

No Coverage Where Amended Complaint Adds New Cause of Action But Original Complaint Was Not Timely Reported

May 2007

The Northern District of Texas, applying Texas law, has held that late notice precluded coverage where a policyholder first reported the matter after receiving an amended complaint that added a new cause of action, reasoning that the complaint was based on "the same or essentially the same set of facts" in the original complaint filed 22 months earlier. *Emcode Reimbursement Solutions, Inc. v. Nutmeg Ins. Co.*, 2007 WL 803965 (N.D. Tex. Mar. 15, 2007).

A company obtained professional services insurance under three successive one-year claims-made policies. The notice provisions in the policies provided that, "[a]s a condition precedent to coverage under this Policy, the Insured shall report such Claim in writing to the Company as soon as practicable but in no event later than 60 days after expiration or termination of this Policy . . ." The policies defined "Claim" to mean "receipt by the Insured of a written demand naming the Insured seeking Damages, Professional Services, or equitable relief arising out of a Wrongful Act by the Insured or any Entity for whom the Insured is legally liable."

The company was served in March 2003 with a complaint for breach of contract and conversion, but did not report the suit to the insurer at that time. The company also failed to notify the insurer of the amended complaint, which it received in June 2003 and which added counts for breach of contract and conversion. Finally, in January 2005, after receiving a second amended complaint that added a negligence count, the company forwarded a copy of the second amended complaint to the insurer. The insurer denied coverage based on late notice.

The court first rejected the company's argument that the tardy notice was excused because it had a reasonable basis to believe that the earlier complaints were not covered. The court explained that it was not aware of any authority applying the excuse doctrine to claims-made policies. The court reasoned that "[t]he purpose of claims-made policies, unlike occurrence policies, is to provide exact notice periods that limit liability to a fixed period of time after which an insurer knows it is no longer liable under the policy, and for this reason, such reporting requirements are strictly enforced." It therefore declined to extend the "excused late notice" doctrine to claims-made policies.

The company also argued that the second amended complaint's negligence count constituted a new wrongful act under the policy, giving rise to a new demand and thereby bringing the claim within the coverage period for the third policy. The court rejected that argument, reasoning that even if the new complaint could be considered a "new demand," it did not arise out of a new "Wrongful Act." Instead, the court explained both complaints arose out of "the same or essentially the same set of facts." The court reasoned that if it were to hold otherwise, it would "enlarge" the coverage provided under the claims-made policy and "would materially compromise a fundamental purpose for such a policy." The court stated that this "in turn could impact the premiums that insurers charge for such policies, perhaps redounding to the detriment of insurance purchasers who may choose claims-made policies because they generally cost less."