

Maryland Notice-Prejudice Statute Potentially Applies to Notice Provision of Claims-Made-and-Reported Policy

November 2013

The United States District Court for the District of Maryland, applying Maryland law, has held that Maryland's notice-prejudice statute, Maryland Code § 19-110, precluded dismissal where a claim allegedly was made during the policy period of a claims-made-and-reported policy but the insurer denied coverage because the claim was not reported within 60 days after the end of the policy period as the insuring agreement and notice provision required. *McDowell Building, LLC v. Zurich Amer. Ins. Co.*, 2013 WL 5234250 (D. Md. Sept. 17, 2013).

In June 2006, the client of the insured, a design firm, brought suit against the insured for failing to file an application with the Maryland Historical Trust to receive historic preservation credits. The client served the insured with the complaint but stayed the action pending the outcome of its proceeding against the Maryland Historical Trust.

In 2009, the insured tendered the lawsuit to the insurer. The insurer denied coverage based on the insured's failure to provide notice in accordance with the provisions of the policy in effect at the time that the suit was filed in June 2006. The policy's insuring agreement provided coverage for claims first made and reported during the policy period but also provided for a grace period for reporting claims up to 60 days after the expiration of the policy. The insured subsequently settled with the client and assigned its rights under the policy to the client. The client then brought suit against the insurer and argued that the insurer must prove prejudice to deny coverage based on late notice based on Maryland Code § 19-110 ("An insurer may disclaim coverage on a liability insurance policy on the ground that the insured . . . has breached the policy by not giving the insurer required notice only if the insurer establishes by a preponderance of the evidence that the lack of . . . notice has resulted in actual prejudice to the insurer."). The insurer moved to dismiss the complaint by arguing that Section 19-110 did not apply to claims-made-and-reported policies.

The court denied the insurer's motion to dismiss the complaint. The court reasoned that, at least at the pleadings stage, the insured sufficiently had pled that the requirement to give notice within 60 days after the policy expired constituted a covenant, rather than a condition precedent, under Maryland law. The court noted that certain judges applying Maryland law at the summary judgment stage have held that Section 19-110 does not apply to seemingly indistinguishable notice provisions that constitute a condition precedent to

coverage, such as a claims-made policy in which timely notice is a requirement to triggering coverage under the insuring agreement. However, the court opined that the law on this issue is “very much in flux” and that, at least as a matter of pleading, the allegation that a claim was made during the policy period and coverage was denied due to late notice was sufficient to state a claim that the notice provision was a covenant, rather than a condition precedent, even though it was found in the policy's insuring agreement and identified as a condition to coverage.