

Texas Court: Written Notice 11 Months After Suit Is Not "As Soon As Practicable"

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The Texas Court of Appeals, applying Texas law, has held that a policyholder did not provide timely written notice to the insurer "as soon as practicable," as required by the D&O insurance policy, when it waited 11 months to notify the insurer of the suit. *Prodigy Commc'ns Corp. v. Agric. Excess & Surplus Ins. Co.*, 2006 WL 1461142 (Tex. App. May 30, 2006).

The D&O policy required that notice be given to the insurer "in writing, as soon as practicable, of any claim first made against the Directors and Officers during the Policy Period...but in no event later than ninety (90) days after the expiration of the Policy period." The policyholder provided the insurer with written notice of a securities lawsuit 11 months after the suit was filed. The insurer denied coverage, asserting that the notice was not provided "as soon as practicable."

The court determined that the 11-month delay in providing notice was untimely. In so holding, the court rejected the policyholder's argument that the language of the policy provided a "safe harbor" that only required notice of a claim to be filed within 90 days of policy expiration no matter when the claim was made against the policyholder. The court reasoned that the policyholder's "interpretation is contrary to the plain meaning of the words used in the provision" and that the provision was unambiguous.

The court also rejected the policyholder's contention that it was entitled to discovery on the issue of whether the insurer had actual notice of the securities lawsuit. The court held that "[a]ctual notice is not sufficient" to meet the policy's requirement of written notice regardless of whether the insurer was prejudiced by the late notice. Moreover, according to the court, the insurer "was not required to prove it was prejudiced by the [policyholder's] delay," as the policy clearly stated written notice was required "as soon as practicable" so that actual notice at any time had no bearing on this case. The court "declined to follow federal district court opinions creating the extra-contractual obligation of an insurer to show prejudice following the insured's failure to perform a [policy] condition."