# Insurance Alert: Better Late than Never—Except when it Comes to Notice Under Claims-Made Insurance Policies

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We frequently field questions from our insured clients about whether and when to submit a claim to their insurers. Frequent concerns include:

- "Is the claim potentially significant enough to merit notice?"
- "This claim will likely resolve very quickly and at a limited cost, so should we really give notice?"
- "We are concerned about increased premiums if we submit notice of claims too frequently."

With limited exceptions, our advice is to provide prompt notice of the claim to all carriers under all potentially implicated insurance policies.

A recent decision highlights the importance of prompt notice. In *Food Market Merchandising, Inc. v. Scottsdale Indemnity Company*, No. 16-347(8th Cir, May 25, 2017), the court affirmed the trial judge's entry of summary judgment for Scottsdale based on late notice. The Scottsdale policy provided "claims-made" coverage for business and management risks, including employment practices liability. The policy required that the insured provide notice of a claim "as soon as practical, but in no event later than sixty (60) days after the end of the Policy Period."

Food Market Merchandising (FMM) was sued in January 2014 by a former employee, claiming that his commission had been shorted on a new product line. FMM retained its own lawyers to defend the claim. The court entered partial summary judgment in favor of the former employee in June 2014. Then, two months later, FMM first provided notice of the claim to Scottsdale. Scottsdale denied coverage, based in part on FMM's failure to provide timely notice and brought a declaratory judgment action to establish that it had no

duty to defend or indemnify FMM. The trial court entered summary judgment in favor of Scottsdale, finding that FMM had failed to provide timely notice of the claim.

On appeal, FMM argued that summary judgment was improper because Scottsdale had failed to establish that it had suffered any prejudice as a result of FMM's late notice. After all, FMM hired competent defense counsel and had every incentive to protect its interests. Nevertheless, the court of appeals rejected FMM's lack-of-prejudice argument, finding that under Minnesota law, as in many other jurisdictions, prejudice is not a defense under claims-made policies where timely notice is a "condition precedent" to coverage.

FMM also claimed that its notice was timely since it was given before the policy expired. The court disagreed, noting that such an interpretation would moot the requirement that notice be given "as soon as practicable." Significantly, the appellate court observed that FMM had offered no excuse for its delay, and therefore, no jury issue as to whether FMM had given timely notice to Scottsdale. As a result of this decision, FMM lost all of the policy benefits, including reimbursement of its defense costs and the costs to settle the former employee's claims.

This decision highlights the importance of the insured providing timely notice, particularly under "claims-made" insurance policies. Most management liability policies are written on a "claims-made" basis, whereas most general liability and excess policies are written on an "occurrence" basis. In addition to complying with all notice requirements, the insured should look carefully at how the policy defines a "claim." In most cases, something less than a traditional lawsuit, such a "written demand" for payment or request to suspend the statute of limitations, qualifies as a claim. A broad definition of "claim" can be beneficial to the policyholder. However, the flip side is that a claim triggers the policyholder's notice obligation. As the *FFM* case vividly illustrates, the failure to comply with the notice obligation can be fatal.

Therefore, it is critical that the insured communicate with coverage counsel about notice obligations as soon as possible after receipt of a potential claim. Notice provisions vary based not only on the type of coverage (e.g., occurrence-based or claims made), but also by carrier and year the policy was issued.

If you have any questions or uncertainties about the recent *FFM* ruling and its implications for your organization, please feel free to contact Rick Kubler (612.632.3224) or Nick Nierengarten (612.632.3040).