

ALERT

Reporting Requirement in Policy Conditions Does Not Create Claims-Made-and-Reported Coverage

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The United States District Court for the Northern District of California, applying California law, has denied an insurer's motion to dismiss its insureds' claim for breach of contract and bad faith, holding that a claims-made policy that includes a condition requiring claims to be reported "as soon as practicable, but in no event later than 30 days after the Policy Period" is not a claims-made-and-reported policy. *Newlife Scis. LLC v. Landmark Am. Ins. Co.*, 2014 WL 631141 (N.D. Cal. Feb. 18, 2014). As a result, the court concluded that the insurer was required to show prejudice due to the insureds' breach of the reporting condition. The court also held that the statute of limitations on the bad faith claim was tolled when the insureds tendered their defense and that the question of whether the insurer failed to comply with the California Insurance Code involved factual determinations not appropriately resolved on a motion to dismiss.

In June 2008, a cross-complaint was filed against the insured medical device manufacturer and two of its executives. An amended cross-complaint alleging what the insureds believe to be injury covered under their professional liability policy subsequently was filed in November 2008. One year later, the insureds tendered the defense of the amended cross-complaint to their insurer. The insurer denied coverage because the claim was reported more than 30 days after the expiration of the relevant policy. In May 2012, a second amended cross-complaint was filed and, in December 2012, the insureds again tendered the defense of the claim. After the insurer denied coverage a second time, the insureds filed suit against the carrier for breach of contract, bad faith, and unfair business practices based on the failure

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to comply with the claims-made notice requirements of the California Insurance Code.

Denying the insurer's motion to dismiss, the court first held that a notice requirement in the policy conditions only applied to bar coverage if the insurer was prejudiced by the insureds' breach. In so holding, the court distinguished claims-made and claims-made-and-reported policies, stating that the notice-prejudice rule applied only to the former:

The reporting requirement in a "claims made and reported" policy is, thus, not a condition of coverage but part of the coverage definition itself. Whereas an insurer bears the burden to show it was prejudiced by the insured's failure to comply with a reporting condition, it is the insured that bears the burden to show the claim was timely reported in a "claims made and reported" policy.

The insurer argued that the reporting requirement in the policy conditions was made part of the insuring agreement – thus rendering the coverage claims-made-and-reported – because the insuring agreement only obligated the insurer to pay damages because of injury "to which this insurance applies." The court rejected this contention, noting that the insurer cited no authority for this position and stating that "[s]uch a reading would defeat the interpretive rules . . . in which the onus is on the insured to prove a claim falls within the basic scope of insurance and on the insurer to prove any exclusions or conditions apply."

The court also denied the insurer's motion to dismiss the claims for bad faith and failure to comply with the California Insurance Code. With respect to the bad faith claim, the court held that (1) the insureds' tender of the amended cross-complaint tolled the applicable two-year statute of limitations and (2) whether the "genuine dispute" doctrine precluded a finding of bad faith presented factual issues not amendable to resolution on the pleadings. With respect to the insureds' claim that the insurer had engaged in unfair business practices by failing to comply with the notice requirements for claims-made policies set forth in Cal. Ins. Code § 11580.01, the court held that factual issues – specifically, whether the insurer "substantially complied" – precluded dismissal.

The opinion is available [here](#).