

The complaint

A company that I will refer to as P has complained that Great Lakes Insurance SE unfairly declined its professional indemnity insurance claim.

Great Lakes is the insurer of this policy. Part of this complaint concerns the actions of its agent. As Great Lakes has accepted it is accountable for the actions of its agent, any reference to Great Lakes includes the actions of its agent.

What happened

P held professional indemnity insurance with Great Lakes. P claimed on its policy in October 2022 after a complaint that was brought against it by a client, who I will refer to as K, was upheld by our service. The final decision issued by our service required P to pay K compensation and P claimed on its policy with Great Lakes for its losses.

Great Lakes declined P's claim as it said that P had not declared the claim when it should have done and this had prejudiced its position. Moreover, Great Lakes said P had answered 'no' when asked if it was looking to notify the claim at renewal in January 2022. As P had not notified the claim at renewal, Great Lakes issued the policy which included an exclusion for known claims and circumstances.

Unhappy with Great Lakes' response, P brought its complaint to our service.

P said that K had raised a complaint with our service in April 2021 about the basis of settlement for its claim. P said it was informed by our service shortly afterwards that we would not be upholding K's complaint.

P said that in January 2022, when the policy was due for renewal, it declared what had happened in its proposal form for the renewal. However, as it did not think that the complaint against it was progressing, when asked by Great Lakes, it said it did not want to declare the complaint as a potential claim.

P said that our service contacted it again in October 2022 to advise that K had escalated its complaint for an Ombudsman's decision and the Ombudsman intended to uphold the complaint. P said the complaint being considered by the Ombudsman related to the quality of the documentation, rather than the basis of settlement which it considered to be the original complaint. So, P informed Great Lakes of the complaint and notified it of the claim.

P said that it did not inform Great Lakes of the complaint in April 2021 because it did not think there was any merit in K's complaint and it had been informed that it wasn't being upheld. P also thought that the nature of the complaint considered by the Ombudsman was different to the one raised in April 2021. Despite this, P said it did declare the complaint on the renewal form and Great Lakes would have known that claims of this nature could still be under consideration by our service. P did not think it was fair for Great Lakes to exclude cover, given the information provided on the form. It said it had no option but to renew with Great Lakes as the only insurer offering cover for claims relating to Covid-19.

Our Investigator looked into P's complaint but didn't recommend it be upheld. He did not think that P had notified Great Lakes of the claim in line with the policy terms and he thought that had prejudiced Great Lakes' position. He thought that, as P had said it did not want to notify Great Lakes about the claim at renewal, it was fair and reasonable for Great Lakes to include the exclusion for known claims and circumstances. He thought that as the complaint would be considered a known claim or circumstance Great Lakes was entitled to rely on the exclusion to decline P's claim.

P asked for an Ombudsman's decision.

P said the nature of K's complaint changed in April 2022 when K escalated its complaint to an Ombudsman. It did not believe that the complaint raised in April 2021 was the same complaint as the complaint considered by the Ombudsman in October 2022 and said it could not have raised the issue with Great Lakes until the complaint was amended by the Ombudsman. It believed the original complaint made by K was about the basis of settlement and therefore it was not responsible for that.

P said it bought its policy through a specialist broker in an advised sale. K's complaint was not considered by our service until April 2022 and was not upheld by the Investigator. P said that, at the time of the renewal, it did not know the complaint was progressing, or that what our service could consider could change from the complaint initially raised. It said it was not practical to notify Great Lakes of every complaint that was made to it.

P did not think it was reasonable for Great Lakes to have included the exclusion for known claims and circumstances at renewal given the information contained within the proposal form; and it said Great Lakes should have done more to let it know that the complaint raised with our service might not have been resolved. It also thought Great Lakes should be required to explain how it had been prejudiced by the late notification of the claim.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Notifying Great Lakes of the claim

The "insuring clauses" section of P's policy indemnifies P "for any final and binding compensatory awards or determinations by any Ombudsman as long as the claim was notified during the period of insurance. The period of insurance was January 2021 to January 2022.

The "claims conditions" sections says that if P fails to comply with any of the claims conditions, Great Lakes will be entitled to reduce the amount it pays by an amount it determines to be fair and reasonable based on the prejudice caused by the non-compliance.

The policy says that P should notify Great Lakes:

"in writing as soon as reasonably possible if **You** receive, discover or become aware of

1.1.1. any **Claim** made against **You**;

1.1.2. any indication that someone intends to make a **Claim** against **You** or

1.1.3. a **Circumstance**.

Notification under this clause must be made irrespective of **Your** view on liability

or the validity of the **Claim** or potential **Claim**.

1.2 What must be included

The notification must include full particulars, including without limitation the identity of the claimant or potential claimant, details of the allegations and potential allegations against **You**, identification of the services giving rise to the **Claim** or **Circumstance** and, if known, the potential quantum of the **Claim** or **Circumstance**."

Within the definitions section, the policy says that a claim:

"shall mean any written or oral demand for monetary damages and/or notice in writing of any intention to commence legal proceedings against **You** and/or other relief including non-pecuniary relief and/or any civil arbitration or adjudication proceedings including counterclaim and appeal made by a third party against **You** in connection with **Your Business**"

A circumstance:

"shall mean any circumstance, event or state of affairs which may reasonably be expected to give rise to a **Claim** against **You** or a claim for **Loss** by you of a kind that may be covered under this **Policy**. Subject to the terms of **Claims Condition 1**, examples of the types of matters which **You** should notify as a **Circumstance** include but are not limited to the following:

- a. any complaint from a client about work undertaken by **You** and which cannot be resolved within three working days;
- b. any series of complaints from a client about work done by **You**;
- c. any situation by which **You** become aware of any shortcoming in work undertaken for a client (whether this is known to the client or not);
- d. any situation in which a client, following a complaint by the client, fails to pay fees or premiums invoiced by **You**;
- e. any threat of a **Claim** being brought against **You**;
- f. the discovery, or reasonable cause for suspicion, of dishonesty or fraud on the part of any current or former partner, director, member **or Employee** of **Yours**;
- g. the receipt by **You** of any written demand for compensation or demand for other civil relief including non-pecuniary relief made by a third party against **You**;
- h. any civil, arbitration or adjudication proceedings, application including any counterclaim or appeal served upon **You**;
- i. the receipt by **You** of any communication invoking a Pre-Action Protocol"

P did not notify Great Lakes about K's complaint during the period of insurance and I think it should have done. I'll explain why.

P said that it did not consider that P's complaint was something that needed to be notified to Great Lakes as it was about the basis of settlement of the claim. P has referred to a letter provided by Great Lakes regarding Covid-19 claims which said:

"Firstly, if a broker insured with [Great Lakes' agent] is aware of Circumstances (as defined in the policy) then we should be notified formally in the usual way. This would include a Claim being made against you.

A number of brokers insured with [Great Lakes' agent] have been contacted by clients asking for information as to how their insurance may respond to COVID-

19. Most will be uninsured and consequently disappointed. Such enquiries will generally not meet the definition of Claim or Circumstance and won't act as a trigger to notify us..."

I do not believe that K's initial complaint was not a complaint against P. In its letter of complaint in April 2021, K said it believed P's "action, or inaction and lack of care, has directly resulted... in a substantial loss to our business." It let P know that if it could not reach a satisfactory settlement it would bring the complaint to our service.

In my view, in April 2021, K let P know it believed P had caused it a financial loss and asked for a settlement for its error in the way the policy had been arranged. K also let P know it would bring the complaint to our service if it was not resolved. I think this amounted to a written demand for monetary damages and therefore was a claim. However, even if it did not meet this definition P should have notified Great Lakes as a circumstance as "a" applied. P was also notified that the complaint had been raised with our service a short while later, so I also think "g" also applied.

I appreciate that P did not believe that K's complaint would be upheld but the notification condition applies irrespective of the insured's view of the validity of the claim. And the letter from Great Lakes' agent makes it clear that if there is a claim against a broker it should be notified in the usual way.

Moreover, even if I accepted that P did not think that it needed to notify Great Lakes in April 2021, by May 2022 P had been informed that K's complaint had been considered by an Investigator and referred to an Ombudsman for a decision. So I do not believe that P should only have reasonably known to notify Great Lakes about it in October 2022. So, even though the renewal had already occurred, I think P should reasonably have notified Great Lakes about the complaint much earlier than October 2022.

Great Lakes said that the late notification prejudiced its position because it had lost the opportunity to consider P's liability, to appoint solicitors to assist P in its response and to explore the opportunity to explore negotiation of a settlement with K.

While it's impossible to know what would have happened if P had notified Great Lakes of the claim sooner, I accept the points that Great Lakes has made about the late notification of the claim causing prejudice. Therefore, I think it is reasonable for Great Lakes to rely on the late notification to refuse to pay P's claim.

Exclusion for known claims and circumstances

In any event, the terms and conditions of P's policy for the period January 2022 to January 2023 say that the policy will not provide indemnity against any loss arising directly or indirectly from:

"Known claims or circumstances

any **Claim** made or **Circumstance** known to **You** (or of which **You** ought to have been aware) before the date of commencement of the **Period of Insurance**;"

The definitions for "claims" and "circumstances" in the policy remained the same as in the 2020-2021 policy.

The proposal form for P's renewal asked if P was aware of any circumstance which might lead to a claim. P answered "yes" and provided the details of the complaint that had been raised against it. Great Lakes asked if P intended to notify the claim and it said it wasn't.

It is for Great Lakes to decide the risks it wants to cover and I don't consider that the exclusion is an unfair term given that P said it did not want to formally notify the claim. I recognise that P did not believe that K's complaint was progressing but Great Lakes specifically asked whether P wanted to notify the claim and P said it did not. I do not consider that there was any obligation on Great Lakes to inform P that K's complaint might not be resolved, particularly given that P's policy was sold via another broker.

That means that the policy was written to exclude known claims and circumstances. In its letter of complaint in April 2021, K complained that P's actions when arranging the policy had caused it a financial loss. This is the same complaint issue that the Ombudsman considered in her final decision, so I am satisfied that when the claim was made it was regarding a known claim or circumstance and therefore excluded by the policy.

Taking all of this into consideration, I do not uphold this complaint and am not going to require Great Lakes to pay P's claim.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask P to accept or reject my decision before 6 September 2023.

Sarann Taylor
Ombudsman