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Comply with policy terms – or pay the price

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The recent American case of President and Fellows of Harvard College v Zurich American Insurance Company considered the implications for a policyholder of failing to comply with the notification policies in their insurance policy

Facts

In 2014, a lawsuit was filed against Harvard College for alleged unconstitutional admission policies. Harvard benefitted from an insurance programme to cover such claims, which comprised of a primary policy with AIG to a limit of USD25 million, with a USD15 Million over USD25 million excess layer policy with Zurich.

Harvard initially defended the claims with support from AIG, its primary insurer. When the limit of the primary policy was exhausted, Harvard notified Zurich of the claims. However, this notification was some 17 months after the date when notification should have been given under the excess layer policy, which was written on a 'claims made and reported' basis, subject to a 90 day grace period at the end of the policy period. Zurich repudiated policy liability on account of a breach of the notification obligations.

There was little doubt that the notification obligations had not been complied with. However, Harvard argued that Zurich has constructive knowledge of the claims, which has been the subject of significant publicity. Accordingly, Harvard argued that formal notice in accordance with policy terms was not required and that Zurich could not have been prejudiced by the late notice. Essentially Harvard argued that insurers were taking advantage of a technicality.

Judgment

In judgment, the court emphasised that under Massachusetts' law the unambiguous terms of an insurance policy must be strictly enforced and an insured's failings to comply with the notice term of a claims-made-and- report policy entitled insurers to take the stance they did.

Whilst all cases are subject to their particular facts and the jurisdiction in which they are heard, this case is an important reminder of the overarching principal of contract law in most jurisdictions; namely that the meaning of the words used – if unambiguous – will be applied (particularly between commercial parties

It is also worth noting that many policy wordings are not worded as tightly as the wording in this case. If notification obligations are not drafted as conditions precedent, there will generally be more scope for policyholders to argue that coverage should still apply (albeit with allowance given for prejudice suffered due to the late notice).

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Our expertise