

# Waiver and Notice-Prejudice Arguments Do Not Apply to Notice Requirement in Claims-Made Policies

---

December 2005

In an unreported decision, the United States District Court for the District of Oregon, applying Oregon law, has held that waiver and lack of prejudice are irrelevant when an insurer denies coverage for late notice under a claims-made policy. *Or. Sch. Activities Ass'n v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 2005 WL 2600444 (D. Or. Oct. 13, 2005).

The insurer issued a claims-made policy to a school association. The policy afforded coverage only for claims reported during the policy period. The policy defined claim to include "a civil, criminal, regulatory or administrative proceeding, for monetary relief which is commenced by: (I) service of a complaint or similar pleading." The relevant policy period afforded coverage for claims made between August 1, 1999 and August 1, 2000. The policy contained a notice provision requiring notice be given "as soon as practicable" and either (i) anytime during the policy period or (ii) within 30 days after the end of the policy period so long as the claim is reported within 30 days after it is first made.

The school association scheduled a basketball tournament on a Saturday. On May 8, 2000 a group of students presented a claim of religious discrimination to the association's executive board. On June 30, 2000, after the school association's president rejected the complaint, the students appealed the order to the state of Oregon's Superintendent of Public Instruction. The students identified themselves as "claimants" and requested a hearing and a variety of relief. However, the insured did not report the claim to the insurer until March 2, 2001. The insurer denied coverage based on late notice, and litigation ensued.

With respect to waiver, the court rejected the school association's argument that the insurer waived its right to assert late notice by raising other coverage defenses after it raised the late notice defense. The court explained that the waiver argument applies where the insurer completely fails to raise late notice before litigation or does so belatedly after raising other defenses. According to the court, the school association's argument "would effectively write all non-notice defenses out of an insurance policy. Insurers would have to choose at their peril between a notice defense and any other defense." The court also explained that the doctrine of waiver of notice applies only to occurrence policies because "with a claims-made policy, the coverage is non-existent until timely notice is made."

Finally, the court held that a showing of prejudice is not required for a late notice defense under a claims-made policy. The court reasoned that requiring a showing of prejudice would materially alter the terms of the policy and require the insurer to provide coverage to which it did not agree.

For more information, please contact us at 202.719.7130