

Texas Supreme Court to Decide Whether Prejudice Is Required to Support a Late Notice Defense Where Notice Is Given During the Policy Period

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The United States Court of Appeals for the Fifth Circuit has certified to the Texas Supreme Court the following question: "Must an insurer show prejudice to deny payment on a claims-made policy, when the denial is based upon the insured's breach of the policy's prompt-notice provision, but the notice is nevertheless given within the policy's coverage period?" *XL Specialty Ins. Co. v. Financial Indus. Corp.*, 2007 WL 4461190 (5th Cir. Dec. 19, 2007).

The case involved a management liability policy that provided coverage for claims first made against the insured during the period March 12, 2005 to March 12, 2006. The policy expressly provided that, "[a]s a condition precedent to any right to payment under this Policy . . . the Insured shall give written notice to the Insurer of any Claim as soon as practicable after it is first made."

The claim at issue—a lawsuit filed against the insured in Texas state court—was first made on June 5, 2005. The insured notified the insurer of the lawsuit seven months later, on January 23, 2006. The insurer subsequently denied coverage based on the insured's failure to provide timely notice of the claim. In the coverage action that followed, the insured admitted that it breached its obligation to provide notice as soon as practicable. Nevertheless, the insured argued that it was entitled to coverage because notice was provided before the policy expired and the insurer was not prejudiced by the delay. The Fifth Circuit certified to the Texas Supreme Court the question of how the notice-prejudice rule applied in this circumstance.