

No Prejudice Required to Deny Coverage for Late Notice under Claims-Made and Reported Policy

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In an unreported decision applying Maryland law, the United States Court of Appeals for the Fourth Circuit has held that an insurer can deny coverage where a policyholder provided late notice of a claim under a "claims made plus reporting" policy regardless of whether the insurer was prejudiced by the untimely notice. *Jenjer Enters. v. Exec. Risk Indem. Inc.*, 2004 WL 1011004 (4th Cir. May 6, 2004).

The insurer issued a claims-made EPL policy to a company. The policy required the company to provide to the insurer written notice of any claim made during the policy period "as soon as practicable and in no event later than sixty...days after such Claim is first made." The policy also stated that "[c]ompliance with this notice requirement is a strict condition precedent to coverage under this Policy."

On March 2, 2001, the company received from the Equal Employment Opportunity Commission (EEOC) a notice of a charge of discrimination, which stated that an employee of the company alleged that she had been subject to gender discrimination. The company did not notify the insurer of this notice from the EEOC. On October 4, 2001, after further EEOC procedures, the employee filed suit against the company. The company tendered the suit to the insurer, which denied coverage because the company had not provided notice of the claim within 60 days after its receipt of the notice of charges from the EEOC. Subsequently, the underlying litigation settled, and the company sued the insurer, arguing that, absent prejudice, an insurer cannot deny coverage for late notice.

The Fourth Circuit noted that the Maryland Insurance Code requires an insurer to demonstrate actual prejudice in order to deny coverage for late notice under a claims-made policy. However, the court explained that Maryland courts have held that the prejudice requirement is inapplicable to "claims made and reporting" policies, such as the one at issue in the case. The company argued that the policy should be considered a strict "claims made" policy, to which the prejudice requirement would apply, because the reporting requirement was not included in the declarations page and insuring agreements of the policy. The court rejected this argument, explaining that "[p]arties may also create a 'claims made and reporting' policy, as was done here, by expressly providing in a policy's declaration page or insuring agreement that coverage is subject to certain terms and conditions and setting forth those terms and conditions, including a reporting

requirement as a strict condition precedent to coverage, in another part of the policy." The court concluded that since seven months lapsed between when the company received notice of the EEOC complaint and when it notified the insurer of the claim, the insurer properly denied coverage.

For more information, please contact us at 202.719.7130.