

Pennsylvania High Court Affirms Notice-Prejudice Rule Inapplicable to Claims-Made Policies

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The Pennsylvania Supreme Court has affirmed without opinion a Pennsylvania Superior Court ruling that insurers that issued a claims-made-and-reported policy need not prove prejudice in order to deny coverage based on late notice. The court also affirmed that notice is a condition precedent to coverage under a claims-made policy, such that the insured bears the burden of establishing compliance with the policy's notice provisions. *ACE Am. Ins. Co. v. Underwriters at Lloyds & Cos.*, 2009 WL 1176268 (Pa. Apr. 29, 2009).

The insurers issued an E&O policy to another insurance company (the "Insured"). The policy contained a "specific notice" section that provided, in relevant part:

"The Insured shall provide notice of all Claims to the Insurer as soon as practicable after such Claims first become known to the [Insured], but in no event later than ninety (90) days after the expiration of the Policy Period If a Claim which is reasonably likely to result in Loss exceeding \$4,000,000 is made against the Insured, then the Insured shall forward as soon as practicable to Insurer every demand, notice, summons or other process received by the Insured or by their representatives."

The policy provided specified coverage for Claims "first made against the Insured during the Policy Period . . . and reported to the insurer during the Policy Period."

The Insured sought coverage from its insurers for \$37.2 million for a bad faith claim brought against it in 1996. The insurers denied coverage based on the Insured's failure timely to comply with the specific notice requirements for claims reasonably anticipated to exceed \$4 million. Specifically, the insurers maintained that the Insured was required to provide such specific notice by June 30, 1999, but did not do so until July 27, 2000.

The Insured filed a coverage action against the insurers. Following a jury trial, the trial court entered judgment in favor of the insurers. The Insured appealed the judgment. The intermediate appellate court affirmed and the Pennsylvania Supreme Court granted appeal of the following issues: (1) whether the notice provision in a claims-made policy constitutes a condition precedent to coverage, such that the insured bears the burden of

showing compliance with the condition; and (2) whether the notice-prejudice rule applies to claims-made policies.

In the decision summarily affirmed by the Pennsylvania Supreme Court, the intermediate appellate court ruled that the Insured had the burden to prove that it complied with the notice provisions in the policy in order to establish coverage. The court explained that, under a claims-made policy, "notice is a condition precedent to coverage, and not a limitation of coverage."

The court also concluded that the Insured had "failed to establish that its compliance with the general reporting requirements of the policy was sufficient to effectuate coverage such that its failure to comply with the policy's specific and heightened notice provisions was either excused or negated."

The Supreme Court also summarily affirmed the lower court's ruling that the notice-prejudice rule set out in *Brakeman v. Potomac Insurance Co.*, 371 A.2d 193 (Pa. 1977), applies only to occurrence policies and not to claims-made policies. Noting that the Pennsylvania Supreme Court had at that time not ruled on the issue, the intermediate appellate court declined to extend the notice-prejudice rule to claims-made insurance policies and concluded that, where an insured has clearly breached the notice requirement, an insurer need not show prejudice to deny coverage. The court also ruled that the Insured's compliance with the policy's general reporting requirements did not excuse its breach of the specific notice requirements.