WHEN IS A CLAIM NOT A "CLAIM"?

WHAT RISK AND INSURANCE PROFESSIONALS NEED TO KNOW

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This monograph reviews case law discussing what constitutes a "claim" under claims-made insurance policies.

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Context

The defining feature of "claims-made," as opposed to "occurrence," policies is their trigger of coverage. Occurrence coverage is typically triggered by the happening of an "occurrence," "accident," or other defined event during the policy's effective period. Under a claims-made policy, coverage is usually triggered when a "claim" is first made against the insured during the policy's effective period.[1] For a variety of reasons, claims-made coverage may often make sense for both policyholders and insurers.[2]

Because the trigger of coverage under claims-made policies requires the making of a "claim," it can often be important to determine precisely when such a "claim" was first made. The answer to that question may have significant coverage implications in a number of contexts. For example:

- If an insured has a series of claims-made policies issued by different insurers, determining when a "claim" was first made can determine which insurer's policy is triggered.
- If the insured has a series of claims-made policies with significantly different limits available, or significantly different terms and conditions, deciding when a "claim" was first made can also determine which of those limits, terms, and conditions might apply.
- If an insured has had periods during which it was self-insured or uninsured, deciding when a "claim" was first made can determine whether it has any applicable insurance at all.
- Even where an insured has a series of identical claims-made policies issued by the same insurer, deciding when a "claim" was first made can determine which year's reinsurance may be impacted.

In disputes over when a "claim" was first made, parties sometimes take differing views of what the word *claim* means. This is particularly likely to happen if the underlying dispute developed gradually, escalating through a series of contacts and confrontations before emerging as a full-blown lawsuit. At what point in that sequence of events was a "claim" first made within the meaning of the policy?

Although most people would understand the word *claim* to encompass something more than just a lawsuit, parties often disagree over whether that "something more" might include such things as:

- a letter from a lawyer seeking information (*e.g.*, a "Dear Doctor" letter, asking for a copy of a physician's records relating to the lawyer's client),
- a letter expressing a grievance, complaint, or accusation,
- a threat of possible future litigation,
- a demand for some kind of monetary compensation or other relief, or
- a demand that someone re-do unsatisfactory work at no cost.

Dictionary definitions make it clear that the word *claim* may be used in a number of senses, meaning different things in different contexts.[3] Some policyholders have relied on such definitions to argue that the word *claim* is inherently ambiguous and should therefore be construed against the insurer and in favor of coverage.

To minimize disagreements over the meaning of the word *claim*, some claims-made policies attempt to define it. Such policy definitions have varied significantly, among both different companies and different lines of coverage. The following are a few policy definitions of *claim* quoted in reported cases:

- "any written demand or notice received by an Insured from a person or from any administrative agency advising that it is the intention of a person to hold the Insured responsible for the consequences of a Wrongful Employment Practice and includes any demand received by an Insured for damages and/or the service of suit"[4]
- "a demand for money or money damages received by the Insured during the Policy Period and forwarded to the Company during the Policy Period"[5]
- "a demand received by the Insured for money or services, including the service of suit or institution of arbitration proceedings against the Insured"[6]
- " 'Claim' includes a judgment, arbitration award or any demand for money or services resulting from an actual or alleged act or omission covered hereunder."[7]

However, many policies make no effort to define *claim*. As a result, a number of coverage lawsuits have required courts to determine the meaning of the undefined word *claim* in a claims-made policy.

Although the resulting case law is not unanimous, the vast majority of courts considering the issue have held that the undefined term *claim* in a claims-made policy is (a) not ambiguous and (b) contemplates a demand, made under an assertion of legal right, for compensation in the form of money, services, or something else of value. This has often been expressed by the observation that, to be a "claim," such a demand must "relate to an assertion of legally

cognizable damage, and must be a type of demand that can be defended, settled and paid by the insurer."[8] The actual filing of a lawsuit or service of a demand for arbitration is usually not required[9] (especially where the policy language distinguishes between "claims" and "suits"), but something more than merely airing a grievance or giving notice of a potential future claim is necessary.

The word "claim," standing alone, is not ambiguous

Most courts considering the issue have concluded that the undefined word *claim* in a claims-made policy is not ambiguous, and therefore should not automatically be construed against the insurer and in favor of coverage. Some courts have said so expressly.[10] Other courts have reached the same conclusion implicitly, by holding that *claim* has a plain and ordinary meaning and should be understood according to that meaning.[11]

A grievance or complaint is not a "claim"

Merely lodging a grievance or complaint – without demanding compensation for it – does not constitute the making of a "claim." That is so even if the surrounding circumstances would lead a reasonable person to expect a demand for compensation to be made in the future.

Thus, for example, it has been held that no "claim" was made when a patient complained to her surgeon that she was unhappy with the results of surgery he had performed, because she did not demand any compensation.[12]

In the same vein, it has been held that an EEOC letter to an employer, advising of an age discrimination complaint lodged by a former employee, was not a "claim," because it made no demand for money or other relief.[13]

Raising questions about someone's conduct and asking for an explanation also does not, by itself, constitute the making of a "claim." In one case, for example, someone winding up an estate wrote to the lawyer who had drafted the decedent's will, pointing out problems with the will and asking for an explanation from the lawyer. The court held the letter did not constitute a "claim" against the lawyer, because it demanded no compensation.[14]

Even an express threat of litigation is not necessarily a "claim." In one case, for example, someone complained about the insured's past conduct and expressly warned that the insured could be liable for damages if it failed to honor its commitments in the future. This was held not to constitute the making of a "claim," because it did not include a demand for money or other compensation.[15]

Notice of a potential future claim is not a "claim"

The kinds of cases just mentioned also stand for the proposition that notice of a <u>potential</u> claim, or of a <u>future</u> claim, is not the making of a "claim." In the EEOC case mentioned above, for example, the court characterized the EEOC's letter as merely a warning that a "claim" might be made in the future.[16] In the case about the will, the court characterized the letter as merely notice that a "claim" might be made in the future if the lawyer did not provide a satisfactory explanation of the will.[17] In the case involving the threat of litigation, the court characterized the threat as merely raising the specter of a potential future "claim" if the insured did not live up to its obligations.[18]

Notice of an occurrence is not a "claim"

An insured's own knowledge of an "occurrence," or of facts that might give rise to liability, does not constitute the making of a "claim" in the absence of a demand for compensation or other relief. Even if a potential claimant gives the insured notice of the "occurrence," that still does not constitute a "claim" in the absence of a demand for compensation or other relief. Even notice that a potential claimant has hired a lawyer is not a "claim," absent a demand for compensation of some kind. Also, the insured's report of the "occurrence" to its own insurer is not the making of a "claim."[19]

A "claim" may demand something other than money

Most cases discussing the meaning of the word *claim* deal with demands for money, because that is the most common type of relief that claimants demand. However, some cases have held that a "claim" was made even where the claimant demanded only some kind of relief other than money.[20] In one such case, the court held a "claim" was made when a state agency demanded an insured excavate solid waste and comply with other environmental requirements.[21] In another case, a client unhappy with his lawyer's work demanded the lawyer re-do it at no charge. The court held that demanding free services as a form of compensation constituted the making of a "claim."[22]

Suggestions

In light of the above general observations, you may wish to consider the following suggestions.

1. The cases cited in this monograph are from courts in a number of states. When trying to determine whether something is or is not a "claim," check to see whether there is case law on point in the specific jurisdiction whose law applies to your policy.

If you are a claimant

1. Consider whether you can learn anything about the insurance arrangements of the person or organization against whom you wish to make a claim. You may find it would be in your interest to withhold making a claim until the beginning of a new policy period, or before the end of a current policy period.
2. If you are not yet ready to file a lawsuit, but want to make a "claim" that will trigger the other party's claims-made coverage, then make sure your claim letter includes a clear demand for money or some other kind of compensation or relief. (A demand for money is best for this purpose; you need not state a specific sum.)
3. If you want to give some sort of notice, lodge a complaint, threaten litigation, or something along those lines, but do **not** yet wish to make a "claim" that would trigger the other party's current claims-made coverage, then make no demand for money or other relief and do not characterize your communication as a "claim."
4. If your intent is to make a "claim," then do so in writing and make sure the insured receives it. Many policies require a "claim" to be made in writing, so an oral demand might not be a "claim" at all. Also, if the insured does not receive your "claim," there will be a serious issue as to whether the claim was actually "made" during the policy period.

If you are an insured

1. When shopping for insurance, consider whether you would rather have a claims-made policy that includes a definition of *claim*, or one that leaves it for courts to define on a case-by-case basis. If you are in a position to negotiate policy terms with your insurer, consider whether to negotiate an agreed definition of *claim*, or leave it for courts to define on a case-by-case basis.
2. Do not assume that, because a particular communication is not a "claim" it therefore need not be reported to an insurer: you might be wrong. Even if you are right and the communication is not a "claim," most policies require policyholders to report promptly **both** (a) the making of a claim **and** (b) occurrences or circumstances likely to result in a claim. When in doubt, it is usually better to err on the side of giving prompt notice to all insurers that might afford coverage.
3. As a corollary to #2, if someone sends you a letter that says something to the effect of "please forward this to your insurance company," it is usually a good idea to **do so promptly**.

If you are an insurer

1. Consider carefully whether your claims-made policy forms should define *claim*, or leave it for courts to define on a case-by-case basis.
2. When examining a matter that is not yet in suit, consider whether there has been any communication that constitutes the making of a "claim" within the meaning of your policy.
3. When analyzing coverage for a matter already in litigation, bear in mind that the summons and complaint with which you opened your file might not really be the first time this "claim" was made.

Notes

[1] Subject, of course, to any retroactive date or other feature of the policy that may extend or shorten the effective claims-made period. Some claims-made policies provide that coverage is not triggered unless the claim is both made against the insured **and** reported to the insurer during the effective claims-made period. Such policies are sometimes referred to as "claims-made-and-reported."

[2] Claims-made coverage can provide a number of benefits for policyholders and insurers. From the policyholder's perspective, claims-made coverage is often less expensive than similar occurrence-based coverage would be during the first few years of a claims-made program. In an era of rising verdicts, a policyholder can have some assurance that a claim made today will be subject to limits of liability afforded by a current policy, rather than the possibly inadequate limits of a policy issued many years earlier. Also, for some lines of insurance, claims-made coverage may sometimes be the only type available in a given state.

From the insurer's perspective, once a policy's claims-made period has ended, the insurer has some assurance no further claim will be made under that policy, so there should be little chance of the kinds of unforeseen long-tailed exposures that so often arise under occurrence-based coverages. Other things being equal, this permits more accurate pricing and reserving.

[3] Webster's Third New International Dictionary defines *claim* as follows:

claim \ "\ *n* –s [ME *claim*, *claime*, fr. OF *claim,* fr. *clamer*] **1 a** (1) **:** an authoritative or challenging request **:** DEMAND <the present age makes great ~*s* upon us – Matthew Arnold> (2) **:** a demand of a right or

supposed right <Holland withdrew her ~ to the annexation of German territory> (3) **:** a calling on another for something due or supposed to be due <the speaker laid no ~ on the intelligence of his audience> **b :** a demand for compensation, benefits, or payment (as one made in conformity with provisions of the Social Security Act or of a workmen's compensation law, one made under an insurance policy upon the happening of the contingency against which it is issued, or one made against a transportation line because of loss occasioned by carrier negligence or overcharge); *also* **:** the amount or payment of such a demand **2 :** a privilege to something **:** RIGHT <his ~ to be called Europe's leading spokesman> <a ~ to fame> < liberty itself became…a principle of anarchy rather than a body of ~*s* to be read in the context of the social process – H.J. Laski>; *specif* **:** a title to any debt, privilege, or other thing in the possession of another <an applicant has a special ~ on…the funds listed – *Official Register of Harvard Univ.*> **3 :** an assertion, statement, or implication (as of value, effectiveness, qualification, eligibility) often made or likely to be suspected of being made without adequate justification <his ~*s* to sound scholarship> <appraising the authenticity of dome dealers' ~ – Edith Diehl>; *specif* **:** the formal assertion of novelty and patentability with specification of particulars made by an applicant for a patent **4 :** an assertion of title made (as by a settler, lumberman, prospector) on a tract of land (as one in the public domain) and evidenced by staking or otherwise marking as required by law; *also* **:** the tract of land for which such an assertion is made.
WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 414 (unabridged, 1993)

[4] *Specialty Food Systems, Inc. v. Reliance Ins. Co. of Illinois*, 45 F.Supp.2d 541 (E.D.La.1999).

[5] *Insite Properties, Inc. v. Jay Phillips, Inc.*, 271 N.J.Super. 380, 385, 638 A.2d 909, 912 (App.Div. 1994).

[6] *Evanston Ins. Co. v. GAB Business Services, Inc.*, 132 A.D.2d 180, 521 N.Y.S.2d 692 (1st Dep't 1987).

[7] *Heen and Flint Associates v. Travelers Indem. Co.*, 93 Misc.2d 1, 400 N.Y.S.2d 994 (Sup.Ct., Monroe County, 1977).

[8] *Evanston Ins. Co. v. GAB Business Services, Inc.*, 132 A.D.2d 180, 185, 521 N.Y.S.2d 692, 695 (1st Dep't 1987).

[9] At least one court has held otherwise. *Hyde v. Fidelity & Deposit Co. of Maryland*, 23 F.Supp.2d 630 (D.Md.1998) ["A claim is something demanded as of right in a *court*." (*id*., 23 F.Supp.2d at 633; emphasis in original)]. This is not the majority view.

[10] *E.g.*, *Hyde v. Fidelity & Deposit Co. of Maryland*, 23 F.Supp.2d 630 (D.Md.1998); *Safeco Title Ins. Co. v. Gannon*, 54 Wash.App. 330, 774 P.2d 30 (Ct.App. 1989), *rev. denied*, 113 Wash.2d 1026, 782 P.2d 1069 (1989); *Ins. Corp. of America v. Dillon, Hardamon & Cohen*, 725 F.Supp. 1461 (N.D.Ind.1988).

[11] *E.g.*, *Windham Solid Waste Mgmt. Dist. v. National Cas. Co.*, 146 F.3d 131 (2nd Cir. 1998); *Hill v. Physicians & Surgeons Exchange of California*, 225 Cal.App.3d 1, 274 Cal.Rptr. 702 (Ct.App.1990); *Evanston Ins. Co. v. Security Assur. Co.*, 715 F.Supp. 1405 (N.D.Ill.1989); *Bensalem Township v. Western World Ins. Co.*, 609 F.Supp. 1343 (E.D.Pa.1985); *Phoenix Ins. Co. v. Sukut Constr. Co.*, 136 Cal.App.3d 673, 186 Cal.Rptr. 513 (Ct.App. 1982); *Burlington County Abstract Co. v. QMA Associates, Inc.*, 167 N.J.Super. 398, 404, 400 A.2d 1211,1214 (App.Div. 1979), *cert. denied*, 81 N.J. 280, 405 A.2d 824 (1979); *Hoyt v. St. Paul Fire & Marine Ins. Co.*, 607 F.2d 864 (9th Cir. 1979).

[12] *Hill v. Physicians & Surgeons Exchange of California*, 225 Cal.App.3d 1, 274 Cal.Rptr. 702 (Ct.App.1990).

[13] *Bensalem Township v. Western World Ins. Co.*, 609 F.Supp. 1343 (E.D.Pa.1985).

[14] *Hoyt v. St. Paul Fire & Marine Ins. Co.*, 607 F.2d 864 (9th Cir. 1979).

[15] *Evanston Ins. Co. v. Security Assur. Co.*, 715 F.Supp. 1405 (N.D.Ill.1989).

[16] *Bensalem Township v. Western World Ins. Co.*, 609 F.Supp. 1343 (E.D.Pa.1985).

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[18] *Evanston Ins. Co. v. Security Assur. Co.*, 715 F.Supp. 1405 (N.D.Ill.1989).

[19] *E.g.*, *Insite Properties, Inc. v. Jay Phillips, Inc.*, 271 N.J.Super. 380, 385, 638 A.2d 909, 912 (App.Div. 1994); *Safeco Title Ins. Co. v. Gannon*, 54 Wash.App. 330, 774 P.2d 30 (Ct.App. 1989), *rev. denied*, 113 Wash.2d 1026, 782 P.2d 1069 (1989); *Heen and Flint Associates v. Travelers Indem. Co.*, 93 Misc.2d 1, 400 N.Y.S.2d 994 (Sup.Ct., Monroe County, 1977).

[20] *E.g.*, *Windham Solid Waste Mgmt. Dist. v. National Cas. Co.*, 146 F.3d 131 (2nd Cir. 1998); *Phoenix Ins. Co. v. Sukut Constr. Co.*, 136 Cal.App.3d 673, 186 Cal.Rptr. 513 (Ct.App. 1982).

[21] *Windham Solid Waste Mgmt. Dist. v. National Cas. Co.*, 146 F.3d 131 (2nd Cir. 1998).

[22] *Phoenix Ins. Co. v. Sukut Constr. Co.*, 136 Cal.App.3d 673, 186 Cal.Rptr. 513 (Ct.App. 1982).