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# Colorado Supreme Court Rejects Notice-Prejudice Rule for Claims-Made Policies

In its recent decision in *Craft v. Philadelphia Indem. Ins. Co.*, 2015 CO 11 (Feb. 17, 2015), the Colorado Supreme Court, on a certified question from the United States Court of Appeals for the Tenth Circuit, had occasion to consider whether a prejudice rule should apply to claims-made policies requiring reporting within a specified period.

Over a decade ago, Colorado's Supreme Court adopted a notice-prejudice rule for cases involving auto policies and occurrence-based general liability policies. *Clementi v. Nationwide Mutual Fire Insurance Co.*, 16 P.3d 223, 230 (Colo. 2001); *Friedland v. Travelers Indem. Co.*, 105 P.3d 639, 643 (Colo. 2005). The policy at issue before the Court in *Craft* was a directors and officers policy requiring that the claim first be made during the policy period and that the insured report the claim to the insurer – Philadelphia Indemnity Company – within sixty (60) days of the policy's expiration.

In the underlying matter, an officer of the insured was sued for alleged misrepresentations he made in connection with a merger. The individual was unaware of the Philadelphia D&O policy until some sixteen months after it had already expired. When he later tendered the suit, Philadelphia denied coverage as a result of the claim not having been reported within the time period specified. In the ensuing coverage litigation, the Colorado federal district court granted Philadelphia's motion to dismiss. On appeal to the Tenth Circuit, the court elected to certify two questions to the Colorado Supreme Court: (1) whether the notice-prejudice rule applies to claims-made liability policies in general; and (2) if so, whether the rule applies to both types of notice requirements in those policies.

In considering these questions, the Court reframed the certified questions into a single question, that being whether the notice-prejudice rule applies to the date-certain notice requirement of claims-made policies. After considering the nature and purpose of such policies, and the public policy behind the notice-prejudice rule, the Court answered the question in the negative.

In so doing, the Court distinguished the notice requirement under an occurrence policy and the reporting requirement in a claims-made policy, explaining:

... a date-certain notice requirement fulfills a very different function than a prompt notice requirement. Whereas a prompt notice requirement serves to allow the insurer to investigate the claim and negotiate with the third party asserting the claim, the date-certain notice requirement defines the "temporal boundaries of the policy's basic coverage terms."

Just as significantly, explained the Court, ordinary principles of contract required the enforcement of the policy's express reporting condition, noting that imposing a prejudice requirement under such a policy would alter the basic terms of the agreement. The Court also found an economic rationale for its decision, reasoning that imposing a prejudice requirement for claims-made policies would significantly harm the insurance market in Colorado:

Such a result would significantly diminish the advantages of claims-made policies for both insurers and insureds: insurers could no longer "close the books" on previous policy periods, and policy premiums presumably would rise to account for the risk that an insured might notify the insurer of a claim after the policy period has expired. Even if insurers could somehow compensate for the additional risk, extending the notice-prejudice rule to the date-certain notice requirement of claims-made policies likely would decrease the availability of this type of insurance product in Colorado.

The Court also rejected the insured's argument that at the very least, a notice-prejudice rule should apply when the insured renews its policy on a successive basis, or "seamless" coverage – a rule adopted by courts in Ohio and Kentucky.