

Newsletter

August 2010

What is a claim / what is a circumstance

When a claim is made against you or your company, most people understand when they need to notify the insurance company. However, for 'claims made' policies you are also required to disclose/notify Insurers of any *circumstances* that could give rise to a claim. It's relatively easy to understand what a 'claim' is. However defining exactly what a 'circumstance that could give rise to a claim' is much harder.

What is a claim?

Insurance companies may have slightly different versions, but in essence a claim is:

- (a) a written demand seeking compensation or damages for a wrongful act; or
- (b) a civil, criminal, administrative, regulatory, arbitration, mediation, conciliation or alternative dispute resolution proceeding for a wrongful act commenced by the filing of charges or orders; or
- (c) an investigation including where no wrongful act has been specified.

If any of the 3 things above occur, then you have a claim, and you can trigger the insurance policy.

What is a circumstance?

This is a surprisingly complex area because it's a subjective assessment.

A connection between the known circumstances and the claim may be described by saying that circumstances "may give rise to a claim" if a reasonable person, who reflects on those known circumstances, thought that the bringing of a claim against the insured in respect of them was a "definite risk" or a "real possibility" or "on the cards", or perhaps even just "springing to mind"¹

As you can see, this is very subjective and requires a judgement call.

¹ I have paraphrased Lindgren J in *FAI General Insurance Company Limited v McSweeney* (1999)

It's also worth noting that the mere fact that you do not believe you have been negligent is irrelevant to determining whether circumstances existed which could give rise to a claim.²

The consequence for making an error (failing to notify a circumstance when you should have) can be severe. You can prejudice your rights to cover for any subsequent claim that develops out of those circumstances.

On a practical level, I think it makes sense to be conservative when considering these matters. Chat with your Broker who can better assist you in relation to specific examples.

² Fishwives Pty Limited v FAI General Insurance Company Limited & Ors [2001]