First Circuit Holds That Notice Provisions in Claims Made Policies Must Be Strictly Enforced

By: Austin D. Moody
Insurance Coverage and Bad Faith
8.11.23

In *President & Fellows of Harvard College v. Zurich Am. Ins. Co.*[1], the United States Court of Appeals for the First Circuit ruled that Harvard was not entitled to coverage under an excess claims-made and reported policy issued by Zurich American Insurance Co. (Zurich) because it failed to comply with the notice provisions of the policy.

The ruling reinforces well-established Massachusetts law that an insured seeking coverage under a claims-made policy must strictly comply with the terms of the policy as they relate to notice. An insurer's actual notice of a claim or lawsuit through other means does not relieve an insured of this burden

The coverage fight stemmed from Harvard's demand for coverage for legal costs related to the nearly decade-long fight between Harvard and Students for Fair Admissions, which recently culminated in the Supreme Court's ruling that Harvard's consideration of race in its admissions policies was unconstitutional.

Harvard was initially sued on November 17, 2014. On November 19, 2014, it gave notice to its primary insurer, American International Group, Inc. (AIG). However, it neglected to provide notice to Zurich until May 23, 2017. The excess policy issued by Zurich, which expired on November 1, 2015, required that notice be given within ninety days of the end of the policy period.

Harvard argued that Zurich had not been prejudiced by its failure to strictly adhere to the policy's terms regarding notice and that it should have an opportunity to show that Zurich had actual notice of the well-publicized lawsuit during the notice period provided by the policy. The court noted that the issue of notice under a claims-made policy has been addressed multiple times by both the Massachusetts Supreme Judicial Court and the First Circuit itself and wrote that it was "[s]taying within the borders of this well-beaten path" in "hold[ing] that the failure to give notice according to the policy's terms and conditions forfeits any right to coverage."[2]

Although, under Massachusetts law, an insurer must show prejudice in order to decline coverage due to an insured's failure to adhere to the notice provisions of an occurrence-based policy, the court noted that no such rule exists when it comes to claims-made policies. As many courts, both in Massachusetts and nationally, have recognized, the primary reason for this is to promote fairness in rate setting. Shortly after the expiration of a claims made policy, an insurer should be well apprised of the claims it faces under that policy.

The court rejected Harvard's argument that this rule does not apply where an insurer has actual notice of a claim and can use that information to set its rates, notwithstanding the insured's failure to comply with the policy's notice requirement. The court referred to this argument as "little more than gaslighting" and "simply another way of arguing that Zurich was not prejudiced by the lack of timely written notice."[3] The court held that, even if Harvard could show that Zurich had actual notice of the underlying lawsuit, it would be irrelevant from a coverage perspective. It held that the District Court had correctly denied Harvard's request for additional discovery as to Zurich's actual knowledge.

Insurers issuing claims made policies in Massachusetts should feel confident in strictly applying the notice requirements of their policies when insureds fail to comply with these provisions.

If you have questions or would like more information, please contact Austin D. Moody (moodya@whiteandwilliams.com; 617.748.5206).

[1] 2023 U.S. App. LEXIS 20715 (1st Cir. Aug. 9, 2023).

[2] *Id.*, at *1-2.

[3] *Id.*, at *10.