

# Coverage Action Dismissed Based on Insured's Failure to Allege Facts Showing Timely Notice of Claim

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In a suit brought by an insured following a disclaimer of coverage based on late notice, a federal district court applying California law dismissed the complaint for failure to state a claim because the facts alleged did not establish that the insured had provided timely notice of the underlying action. *World Health & Education Foundation v. Carolina Casualty Ins. Co.*, 2009 WL 331453 (N.D. Cal. Feb. 11, 2009).

The case involved a claims-made-and-reported professional liability policy issued to a non-profit health funding and education organization for the period from April 4, 2007, to April 4, 2008. The policy provided that as a "condition precedent to their rights under this Policy, an insured shall give the Insurer written notice of any Claim: . . . in the event of a lawsuit, as soon as practicable, but in no event later than 15 days after such Claim is first made." As alleged by the insured, the underlying complaint was filed on April 30, 2007, and served on September 12, 2007. The organization allegedly first reported the claim to the insurer more than seven months later, on April 28, 2008. The insurer refused to defend the action on the ground that the insured had breached its obligation under the policy to provide timely notice of the claim.

In the coverage litigation that followed, the insurer moved to dismiss the organization's complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Finding that the complaint did not allege any facts showing how the claim was timely reported, the court granted that motion. It did, however, grant the organization leave to amend to add allegations that would establish a claim for coverage. In this regard, the court recognized that compliance with a reporting requirement in an insurance policy may be "equitably excused" in particular circumstances and noted that the insured here sought leave to assert facts concerning the policy's "Extended Reporting Period" and communications with the insurer that purportedly had caused the insured to believe that there would be coverage for any claims made while the policy was in effect. The insured also sought to raise the issue of whether the insurer had been prejudiced by any delay, but the court pointed out that the notice prejudice rule did not apply in the context of a claims-made-and-reported policy.