

# Notice Provided Nine Months After Underlying Suit Filed but Before Expiration of Claims-Made Policy Precludes Coverage

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The United States Court of Appeals for the Fifth Circuit, applying Texas law, has held that a third-party judgment creditor may not recover against an insurance policy because the policyholder's delay of nine months in notifying the insurer of the claim constitutes late notice under a claims-made policy requiring that notice be provided "as soon as possible." *Singleentry.com, Inc. v. St. Paul Fire & Marine Ins. Co.*, 2004 WL 2796534 (5th Cir. Dec. 7, 2004).

The insurer issued a claims-made errors and omissions policy to the policyholder, which stated: "If an accident, error, event, offense, or wrongful act happens that may involve liability protection provided by this policy, you . . . must tell us or our agent what happened as soon as possible." A third-party claimant sued the policyholder during the policy period. The policyholder did not notify the insurer until nine months later, although notice was provided before the policy period expired. The insurer denied coverage based on late notice. The third-party claimant obtained a judgment against the policyholder and filed suit against the insurer, seeking payment under the policy. The trial court held for the insurer, concluding that the policyholder failed to comply with the policy's notice requirements.

The Fifth Circuit affirmed, ruling that compliance with the notice provision was a condition precedent, the breach of which voids policy coverage. Citing *Matador Petroleum Corp. v. St. Paul Surplus Lines Insurance Co.*, 174 F.3d 653 (5th Cir. 1999), the court noted that "[a]n insurer is not required to show prejudice from late notice where a claims-made policy is involved." Holding that a policyholder's failure to provide proper notice under a claims-made policy therefore negates coverage regardless of whether the insurer has been prejudiced, the court concluded that the policyholder's nine-month delay did not constitute notice "as soon as possible." In doing so, the court rejected the claimant's argument that a notice requirement must be specifically denominated a "condition precedent" or contain certain conditional terms in order to constitute a condition precedent. Further, the court observed that the fact that notice was given before the policy expired was irrelevant as the insured had still failed to comply with the condition precedent of notice "as soon as possible."

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For more information, please contact us at 202.719.7130.