SDNY Holds Claims-Made-and-Reported Reporting Requirement Not Waivable

Anthony L. Miscioscia and Margo Meta
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The United States District Court for the Southern District of New York (SDNY) recently addressed this issue in *Hunt Construction Group v. Berkley Assurance Company*, Case No. 19-cv-8775, 2021 U.S. Dist. LEXIS 183350 (S.D.N.Y. Sept. 24, 2021). The court, following established New York law, held that "[i]n the context of claims-made-and-reported insurance policies, where the timing of a claim reporting establishes the contours of policy coverage, an insurer's late-reporting defense is not subject to waiver."

In 2014, Hunt Construction Group, Inc. (Hunt) was retained as a general contractor for a construction project (Project). Berkley Assurance Company (Berkley) issued a series of claims-made-and-reported professional liability insurance policies to Hunt for the policy periods of June 15, 2016 to June 15, 2017 and June 15, 2018 to June 15, 2019. On February 16, 2017, the Project's owner sent a "Notice of Claims" letter to Hunt, alleging that Hunt had mismanaged the Project, and requested that Hunt correct certain issues. The policies issued by Berkley provided that a "Professional Claim" included a written demand seeking correction of "Professional Services," which included project management. Hunt failed to notify Berkley of the "Professional Claim" until after November 2018, when the Project's owner sued Hunt. Although Berkley initially defended the lawsuit under a reservation of rights, including "the right to deny coverage" pending further investigation, it denied coverage seven months later on the basis that the notice was untimely.

In a prior decision, *Hunt Construction Group, Inc. v. Berkley Assurance Company*, 503 F. Supp. 3d 106 (S.D.N.Y. 2020), the court determined that Berkley waived its late notice defense because it had defended for seven months prior to rejecting coverage. Berkley filed a Motion for Reconsideration on the basis that a claims-made-and-reported policy's reporting requirement is not waivable under New York law.

Upon reconsideration, the court agreed with Berkley, finding that a series of New York cases required a finding of no waiver. The *Hunt* court cited to the following decisions: *Berkley Assurance Company v. Hunt Construction Group, Inc.*, 465 F. Sup. 3d 370 (S.D.N.Y. 2020) (stating that "Hunt fails to cite, and the Court has not found, any case holding that an insurer waived [a non-coverage based on late reporting] argument under a claims-made-and-reported policy); *Calocerinos & Spina Consulting Engineers, P.C. v. Prudential Reinsurance Co.*, 856 F. Supp. 775 (W.D.N.Y. 1994) (noting that "because the timing of notice is the trigger for coverage in a claims made policy and is thus material to the existence or nonexistence of coverage, the waiver doctrine cannot apply"); *McCabe v. St. Paul Fire & Marine Insurance Company*, 914 N.Y.S.2d 814 (4th Dep't 2010) (finding that "the overwhelming weight of authority holds that such an argument [for non-coverage based on late reporting] is not subject to waiver because the doctrine of waiver 'may not operate to create coverage where it never existed'"); *Certain Underwriters at Lloyds London v. Advance Transit Company Incorporated*, 188 A. D.3d 523 (NY. App. Div. 2020) (affirming lower court's holding that failure to timely report a claim under a claims-made-and-reported policy precluded coverage, even though the insurer initially defended subject to a reservation of rights).

If you have any questions or need more information, contact Anthony L. Miscioscia (miscioscia@whiteandwilliams.com; 215.864.6356) or Margo E. Meta (metam@whiteandwilliams.com; 215.864.6219).