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Texas Hold 'Em: Supreme Court Says *Not So Fast* to Insurer's "No Prejudice" Position for "Claims Made" Policies

It has been said many times that there are only three certainties in the world: death; taxes; and insurers need not prove prejudice to disclaim coverage for late notice under claims-made policies.

So, needless to say, the Supreme Court of Texas's opinion issued yesterday in the closely–watched case of *Prodigy Communications v. Agricultural Excess & Surplus Lines Insurance Co.*, declaring that an insurer must prove prejudice to disclaim coverage for breach of a claims-made policy's notice provision, is sure to cause some forehead creasing. After all, when it comes to claims-made late notice cases, policyholders usually do as well as 16th seeds in the NCAA tourney.

To be fair, *Prodigy* did not involve the typical claims-made late notice battle that has been fought between insurers and policyholders over the years. But it involved a claims- made issue that arises with some frequency and that has generally eluded judicial attention.

Prodigy involved a dispute over the policyholder's satisfaction of a Notice of Claim provision in a claims-made D&O policy. Specifically, a three year Discovery Period had been purchased which extended coverage under the policy to claims first made against the Insureds between May 31, 2000 and May 31, 2003. The Notice of Claim provision stated:

> The [Insureds] shall, as a condition precedent to their rights under this Policy, give the Insurer notice, in writing, as soon as practicable of any Claim first made against the [Insureds] during the Policy Period, or Discovery Period [(5/31/00 to 5/31/03)] (if applicable), but in no event later than ninety (90) days after the expiration of the Policy Period or Discovery Period [8/29/03], and shall give the Insurer such information and cooperation as it may reasonably require.

Prodigy at 3.

Prodigy was served with a complaint on June 20, 2002 and first notified its insurer of the suit by way of a June 26, 2003 letter.

The suit was a claim first made during the three year Discovery Period (5/31/00 to 5/31/03) and notice of it was provided to the insurer within 90 days after the expiration of the Discovery Period. Nonetheless, despite the policyholder satisfying these timing requirements, the insurer disclaimed coverage on the basis that it was not notified of the claim *as soon as practicable*, as also required under the Notice of Claim provision. After all, there had been a one year delay in notifying the insurer of the suit.

As is wont to happen, coverage litigation ensued. The Texas Court of Appeals examined this Notice of Claim provision and held that Prodigy was required to give notice "as soon as practicable" even though the policy allowed notice within 90 days after the expiration of the policy period; notice given one year after

the filing of the suit was not "as soon as practicable" as a matter of law; and the insurer was not required to prove that it had been prejudiced by Prodigy's late notice.

The Supreme Court of Texas agreed to hear Prodigy's appeal and it reversed the court of appeals. The Texas high court held: "In a claims-made policy, when an insured notifies its insurer of a claim within the policy term or other reporting period that the policy specifies, the insured's failure to provide notice 'as soon as practicable' will not defeat coverage in the absence of prejudice to the insurer." *Prodigy* at 14-15.

The essential rationale for the Supreme Court's decision was that Prodigy's obligation to provide the insurer with notice of the claim "as soon as practicable" was not a material part of the bargained-for exchange under the claims-made policy. *Prodigy* at 14. In other words, the notice requirements in claims-made policies allow an insurer to "close its books" on a policy at its expiration date. Thus, even if Prodigy did not give notice "as soon as practicable," the insurer was not denied the benefit of its claims-made policy since it still could not close its books on the policy until 90 days after the Discovery Period expired, which had not yet happened when Prodigy gave notice of the claim.

Conclusion

The Supreme Court's decision in *Prodigy* did nothing to suggest that an insurer is required to prove prejudice to disclaim coverage in the event that an insured fails to satisfy a claims-made policy's requirement that notice be provided during the policy period or within a specified number of days thereafter.

However, given the dearth of case law addressing the "as soon as practicable" issue in a claims-made context, any court addressing a claims-made policy that has a Texas two-step notice provision is unlikely to do so without considering how the Supreme Court of Texas handled the issue in *Prodigy*.

A copy of the March 27 decision from the Supreme Court of Texas in *Prodigy Communications v. Agricultural Excess & Surplus Lines Insurance Co.* is attached. Note that there is also a three Justice dissenting opinion. It is not attached, but can be obtained at the Supreme Court's website (which is currently down).

Please let me know if you have any questions.

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