

**ALERT**

# Insurer Not Entitled to Dismissal of Coverage Action Based on Late Notice of Claim

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A New York trial court has held that an insurer was not entitled to dismissal of an insured's coverage action at the motion to dismiss stage because it was unclear whether the insured was obligated to provide notice of a claim as soon as practicable based on the policy's related claims language. *Sirius XM Radio Inc. v. XL Specialty Ins. Co.*, 2013 WL 5958390 (N.Y. Sup. Ct. Nov. 7, 2013). In addition, the court declined to dismiss the insured's coverage action on the grounds that the insured did not seek consent to incur defense costs.

The directors and officers of the insured, a satellite radio provider, were sued in five actions filed between July 2008 and May 2011. The actions alleged wrongdoing by the directors and officers concerning approval of a merger and mismanagement of the company after the merger. The insured provided notice of the first suit as a notice of potential claim but did not provide notice of that lawsuit or the later lawsuits filed against the insured's directors and officers. The insurer denied coverage for the five lawsuits because the insured failed to provide timely notice under the policy, which required notice of a claim "as soon as practicable after it was first made." The insurer also contended that the insured failed to seek its consent before incurring defense costs in the five actions. The insured filed suit against the insurer to recover fees and costs incurred in defending the suits.

The court held that, at the motion to dismiss stage, it could not determine that the insured failed to give timely notice. As an initial matter, the court held that it was required to accept the insured's assertion that it provided timely notice of the first two lawsuits. The insured contended that it provided timely notice of all five actions because the suits constituted related claims and each suit was

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deemed first made when the first claim was made. The court held that “[w]hether the deemed date of the later claim relieves the Insured of the obligation to give notice each time a later Claim is made is not sufficiently clear from the words” of the policy “to require dismissal of the complaint . . . .”

The court also held that it could not dismiss the insured’s cause of action for the insurer’s failure to pay defense costs on the grounds that the insured did not seek the insurer’s consent before incurring those costs. The insured offered documentary evidence that the initial notice requested the insurer’s consent to incur defense costs. The court held that “[t]here is no evidence whether [the insurer] gave its consent, refused it, or simply ignored this part of the notice.” So, at the motion to dismiss stage, the insured stated a cause of action for breach of contract.

The court dismissed the insured’s request for attorneys’ fees in the coverage action because the insured filed the coverage action. The court held that attorneys’ fees in a coverage action are only available when “the insurer has cast the insured in a defensive posture” by filing suit against the insured.

The opinion is available [here](#).