

# Harvard Stuck With Admissions Suit Tab After Insurance Flub

By **Chris Villani**

Law360 (November 2, 2022, 4:19 PM EDT) -- Harvard University will have to pay the legal tab it racked up during the affirmative-action case recently argued before the U.S. Supreme Court after a federal judge ruled Wednesday that the school was late in telling Zurich American Insurance Co. about the landmark suit.



A Massachusetts district judge told Harvard it must pay legal fees it incurred during its affirmative-action case before the Supreme Court because it failed to timely tell its insurer about the suit. (Photo by Maddie Meyer/Getty Images)

In a four-page memorandum, U.S. District Judge Allison D. Burroughs said the law clearly breaks Zurich's way. Under the policy agreement between Zurich and Harvard, the school had to put the insurer on notice about the suit no later than Jan. 30, 2016, the judge found.

Harvard did not provide formal notice about the landmark lawsuit until the spring of 2017, but argued that the insurer clearly knew about the legal challenge through widespread media coverage and its own underwriting process.

Judge Burroughs found Harvard's arguments to be "unavailing, unsupported by case law, controlling or otherwise."

"It is thus clear that Zurich's lack of prejudice, or constructive, or even actual knowledge would not change Harvard's obligation to provide notice in full compliance with the terms of the policy," Judge Burroughs wrote. "As Zurich aptly observes, courts 'leave no wiggle room' to excuse an insured's noncompliance with the notice provisions of a claims-made policy."

Harvard had argued that the notice provision is **a mere technicality** that should not allow Zurich to duck its contractual obligations, which included paying \$15 million worth of excess coverage to help Harvard handle its legal bills.

Zurich had actual notice of the suit, which was filed by the anti-affirmative action group Students For Fair Admissions, Harvard argued. It said the insurer had the chance to adjust the school's premiums accordingly.

The school had a primary educational institution risk protector policy from AIG that ran from November 2014 to November 2015 and an excess select policy from Zurich that ran for the same period. SFFA sued Harvard in November 2014 and AIG was informed days later, but Harvard did not notify Zurich until May 2017.

Zurich said Harvard's policy contained language that made it only applicable if claims were submitted within the policy period or an extended reporting period and that separate notice must be given to each insurer, so the notice Harvard gave AIG **doesn't count**.

Judge Burroughs ultimately agreed, finding that Massachusetts law is clear that the unambiguous terms of an insurance policy must be strictly enforced and failure to comply with the notice provision by the insured bars coverage.

"Even in cases where insureds directly provided information about a claim to an insurer's underwriters — not the case here — courts have still held that this was insufficient to be considered notice of a claim as required by the strict provisions of a claims-made policy," Judge Burroughs wrote.

Representatives for both Zurich and Harvard declined to comment.

Harvard and the University of North Carolina at Chapel Hill defended their race-conscious admissions policies before the high court during five hours of oral argument Monday.

A majority of the conservative court seemed ready to **end the use of race** in college admissions, turning schools toward "race-neutral" alternatives to try to achieve diversity.

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 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 1:21-cv-11530, in the U.S. District Court for the District of Massachusetts.

--Additional reporting by Elliot Weld and Brian Dowling. Editing by Alyssa Miller.