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Better Late Than Never? Not So for Directors' and Officers' Liability Coverage

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Directors and officers facing liability claims, including investigations and enforcement proceedings, must pay careful attention to the notice provisions of their directors' and officers' (D&O) liability coverage policies and ensure that they report claims to their insurer in a timely manner. As a recent decision of the Court of Appeal for Ontario confirms, the failure to do so can result in coverage being denied.

Key Takeaways

- Depending upon the wording of the policy, the requirement to provide notice of a claim to an insurer during the policy period can constitute a condition precedent to D&O coverage written on a claims-made basis. This is different from a policy written on an occurrence basis, which provides coverage for incidents that take place during the policy period, regardless of when the claim is brought.
- If notice in a claims-made policy is a condition precedent to coverage and is not made in a timely manner, the equitable remedy of relief from forfeiture is unlikely to be available. The failure to provide such notice is likely to be characterized as a "non-compliance" for which relief from forfeiture is not available.
- If there is a legal prohibition on disclosing an investigation or a proceeding to the insurer, the terms of the applicable statute should be carefully reviewed. The *Securities Act* (Ontario) (OSA) was amended in December 2019 to allow the subjects of confidential investigations of the Ontario Securities Commission (OSC) to notify their insurers about an investigation under certain conditions.
- Even if there is a statutory prohibition on disclosing the terms of a confidential investigation to the insurer, the director or officer should consult experienced counsel on how to best proceed in these circumstances.

The Decision

In *Furtado v Lloyd's Underwriters*, the Court of Appeal for Ontario considered whether the directing mind of certain entities (Director) was entitled to claims-made D&O coverage arising out of an OSC investigation commenced in March 2019. The investigation was not reported to the insurer until almost three years later – in February 2022. Given the obvious delay in notifying the insurer, at issue was whether the Director could seek the equitable remedy of relief from forfeiture, which would have allowed the Court to grant him coverage notwithstanding the delay.

The Director argued that his obligation to notify the insurer of the investigation had been suspended by virtue of a confidentiality order of the OSC and that there was no substantial breach or prejudice to the insurer. The Director also argued that his "imperfect compliance" with the insurance policy should be excused and that he should be afforded coverage.

It bears noting that, in December 2019, the OSA was amended to permit subjects of confidential investigations to inform their insurers. In fact, the Director was advised of his right to do so by the OSC beginning in February 2021 (a year before he reported the claim to his insurer).

The Court of Appeal affirmed the decision of the court below to deny relief from forfeiture. Critically, the Court of Appeal held that "where the wording of a claims-made and reported policy makes clear that the making and reporting of a claim are the triggering events for coverage, the failure to comply with a notice provision constitutes non-compliance with an essential condition of coverage such that there can be no relief from forfeiture." Put simply, if a claims-made policy makes notice a condition precedent for coverage, relief from forfeiture is unavailable if notice is not given in a timely manner.

The foregoing analysis is different with respect to occurrence policies, which provide coverage for incidents that take place during the policy period, regardless of when the claim is brought. Under such policies, notice does not form part of an integral part of the event triggering coverage. Relief from forfeiture therefore remains a viable remedy.

Implications

Given the strict manner in which the Court of Appeal interpreted the notice provisions of claims-made and reported policies, directors and officers and their counsel would be prudent to ensure strict compliance with the notice provisions of D&O policies.

This decision is also a reminder that if a confidentiality order has been made preventing notice to the insurer in the context of an investigation, insureds should consult experienced counsel on how to best proceed with respect to their insurer and the regulators.

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