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Insurer's Poorly Drafted Language Applied As Written; Insured Can't Complain When New York Law is Applied After It Chose to Reject Missouri Tax

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An insured under an **errors and omissions policy** gives timely notice of circumstances during the policy period in effect when it first became aware of its **potential civil liability**. The E&O insurer acknowledges notice. Many years later, the insured is sued, but it waits almost two years before it gives notice of the suits. Believe it or not, this happens more often than you would imagine.

The insurer's position upon receiving notice of the suits? First, it denies that the suit, which was filed two years earlier, is a claim made while the current policy was in force. The insured sues. Then, the insurer acknowledges that its first denial was erroneous and admits that the suit was a related claim to the original notice of circumstances. The insurer, however, adds another reason for denial, because the suit was not timely reported.

In George K. Baum & Company v. Twin City Fire Insurance Company**,** No. 12-3982 (8th Cir. 7/16/2014), the Eighth Circuit Court of Appeals, in predicting New York law, found that the insurer's **requirement for timely notice** was inapplicable to liabilities that arose from a related claim, for which the insured gave timely notice. The notice provision referred to when "such Claim is reported," but also provided that all claims arising out of the same wrongful act or interrelated wrongful acts shall be considered a single claim for the purposes of this Policy." Having conceded that the claims are treated as "a single claim for all purposes," the insurer could not impose a separate notice provision. When the insurer complained that reading the policy as drafted could mean that the insured could feel "free to wait weeks, months or even years before providing notice," the Court replied that "these are the complaints of a poor draftsman, and we are as unsympathetic as we expect the New York Court of Appeals would be." Thus, the Court rejected the insurer's late notice argument under both the policy provision and New York's implied notice requirement.

The Court did not give the insured a complete win, however. The Court chastised the insured for arguing that Missouri law should apply even though it had expressly chosen to have the policy issued at the address of its New York office in order to avoid Missouri's surplus tax. It also found that the insured owed a $3 million retention for derivative litigation, not the lesser $1 million SIR for general claims.

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