RIKER DANZIG SCHERER HYLAND PERRETTI LLP

# NJ Supreme Court: Insurer Need Not Show Prejudice to Prevail on Late Notice Defense to "Claims Made" Coverage

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The New Jersey Supreme Court recently issued an important decision in the context of a "claims made" directors and officers liability policy, affirming two lower court rulings that the insurer need not establish prejudice as a prerequisite to denying coverage based on the policyholder's failure to provide the carrier with notice of the claim "as soon as practicable."

The underlying case was an action brought by Templo Fuente de Vida Corp. ("Templo") against First Independent Financial Group ("First Independent"), asserting breach of contract, breach of fiduciary duty, professional malpractice and professional negligence claims against First Independent, which allegedly "back[ed] out" of an agreement to fund Templo's purchase of a property. More than six months after First Independent was served with the complaint in the underlying action, it provided notice to its directors and officers liability insurer, National Union Fire Insurance Company ("National Union"). National Union disclaimed coverage based upon the policyholder's failure to comply with a policy provision requiring notice "as soon as practicable", even though notice was provided during the policy period. As part of the settlement of the underlying action, First Independent assigned its rights against National Union to Templo, which then filed a declaratory judgment action against the insurer.

The trial judge granted summary judgment in favor of National Union, agreeing that coverage was barred due to the policyholder's failure to provide notice of the claim "as soon as practicable," as required by the policy. The court further held that the insurer need not prove that it was prejudiced as a result of the late notice in order to deny coverage for the claim. The Appellate Division affirmed, and Templo appealed.

On February 11, 2016, the New Jersey Supreme Court unanimously affirmed the rulings below. First, the Court noted that it was undisputed that the policyholder had failed to report the claim "as soon as practicable" as required by the policy. In this respect, the result seems to have been driven by the policyholder's failure to offer "any evidence" to justify the six-month delay in reporting the claim. Accordingly, the Court held that the unexplained six-month delay did not satisfy the policy's notice requirement – although the Court noted that it need not, and would not, draw a "bright line" rule for what constituted timely compliance with an "as soon as practicable" notice provision.

Next, the Court considered – and rejected – the argument that the insurer should be required to show prejudice in order to decline coverage based on late notice. Here, the Supreme Court revisited two of its prior important precedents: Cooper v. Government Employees Insurance Co., 51 N.J. 86 (1968) and Zuckerman v. National Union Fire Insurance Co., 100 N.J. 304 (1985).

In Cooper, the Court had first held that insurers seeking to deny coverage based upon late notice under "occurrence" based policies must establish that they were prejudiced by the late notice. In Zuckerman, the Court declined to extend the Cooper rule to require the insurer to show it was prejudiced by late notice under "claims made" policies. See Zuckerman, 100 N.J. at 324 (stating that while "[t]he Cooper doctrine has a clear application to ['occurrence'] policies, . . . It has . . . no application whatsoever to a 'claims made' policy that fulfills the reasonable expectations of the insured with respect to the scope of coverage.").

The Court then went on to discuss the general differences between "claims made" insurance policies (such as the one at issue in Templo) and "occurrence" based insurance policies. Under "occurrence" based policies, the policy typically provides coverage for injuries or damage that occur during the policy period (i.e., it is the "occurrence" of the particular peril that is insured), whereas under "claims made" policies, it is the making of the claim, during the policy period, that is the event insured. As the Court noted, "occurrence" based policies are often issued to "unsophisticated consumers unaware of all of the policy's requirements," and thus are often considered contracts of adhesion. On the other hand, the Court suggested that "claims made" policies are often issued to "a more sophisticated clientele, who are much better able to deal with the insurers on an equal footing." Thus, the Court intimated that the policy considerations that pertain to "occurrence" based policies might not apply to "claims made" policies.

Although the Court declined to "make a sweeping statement about the strictness of enforcing the . . . notice requirement in 'claims made' policies generally," it did note that the Templo case involved a sophisticated policyholder – an incorporated business entity that engaged in complex financial transactions, had at least fourteen full-time employees, and hired an insurance broker to procure the policy at issue. Accordingly, the Court proceeded to enforce the unambiguous terms of the "claims made" directors and officers policy – a contract "that had been entered into between sophisticated business entities" – and held that National Union properly declined coverage, and did not need to demonstrate prejudice resulting from the late notice.

Templo is a potentially significant decision for insurers. At a minimum, the case confirms that an unambiguous late notice provision in a "claims made" policy issued to a sophisticated policyholder will be enforceable, without any requirement that the insurer show prejudice to deny coverage. On the other hand, the Court appears to have left open the question of whether a different result would have been reached had the policyholder been "less sophisticated."

Of particular interest to insurers, however, will be whether Templo may be expanded outside of the "claims made" context, especially where the policyholder is a sophisticated business entity. Since the sophistication of the insured appeared to be a critical factor in the Templo court's reasoning, insurers may seek to use Templo as a means of eroding the Cooper prejudice requirement in late notice cases involving "occurrence" based policies, where the policyholder is particularly sophisticated.

The decision is Templo Fuento De Vida Corp., et al. v. National Union Fire Insurance Co., No A-18-14), __ A.3d ___ (Feb. 11, 2016) and is available for download here.

If you have any questions about this decision, please contact any one of our Insurance Partners:

Brian O'Donnell

Lance Kalik

Glenn Curving

Michael O'Mullan

Caroline Brizzolara

Anthony Zarillo

Tracey Wishert

## Attorneys:

Brian E. O'Donnell · Lance J. Kalik · Glenn D. Curving · Michael P. O'Mullan · Caroline Brizzolara · Anthony J. Zarillo, Jr. · Tracey K. Wishert

## Practice:

Insurance and Reinsurance Law