

In Louisiana, Late Notice Under Claims-Made Policy Precludes Coverage Regardless of Prejudice

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A magistrate judge of the United States District Court for the Western District of Louisiana has issued a report and recommendation granting an insurer's motion for partial summary judgment, holding that a company's failure to provide timely notice under a claims-made D&O policy precludes coverage regardless whether the insurer can show prejudice. *Argent Fin. Group, Inc. v. Fid. & Deposit Co. of Md.*, 2005 WL 2304515 (W.D. La. Sept. 21, 2005). The magistrate judge also recommended granting summary judgment for the insured company on the question of whether separate suits by different customers, each of which alleged wrongful acts by the same officer, constituted Related Claims.

The insurer issued a D&O policy to the company. The policy contained a notice provision that stated "[t]he Company or the Directors and Officers shall, as a condition precedent to their rights under this policy, give to the Insurer notice in writing of any Claim as soon as practicable, but in any event no more than thirty (30) days after the date of termination of the Policy Period, and give the Insurer such information and cooperation as it may require." The policy also contained a provision that stated that "the payment of Defense Expenses by the Insurer shall be without prejudice to, and with a full reservation of all the Insurer's rights, remedies and defenses." The "Related Claims" provision in the policy further provided that "Claims based upon or arising out of, directly or indirectly resulting from, in consequence of, or in any way involving the same or related series of Wrongful Acts, facts, circumstances, situations, transactions or events shall be deemed to be a single Claim, which shall have been deemed to have been first made when the earliest Claim was made."

Between 1999 and 2002, customers of the company filed five separate actions against the company alleging that a securities broker employed by the company breached fiduciary duties. Three of the actions ultimately settled. The company provided notice of the remaining actions to the insurer approximately six and ten months after it first learned of the matters. The insurer initially advanced \$40,000 in defense costs in connection with one of the remaining actions without any reservation of rights. The company filed the instant action seeking damages and attorneys' fees in connection with the settled actions and declaratory relief with respect to the two remaining actions.

The court first held that the insurer properly denied coverage for two of the matters based on late notice. As an initial matter, the court rejected the company's contention that the insurer waived its right to rely on a late-notice defense by advancing defense costs without a reservation of rights. The court noted that the policy at issue contained a provision expressly indicating that advancement of defense expenses would be subject to a complete reservation of rights. The court held that "[a]lthough [the insurer] included a reservation of rights clause in the Policy itself rather than a separate document, the Court finds no reason to disregard it, or the parties' intentions." The court reasoned that the insurer and the company were "two sophisticated companies," the policy was signed by both parties and the clause provided sufficient notice to the company as a non-waiver agreement under Louisiana law. Accordingly, the insurer did not waive its right to rely on the company's late notice to preclude coverage.

The court also rejected the company's contention that the insurer was required to prove prejudice flowing from the company's failure to provide timely notice. The court held that it was bound by the Fifth Circuit's decision in *MGIC Indemnity Corp. v. Central Bank of Monroe*, 838 F.2d 1382 (5th Cir. 1988). In *MGIC*, which the court noted involved nearly identical policy provisions, the Fifth Circuit held that an insurer was not required to establish prejudice resulting from untimely notice, basing its reasoning on the fact that the policy expressly listed timely notice as a "condition precedent to coverage" and the sophistication of the insurer and the company. The court thus applied the notice provision in the policy as written, finding that the company failed to provide timely notice. The court expressly held that there was "an inexplicable delay in [the company's] notification" and that notice was therefore untimely.

Regarding the "Related Claims" issue, the company argued that five of the actions filed against the company were not related and thus not subject to the \$1 million limit of liability applicable to all claims filed in a single year. The insurer argued that, under the "Related Claims" provision, all five claims were related because the harm to the underlying plaintiffs in each case was caused by the actions of a single individual. The court held that the Fifth Circuit's ruling in *FDIC v. Mmahat*, 907 F.2d 546 (5th Cir. 1990), was controlling. In *FDIC*, the Fifth Circuit held that three separate instances of malpractice involving the same client were not "logically or causally connected" because "a single motive does not make a single act." Applying this reasoning, the court in the instant case held that "the five claims against [the company] are even more distinct than those in *FDIC*" because "each claim occurred at different time periods, involved different customers and transactions, and alleged different instances of wrongdoing, albeit . . . under the large umbrella of breach of fiduciary duty." The court also held that "if [the insurer] had intended 'related' to mean all harm caused by an individual, then it should have included that phrase in the Policy." Accordingly, the court held that the five claims filed against the company were not subject to the policy's per year limit of liability.

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