

ALERT

Prejudice Required for Late Notice Defense Under Claims-Made Policy

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A Louisiana federal court, applying Louisiana law, has rejected a late notice defense under a claims-made financial institutions bond where notice of a claim was given during the policy period, even though notice did not comply with a provision specifying that notice must be given within 60 days of the discovery of a claim. *Grubaugh v. Central Progressive Bank*, 2014 WL 793994 (E.D. La. Feb. 27, 2014). The court, however, concluded that if the insurer could prove prejudice from the breach of the 60-day notice provision, then coverage would be barred.

In July 2008, a customer filed regulatory complaints against a bank after discovering allegedly fraudulent activity related to his checking account. The customer then filed suit in May 2009 against the bank, bank employees, and an insurer that issued a bond to the bank for the period of February 1, 2007 to November 15, 2009. The bank provided notice of the lawsuit to the insurer in July 2009.

The bond stated that it applied "only to loss first discovered by a director or officer of the ASSURED during the BOND PERIOD" and required the bank to provide notice "at the earliest practicable moment, not to exceed sixty (60) days after the discovery of a loss" The insurer moved for summary judgment on the ground that the bank discovered the loss in July 2008 when the regulatory complaints were filed but did not provide notice until almost a year later. The court agreed with the insurer on the timing of the bank's discovery of the loss and that the bond was a claims-made policy. The court, however, noted that, unlike some claims-made policies, the notice provision did not specify that notice within 60 days was a condition precedent to coverage and stated that it would not read the 60-day reporting period as an express condition precedent to

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coverage. Furthermore, the bank provided notice to the insurer during the bond period. The court decided that "coverage exists under [the] bond even though the precise time line for reporting was not followed" and that the "scope of the [insurer's] bargained-for coverage has not been expanded" The court stated, however, that "if [the insurer] can prove that it was prejudiced by the late notice, [the customer] could still be precluded from bringing a direct action."