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New Jersey Supreme Court Holds That Late Notice Destroys Coverage Even without Prejudice

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In *Templo Fuente De Vida Corp. v. National Union Fire Insurance Co.*, No. 074572, 2016 N.J. LEXIS 144 (Feb. 11, 2016), the New Jersey Supreme Court confronted a claims-made directors and officers policy that required the policyholder to provide notice "as soon as practicable." The policyholder provided notice during the policy period as required — six months after receiving the claim. The policyholder did not provide an explanation for the delay. The Supreme Court held that the six-month delay was not notice "as soon as practicable," and upheld the insurance company's denial of coverage. Notably, the Supreme Court allowed the insurance company to disavow coverage while not requiring the insurance company to prove that it had incurred prejudice as a result of the late notice.

It is settled law that under a claims-made policy, the policyholder must provide notice of a claim during the policy period. Notice under a claims-made policy after the end of the policy period is usually fatal to coverage. The insurance company does not need to show prejudice. In *Templo Fuente*, the policyholder's notice was made during the policy period. Still, the Supreme Court has now extended the "no prejudice" rule to notice within the policy period.

The Supreme Court limited its holding to the facts before it, emphasizing that the delay in providing notice was unexplained. The court did not cast any light on what it might consider to be excusable delay. It also did not elucidate what might be an acceptable delay — is three months too long? The court specifically stated, "we need not and do not draw any 'bright line' on these facts for timely compliance with an 'as soon as practicable' notice provision."

Claims-made policies define "claim" differently depending on the insurance company and the policy at issue. One typical definition is "any written demand for monetary or non-monetary relief." A policyholder may wait to provide notice because: (1) it does not recognize a particular communication as a "claim"; and (2) companies focus on defending against a claim, rather than securing insurance coverage. Policyholders should attempt to secure in their claims-made policies a clause that limits the notice requirements. For example, favorable policy language would require notice of a claim only when a "written demand for monetary or non-monetary relief" is received by the policyholder's risk manager.

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"As soon as practicable" is not a novelty. The New Jersey Supreme Court analyzed this phrase in 1968 in the context of an automobile liability policy. *Cooper v. Government Employees Insurance Co.*, 51 N.J. 86 (1968). In that case, the Supreme Court held that it would not foreclose coverage for late notice unless the insurance company demonstrated "appreciable prejudice." In *Templo Fuente*, the court drew a sharp line between occurrence policies, such as general liability and claims-made policies. It also indicated that it might draw a line between individuals and "unsophisticated" policyholders versus "sophisticated" policyholders who used insurance brokers to negotiate policies.

Templo Fuente casts a heavy burden on policyholders. Most corporate policies outside of general liability are claims-made, such as errors and omissions, directors and officers, and employment practices liability insurance. While a filed complaint is easily recognized as a "claim," claims-made policies may be triggered by an angry letter from a shareholder or a letter from a former disgruntled employee. We can only hope that *Templo Fuente* is an aberration that does not indicate the future direction of New Jersey's generally pro-policyholder insurance law.