

A practice note on late submissions of claims

1. A clause in a policy document requiring a claim to be lodged within a stipulated period is not in itself objectionable as being grossly unreasonable or against public policy.
2. Such a clause can either be unqualified (a so-called “guillotine” clause) or it can allow for exceptions. Examples of such exceptions are: “in the discretion of the insurer”; “unless special circumstances exist”; or “provided the insurer is not prejudiced thereby”.
3. Reliance by an insurer on a “guillotine clause” is to be treated in the same fashion as a defence based on extinctive prescription. It will in principle be enforced by this office. The only exception will be if the circumstances of the case are such that fairness to both parties requires that the office should exercise its equity jurisdiction in favour of the complainant. In that event the complaint would thereafter have to be considered on its merits.
4. It is important, in considering the exercise of equity jurisdiction, that the circumstances relating to *both* parties are taken into account. So, for example, it will be a compelling circumstance that it would be difficult for an insurer, because of the long delay, to properly examine the circumstances pertaining to the claim. The exercise would thus always involve balancing equities.

5. Relevant circumstances to be taken into account in exercising our equity jurisdiction would include:

(i) the complainant was only a fraction late; conversely, the longer and more unreasonable the delay, the less inclined the office will be to come to the assistance of the complainant;

(ii) the insurer was aware, within the time limit, that the complainant seriously intended to claim but the prescribed formalities for lodging such a claim were only complied with after the prescribed period had elapsed;

(iii) the complainant was not to blame for the delay in prosecuting the claim, for instance:

– he was in a coma or in such a serious condition as a result of accident or illness that he could not reasonably have been expected to apply his mind to the prosecution of a claim;

– there is uncertainty as to when the notice period commenced and such uncertainty contributed to the complainant's failure to lodge his claim within the stipulated period. That would be particularly so when the commencement of the period is not confined to a particular determinable event (e.g. the last day of work) but relates to

a condition on which an assessment, legal or medical, is yet to be made. A common example is the case of the disability claim when it depends on medical or legal evaluation when the complainant has become permanently disabled for the purpose of a claim in terms of the policy;

- (iv) conversely, where the complainant was lax or unable to explain the cause for his delay, the office will be disinclined to come to his assistance;
- (v) where the delay was largely due to the insurer itself – for instance, in not having its own prescribed claim forms available; or if its agent’s advice misled the complainant as to the necessity of lodging a claim in due form; or if the insurer, to the knowledge of the complainant, in the past never insisted on strict compliance; or where the insurer, departs from its own past practice and policy in allowing dispensations for late claims.
- (vi) where the insurer was not significantly prejudiced by receiving the claim beyond the prescribed period.

6. The same approach would largely apply if the clause is not a true “guillotine” clause but allows for any of the exceptions described in par. 2 above. In those circumstances our emphasis would be on the factors justifying (or not) the exception. Where that is the position the office may make a determination favouring the complainant on the merits, i.e. without invoking its equity jurisdiction.