



Notice of Circumstance and the COVID-19 Pandemic

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Management and Professional Liability Policies

Generally speaking, a Notice of Circumstance (“NOC”) provision in management and professional liability policies (i.e. D&O, Employment Practices Liability, Fiduciary Liability, Professional Liability) allows the company to provide a circumstance or fact that could reasonably be expected to give rise to a claim in the future. The effect of the NOC is that, if a claim is later made, even after the expiration of the policy period, or even an extended reporting period, the claim will be considered first made when the original NOC was given. Thus, the main purpose of a NOC is really to act as a policy limits preservation strategy (i.e. to save the limits of the policy that the NOC was given under for potential claims that may be made in the future.)

Although the concept of a NOC sounds simple, in application numerous issues must be considered before deciding to submit a NOC. First, while a “claim” requires reporting, the providing of a NOC is not required under the policies mentioned above, and, even if there is a decision made not to notice a NOC, the company does not waive any rights to submit an actual “claim” that arises from similar circumstances in the future (whether later in the policy period or even in a future policy period). Second, the majority of these policies do not define a “circumstance”. In general terms, it is a fact or situation which, objectively evaluated, creates a reasonable and appreciable possibility that it will give rise to a claim against an insured(s). In order to be accepted as a proper NOC, the notice of the insurer **MUST** contain the following information (note that the requirements may vary with each specific policy):

- The nature of alleged wrongful acts
- The name(s) of potential claimants that may bring a claim
- The name(s) of potential insured persons that may have committed wrongful acts
- The type of damages sought by potential claimants
- The circumstances by which an Insured became aware of such circumstances

A typical “circumstance” would be a verbal complaint or demand by a shareholder, an employee or a client, or a threat to potentially bring a claim which has not yet evolved into an actual “claim”.

Another example of a circumstance would be a realization by the insured that its advice or services had been negligently provided and that a “claim” may arise as a result.

A stock price drop, even if precipitous, as result of an overall stock market decline and/or layoffs/reductions in force (RIF) as a result of the COVID-19 crisis would most likely not be sufficient to put the insurer on notice of a future claim.

Risk Management Implications

There can be instances where a NOC is warranted (such as when the specificity of facts are met, and the incumbent insurer is going to be placing a COVID-19 exclusion on the upcoming policy at renewal). However, we certainly do not advise clients to report a general NOC to all applicable policies for potential claims that may arise from the COVID-19 pandemic. We also do not recommend that a company provide a “laundry list” of potential claims without enough required specificity as those notices may not be accepted as a NOC by the insurer.

If a NOC is submitted and rejected by the insurer as insufficient, then that could potentially create issues with policy renewals and future coverage, particularly if future coverage has become more limited in terms of continuity protections. As each scenario is very facts-specific and each policy’s wording is very specific, we advise all clients that, before a NOC is submitted, the company consult with their outside counsel and/or their USI account service team for advice and consultation on whether a NOC is appropriate for the scenario.

How Can We Help?

For more information, please contact your local USI consultant, or visit us at www.usi.com.