

Prejudice Irrelevant to Late Notice Under Claims-Made Policy

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The United States District Court for Southern District of Ohio, applying Ohio law, has held that a professional liability insurer does not have to prove it was prejudiced to deny coverage when the policyholder provided notice after the expiration of a claims-made policy. *Wendy's Int'l, Inc. v. Illinois Union Ins. Co.*, 2007 WL 710242 (S.D. Ohio March 6, 2007).

The policyholder was an international fast food chain that purchased consecutive one-year errors and omissions liability policies. The policy at issue afforded specified coverage for sums "that the Insured shall become legally obligated to pay as Damages and Claims Expenses because of a Claim first made against the Insured during the Policy Period by reason of a Wrongful Act."

The policy also included a "Conditions, Notice of Claims" section which provided that "[t]he Insured, as a condition precedent to the obligations of the Company under this Policy, shall give written notice to the Company immediately, but in no event later than 60 days after the end of the Policy Period of any Claim made against the Insured."

A Kansas businessman filed an arbitration against one of the fast food chain's subsidiaries over a franchising deal during the first policy period. The fast food chain did not give notice of the arbitration during the first policy period. Then, during the second policy period, the same businessman sued the chain's subsidiary in state court. At that time, the fast food chain gave notice to the insurer of both the arbitration and the state court action. In a telephone conversation, the claims specialist for the insurer allegedly stated that the carrier "didn't care" about timely notice. In its reservation of rights letter, however, the claims specialist noted that, under the policy, the arbitration and state lawsuit were related claims first made during the first policy period, but not reported until the second policy period. The letter therefore reserved the insurer's rights to deny coverage based on untimely notice, and the insurer provided the subsidiary a defense. After the state court action was dismissed, the fast food chain's subsidiary settled the arbitration without the consent of the insurer. The insurer then denied coverage for the settlement on several grounds, including late notice.

In the coverage litigation, the insurer moved for summary judgment on the late notice defense. The subsidiary argued that the policy was a claims-made policy, rather than a claims-made-and-reported policy, and that the insurer therefore had to prove prejudice to succeed on its late notice defense. The district court disagreed,

noting that the policy conditions provided that "[t]he Insured, as a condition precedent to the obligations of the Company under this Policy, shall give written notice to the Company immediately, but in no event later than 60 days after the end of the Policy Period of any Claim made against the Insured." The court distinguished this notice provision, with a specific notice date of sixty days after the end of the policy period, from a notice provision which requires "immediate" or "prompt" notice. In light of the strict reporting requirement, the court held that Sixth Circuit precedent dictated that the notice-prejudice rule did not apply to the policy.

The court also rejected the subsidiary's argument that the insurer had waived the notice defense because of the claims specialist's purported statement that the insurer "didn't care" about late notice. The court explained that waiver "may not be used to expand an insurance policy's coverage" unless the insurer "voluntarily relinquishes a known right" or induces the policyholder into changing its conduct to its detriment. The court pointed out that the insurer issued a reservation of rights letter the day after the purported conversation, and only a few weeks after learning of the arbitration, which undermined the argument as to detrimental reliance.