Alert

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COZEN O'CONNOR

First Circuit Affirms Insurer's Denial for Late Notice Under Claims-Made Policy

On August 9, 2023, the U.S. Court of Appeals for the First Circuit affirmed the holding of the District of Massachusetts that failure to provide notice according to a claims-made policy's terms and conditions forfeits any right to coverage. *President and Fellows of Harvard College v. Zurich American Insurance Company.*[1] The First Circuit rejected the insured's argument that an insurer's purported actual knowledge of a claim – here by virtue of the media attention surrounding the underlying litigation – is sufficient to comply with the policy.

Discussion

On November 17, 2014, Students for Fair Admissions, Inc. sued the president and fellows of Harvard College (collectively Harvard), alleging Harvard's raced-based admissions program violated Title VI of the Civil Rights Act of 1964 (the Underlying Action). The Underlying Action recently concluded on June 29, 2023, with an opinion by the U.S. Supreme Court.[2] Prior to the commencement of the Underlying Action, Harvard purchased a primary claims-made liability insurance policy issued by AIG (the AIG Policy) as well as an excess, follow-form claims-made policy issued by Zurich American Insurance Company (the Zurich Excess Policy). Under the AIG Policy, as a condition precedent to coverage, Harvard was required to provide written notice to AIG of any claim as soon as practical but in no event later than 90 days after the end of the policy period. The Zurich Excess Policy provided that Harvard was to provide notice to Zurich under the same terms and conditions as it provided notice under the AIG Policy and that notice to AIG did not constitute notice to Zurich. In November 2014, Harvard gave notice of the Underlying Action to AIG but not to Zurich. Harvard eventually provided notice to Zurich in May 2017, long after the Zurich Excess Policy had expired and its 90-day reporting window had closed. Zurich denied coverage on the ground that Harvard failed to provide timely notice pursuant to the terms and conditions of the Zurich Excess Policy and therefore forfeited coverage.

Harvard commenced a coverage action against Zurich in the U.S. District Court for the District of Massachusetts in September 2021. Zurich moved for summary judgment. The District Court granted Zurich's summary judgment motion, holding that Massachusetts law is clear that the unambiguous terms of an insurance policy must be strictly construed and that failure to provide notice according to the terms of a claims-made insurance policy forfeits coverage, with no exceptions for constructive notice or that an insurer must demonstrate prejudice.[3]

The First Circuit affirmed. On appeal, Harvard argued that 1) the District Court misapplied Massachusetts law on strict compliance and 2) the Zurich Excess Policy's notice provision is ambiguous as to how notice should be provided. As to the first argument, the court found the District Court correctly applied Massachusetts law and that the general rule is that an insurance policy, including its notice provision, is to be enforced according to the plain meaning of its terms. The court then noted that there is a limited exception to this rule under occurrence-based policies, finding that the underlying purpose of the notice provision of an occurrence-based policy is to afford the insurer an opportunity to promptly investigate facts pertaining to liability when that investigation can effectively be made. In comparison, the purpose of notice under a claims-made policy is not only to provide the insurer a chance to investigate but also "to promote fairness in rate setting." Although technical non-compliance with the notice requirement of an occurrence-based policy can result in unfairness to an insured, to allow for technical non-compliance in a claims-made policy would frustrate the purpose of insuring claims (that can only be reported within a specified period set forth in the policy) rather than occurrences.

Harvard argued that if Zurich had actual notice — based on the media attention surrounding the

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Underlying Action — then the rate-setting purpose would be satisfied, notwithstanding its failure to provide written notice. The court strongly rejected that contention asserting that the argument was "little more than gaslighting." The court found this was Harvard's attempt to argue that Zurich was not prejudiced by the lack of timely written notice when Massachusetts law is clear that an insurer need not demonstrate prejudice before denying coverage for late notice under a claims-made policy. The court also noted that Harvard relied mainly on decisions involving occurrence-based policies to support its argument, which were clearly distinguishable from this matter.

As for the second argument relating to the ambiguity of the reporting terms, Harvard argued that further discovery could reveal that a newspaper or other media outlet reported the claim to Zurich due to its media coverage. The court did not entertain this argument because Harvard raised it for the first time on appeal.

In sum, neither Harvard nor Zurich disputed that Harvard purchased a claims-made policy from Zurich or that Harvard failed to provide notice until after the deadline set in the Zurich Excess Policy. Therefore, under Massachusetts law, Zurich was correct to deny coverage because failure to give timely notice pursuant to the terms of claims-made policy results in forfeiture of coverage by the insured.

Conclusion

The First Circuit's opinion provides a good analysis of the distinctions between occurrence and claims-made policies, including the underlying rationale for the differences in the notice provisions of the two types of policies. Insurers issue claims-made policies with the expectation that they can close the books on claims for a particular policy period once the reporting period has expired, which allows them to evaluate future risks — and premiums — with some certainty for a particular insured. This decision also follows similar holdings in the Third Circuit,[4] the Northern District of California,[5] and the Southern District of New York.[6] As noted, Massachusetts does not require prejudice to deny claims for late notice when it involves claims-made policies, and both the decision in the District of Massachusetts and the First Circuit highlight this point. Of course, an insured and insurer are free to negotiate a prejudice requirement into a specific policy.

Although the First Circuit did not address Harvard's contention on appeal that the Underlying Action could have been reported by a third party news outlet to Zurich, given the strict compliance standard under Massachusetts law, and depending on the specific policy language, it appears the First Circuit would also reject that argument akin to the line of cases that hold that even reporting direct notice of a claim to an insurer's underwriters is insufficient to fulfill the notice and reporting requirements of a claims-made policy. This decision should be of interest to any insurer practicing in a non-notice prejudice jurisdiction.

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[1] *President and Fellows of Harvard College v. Zurich American Insurance Company*, No. 22-1938, 2023 WL 5089317 (1st Cir.) (applying Massachusetts law).

[2] *See Students for Fair Admissions, Inc. v. Presidents and Fellows of Harvard College*, 143 S.Ct. 2141 (2023).

[3] *President & Fellows of Harvard College v. Zurich Am. Ins. Co.*, No. 21-CV-11530-ADB, 2022 WL 16639238 (D. Mass. Nov. 2, 2022).

[4] *Atlantic Health Systems, Inc. v. National Union Fire Ins. Co. of Pittsburgh*, 463 Fed. App'x 162 (3d Cir. 2012).

[5] *Heritage Bank of Commerce v. Zurich American Ins. Co.,* No. 21-10086, 2022 WL 3563784, (N.D. Cal. Aug. 17, 2022).

[6] *Checkrite Ltd., Inc. v. Illinois National Ins. Co.*, 95 F.Supp.2d 180 (S.D.N.Y. 2000).