BINDING AUTHORITY
Insurance Coverage Decisions: Issued Today - Impact Tomorrow
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[See below for *Binding Authority* Contest]

Mind The Gap: Continuous "Claims Made" Coverage That Isn't

Kentucky's distillery of claims made notice issues

> "It ought to be easy ought to be simple enough." Bruce Springsteen, "Tunnel of Love," TUNNEL OF LOVE, Columbia Records, 1987.

By all accounts, that should perfectly describe notice issues under claims made policies. The threshold requirement to trigger coverage is simple - the "claim" must be *first made* against the insured during the policy period and reported to the insurer prior to the end of the same policy period. Easy, right? We're not talking about a quadruple state choice of law analysis under the Restatement of Conflicts here folks.

> "But the house is haunted and the ride gets rough." *Id.*

Of course, anyone who handles claims under claims made policies knows that somewhere the train went off the track. The number of coverage disputes – involving both insurers against insureds and disputes between insurers – over such a seemingly simple concept is remarkable. There are several reasons why – such as disputes over identifying what exactly was the "claim" "first made" and variations in policy language between consecutive insurers.

For an excellent example of just how divergent the views can be on the claims made notice issue, consider Friday's (unpublished) opinion from the Kentucky Court of Appeals in *AIG Domestic Claims v. Pike County Board of Education*.

The issue was notice under a claims made and reported errors and omissions policy. The claim was a lawsuit that was filed during policy Year 1, but not reported to the insurer until policy Year 2. It sounds like the paradigm claims made policy notice issue that a court should be able to resolve without breaking a sweat. Then how come the Kentucky Court of Appeals needed to reverse the trial court -- with all three judges on the Court of Appeals then filing separate opinions, including a dissenting opinion.

In actual fact, the case involved a Discovery Period endorsement that added a layer of complexity to it. But that doesn't take away from the variation in opinion on certain fundamental claims made notice issues that were raised by the court. The court concluded that no coverage was owed, but how it got there is the real story.

The majority opinion took the traditional road – "[W]e choose to follow the majority rule of other jurisdictions that failure to notify an insurer of a claim under a claims-based policy within the policy period will defeat coverage." *Pike County Board of Education* at 9.

A concurring opinion concluded that, because the insured renewed its claims made policy with the same insurer, its coverage must be continuous. "The policy was in force from July 1, 2005 through July 1, 2007, during which time the terms of the policy remained identical creating seamless coverage over the two year period. It is difficult to fathom that a claim accruing during the two policy periods would not be covered by either policy." *Pike County Board of Education* at 10-11. While the concurring opinion concluded that coverage was not owed, it was because the insured's fourteen month delay in giving notice violated the policy's requirement to provide notice "as soon as practicable." *Pike County Board of Education* at 12.

The flaw in the concurring opinion, with all due respect to Judge Thompson, is that the policy was not in force from July 1, 2005 through July 1, 2007, as stated. Rather, there were two policies, with one in force from July 1, 2005 through July 1, 2006 and another in force from July 1, 2006 through July 1, 2007. The concurring judge essentially argued that consecutive claims made policies concrete "one giant claims made policy" (my term, not the judge's) that extends the period for providing notice. But this argument is routinely rejected by courts, which instead conclude that each claims made policy is a separate contract that stands on its own.

Completing the claims made trifecta, Judge Caperton dissenting and would have remanded for consideration by the trial court as to whether the claim was reported in a reasonable time. However, the judge was fundamentally troubled by claims made policies in general, stating: "The insurance policy *sub judice* was for a policy period of one year. The promised term of one year is certainly elusive in a claims-made policy and begs for the attention of our judicial system. Consider a situation in which the insured is made aware of a claim during the last minute of the last hour of the policy period. I dare say anyone would argue that it is practical to report such a claim before the clock strikes midnight and the carriage which provides comfort to the insured collapses." *Pike County Board of Education* at 12.

A copy of the August 28 decision in *AIG Domestic Claims v. Pike County Board of Education* is attached.

Please let me know if you have any questions.

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