

## Notice by a Third Party Deemed Insufficient Where Policy Required Notice by the Insured

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The United States District Court for the Eastern District of Pennsylvania has held that a third party's notice to an insurer of an occurrence and claim was insufficient to trigger coverage under a general liability insurance policy because the policy specifically required notice by the insured. *Essex Ins. Co. v. Liberty Mut. Ins. Co.*, 2010 WL 4751583 (E.D. Pa. Nov. 23, 2010)

The insurer issued a general liability policy to a paintball goggle manufacturer for the policy period of July 17, 2007 to July 17, 2008. The policy's notice provision specified that, "[i]n the event of an occurrence which may result in a claim under this Policy, the Insured shall notify the Insurer thereof as soon as possible . . . ." The policy also required that, "[i]f a claim is made or suit is brought against the Insured, the Insured shall immediately forward to the Insurer every demand, notice, summons or other process received by the Insured or the Insured's representative." The policy contained a claims-made endorsement, which provided for an extended reporting period for claims for bodily injury, but only if the claim arose out of an occurrence that was reported to the insurer in writing no later than 60 days after the end of the policy period, and in accordance with the policy's notice provisions. The claims-made endorsement also excluded from coverage claims not reported to the insurer within 60 days of the end of the policy period if the occurrence had not been previously reported to the insurer. A provision in the policy also required the insurer's consent to any settlement and provided that the insurer was entitled to deny coverage to the extent that the insured admitted liability or voluntarily made any payment thereby causing prejudice to the insurer.

An accident occurred in March 2006 causing bodily injury to an individual engaged in paintball games. In November 2007, the individual sued, among others, the paintball facility, the entity that sold the allegedly defective paintball goggles to the facility, and the goggle manufacturer. On August 19, 2009, the insurer for the paintball facility tendered the claim to the insurer for the goggle manufacturer, claiming that the facility, as a vendor of the manufacturer's product, constituted an insured under the manufacturer's policy. Shortly thereafter, the facility's insurer notified the manufacturer's insurer of a settlement conference in the underlying lawsuit, and invited that insurer's participation. The manufacturer's insurer denied coverage and declined to participate in the settlement conference. The case settled, and the paintball facility assigned to its insurer its rights to recover from the manufacturer's insurer.

The facility's insurer sued the manufacturer's insurer, seeking contribution for amounts it paid in defense and settlement of the underlying claim. The manufacturer's insurer moved to dismiss the lawsuit, arguing that the occurrence and claim were not covered under the policy because they were not timely reported and that it had no contribution obligation because the underlying claim was settled without its consent. The facility's insurer argued that the manufacturer's insurer was given timely indirect notice of the occurrence and claim by the entity that sold the allegedly defective paintball goggles to the facility, when that entity provided notice to the manufacturer's insurer under a separate policy that that insurer had issued to that entity. The facility's insurer also argued that the manufacturer's insurer's refusal to participate in the settlement conference operated as an equitable bar to its enforcement of the policy's consent to settlement provision.

The court agreed with the manufacturer's insurer, and granted its motion to dismiss. The court rejected the argument that indirect notice by a third party under a separate policy was sufficient because the manufacturer's policy clearly and unambiguously required that notice be provided by the insured, and did not permit notice to be made by another party on behalf of the insured. Accordingly, since notice was not given to the insurer by any entity that was insured under the manufacturer's policy within 60 days after the end of the policy period, as required by the claims-made endorsement, there was no coverage under the policy. The court also rejected the argument that the manufacturer's insurer had to establish that it was prejudiced as a result of the late notice, noting that an insurer does not have to establish prejudice when denying coverage for lack of notice in connection with a claims-made policy.

The court further rejected the equitable argument that the manufacturer's insurer's failure to participate in the settlement conference precluded it from denying coverage pursuant to the policy's consent to settlement provision. In this regard, the court noted that, "[w]here, as here, the terms of an insurance policy are clear and unambiguous, we may not consider the equities of enforcing those terms." Accordingly, the court concluded that the manufacturer's insurer had no duty under the policy to pay any portion of the underlying settlement because there was no allegation that the insurer had consented to that settlement.