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The D&O Diary

A Periodic Journal Containing Items of Interest From the World of Directors & Officers Liability, With Occasional Commentary

Late Notice Precludes Excess Coverage for High-Profile Harvard Suit

By Kevin LaCroix on August 13, 2023

In a June 29, 2023, **decision** in *Students for Fair Admissions v. Harvard*, the U.S. Supreme Court held that the college's use of affirmative action in its admissions program was unconstitutional. The discrimination case against the college not only went all the way to the Supreme Court but was also the subject of a long-running insurance coverage dispute involving the college's excess employment practices insurance. In an August 9, 2023, ruling, the First Circuit held in the insurance coverage dispute that the college's late provision of notice of claim regarding the underlying discrimination lawsuit precluded excess coverage for the claim. This high-profile insurance coverage ruling has some important lessons about the provision of notice to insurers in connection with liability claims. A copy of the appellate court's August 9, 2023, ruling can be found **here**.

Background

On November 17, 2014, an organization known as Students for Fair Admissions sued Harvard alleging that the college's consideration of race as part of its affirmative action program in its

admissions processes violated the equal protection clause of the U.S. constitution. At the time, Harvard maintained a $40 million program of employment practices liability insurance, consisting of a primary layer of $25 million and an excess layer of $15 million.

On November 19, 2024, Harvard notified the primary insurer of the Students for Fair Admissions lawsuit. However, Harvard did not notify the excess insurer of the claim until May 23, 2017, well beyond the insurance program's ninety-day notification window. The excess insurer denied coverage under the excess policy on the grounds of late notice.

In September 2021, Harvard sued the excess insurer in the District of Massachusetts federal court, seeking both a declaration of coverage and damages. The excess insurer contended that the college's late provision of notice of claim precluded coverage. The insurer filed a motion for summary judgment. The district court granted the insurer's summary judgment motion. Harvard appealed.

The Relevant Policy Language

The primary policy's notice provision provides as follows:

> The Insureds shall, as a condition precedent to the obligations of the Insurer under this policy, give written notice to the Insurer of any Claim made against an Insured … as soon as practicable…. Notwithstanding the foregoing … in all events, all Claims … must be reported to the Insurer no later than ninety (90) days after the end of the Policy Period or the Discovery Period (of applicable).

The excess policy provides with respect to notice of claim as follows:

> As a condition precedent to exercising any rights under this policy, the Policyholder shall give the Underwriter written notice of any claim or any potential claim under this policy or any Underlying Insurance in the same manner required by the terms and conditions of the [primary] policy."

The August 9, 2023, Opinion

In an August 9, 2023, opinion written for a unanimous three-judge panel by Judge **Bruce Selya**, the First Circuit affirmed the district court's grant of summary judgment for the excess insurer.

The appellate court opened its opinion with a detailed review of Massachusetts law regarding timeliness of notice of claims under claims made insurance policies. The appellate court noted that under occurrence policies, a notice prejudice rule applies, meaning that the insurer could not

deny coverage based on late notice of claim unless the insurer was able to show that the late provision of notice prejudiced the insurer. However, the appellate court noted, in contrast to occurrence policies, with respect to claims made policies (of the type involved here), under Massachusetts law, an insurer need not show prejudice in order to disclaim coverage based on the late provision of notice. The appellate court emphasized that in a diversity jurisdiction suit involving claims under the state law, its role was circumscribed to applying the local law as it stands, and not to extend or revise the law.

In trying to argue that its late provision of notice should not preclude coverage under the excess policy, Harvard raised two arguments. First, Harvard argued that the district court had erred in applying Massachusetts law when it determined that strict compliance of the excess policy's notice requirement was a prerequisite to coverage. Second, the college argued that issues of fact remained as to whether the notice requirement was satisfied.

With respect to the first argument, Harvard argued that, as it believed further discovery would show, the excess insurer had actual notice of the claim, the principles supporting the strict application of the notice requirement in the claims made context were satisfied. This, the appellate court said, "is little more than gaslighting" as it is "simply another way of arguing that [the excess insurer] was not prejudiced by the lack of timely written notice." The argument was also "collapse the distinction" that Massachusetts courts have drawn between occurrence and claims made policies. The appellate court added that there is nothing in the relevant Massachusetts case law suggesting that the courts "meant to carve out an exception to that general rule for circumstances in which an insurer had actual notice of a pending claim."

The appellate court said further that "we would be straying well outside our assigned lane to reach such an exception into Massachusetts law," making a point to emphasize that the college had chosen to sue the excess insurer in federal court rather than proceeding in state court," and that having made that choice, the college was not in a position to ask the federal court to "blaze a new trail." For the same reasons, the appellate court declined to consider the college's argument that the strict enforcement of the notice requirements would contravene sound public policy. It is, the appellate court emphasized, for Massachusetts courts, not for a federal court, to weigh the policy implications of Massachusetts law.

Finally, the appellate court rejected the college's argument that issues of fact remained on the question whether the college had actually complied with the excess policy's notice requirement. The college had tried to argue that further discovery might reveal that a newspaper or other media outlet had reported the claim to the excess insurer. The appellate court declined to hear the

argument because the college had not raised the argument in the district court but had only raised it for the first time on appeal.

Discussion

On the one hand, given the applicable Massachusetts case law and given the facts of the case (that is, that the notice to the excess insurer was far beyond the end of the 90-day window), the outcome of this case is arguably unsurprising and breaks no new ground. (Indeed, the appellate court said as much in its opening paragraphs.) On the other hand, the high-profile nature of the underlying claim and therefore of the insurance coverage dispute does make the appellate court's ruling noteworthy. At a minimum, the ruling provides some important reminders of some basic truths about the provision of notice under liability insurance policies.

First, while there are arguments that policyholders can try to raise to argue that their late provision of notice of claim should not preclude coverage, the more important point is that well-advised policyholders will seek to implement procedures and practices to try to avoid the late provision of notice in the first place. I don't know how it happened here that the college provided timely notice of claim to the primary insurer but only belated notice to the excess insurer. However it came to pass, the fact pattern here is a sharp reminder of the fact that the process of providing notice to insurers of a claim should include notice to *all* insurers in the tower (and for that matter to all potentially applicable insurance programs). My oft-stated rule of thumb on questions of notice is: Always provide notice. Which I will now amend to say: Always provide notice to all of the insurers.

Second, long years of experience with thousands of claims has taught me that even the most organized and most well-intentioned policyholders can still wind up providing notice of claim to its insurers late — as, indeed, Harvard did here, at least with respect to its excess insurance. In many jurisdictions (for example, California, as discussed **here**), the policyholder can try to argue that even though the notice was late, coverage should not be precluded because the insurer was not prejudiced by the late notice. However, in other jurisdictions – for example, Massachusetts – the courts will hold the late provision of notice under a claims made policy precludes coverage regardless of whether the late notice prejudiced the insurer.

For that reason, it is increasingly common at least in the D&O insurance context for provisions to be incorporated directly into the policy specifying that the insurer will not seek to deny coverage based on the late provision of notice unless the insurer can show that the late notices caused the insurer material prejudice. Both of these considerations represent important means by which

policyholder can try to protect themselves from the kinds of conflicts that this insurance dispute represents.

There was an important point of emphasis in the appellate court's opinion that is worth further consideration. The appellate court emphasized a number of times in its opinion that as a federal forum considering a diversity jurisdiction case under local law, its role is very circumscribed. The court even made the point that if the college had wanted to argue for extensive or revision of the law, the college should have selected a state court forum rather than a federal forum. The appellate court's emphasis of this point is striking and does raise important issues that should be considered when litigants are trying to decide where to pursue their claims.

Special thanks to a loyal reader for providing me with a copy of the First Circuit's opinion.

Word Choices: One final note about this opinion is that the Court's use of language was in certain instances unusual to say the least. In that regard, it comes as no surprise that his Wikipedia **profile** notes that Judge Selya is known for his "distinctive writing style."

The opinion's reference to one of the college's arguments as "gaslighting" is, to me at least, unexpected. I confess I have never been quite sure what the word "gaslighting" is supposed to mean, but to the extent I have any understanding of the word, I don't think the court's use of the term in this context is quite right.

But even more noteworthy, the opinion's reference to the college's argument that it raised for the first time on appeal as a "sockdolager" left me confused. This is a word I have to my knowledge ever previously encountered. It **apparently** means a decisive blow. So the appellate court's use of the word was, in context appropriate, even if it is, in my mind, a questionable word choice.

Finally, in rejecting the argument that the college tried to raise for the first time on appeal, the appellate court said in declining to consider the argument, the court said it saw "no sufficient reason for departing from our customary praxis." The word "praxis" apparently means action or practice. Which makes me question why the court would use an unfamiliar or uncommon word when a simple, familiar word – practice – would do.

I am not a fan of courts using unusual or unfamiliar words when familiar words are available and sufficient for the purpose. The use of unfamiliar words can lead to lack of clarity, confusion, and perhaps even misunderstanding.

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