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Claims-Made Insurance Policies and the Notice-Prejudice Rule Under Pa. Law

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Claims-made insurance policies provide coverage for claims made during the policy period regardless of when the events out of which the claim arose occurred. Many claims-made insurance policies also require that the insured provide notice of the claim to the insurer "as soon as practicable" in addition to the requirement of notice during the policy period (sometimes referred to as "claims-made and reported policies").

Generally, notice during the policy period or extended reporting period is treated as an absolute condition precedent to coverage under a claims-made and reported policy. If an insured fails to report the claim during the policy period or extended reporting period, coverage is not available, regardless of the circumstances. Attempts by insureds to apply the notice-prejudice rule applicable to "occurrence" policies to claims-made policies have been largely unsuccessful.

An occurrence policy provides coverage for "occurrences" that take place during the policy period regardless of when the claim is made, see "Couch on Insurance" 3d Section 102:22; *Home Insurance v. Law Offices of Jonathan DeYoung,* 32 F. Supp. 2d 219, 224 (E.D. Pa. 1998). Most states, including Pennsylvania, require an insurer to prove that it has been prejudiced by untimely notice before it may deny coverage under an occurrence policy based on the insured's failure to provide timely notice, as in *Brakeman v. Potomac Insurance,* 371 A.2d 193, 197 (Pa. 1977). In *Brakeman* the Pennsylvania Supreme Court explained that in an occurrence policy reporting the claim to the insurer does not define the scope of coverage. Instead, it is intended to ensure that the insurer has an opportunity to promptly investigate the claim. Where an occurrence policy is concerned, allowing an insurer to deny coverage based on untimely notice would work a forfeiture because the insured would be denied the coverage it had paid for in premiums.


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This reasoning does not apply to a claims-made and reported policy because in a claims-made policy, notice serves a different purpose. It provides a date certain after which an insurer knows that it no longer is liable under the policy, and accordingly, allows the insurer to more accurately fix its reserves for future liabilities and compute premiums with greater certainty, as in *Harrisburg v. International Surplus*

Lines Insurance, 596 F. Supp. 954, 962 (M.D. Pa. 1984). Extending the reporting time after the end of the policy period would provide the insured an extension of coverage it had neither bargained for nor paid for, see *Lexington Insurance v. W. Pennsylvania Hospital,* 318 F. Supp. 2d 270, 273 (W.D. Pa. 2004); see also *4th St. Investments v. Dowdell,* 340 F. App'x 99, 100-01 (3d Cir. 2009).

The notice-prejudice rule is generally deemed inapplicable to the requirement of notice during the policy period. Some states, however, have applied the notice-prejudice rule to a claims-made and reported policy's requirement of notice "as soon as practicable." For example, in *Financial Industries v. XL Specialty Insurance,* 285 S.W.3d 877 (Tex. 2009), the Texas Supreme Court held that, while an insurer need not show prejudice to deny coverage for failure to give notice within the policy period of a claims-made policy, it would be required to show prejudice to deny coverage where the claim is reported within the policy period but not "as soon as practicable." The court explained that notice during the policy period served to define the scope of coverage. The court reasoned that the obligation to give notice as soon as practicable was akin to the notice requirement in an occurrence policy and conditioning its enforcement on proof of prejudice did not extend un-bargained-for coverage. By contrast, the New Jersey Supreme Court recently declined to apply the notice-prejudice rule where the insured had notified the insurer of the claim during the policy period, but not as soon as practicable, see *Templo Fuente De Vida v. National Union Fire Insurance of Pittsburgh*, 129 A.3d 1069, 1071 (N.J. 2016).

The Pennsylvania Supreme Court has not issued addressed application of the notice-prejudice rule to claims-made insurance policies. Other courts answering the question under Pennsylvania law have unanimously concluded that the notice-prejudice rule does not apply to either the requirement that notice be provided during the policy period or that notice be provided as soon as practicable.

The requirement of notice during the policy period has been addressed in several federal decisions. In *Harrisburg v. International Surplus Lines Insurance,* 596 F. Supp. 954, 962 (M.D. Pa. 1984) the insured failed to notify the insurer of the claim until more than a year after the policy period expired. Noting the differences between occurrence and claims-made policies, the court concluded that the notice prejudice rule was in applicable. Similarly, in *Pizzini v. American International Specialty Lines Insurance,* 210 F. Supp. 2d 658, 661 (E.D. Pa. 2002) the insured failed to report the claim until after the end of the policy period. The absence of Pennsylvania authority and the weight of existing case law led the court to conclude that under Pennsylvania law, the notice-prejudice rule does not apply to claims-made policies. Therefore, the court concluded that an insurer providing liability coverage under a claims-made policy need not show it was prejudiced by an insured's failure to provide timely notice of a claim in order to deny coverage on that ground. See also *Lexington Insurance v. West Pennsylvania Hospital,* 318 F. Supp. 2d 270, 273 (W.D. Pa. 2004) (notice-prejudice rule not applicable to requirement of notice during the policy period). None of these decisions address the question of whether a requirement of notice as soon as practicable in a claims-made policy is subject to the notice-prejudice rule. Also see *Reifer v. Westport Insurance,* 2015 Pa. Super. Unpub LEXIS 4300 (Pa. Super. 2015) (declining to apply notice-prejudice rule to claims-made policy where insured failed to provide notice of claim during policy period).

A notice "as soon as practicable" requirement in a claims-made policy was addressed by the Pennsylvania Superior Court in *Ace American Insurance v. Underwriters at Lloyds*, 939 A.2d 935, 940 (Pa. Super. 2007).

In *Ace American Insurance,* the policy included what the court characterized as a "general" reporting section and a "specific" reporting section. The general section required that hat the insured provide notice of all claims to the insurer as soon as practicable after such claims first became known to the general counsel or risk manager of the insured, but in no event later than 90 days after the expiration of the policy period. The specific reporting section required the insured notify the insurer as soon as practicable of any claim in which it was reasonably likely that the loss would exceed $4 million. A claim for more than $30 million was asserted against the insured in 1996. The insured provided notice that complied with the "general" notice requirement. But that notice did not comply with the "specific" notice requirement.

The insured argued that having complied with the "general" reporting requirement, the insurer should be required to prove prejudice under the *Brakeman* case before it could deny coverage on the basis of the "specific" requirement. Citing *Pizzini*, the Superior Court declined to apply the notice-prejudice rule to a claims-made policy until such time as the Pennsylvania Supreme Court ruled on the issue. *Ace American Insurance,* 971 A.2d 1121, 1123 (Pa. 2009), was affirmed by the Supreme Court without opinion

While *Ace American Insurance* seemingly answers the question of whether the notice-prejudice rules applies to a claims-made policy's requirement that notice be provided "as soon as practicable," there is reason to question the force of the decision. *Ace American Insurance* includes no independent analysis. Instead, the Superior Court adopted the reasoning of the U.S. District Court for the Eastern District of Pennsylvania's decision in *Pizzini*. But *Pizzini* addressed only the question of whether the notice-prejudice rule applied where the insured failed to provide notice during the policy period. It did not address the question of whether the notice-prejudice rule applied where the insured provided notice during the policy period but not as soon as practicable. Neither *Pizzini* nor *Ace American Insurance* addresses the argument that a notice as soon as practicable requirement serves a purpose different than the requirement of notice during the policy period and should therefore be treated differently. And while the Pennsylvania Supreme Court affirmed the Superior Court's decision in *Ace American Insurance*, that affirmance was without opinion and therefore its precedential value is limited. Thus, applicability of the notice-prejudice rule to an "as soon as practicable" notice requirement in a claims-made policy may still be an open question under Pennsylvania law.

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