

## Tardy Notice Bars Coverage for Bank

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February 2006

In an unreported decision, the United States District Court for the Northern District of Texas, applying Texas law, has granted summary judgment to two insurers, holding that there was no coverage under three claims-made professional liability policies because the claim was first made prior to the effective date of two of the policies and the 28-month delay in notifying the insurer of the claim violated the third policy's provisions requiring notice "as soon as practicable." *Executive Risk Indem. Inc. v. First State Bank*, 2006 WL 42359 (N. D. Tex. Jan. 9, 2006).

Two professional liability insurers issued three consecutive one-year claims-made professional liability policies to a bank and its subsidiaries. The first insurer's policy was effective from September 2000 to September 2001 (the 2000 policy). The second insurer's policy was effective from September 2001 to September 2002 (the 2001 policy) and then was renewed for September 2002 to September 2003 (the 2002 policy). The terms of all three policies provided, in substantially similar language, that "[a]s a condition precedent to their right to payment the Insured Persons or the Company must give [the insurer] written notice by certified mail of any Claim as soon as practicable after such Claim is made." Under the 2001 and 2002 policies, a Claim is deemed first made on "the date that the judicial or administrative proceeding is served upon any Insured." In January 2001, the bank was served with a third-party complaint identifying it as a defendant. The bank forwarded notice of the complaint to the second insurer in May 2003. The second insurer denied coverage for the claim on the grounds that the bank had breached the notice condition, and coverage litigation ensued.

The district court first held that there was no coverage under either the 2001 or 2002 policies because the claim was first made in January 2001, when the third-party complaint was served on the bank, prior to the effective date of the policies.

The court then held that, although the claim was first made during the policy period of the 2000 policy, there was no coverage under that policy because the 28-month delay in notifying the insurers breached the requirement that notice be provided "as soon as practicable." The court rejected the bank's argument that it had met the condition because it had provided notice of the lawsuit to a "go-between contact" between the parties within a month of being served. Instead, the court found that this "go-between" acted as the policyholder's agent and consequently notice upon it did not serve to meet the policies' notice provision. In addition, the court rejected the assertion that the insurer had not been prejudiced, noting that under *Federal Insurance Co. v. CompUSA, Inc.*, 239 F. Supp. 2d 612 (N.D. Tex. 2002), *aff'd*, 319 F.3d 746 (5th Cir. 2003), an "insurer under [a] claims-made policy [is] not required to demonstrate actual prejudice from [the] absence of

notice that [the] policy required."