MICHIGAN LAWYERS WEEKLY

July 18, 2011

Late notice under claims-made policies in Michigan

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There are two basic types of liability policies: occurrence policies and claims-made policies. Occurrence policies protect the insured from liability for acts that occur during the policy period — regardless of when a claim is ultimately made.

Claims-made policies provide coverage for claims that are made during the life of the policy — typically, regardless of when the wrongful acts giving rise to the claim may have occurred. Both types of policies require that the insured give the insurer notice of any claims that are made against the insured.

As a general rule, in the context of an occurrence policy, late notice is not a defense to coverage unless the insurer was somehow prejudiced by the late notice — often referred to as the "notice-prejudice rule." If the act in question occurs during the life of a given policy, it is covered by that policy regardless of when a claim is made — even if the claim is made several years later. Providing notice of the claim really serves only one purpose under an occurrence policy — to allow the insurer to begin its investigation into the facts surrounding the claim.

Claims-made policies usually require that the insured give notice of the claim during the life of the policy or within a certain time period after the expiration of the policy. Under a claims-made policy, the making of the claim is what triggers coverage.

Once a claims-made policy expires, with the exception of any potential claims that may have been reported during the life of the policy, the

insurer's liability under that policy also expires. The insurer can close its books on the policy thereby enabling the insurer to more accurately set its reserves with respect to its future liabilities.

In the context of a claims-made policy, providing notice on a timely basis goes to the heart of the contract — especially if the policy also requires that the claim be reported during the life of the policy. For this reason, the vast majority of jurisdictions have found that the notice-prejudice rule does not apply to claims-made policies. Rather, in the context of a claims-made policy, the insured's failure to give notice of a claim during the life of the policy or within the designated time after the policy's expiration (usually a number of days) is an absolute defense to coverage.

Whether the notice-prejudice rule applies to claims-made policies under Michigan law is still somewhat unclear. This is exacerbated because there is a Michigan statute that requires liability policies to provide that failure to give notice within the specified time period will not invalidate a claim if it is shown that it was not reasonably possible to give notice within the prescribed time and notice was given as soon as was reasonably possible (M.C.L.A. 500.3008).

To date, there is no definitive ruling as to whether this statute allows an insured to avoid the notice requirements of a claims-made policy. The Michigan Supreme Court first addressed this issue, albeit in dicta, in *Stine v. Continental Casualty Co.* The *Stine* Court suggested that the statute could excuse late notice under a claims-made policy. Ten years later, the Michigan Court of Appeals refused to apply the notice-prejudice rule in the context of a claims-made policy *Schubiner v. New England Insurance Co.*required written notice, and the insured did not present any evidence that it had provided written notice, nor did the insured claim that it had given notice as soon as reasonably possible.

Several years later, in the unpublished *Clay v. Ferguson Clinic for Digestive Diseases*, the Michigan Court of Appeals found that an insured's failure to give notice of a claim during the life of a claims-made and reported policy was a complete defense to coverage. However, the *Clay* Court noted that:

"This is not a case in which a claim was made against the insured during the policy period, but notice could not reasonably have been given to the insurer during the policy period. The claim against the insured was made no less than twenty days before the policy expired." Judge Rosen recently addressed this issue in *State Bar of Michigan v.*

National Union Fire Ins. Co. of Pittsburgh, Pa. The policy in that case required that notice of a claim be given "as soon as practicable" after the claim was made but in no event more than 30 days after the expiration of the policy.

The insured argued that late notice was not a defense to coverage under the claims-made policy unless the insurer was somehow prejudiced by the late notice. Rosen concluded that he was bound to follow the *Schubiner* ruling that an insurer need not demonstrate that it was prejudiced by an insured's late notice in order to deny coverage under a claims-made policy.

Late notice is a recurrent issue in coverage litigation. Michigan claims-made insureds continue to argue that late notice is not a defense to coverage unless the insurer was somehow prejudiced by the delayed notice.

To avoid this issue altogether, claims-made insureds should make every effort to report any claims that are made as soon as they learn of the late claim. To further protect themselves, claims-made insureds also should consider reporting any potential claim that they are aware of before their policy expires.

Claims-made policies typically contain a provision which allows them to report a potential claim during the life of a given policy, regardless of when the claim is ultimately made. If they do so, any claim that is ultimately made will be treated as if it were made during the life of the policy during which such notice was given.

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