to ensure claims and potential claims are reported on a timely basis. Not complying with these provisions could jeopardize coverage substantially for the organization. As a project manager or project director you must understand the difference between the three in order to report a timely incident, circumstance, claim or anything where some third party has voiced concern.

The surest way to preserve the claims explained in this document is to ensure that you give notice to the insurer and make claims in strict accordance with the reporting requirements outlined by your policy. Furthermore, no insured should admit liability, accept fault or settle any claim without the prior written consent of the carrier.

III. Organizational Reporting Structure

The duty to report a claim to the insurer sometimes depends on who received notice of the claim. Many policies state that the insured is required to give the insurer notice of the claim when the claim is made to the "insured." Depending on the policy's definition of "insured," a claim may be reportable if any of the insured's employees learn of it. This creates a problem when, for example, an on-site employee, remote from the insured's risk management department,

- *insert incident reporting flowchart or escalation chart for your organization along with reporting forms, procedures and policies (if any).*



IV. Reporting of Contractors Professional Claims

Identifying Circumstances that “Could Arise to a Claim”

Most CPRL policies allow you to report circumstances that may give rise to claims at a later date (some are identified as reporting of potential claims). Such events can vary widely.

- If your policy allows you to report a “circumstance” that may develop into a claim, err on the side of reporting. If the circumstance develops into an actual claim, the insurer usually agrees that the date that the insured gave notice of the circumstance will be considered the date that the insured gave notice of the claim.
- The report of a “circumstance” does not need to be as detailed as the report of a “claim.”
- If you do not know all the facts, report everything you know and indicate that you are still investigating and gathering information. Report any relevant information as soon as it becomes available, especially if that information means that the “circumstance” becomes a “claim.”
- Include a description of the event and the claim that might arise from the event.
- Samples of circumstances may include but not be limited to:
 - *Communication made by owner requesting to investigate potential problems with systems or structure*
 - *Collapse or partial collapse of any portion of work*
 - *Systems not functioning properly*
 - *A client expressing dissatisfaction with the work or the insured’s performance*
 - *Faulty work installed by a subcontractor (which can lead to allegations of the insured failing to inspect work or manage the subcontractor properly)*

Identifying the Actual Claim

Do you have a “claim” as identified by the Policy, or a mere complaint, disagreement, or dispute?

At its most basic definition, a “claim” is a **demand for money or services**. Some policies also require the **assertion of a legal right** or that the claim be **in writing** or **both**.

For the reasons outlined below, we recommend that you consider any **demand for money or services** or **assertion of a legal right** to a “claim” and report it accordingly.

- **Demand for money or services** – The meaning of this phrase can vary depending on the jurisdiction, but, as a best practice, if someone demands payment or a service, there is a reportable claim. Err on the side of caution and report.

- **Assertion of a legal right** – Some courts have held that the threat of a suit embeds within it a demand for payment. A party may also assert a legal right by alleging that its rights have been violated. In any event, any time a communication threatens legal action, you should consider it a claim and report it.
- **In writing** – Frequently, CPrL policies require that a demand made against a policyholder be in writing for it to be considered a claim. “Writing” includes letters, handwritten notes, Tweets, e-mails, and text messages. Although a formal letter is the best practice for an aggrieved party in making a claim, you should consider *any* writing that makes a demand or alleges a legal right to be a claim.
 - *Formal lawsuit or complaint served to insured*
 - *Notice of injury or damages resulting from work*
 - *Demand made by owner to correct or rectify any portions of the work*

When to Report the Claim

Your policy will advise *when* to report a claim – either a specific time frame or “as soon as practicable.”

- If it is a specific time frame, that time (usually 30 or 60 days) begins to run from the date the insured learned of the claim. (See also Section III, above.)
- If the policy states that the claim should be reported “as soon as practicable” –
 - Don’t delay. Report the claim as soon as you are aware of it. Report all relevant, known information, and report other information as you become aware of it.
 - Unreasonable delays in reporting are typically only excused if you can demonstrate that you lacked knowledge of the claim or had a reasonable belief of non-liability. Don’t rely on excuses. Report the claim as soon as possible.

Be aware of the policy period, especially if you are renewing coverage with another carrier.

- Your policy likely includes an “extended reporting period” that allows you to report claims within a certain period of time following the end of the policy period. In some cases, you will have a 30 or 60-day automatic extended reporting period. Do not rely on extended reporting periods; report as soon the event has been identified.
- As the renewal of your CPrL program approaches it is always prudent to survey appropriate personnel within the organization to determine if anyone is aware of a claim, potential claim or circumstance that needs to be identified to the carrier before the program renews.

What to Include in the Notice of Claim

- Always include the specific information as required by the policy. *If any required information is not known, indicate as much in the notice, and provide the required information as soon as it becomes available.*
- As a general rule, you should include –
 - The identities of the involved parties
 - What happened
 - When it happened
 - Where it happened
 - How it happened
 - Any correspondence received (email, letter, complaint, etc.)

V. Special Considerations for Protective Indemnity and Rectification/Mitigation Claims

Protective Indemnity Claims

Recovery under this coverage part typically requires that the policyholder make a claim against the design professional. Notice to the insurer of the loss is, by itself, typically not sufficient. To recover under your CPrL's protective indemnity coverage, depending on the specific wording of the policy, it is oftentimes advisable to, –

- Make a written demand or demand for arbitration or mediation or file suit against the at-fault design professional. You typically must also make your claim against the at-fault design professional before the end of the policy period or the optional extended reporting period of the policy from which you are seeking protective indemnity coverage.

Rectification or Mitigation (R/M) Claims

As with protective indemnity claims, the negligent acts or omissions against which the claim is made must typically arise from professional services rendered after the policy's retroactive date and before the end of the policy period. To recover under your CPrL policy's rectification or mitigation coverage, depending on the specific wording of the policy, it is oftentimes advisable to, –

- Report to the insurer, in writing and as soon as discovered, any circumstances that you reasonably expect could lead to a professional claim as rectification may pay for the cost to remedy the error. For example, during the commissioning of the HVAC system of a commercial office building it is discovered that certain floors are not cooling appropriately. Upon further investigation it's determined engineering errors are discovered in the size of the system itself and the ventilation network resulting in the retardation of airflow to those areas. As soon as those engineering errors are discovered and prior to providing a remedy, the insured must report this R/M claim to its carrier.
- Demonstrate to the insurer, in writing, the proposed action to be taken to remedy the error and receive formal approval to move forward.
- Demonstrate to the insurer, in writing, the reasonableness and necessity of the proposed cost of the mitigation in light of the projected benefit of avoiding a covered third-party claim **and obtain the insurer's consent to mitigation strategy before incurring any actual mitigation costs.**

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