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NEWSLETTER

No Coverage for Claim Reported a Year Late, Even with Extended Reporting Period

March 2003

The Fifth Circuit Court of Appeals, applying Texas law, has held that an insured's delay of approximately one year in reporting to its insurer a claim made against it was untimely. *Fed. Ins. Co. v. CompUSA, Inc.*, No. 02-10768, 2003 WL 173960 (5th Cir. Feb. 12, 2003), incorporating by reference *Fed. Ins. Co. v. CompUSA, Inc.*, No. 3:01-CV-0593-D, 2002 WL 1285263 (N.D. Tex. June 4, 2002).

The insurer issued a claims-made professional liability policy to the policyholder company and to its directors and officers. The policy provided that "[t]he Insureds shall, as a condition precedent to exercising their rights under this coverage section, give to [the insurer] written notice as soon as practicable of any Claim made against any of them for a Wrongful Act." The policy contained a clause specifying how notice was to be provided. The policy also contained a provision allowing the company to extend the reporting period for one year for claims based on acts committed during the policy term, and that provision was subsequently increased to six years.

During the policy period, the company and its president were sued for fraud, tortious interference, conspiracy and unjust enrichment. The company viewed the suit as frivolous and did not notify the insurer of the suit. Thirteen months later (after expiration of the policy) the jury returned a $265.5 million verdict. No longer viewing the claim as "frivolous," the company notified the insurer, which denied coverage because of late notice. Coverage litigation ensued.

The court initially held that the notice to the insurer was untimely, concluding that notice provided after the jury verdict did not comply with the requirement of the policy to provide notice "as soon as practicable." The appellate court then adopted the district court's order, rejecting the three arguments made by the company to avoid the plain language of the policy, arguments which the appellate court characterized as "lying somewhere between wholly specious and downright frivolous."

First, the court rejected the company's argument that the insurer had "constructive notice" of the claim because an underwriter had read the company's form 10-Q , which contained a reference to the underlying lawsuit. The court held that, even if the insurer had actual knowledge of the claim, that fact did not relieve the company of its obligation to comply with the specific notice requirements in the policy. Next, the district court rejected the company's argument that the insurer should have to demonstrate actual prejudice because the

extension of the reporting period converted the claims-made policy into an occurrence policy. The court explained that, under Texas law, insurers may deny coverage under claims-made policies without showing prejudice, and the extension of the reporting period was entirely consistent with a claims-made policy. Finally, the district court rejected the argument by the president of the company that the policy prohibited the president from reporting the claim against him personally because the policy provided that the company agreed "to act on behalf of all Insureds with respect to the giving and receiving notice of claim." The court reasoned that the clause neither prohibited the president from complying with the notice provision, nor excused him from doing so. Since he was the president, he was authorized to give notice for the company.

For more information, please contact one of WRF's Professional Liability Attorneys at 202.719.7130