

# No Coverage for Late Notice of Claim Filed with Banking Authorities

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The United States District Court for the Eastern District of Louisiana, applying Louisiana law, has held that no coverage was available for a lawsuit filed by a bank customer because the claim was first made when the customer filed complaints with federal and state banking authorities and because the bank provided late notice of the claim. *Grubaugh v. Central Progressive Bank*, 2013 WL 6709887 (E.D. La. Dec. 18, 2013). The court also held that the insurer's coverage defense of late notice applied to the bank customer and held that the insurer did not waive the coverage defense.

In June 2008, the customer of an insured bank filed complaints with state and federal banking authorities in which he alleged unauthorized withdrawals from his bank accounts and demanded reimbursement of the withdrawals. The banking authorities notified the bank of the complaints, and the bank responded to the complaints. In June 2009, the customer filed a lawsuit against the bank in Louisiana state court, and several days later, the bank tendered the lawsuit to its insurer, which provided D&O and professional liability coverage to the bank from February 1, 2007 to November 15, 2009. In June 2011, the customer amended the complaint to name the bank's insurer as a defendant under Louisiana's direct action statute. The insurer moved for summary judgment because the bank did not provide timely notice of the claim.

The court held that no coverage was available under the policy for the customer's lawsuit. First, the court held that the complaints filed with banking authorities constituted a "claim" that was first made in June 2008. The policy defined "claim," in relevant part, as a "written demand for monetary damages" and, with respect to the policy's professional liability coverage, required that the demand be brought "by or on behalf of a customer." The court held that the complaints filed by the customer with the banking authorities and served on the bank constituted written demands for monetary relief because the customer demanded reimbursement of allegedly unauthorized withdrawals from his bank account.

Second, the court held that the bank provided untimely notice of the June 2008 claim. As a condition precedent to coverage, the policy required that the insured provide notice of a claim "as soon as practicable, but in no event later than ... sixty (60) days after which the insured first becomes aware that the Claim has been made." No coverage was available for the 2008 complaints filed with the banking authorities or the subsequent lawsuit because the bank did not provide notice to the insurer within 60 days of receiving notice of the 2008 complaints. The court also held that it was irrelevant that the customer did not provide the

complaints directly to the bank because the bank received notice of the complaints from the banking authorities.

In addition, the court held that the bank's failure to provide timely notice of the claim barred the customer, as a third-party claimant, from maintaining a direct action against the insurer because there was no potential coverage for the claimant's lawsuit.

Finally, the court held that the insurer did not waive its right to rely on the late notice defense. The customer contended that the insurer waited too long to invoke the late notice defense. But the court held that the insurer had not waived the coverage defense because the insurer issued a reservation of rights letter for the lawsuit and raised late notice as an affirmative defense in the customer's direct action against the insurer.