

Prior Notice Exclusion Bars Coverage Where Notice of Claim Given under Prior Policy

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In an unreported decision, a federal district court in Texas, applying Texas law, has determined that a policyholder was not entitled to coverage under a claims-made replacement D&O policy because it provided notice of the same claim under the prior D&O policy. *United Investors Realty Trust v. Hartford Spec. Co.*, No. 3:01-CV-2083-N (N.D. Tex. Sept. 12, 2003).

The first insurer issued a D&O policy to a real estate investment trust. Six months into the policy period, a second insurer acquired the first insurer's assets, including the right to reissue policies. On July 15, 2000, by agreement of the trust, the second insurer issued a replacement D&O policy. The replacement policy contained a prior notice exclusion that barred coverage for "any Claim, Wrongful Act, or circumstance if notice is given under any directors and officers liability...policy, the term of which incepted prior to the Inception Date of this Policy."

On June 22, 2000, prior to issuance of the replacement policy, a third-party claimant sent a letter to the trust alleging that the directors and officers of the trust breached their fiduciary duties. The trust forwarded the letter to the first insurer, which acknowledged the letter and accepted the defense of the underlying action. The first insurer subsequently was placed into court-ordered rehabilitation, which affected its ability to satisfy its defense obligations. The policyholder then tendered the claim to the second insurer. Coverage litigation ensued.

Examining the application of the prior notice exclusion, the court noted that the first insurer's policy clearly incepted before the second insurer's policy. The court explained that whether notice was tendered to the first insurer depended on the meaning of the term "under" in the exclusion. Using the plain and ordinary meaning of "under" in this specific context, the court stated that "under" means "in accordance with." The court, therefore, concluded that the trust's June 22, 2000 letter constituted notice "in accordance with" the first insurer's policy. In so holding, the court rejected the trust's argument that for notice to be given "under" a policy, it must be given in a manner capable of "effecting" coverage. The court reasoned that the trust's approach "does too much violence to the words of the policy" because it would "dramatically rewrite the notice provision into a prior coverage position." Accordingly, the court held that coverage was barred by the prior notice exclusion in the second insurer's policy.

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