

Conspicuous, Plain and Clear Notice Provision Enforceable, and Failure To Comply With Its Terms Not Equitably Excused

September 2010

A California court of appeal has held that coverage under a claims-made policy was barred by the policyholder's failure to comply with the policy's notice provision. *Z. F. Micro Solutions, Inc. v. Certain Underwriters at Lloyd's London*, 2010 WL 3002045 (Cal. Ct. App. Aug. 2, 2010). The court also held that the policyholder's failure to comply with the notice provision would not be equitably excused.

The insurer issued a claims-made policy that required the policyholder to "give [the insurer] notice in writing of any written Claim as soon as practicable, but in no event later than 60 days after the end" of the policy period. The policyholder was sued during the last month of the policy period, but it did not report the claim to the insurer until four days after the 60-day extended reporting period ended. The insurer denied coverage for the counterclaim based on untimely notice.

The court held that the notice provision was enforceable because it was "conspicuous, plain, and clear." The court explained that California law requires provisions that limit coverage to be "placed and printed so that [they] will attract the reader's attention" and "be stated precisely and understandably." The court noted that the policy's declarations page directed the insured to the appropriate coverage part, which was only three and one-half pages long, and that the notice provision was in the same font as the rest of the policy and was contained in its own paragraph, set apart from other subjects and adequately labeled with the heading "NOTIFICATION" in capital letters. Under these circumstances, the court found the insured could not reasonably have believed it had unlimited time in which to report the claim.

Next, the court rejected the policyholder's argument that it should be equitably excused from complying with the notice provision "to avoid forfeiture." The court held that equitable excusal was not warranted by the facts of the case as no compelling reason existed to justify the policyholder's failure to provide timely notice. Although recognizing that the policyholder provided notice only four days after the extended reporting period deadline, the court observed that the policyholder was aware of the claim months earlier and had provided no justification for the three-month delay in reporting the claim.