

Untimely Notice Causes Loss of Directors and Officers Coverage

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Claims-made and reported policies typically contain, as a condition precedent, fairly strict notice requirements. The entire point of a claims-made policy is to restrict the policy to claims made during the policy period and reported during the policy period or any extended reporting period. Giving notice early and often is a mantra that is often ignored when a policyholder is hit with lawsuits. Ignoring these notice requirements, however, can cause coverage to be lost as policyholders found out in a recent Sixth Circuit case.

In [US HF Cellular Communications, LLC v. Scottsdale Insurance Co.](#), No. 18-3653 (6th Cir. May 31, 2019) (Not Recommended for Publication), a group of related limited liability companies and one of their directors was sued by a company that was partially owned by the main LLC for various tort theories involving use of a maritime communications network frequency. The LLCs had a series of D&O insurance policies, which they purchased in the surplus lines market. The lawsuit was commenced in 2015 with amendments and additional defendants added through April 2016. The main LLC did not notify its D&O insurer of the lawsuit until January 2016. The insurance company denied coverage because the policy required claims to be reported no later than 60-days after the end of the policy period. The previous policy period ended July 31, 2015.

The LLCs sued their D&O carrier alleging breach of contract and other relief. After discovery, the D&O insurer moved for summary judgment and the LLC's moved for partial summary judgment. The district court granted the D&O insurer's motion and denied the LLCs' motions based on late notice.

In affirming the district court, the circuit court noted that there was no dispute that the type of claims alleged in the underlying case would be covered by the D&O policies if they were made after the inception of the policies, timely reported and not barred by any exclusion. The policies, the court stated, were claims-made and reported policies, which require a claim to be made against the insured during the specified policy period and reported to the insurer during the policy period. Here, said the court, the policy language made it clear that the reporting requirement is a condition precedent to coverage.

The court rejected the policyholders' argument that the renewal of the successive claims-made policies extended the reporting period for claims. The court found that each policy had its own "policy period" and that coverage under each policy was discrete and not continuous. The court

concluded that the policies' plain language precluded the policyholders' from seeking coverage because they had failed to timely report the claim to the insurer. The court agreed that the late-notice exclusion applied to bar coverage for these claims and affirmed the grant of summary judgment to the insurer.

The court also affirmed the grant of summary judgment for the insurer concerning a separate D&O policy for an additional defendant brought into the case later based on misrepresentations in the application about whether any director had been sued previously. The director had answered yes on the application and then answered no when the application was updated, even though the original D&O case had been pending at the time of the application.

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