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PERSPECTIVE

'Notice-prejudice rule' ruling could provide new arguments

By Peter S. Selvin

The "notice-prejudice rule," often applied in the context of occurrence-type policies, requires an insurer to prove that the insured's late notice of a claim has substantially prejudiced its ability to investigate the insured's claim. This principle has been applied in the context of both first-party policies. *Pitzer College v. Indian Harbor Ins. Co.*, 8 Cal. 5th 93 (2019), applying the notice-prejudice rule to a consent provision in a first-party policy) and third-party policies written on an "occurrence" basis. *See, e.g.*, *Campbell v. Allstate Ins. Co.*, 60 Cal. 2d 303 (1963). A key question is whether this rule applies in the context of a claims made policy where the insured reports the claim within the policy period but outside a special reporting period that requires the insured to report the claim within a specified time period after the insured has knowledge of the claim.

While the notice-prejudice rule is frequently applied where the pertinent policy is written on an occurrence basis, there are some exceptions to the application of that rule. For example, where the policy provides for a special or expanded form of coverage (such as a pollution buy-back), some courts have held that the notice-prejudice rule will excuse an insured's late notice in the context of a special reporting period associated with such special or extended form of coverage. *See, e.g.*, *Venoco, Inc. v. Gulf Underwriters Ins. Co.*, 175 Cal. App. 4th 750 (2009) ("where the policy provides that special coverage for a particular type of claim is conditioned on express compliance with a reporting requirement, the time limit is enforceable without proof of prejudice"); *but see Petrosantander (USA), Inc. v. Hdi Global Ins. Co.*, 16-CV-01320-EFM-GLR (D. Kan. 2018) (applying Texas law and concluding that "the Texas Supreme Court would require Defendant to demonstrate prejudice resulting from plaintiff's alleged failure to timely notify defendant of the [claim] prior to denying coverage based on a failure to timely to provide such timely notice").

In the context of "claims made and reported" liability policies, however, courts have held that the "notice-prejudice rule" does not apply where an insured gives notice outside the policy period or an extended reported period. *See, e.g.*, *World Health & Educ. Foundation v. Carolina Casualty Ins. Co.*, 612 F.Supp.2d 1089, 1096 (N.D. Cal. 2009); *Root v. Am. Equity Specialty Ins. Co.*, 130 Cal. App. 4th 926, 929-37 (2005).

A different question arises where an insured's notice is within the policy period or extended reporting period, but is untimely based on a special reporting provision in the policy. For example, a "claims made and reported" policy might require that a claim be reported no later than a specified time period after the insured learns of the claim. In this circumstance, the courts are split on whether the "notice-prejudice rule" will operate to excuse the insured's compliance with such a special reporting provision.

Insureds who have timely reported a claim within the policy period but outside the time limit in a special reporting provision have argued for application of the "notice-prejudice rule." But many (if not the majority) of courts have rejected this argument. "Case law has yet to make a distinction between a claim reported within the policy period but outside of an additionally imposed time limit, and a claim reported outside the policy period. *See Illinois Ins. Co. v Brookstreet Sec. Corp.*, 2009 WL 10671583, at *6 (C.D. Cal. Nov. 20, 2009) (rejecting insured's argument that notice-prejudice rule should apply to 'claims-made-and-reported' policies where claim was reported within policy period on basis that insured presented no persuasive authority to rebut the authority that states that the notice-prejudice rules does not apply to claims made and reported policies"). *Centurian Med. Liab. Protective Risk Retention Group, Inc. v. Gonzalez*, 296 F.Supp. 3d 1212 (C.D. Cal. 2017).

However, a recent federal court decision from the Western District of Washington, applied the notice-prejudice rule in the context of a claims made and reported policy to excuse an insured's failure to have notified its insurer of a claim within the time limits of a special reporting period. There the insured notified the insurer of the claim within the policy period but outside the special reporting period. *Providence Health & Servs. v. Certain Underwriters*, 358 F.Supp. 3d 1195 (W. D. Wash. 2019)

In *Providence*, the court focused on a claims made and reported policy which required reporting of claims in writing to the insurer "as soon as practicable but in no event later than the end of the policy period." However, under an endorsement the requirement was added that the claim had to be reported to the insurer "no later than 60 days after an executive officer of the insured organization becomes aware of the claim. Although *Providence* notified the insurer of the claim (in this case, a $17 million arbitration award) during the policy period, it acknowledged that it failed to report the claim within 60 days after becoming aware of the claim.

After the insurer denied the claim, citing late notice under the 60-day notice provision, *Providence* brought suit for a determination that the underlying claim was covered under the policy.

On cross-motions for summary judgment, the court held that under Washington law the notice-prejudice rule would be applied "where a claim is made under a claims-made-and-reported policy within the reporting period, even if the claim is made contrary to the 60-day notice provision." In so ruling, the court noted that "*Providence*'s violation of the 60-day notice provision is more akin to the violations contemplated in those Washington cases cited by the parties involving occurrence-based policies, and the purposes behind the notice-prejudice rule apply".

Subsequently, the court denied the insurer's motion for reconsideration (2019 WL 8503309) and its motion to certify the appeal for interlocutory review (2019 WL 1436882).

Although there are no published cases which have cited to *Providence*, and the decision's precedential value may be limited in light of its reliance on Washington State law, its application of the notice-prejudice rule to a claims made policy breaks new ground and can be basis for arguments on behalf of insureds relating to timely notice. ■

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