



Insurance Coverage Alert – February 2016

A Publication of Saiber LLC's
Insurance Coverage Litigation Group
www.saiber.com

NEW JERSEY SUPREME COURT REACHES SURPRISING DECISION THAT APPRECIABLE PREJUDICE IS NOT REQUIRED TO DENY COVERAGE BASED ON AN "AS SOON AS PRACTICABLE" NOTICE CONDITION IN A CLAIMS MADE POLICY

The Supreme Court of New Jersey held last week that an insurer did not have to demonstrate "appreciable prejudice" to rely on a condition that notice be provided "as soon as practicable" in a claims made Directors & Officers liability policy. *Templo Fuente de Vida Corp. v. National Union Fire Ins. Co. of Pittsburgh, P.A.*, -- A.3d --, 2016 WL 529602 (February 11, 2016). The insured in *Templo Fuente* did not tender the claim regarding a failed real estate transaction to National Union for more than six months. This notice satisfied the insuring agreement requirement that the claim be reported during the policy period but did not meet the condition that notice be provided "as soon as practicable."

Templo Fuente could have relied on *Cooper v. Government Employers Ins. Co.*, 51 N.J. 590 (1968), in which the Court applied an appreciable prejudice standard to the same "as soon as practicable" condition in an occurrence-based policy. Instead, the Court extended its strict interpretation of the claims made reporting obligations in *Zuckerman v. National Union Fire Ins. Co. of Pittsburgh, P.A.*, 100 N.J. 304 (1985), which held that such triggering language enabled insurers to calculate risks and premiums for claims made insurance with greater exactitude. The Court concluded in the instant decision that the notice condition served a similar function in the claims made context of furthering the insurer's ability to set reserves, control or participate in the insured's defense, and determine which policy is implicated.

Templo Fuente further reasoned that occurrence based policies are contracts of adhesion typically purchased by unsophisticated consumers, whereas consumers of claims made policies were "particularly knowledgeable insureds" who are better able to understand their coverage and deal with insurers on an equal footing. The Court noted as evidence of the *Templo Fuente* insured's sophistication that it had fourteen employees, was engaged in complex financial transactions, had a human resources department, and acquired the policy through a broker.

It remains to be seen how broadly *Templo Fuente* will be interpreted by the typically pro-policyholder New Jersey courts. The Court expressly declined to adopt a bright line rule regarding the notice condition and was seemingly persuaded by the insured's failure to explain the six-month delay. It is also not entirely clear whether the "as soon as practicable" condition will be consistently enforced as written in all claims made and reported policies, or could be subject to the

appreciable prejudice standard depending on the insured's degree of sophistication and bargaining power.

The Takeaway

Templo Fuente serves as a helpful reminder that claims made and reported policies ordinarily have multiple notice requirements. Even when the basic insuring language is satisfied, claims professionals handling claims made and reported policies under New Jersey law should consider whether they have a similar "as soon as practicable" condition and an unexplained delay in tendering notice. If factors such as the sophisticated nature of the insured's business and the utilization of a broker are present, such delay may present a viable defense to coverage even where the insurer has not sustained any resulting prejudice.

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