

ALERT

Maryland High Court Holds Statute Requires Insurer to Show Prejudice to Deny Coverage under Claims Made and Reported Policy Based on Late Notice

March 2, 2011

The Court of Appeals of Maryland, the state's highest court, has held that the Maryland Insurance Code requires a showing of prejudice to support a late notice defense to coverage under a claims-made and reported policy. *Sherwood Brands, Inc. v. Great American Insurance Co.*, 2011 WL 657014 (Md. Feb. 24, 2011).

The Policy at issue afforded specified coverage for claims first made during the period of May 1, 2007 to May 1, 2008, and required "as a condition precedent" to coverage that the insured give notice of such claim in writing "as soon as practicable, but in no event later than ninety (90) days after the end of the Policy Period." The insured was sued in two separate suits, one filed on October 17, 2007 and the other on March 28, 2008. The insured did not give notice of these claims until October 27, 2008 and November 6, 2008 - more than 90 days after the end of the policy period. Based on the insured's failure to provide timely notice, the insurer denied coverage for both.

In the coverage litigation that followed, the court focused on Section 19-110 of the Maryland Insurance Code, which provides:

An insurer may disclaim coverage on a liability insurance policy on the ground that the insured or a person claiming the benefits of the policy through the insured has breached the policy by failing to cooperate with the insurer or by not giving the insurer required notice only if the insurer establishes by a preponderance of the evidence

Practice Areas

D&O and Financial Institution Liability
E&O for Lawyers, Accountants and Other Professionals

Insurance

Professional Liability Defense

that the lack of cooperation or notice has resulted in actual prejudice to the insurer.

According to the court, the statute and its requirement of a showing of prejudice come into play only in the event of a breach of the policy—that is, a breach of covenant—as opposed to a failure of a condition precedent to coverage. In this regard, the court pointed to its decision in *T.H.E. Insurance Company v. P.T.P, Inc.*, 628 A.2d 223 (Md. 1993), in which the court held that the statute did not apply to a denial of coverage under a claims made policy for a claim that was made *after* the policy period expired. The court described the requirement in a claims made policy that the claim be first made during the policy period as the “functional equivalent of a condition precedent to coverage.”

Turning to the notice provision at issue in this case, although unambiguously stated to be a “condition precedent” to coverage, the court held that Section 19-110 mandated that the provision be treated as a covenant. As a result, according to the court, the statute applied to require the insurer “to show how it was prejudiced by [the insured’s] late-delivered notice in investigating, settling or defending of the [two] actions” for which coverage was sought.

The court acknowledged that its holding here may seem to “place[] Maryland’s jurisprudence at odds with the majority of other jurisdictions” that do not require a showing of prejudice to support a late-notice defense to coverage under a claims-made and reported policy. The court, however, found it “important to emphasize that Maryland’s notice-prejudice jurisprudence” already “was at odds with most other jurisdictions’ jurisprudence” because Maryland is only one of three states that have legislatively adopted a notice-prejudice rule.