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Harvard Receives a Thicker Text on the Importance of Timely Notice

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Harvard's years-long battle with Zurich Insurance Company has finally ended. As our colleagues wrote in October 2022, Harvard already learned its lesson once when a court ruled that Zurich did not have coverage obligations after the university failed to provide timely notice of a lawsuit under its claims-made-and-reported insurance policy. Earlier this week, the First Circuit provided Harvard with a new volume explaining why it—and policyholders generally—should provide timely notice of claims to their insurers. The First Circuit's decision in President & Fellows of Harvard Coll. v. Zurich Am. Ins. Co., No. 22-1938, 2023 WL 5089317 (1st Cir. Aug. 9, 2023) is but the latest high-profile reminder about the importance of adhering to notice requirements, including with respect to excess insurers, in claims-made-and-reported insurance policies.

Background

Harvard concerns insurance coverage for Harvard's nine-year-long defense of challenges to its affirmative action policies that ultimately were decided by the Supreme Court this past June. The story begins in November 2014 when Harvard bought claims-made-and-reported insurance policies that, among other things, required Harvard to "give written notice to the [insurers] of any Claim made against an Insured . . . as soon as practicable . . . [and] in all events . . . no later than ninety (90) days after the end of the Policy Period" as a "condition precedent to the obligations of the . . . [insurers] under the policies." That same month, Harvard received the affirmative action lawsuit. Harvard—as it should have—promptly notified one of its insurers that it received the lawsuit. But it did not notify its excess carrier, Zurich, until almost three years later—well after the policy period (and the ninety-day grace period) lapsed. So Zurich denied coverage.

Harvard sued Zurich seeking a declaration that Zurich still owed coverage. Harvard argued that technical compliance with the notice requirements was unnecessary when the purpose of compliance—notice—was satisfied through other means. In other words, Harvard contended that Zurich's actual notice of the lawsuit excused Harvard's non-compliance with the notice provision because Zurich received constructive notice and could not have been prejudiced if it already knew about the widely followed and publicized litigation.

The district court disagreed with Harvard and ultimately granted summary judgment for Zurich. In a six-paragraph opinion, the district court held that Massachusetts law was clear in requiring strict compliance with claims-made-and-reported notice provisions. Massachusetts law, according to the district court, contained no exception for actual notice and no requirement that untimely notice result in prejudice.

The First Circuit Decision

On August 9, the First Circuit affirmed Harvard's loss. The First Circuit observed that Massachusetts courts have "plainly articulated" that compliance with notice provisions in claims-made-and-reported policies is required. The First Circuit further noted that it has "unswervingly applied this clear rule" in several opinions. A central component of its reasoning was that the very "essence" of claims-made-and-reported policies is that notice must be given within the policy period or soon after. The rationale, according to the three-judge panel, is that claims-made-and-reported policies "are intended not merely to facilitate an investigation into the facts underlying a claim but also—just as importantly—to promote fairness in rate setting." This contrasts with occurrence-based policies (like those for commercial general liability), which offer lifetime coverage for incidents during the policy period, no matter when the claim is reported. The First Circuit thus declined Harvard's invitation to "read [an actual notice or prejudice exception] into Massachusetts law."

The First Circuit also rejected Harvard's public policy arguments as being outside the permissible scope of federal judicial review given unequivocal Massachusetts law on the centrality of timely notice. And, because "discovery on the issue of actual notice would [thus] have been entirely beside the point," the First Circuit also rejected Harvard's argument that factual issues made it improper for the district court to have granted summary judgment for Zurich.

Takeaways

Harvard's lessons learned at both the district and appellate levels are just the latest reminder that policyholders should not hit "snooze" on their notice obligations. Policyholders should instead provide liberal notice early and often under their insurance policies, including to every insurer in their insurance tower, rather than just the primary layer.

As we have noted before, notice can be provided even before a formal claim has been made through a "notice of circumstances." Had Harvard woken up when its alarm went off in November 2014 (and not languidly snoozed until 2017), it could have avoided this dispute altogether. Policyholders everywhere should note Harvard's lesson so that they do not have to learn it by experience themselves. And, as always, consultation with experienced coverage counsel, including during the policy placement and renewal process to ensure favorable notice language, can help to determine the propriety and method of notice under what are often thick and multifaceted claims-made-and-reported insurance programs.

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