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Templo Fugit: NJ Insureds Must Give Notice Promptly

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In a unanimous opinion, the New Jersey Supreme Court, applying New Jersey law, has held that an insurer is not required to show that it suffered prejudice before denying coverage on the basis of the insured's failure to give notice of the claim "as soon as practicable," even when notice was provided during the policy period of a claims-made-and-reported policy. The court relied in part on the fact that the insurance contract was entered into by sophisticated parties and was not a contract of adhesion. *Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co.*, 2016 WL 529602 (N.J. Feb. 11, 2016). This ruling instructs other New Jersey courts to adhere to the plain language of an insurance policy, thus ensuring that both parties receive the benefits of the bargained-for contract.

In *Templo*, the insurer issued a claims-made-and-reported D&O policy to a finance company. The policy required the insured, as a condition precedent to coverage, to give written notice of any claim "as soon as practicable" and within the policy period. The insured finance company was sued by a client alleging that it failed to procure financing for a real estate transaction. The insured, however, waited more than six months before providing notice of the lawsuit, and the insurer denied coverage. According to the insurer, although notice was given within the policy period, the insured failed to provide notice "as soon as practicable." Thereafter, the insured assigned its rights and interests under the policy to the claimant as a part of a settlement, and the claimant sued the insurer.

The trial court granted summary judgment for the insurer because the insured failed to give notice of the lawsuit as soon as practicable. In so ruling, the court held that the insurer did not need to show

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prejudice as a result of the delay to deny coverage. The trial court explained that proof of prejudice was unnecessary because it "would be an unjust and inequitable expansion of the coverage provided" if it were "to hold that such unambiguous [notice] language [was] unenforceable absent appreciable prejudice." The intermediate appellate court affirmed, emphasizing the fact that the policy "clearly required that notice be provided both within the policy period *and* as soon as practicable."

The New Jersey Supreme Court affirmed, holding that the insurer could decline coverage without demonstrating prejudice because the insured's failure to comply with the notice provisions of the policy constituted a breach of the policy. The court opined that the policy's notice requirements protect insurers of claims-made policies by allowing them to "maximize[e] the . . . opportunity to investigate, set reserves, and control or participate in negotiations with the third party asserting the claim against the insured" and "mark the point at which liability for the claim passes to an ensuing policy, frequently issued by a different insurer, which may have very different limits and terms of coverage." The court also opined that an insurer must show prejudice as a result of untimely notice under an occurrence policy because such policies are usually issued to unsophisticated individual consumers. In contrast, the court found that proof of prejudice is unnecessary for a late notice defense under a claims-made policy and such a holding fulfills the reasonable expectations of the more knowledgeable and sophisticated claims-made policyholder.

Notably, the *Templo* court rejected the argument that all insurance policies are "contracts of adhesion," stressing that the claims-made policy at issue was entered into by sophisticated parties represented by sophisticated brokers. And while the court noted that it "need not make a sweeping statement about the strictness of enforcing the 'as soon as practicable' notice requirement in 'claims made' policies generally," the emphasis in the court's reasoning on claims-made policies and the sophisticated parties that typically enter into such policies supports the legal argument that all provisions of such policies, including notice provisions, must be interpreted according to their bargained-for terms and conditions.

Turning to the "as soon as practicable" requirement, the New Jersey high court found no factual dispute that the notice given by the insured was untimely, as no reason for the more than six-month delay was provided. The court also focused on the fact that the insured was an incorporated business entity that engaged in complex financial transactions and that the insured is a "particularly knowledgeable insured[], purchasing their insurance requirements through sophisticated brokers." Therefore, the court determined that it "need only enforce the plain and unambiguous terms of a negotiated . . . insurance contract entered into between sophisticated business entities." The court thus held that the insured breached the policy by failing to give notice of the claim as soon as practicable.

In holding that New Jersey public policy did not require the insurer to prove prejudice to deny coverage when sophisticated parties were involved, the New Jersey Supreme Court recognized the importance of the terms in an insurance contract and emphasized that, when interpreting insurance policies, courts are not to "engage in a strained construction to support the imposition of liability or write a better policy for the insured than the one purchased." Instead, *Templo* reminds New Jersey courts to closely follow the clear and unambiguous language of insurance policies and that such language is the best way to measure the reasonable expectations of both parties to the insurance contract. Indeed, the *Templo* court makes clear that it is

particularly important to adhere to the notice provisions of an insurance policy because an insured's failure to provide timely notice deprives the insurer of its negotiated right to associate in the defense and play a role in any possible settlement, thereby limiting the potential exposure of the insurer under the policy's terms. Therefore, as the New Jersey Supreme Court has previously noted, a required showing of actual prejudice has "no application whatsoever to a 'claims made' policy that fulfills the reasonable expectations of the insured with respect to the scope of coverage." *Zuckerman v. National Union Fire Insurance Co.*, 100 N.J. 304, 324 (1985).

Templo stands in contrast to prior decisions that require insurers to demonstrate prejudice before disclaiming coverage for failure to give timely notice within the period of a claims-made policy. *See, e.g., Prodigy Commc'ns. Corp. v. Agric. Excess & Surplus Ins. Co.*, 288 S.W.3d 374, 377-79 (Tex. 2009) (holding that, when notice of the claim is provided within the policy period, an insurer must show prejudice before denying coverage on the basis that notice was not also provided as soon as practicable because that part of the notice requirement "was not an essential part of the bargained-for exchange under the claims-made policy"); *see also Fulton Bellows, LLC v. Fed. Ins. Co.*, 662 F.Supp. 2d 976, 993-94 (E.D. Tenn. 2009) (adopting the rationale and the holding of *Prodigy*). In rejecting the approach taken by these courts, the *Templo* court stressed that New Jersey's "jurisprudence has never afforded a sophisticated insured the right to deviate from the clear terms of a 'claims made' policy."

Ultimately, the New Jersey Supreme Court's decision enforces the principle that courts must tether their analysis of coverage—including with respect to notice provisions in claims-made policies—to the precise terms and language at issue in the insurance policy. Moreover, despite the court drawing a distinction between occurrence and claims-made policies, arguably the same rationale concerning the sophistication of the insured could and should apply to occurrence-based policies involving similarly situated—and sophisticated—insureds.