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Harvard's coverage loss a reminder of importance of insurance notice provisions

VIEWPOINT
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A recent decision by the U.S. Court of Appeals for the First Circuit highlights the importance of insurance notice provisions, particularly when dealing with claims-made insurance policies.

In June 2023, Harvard University was in the headlines as a named defendant in a pair of high-profile cases at the U.S. Supreme Court. In November 2014, a political advocacy organization, Students for Fair Admissions, filed separate lawsuits against both Harvard and the University of North Carolina seeking to ban the use of race in higher education admissions. After lower courts ruled in favor of the universities, the Supreme Court agreed to hear the cases in 2022. On June 29, 2023, the Supreme Court issued a decision striking down Harvard's race-conscious admissions policies as violating the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

Harvard vigorously defended its admissions program in the lawsuit, incurring significant legal fees which it sought to recoup through insurance. Harvard had a primary policy with AIG and purchased an excess policy from Zurich American Insurance Co. The AIG policy provided "claims-made coverage," and required prompt notice of any claim within the policy period and no later than 90 days after the end of the policy period. The Zurich excess policy provided that "[a]s a condition precedent to exercising any rights under [the] policy," Harvard had to give written notice in the same manner as required by the primary policy, *i.e.* within 90 days of the end of the policy period.

Although Harvard gave prompt notice of the lawsuit to its primary insurer, AIG, it did not formally notify Zurich of the lawsuit until 2017. Zurich denied coverage on the grounds that Harvard failed to provide timely notice. Harvard filed suit against Zurich seeking a declaratory judgment that it was entitled to coverage and damages.

On August 9, 2023, the First Circuit issued its opinion in *President and Fellows of Harvard College v. Zurich American Insurance Co.* and affirmed the District Court's grant of summary judgment to Zurich.

Harvard argued that the District Court had misapplied the law requiring strict compliance with the policy's notice provisions because Zurich had actual or constructive knowledge of the lawsuit because of the widespread media coverage of the case. The First Circuit rejected this line of argument, describing Harvard's position as "little more than gaslighting."

The First Circuit distinguished between occurrence-based policies and claims-made policies and the different purposes served by notice requirements in each context. With an occurrence-based policy, notice requirements serve to allow the insurer to investigate the facts promptly and effectively. Where an insurer can still effectively investigate the claim, the insurer has not been prejudiced and invalidating coverage because of late notice would be unfair. In contrast, when dealing with a claims-made insurance policy, the notice provision is important in promoting fairness in rate setting. If there is a claim made outside the notice provision, "the primary purpose of insuring claims rather than occurrences is frustrated."

NEW YORK INSURANCE LAW

Although the *Harvard* case applied Massachusetts law, New York law is similar in many respects, and the case is an import-

ant reminder to policyholders of the distinctions between occurrence-based and claims-made insurance policies and the importance of providing timely notice to all insurance policies that are potentially implicated by a claim.

For many years, New York followed a minority approach that an insured's unexcused failure to comply with a policy's notice provision could result in a complete forfeiture of coverage. In 2008, New York amended the Insurance Law and joined the modern trend in favor of a "notice-prejudice" rule, such that late notice alone is insufficient to support a denial of coverage, and an insurer must show that it was prejudiced by the late notice.

Thus, New York Insurance Law § 3420(a)(5) provides that liability insurance policies must now provide that late notice of a claim will not void coverage unless the insurer can demonstrate that it was prejudiced by the late notice. And under Insurance Law § 3420(c)(2), where an insurer alleges that it was prejudiced by late notice, the insurer bears the burden of proof to show prejudice, unless the notice was provided more than two years after the time required by the policy.

But the "notice-prejudice" rule applies only to occurrence-based policies; strict compliance with notice requirements remains the rule for a claims-made policy. "With respect to a claims-made policy, however, the policy may provide that the claim *shall* be made during the policy period, any renewal thereof, or any extended reporting period." Insurance Law § 3420(a)(5) (emphasis added).

CONSIDERATIONS FOR POLICYHOLDERS

The *Harvard* case serves as a reminder to policyholders that you should be mindful of the notice provisions in your insurance policies, particularly for claims-made coverages.

A business that has claims-made coverage should be extra mindful to ensure that all insurance carriers — including excess insurance carriers — are provided with written notice of claim. One way to ensure that this takes place is to formalize your company's internal claims-reporting policies and procedures to ensure that the person or team responsible for managing insurance claims keeps track of notices and responses from insurance carriers.

Additionally, you should also consider holding regular reviews of your company's insurance claims activity. Consider holding such a review at least annually and approximately 60 days before the policy expiration/renewal date. This will afford you the opportunity to review all claims from the prior year and confirm that they have all been properly reported to insurance carriers within the policies' claims-reporting periods. If you find that a claim has slipped through the cracks, you can send notice to the insurance carrier before the end of the policy term.

Finally, when in doubt, report potential claims to your insurer. You may be debating whether or not an incident has risen to the level of a "claim" that must be reported under the policy or whether the claim is significant enough to even bother reporting to the insurance carrier. For example, you might initially believe that a claim is a minor one that will fall within a deductible, only later to find out that the claim is much more significant than originally believed. The safest practice is to report the claim to your insurer at the outset to avoid risking a future disclaimer based on late notice.

The above advice is important even with respect to occurrence-based policies, and providing prompt notice of a claim to your insurer has important benefits. Although the "notice-prejudice" rule *may* protect an insured who has given late notice of a claim to its insurer, that rule does not mean that your insurance carrier won't be able to demonstrate prejudice (or attempt to demonstrate prejudice). No policyholder wants to spend time and money litigating with its insurance carrier over the issue of possible prejudice to the insurer as the result of a late notice. Following well-documented claims-handling procedures will avoid headaches and the risk of a disclaimer of coverage.

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