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NEWSLETTER

California Federal Court Sustains Late Notice Defense

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The United States District Court for the Northern District of California has ruled that a claims-made liability policy provided no coverage for a lawsuit that was not reported to the insurer during the policy period as required by its notice provisions. *World Health &Educ. Foundation v. Carolina Cas. Ins. Co.*, 612 F. Supp. 2d 1089 (N.D. Cal. 2009). In doing so, the court rejected the policyholder's arguments that the insurer should be required to demonstrate prejudice due to the untimely notice and that the policyholder was equitably excused from complying with the policy's notice provisions.

The policyholder purchased non-profit organization liability policy from the insurer for the policy period from April 4, 2007 through April 4, 2008. The policy's declarations provided that "THIS POLICY APPLIES ONLY TO ANY "CLAIM" FIRST MADE AGAINST THE INSUREDS AND REPORTED TO THE INSURER DURING THE POLICY PERIOD, THE AUTOMATIC EXTENDED REPORTING PERIOD, OR THE PURCHASED EXTENDED REPORTING PERIOD." The extended reporting period section provided for an "automatic extension of coverage . . . with respect to any Claim first made and reported" within 60 days after the end of the policy period. The policy also required that "[a]s a condition precedent to their rights under the 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 . . . ."

The policyholder asserted that it was served with the complaint in the underlying lawsuit on September 12, 2007, but first reported the lawsuit to the insurer on April 28, 2008. The insurer denied coverage based on untimely notice, and the policyholder filed the instant lawsuit. The court granted the insurer's motion to dismiss the complaint, ruling that the claim was not timely reported to the insurer as required by the policy's reporting requirements. The court first concluded that the extended reporting period did not apply because the claim at issue was first made during the policy period and not during the 60 day period following the end of the policy period. Citing *Westrec Marina Management, Inc. v. Arrowood Indemnity Co.*, 163 Cal. App. 4th 1387 (Cal. Ct. App. 2008), the court then rejected the policyholder's argument that it reasonably expected coverage despite the notice provisions in the policy because it was continuously covered during the period with the insurer. In addition, the court ruled that the notice-prejudice rule did not apply, noting that California courts have repeatedly declined to apply the rule to claims-made policies because to do so "would essentially convert these policies into occurrence based policies."

With respect to the policyholder's fraudulent misrepresentation, negligent misrepresentation, fraudulent concealment and promissory estoppel claims, the court ruled that the policyholder failed to plead these claims with sufficient particularity under Federal Rule of Civil Procedure 9(b). The court also concluded that parol evidence would not be admissible as to these claims to alter the terms of the policy. The court further noted that the policyholder had not alleged any facts that would indicate equitable relief was appropriate as it had notice of the underlying lawsuit no later than September 12, 2007, and waited 213 days to report the claim to the insurer.