Policyholders Beware: Failure to Give Timely Notice, as Soon as Practicable During a Claims-Made Policy’s Effective Dates or Discovery Period, May Void Coverage Even When an Insurer Is Not Prejudiced

The New Jersey Supreme Court recently held that an insurer may disclaim coverage without showing it was prejudiced by a policyholder’s failure to comply with a claims-made policy’s notice provision.

In *Templo Fuente De Vida Corp. v. National Union Fire Insurance Co.,* A-No. 074572, slip op. (N.J. Feb. 11, 2016), the policyholder purchased a Directors and Officers Liability policy, effective January 1, 2006 through January 1, 2007. It contained a Notice/Claim Reporting provision, requiring the policyholder to give written notice of any claim made against it “as soon as practicable” and either (1) anytime during the policy period or discovery period, or (2) within thirty days after the end of the policy period or discovery period. The policy also required the policyholder to assume its own defense of the claim, but allowed the insurer to associate in the defense. When the policyholder was served with a complaint in February 2006, it hired defense counsel and filed an answer. More than six months later, it gave notice of the claim to its insurer in August 2006. The insurer denied coverage, asserting that the policyholder had breached the contract and forfeited coverage by failing to give notice of the claim “as soon as practicable.”

The policyholder’s assignee ultimately sued the insurer for coverage, urging that the insurer could not disclaim coverage without demonstrating it was prejudiced by the late notice. The trial court disagreed, and granted the insurer’s motion for summary judgment. It found that coverage was barred because the policyholder failed to give notice “as soon as practicable” as required by the insurance contract. The Appellate Division affirmed, noting that the policy “clearly required that notice be provided both within the policy period and as soon as practicable.”

The New Jersey Supreme Court also agreed with the trial court. It explained that an insurer need not prove prejudice to disclaim coverage for late notice because the prejudice requirement applies only to occurrence policies, not claims-made policies. The Court noted that plaintiffs neither challenged the notice provision as ambiguous nor offered any evidence justifying the six-month reporting delay. In fact, they conceded notice was not given “as soon as practicable.” The Court concluded that the “unexplained six-month delay” ran afoul of the policy’s notice requirements, voiding coverage.

The Supreme Court, however, declined to draw any “bright line” relating to timely compliance under an “as soon as practicable” notice provision.

The Court observed that claims-made and occurrence policies historically are treated differently “due in large part to the differences between the policyholders themselves.” The Court explained that occurrence policies are regarded as contracts of adhesion because they traditionally involve insurers with bargaining power superior to that of their policyholders. Courts, therefore, require the insurer to show prejudice before denying coverage for late notice under an occurrence-based insurance policy to prevent an unfair result. The Supreme Court opined that in the claims-made policy context, policyholders are supposedly more sophisticated and better able to deal with insurers on an equal footing. The Court, indeed, characterized the insured as sophisticated because it was an “incorporated business entity that engaged in complex financial transactions”; it purchased a broad variety of insurance coverage; and, it engaged a broker to buy the policy. The Supreme Court, nonetheless, declined to “make a sweeping statement about the strictness on enforcing the ‘as soon as practicable’ notice requirement in claims-made policies generally.” Rather, the Court stated that it “need only enforce the plain and unambiguous terms of a negotiated Directors and Officers insurance contract entered into between [these] sophisticated business entities,” which was intended to preserve the insurer’s rights “to associate and influence how the litigation proceed[ed] from its inception.”

Giving notice of a claim can be complicated. Corporate policyholders, expert in their own industries, often are not sophisticated, let alone expert, in the insurance business. They may use brokers to purchase insurance policies, but frequently do not consult with brokers until they believe notice of a claim is required, at which point they engage the broker to handle it. Yet, their claims-made policies are filled with insurance jargon, describing and defining what constitutes a claim, what triggers coverage, and when claims should be reported to an insurer. Corporate policyholders, nonetheless, must now be vigilant, and perhaps over inclusive, about giving notice of claims under claims-made policies. They should review their policies to understand whether and when they also may be required to give notice of circumstances that may result in claims. If challenged on the timing of notice, a policyholder would be
wise to offer proofs regarding its circumstances and justification for any alleged delay, and what it understood to be “as soon as practicable.” If the insured in *Templo Fuente* had presented justification for the timing of its notice, it may have been afforded an opportunity to have a jury decide whether there was any unreasonable delay in providing notice to its insurer.

**Court Enters Bar Date of March 31, 2016, in the Reliance Liquidation**

On December 22, 2015, the Commonwealth Court of Pennsylvania entered an order setting a bar date in the liquidation of Reliance Insurance Company (http://www.reliancedocuments.com/pdfs/ClaimsBarDateNotice.pdf). As a result of the order, claimants now have until March 31, 2016, to submit claims in the Reliance liquidation.

Our insurance recovery lawyers can help you prepare your submission prior to the March 31, 2016, bar date. Our insurance recovery lawyers have helped other policyholders and claimants secure notices of determination in the Reliance liquidation in the millions of dollars. We can assist with analysis of your potential claims as well as preparation of the required submission in support of claims.