

“Massachusetts Federal Court Upholds Denial of Coverage for Defense Costs Under an Excess Policy Because Insured Failed to Provide Timely Notice Under a Claims-Made and Reported Policy ”

In *President & Fellows of Harvard Coll. v. Zurich Am. Ins. Co.*, No. 21-CV-11530-ADB, 2022 WL 16639238 (D. Mass. Nov. 2, 2022), Harvard University (“Harvard or the University”) filed suit against Zurich American Insurance Company (“Zurich”) for defense costs under an excess claims made and reported policy (the “Policy”). The United States District Court for Massachusetts sided with Zurich and found that the University failed to timely satisfy the notice requirements of the Policy.

The claim arises from a lawsuit filed in 2014 by the Students for Fair Admission, Inc. (“SFFA”) which alleged that Harvard’s student admissions program and affirmative action policy violates Title VI of the Civil Rights Act by discriminating against Asian American applicants. The University’s affirmative action policy also became subject of a related DOJ investigation that was launched in 2017.

Harvard timely notified its primary carrier, National Union Fire Insurance Company of Pittsburgh, P.A. (“National Union”). The National Union policy had a \$25 million limit and treated the underlying SFFA lawsuit and the DOJ investigation as a single claim. However, when the University formally notified Zurich, of the underlying claim in May 2017, Zurich declined coverage on the grounds that Harvard did not give timely written notice of the claim. In order to access the Policy’s \$15 million in limits, the Zurich Policy required that claims are: (1) made during the policy period of November 1, 2014 to November 1, 2015 and (2) reported in writing to Zurich no later than 90 days after the end of the policy period. Under the Policy terms, notice was supposed to be given no later than January 30, 2016.

The University subsequently filed suit against Zurich for breach of contract and declaratory judgment for coverage and payment of defense costs under the Policy. It claimed that its defense costs had already exceeded the National Union limits and will continue to accrue for the SFFA action and the DOJ investigation. Notably, the SFFA lawsuit is on appeal before the U.S. Supreme Court and the DOJ investigation remains pending at the present.

In defense of its lack of timely notice, the University argued that Zurich had both constructive and actual knowledge of the claims against it prior to the deadline because it was aware that National Union was covering the first \$25 million of defense costs, and because the underlying lawsuit had been given significant media coverage and was even discussed at meetings where Zurich personnel were present. The Court disagreed and stated that, “Massachusetts law is clear that (1) the unambiguous terms of an insurance must be strictly enforced and (2) an insured’s failure to comply with the notice provision of a claims-made policy bars coverage.” The Court further noted that under Massachusetts law, prejudice to the insurer, or the insurer’s actual or constructive knowledge of the claim, are not exceptions to the general rule. The Court held that “Zurich’s lack of prejudice, or constructive, or even actual knowledge would not change Harvard’s obligation to provide notice in full compliance with the terms of the Policy.”

Harvard plans to appeal the decision.