

No Extension For Harvard Coverage Bid, 1st Circ. Says

By **Daniel Tay**

Law360 (August 9, 2023, 5:50 PM EDT) -- Harvard failed to revive its lawsuit seeking coverage of the affirmative-action case in which the U.S. Supreme Court undid decades of precedent, with the First Circuit affirming Wednesday the university's late notice to its insurer strictly precluded coverage.

The panel rejected Harvard University's **argument that a lower court** should have considered if its late notice to its excess insurer, Zurich American Insurance Co., had not frustrated the purpose of the notice provision in the claims-made policy at issue. The holdings of a Massachusetts Supreme Judicial Court decision in [Chas T. Main Inc. v. Fireman's Fund Insurance Co.](#) have "spoken directly to the critical issue," U.S. Circuit Judge Bruce M. Selya said in writing for the panel.

"Staying within the borders of this well-beaten path, we hold that the failure to give notice according to the policy's terms and conditions forfeits any right to coverage," Judge Selya said.

Under the excess policy at issue, Harvard was required to notify Zurich of any claims within 90 days of the end of its policy period. Harvard's reporting window closed Jan. 30, 2016, but the school didn't tell its excess carrier of a 2014 lawsuit against it by Students for Fair Admissions, an anti-affirmative action group, until the spring of 2017.

Harvard argued in June during oral arguments that Chas T. Main's holding had been made in a context where the insurer had no actual notice or knowledge of the claim, while in Harvard's case, Zurich had "constructive knowledge" or actual notice of the affirmative action suit because of widespread media coverage of the case. The university said Chas T. Main's most important aspect was whether the purpose of the notice provision had been frustrated by noncompliance, arguing that in the case before the First Circuit, Zurich had actual notice of the claim and therefore the district court had prematurely awarded summary judgment to Zurich.

The panel was unconvinced Wednesday, writing that Harvard's position was "little more than gaslighting." According to the panel, Harvard's argument that the notice provision was not enforceable because Zurich might have had actual notice was just the argument that Zurich was not prejudiced by the lack of timely notice, worded differently.

Under Massachusetts law, a failure to comply with notice requirements in occurrence-based policies does require an insurer to prove that the breach prejudiced it before it can deny coverage, the panel acknowledged. However, the panel noted that in that situation, the purpose of the requirement is to allow the insurer to investigate the facts regarding liability. This means that when an insurer can still effectively investigate, allowing a forfeiture of coverage solely because of technical noncompliance would be unfair to the policyholder, the panel said.

In contrast, under a claims-made insurance policy, the notice provision is also important in promoting fairness in rate-setting, the panel said. Under Massachusetts precedent, the purpose of a claims-made policy is to "minimize the time between the insured event and the payment," meaning that if there is a claim against a policyholder but the insurer is not notified until past the notice period, "the primary purpose of insuring claims rather than occurrences is frustrated," the panel said.

The panel also declined to entertain an argument Harvard brought up for the first time on appeal, which is that there were two elements to the notice provision and that they had both been satisfied. According to Harvard, the notice provision requires "written notice" as soon as practicable, but then

requires that an event be "reported" within 90 days. Under this interpretation, Harvard had provided written notice to Zurich, while the reporting of the case to the insurer did not need to come specifically from Harvard, according to the university.

Harvard had failed to raise the claim in the lower court and failed to show the extraordinary circumstances needed for the panel to exercise its discretion to hear the claim for the first time on appeal, Judge Selya wrote.

Representatives for the parties did not respond to requests for comment.

U.S. Circuit Judges William J. Kayatta Jr., Bruce M. Selya and Jeffrey R. Howard sat on the panel.

Harvard is represented by Ethan W. Middlebrooks, Jade W. Sobh and Marshall Gilinsky of Anderson Kill PC.

Zurich American is represented by Andrew L. Margulis, Jung H. Park and Andres Avila of Ropers Majeski Kohn & Bentley and Paul T. Muniz of Donovan Hatem LLP.

The case is President and Fellows of Harvard College v. Zurich American Insurance Co., case number 22-1938, in the U.S. Court of Appeals for the First Circuit.

Update: this story has been updated with additional information about the decision.