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Harvard's $15M Mistake: Failure to Adhere to Technical Notice Requirements in Insurance Policy May Lead to Significant Forfeiture

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The widely publicized U.S. Supreme Court case addressing Harvard University's (Harvard) admissions practices not only concerns a significant constitutional issue but also serves as a cautionary tale for businesses and institutions with excess liability insurance policies. Last month, the U.S. District Court of Massachusetts overseeing coverage litigation related to the admissions practices challenge held that Harvard was entitled to *zero dollars* of $15 million in excess coverage purchased from Zurich American Insurance Company (Zurich) because Harvard failed to comply with certain aspects of a notice provision in the policy. As Harvard prepares to appeal this decision to the First Circuit, policyholders would do well to familiarize themselves with the notice requirements in their own policies.

Most businesses follow the best practice of placing at least their primary insurers on notice soon after claims are presented, but they may be less aware of whether, when, and how to provide notice to their excess insurers. Unlike in other areas of law, "notice" does not necessarily include "constructive notice" or even "actual notice" in the insurance context. This is because many states still adhere to a Byzantine rule of law resulting in the forfeiture of all coverage unless the policyholder strictly adheres to all technical notice requirements in all of their policies. In Harvard's case, overlooking the terms and conditions of the notice provision may have been a $15 million mistake.

The District Court of Massachusetts was unmoved by Harvard's argument that Zurich undoubtedly knew of the affirmative action lawsuit that has gained nationwide attention in recent years. The court explained that "Massachusetts law is clear that (1) the unambiguous terms of an insurance policy must be strictly enforced and (2) an insured's failure to comply with the notice provision of a claims-made policy bars coverage."[1] The absence of prejudice–or Zurich's "constructive, or even actual, knowledge"–would not change the result, the court explained.[2]

Harvard's loss emphasizes the importance of four recommended best practices policyholders should follow when presented with a claim:

- **Notify *All* Carriers–Primary and Excess** Policyholders might assume that providing notice to their primary insurer is sufficient to protect their interests. However, excess policies often have their own notice provisions requiring that notice of a claim be provided directly to the excess insurer during the policy period (regardless of whether it is apparent that the excess policy will be implicated). Thus, providing notice to the excess insurer only after it appears that excess coverage may be triggered can lead to the forfeiture sustained by Harvard. Policyholders should give broad notice under *every* potentially applicable insurance policy as soon as possible.

- **Provide Notice in the Manner and Method Required by the Policy's Terms** Almost every insurance policy contains instructions on where and how to give notice to the insurer. Policyholders must review their policy and provide written notice in the manner and method provided for in the policy. As the *Harvard* decision illustrates, calling a claims hotline or emailing the insurance company's claims department does not always suffice–actual notice may be insufficient if not in conformity with the policy's technical requirements. Policies also sometimes require

[1] *President & Fellows of Harvard Coll. v. Zurich Am. Ins. Co.*, 2022 WL 16639238, at *1 (D. Mass. Nov. 2, 2022).
[2] *Id.* at *2.

that notice be given to a third-party claims handler. In these cases, contacting the insurer directly may also run afoul of the "strict adherence" rule.

- **Negotiate Endorsements That Limit the Insurers' Late Notice Defense**
  To avoid a "gotcha" late notice denial like the one at issue in the *Harvard* decision, policyholders can protect themselves by negotiating for an endorsement to their policies providing that an insurer may not disclaim coverage on notice grounds unless the insurer is materially prejudiced by a delay in giving notice. Policyholders might also seek an endorsement providing that the "clock" for providing notice does not begin to run unless and until senior management is aware of the claim. Additionally, a provision that prohibits insurers from asserting a late notice defense where the policyholder is asked by law enforcement to keep the claim confidential can further protect a policyholder. These provisions to a policy can supersede the "strict adherence" rule and may help companies avoid the draconic result in *Harvard*. Policyholders should ask their broker or consult with experienced coverage counsel to explore these types of endorsements during their next renewal.

- **Institute Procedure to Route All Legal Proceedings and Demands to Designated Officer**
  To avoid the potential forfeiture suffered by Harvard, policyholders should also develop internal controls that ensure all legal proceedings and demands, both written and oral, are referred to a designated corporate officer. Often, a policyholder's employees and agents will be unfamiliar with what constitutes a claim under their policy. By routing all demands to a designated officer who, with the assistance of experienced coverage counsel, can determine whether notice should be given under any policies the business possesses, policyholders can ensure that valuable coverage is not sacrificed due to a late notice defense.

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