

ALERT

Harvard's Lawsuit Against Zurich

A Painful Lesson Regarding Untimely Reporting and How You Can Avoid It

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As Harvard's recent legal challenges to its admissions criteria head to the Supreme Court, it is vital that insureds learn from Harvard's concurrent insurance coverage case, which highlights the importance of timely reporting to all potentially impacted insurers and the consequences borne by Harvard for its failure to do so.¹

By 2021, Harvard exhausted its \$25-million primary liability insurance policy limit after years of litigating and defending the alleged discrimination lawsuit filed in 2014 and a related 2017 Department of Justice probe, and so it sought an additional \$15 million for ongoing and continuing legal fees and costs from Zurich, its excess policy carrier, for payment of those costs.

While Harvard had provided timely notice to its primary insurer back in 2014, it had waited until 2017 to provide written notice to Zurich. Zurich reserved its right to deny coverage, and thereafter denied coverage based upon Harvard's failure to provide timely notice in accordance with the terms and conditions of its "claims-made-and-reported policy." In 2021, Harvard filed a lawsuit against Zurich when Zurich refused to reconsider its denial of coverage.

On November 2, 2022, the United States District Court dismissed Harvard's appeal of Zurich's successful motion for summary judgment, which ended Harvard's lawsuit seeking \$15 million in excess liability coverage. Harvard argued that while it may not have complied with the strict reporting requirements to its excess insurer, Zurich had knowledge of the lawsuit and was not prejudiced. The District Court disagreed with Harvard and held that the language under the "claims-made-and-reported policy" was clear and unambiguous and must be strictly enforced under Massachusetts' law. Courts in other jurisdictions have similarly held in cases involving the enforceability of clear and unambiguous language in policy contracts.

According to the District Court, those claims covered needed to be made during the policy period and reported in writing no later than 90 days after the end of the policy period. Providing notice in accordance with the policy was a condition precedent to requiring Zurich to fulfill its obligations under the policy contract. "Prejudice and actual or constructive knowledge are not exceptions to the general rule." (*President and Fellows of Harvard College*, *supra*, 2022 WL 16639238 at p. 2). "Nor is an insurer's actual or constructive knowledge of a claim sufficient notice to trigger coverage obligations under such a policy." (*Id.* at p. 3). Harvard's failure to comply in a timely manner with the express notice requirements eliminated any duty on the part of Zurich to provide liability coverage.

Harvard's painful lesson is one that should prompt your firm to consider the following:

- Insurers usually require prompt notice, in writing, of any claim or suit brought against your firm, as well as any act, error or omission, which could reasonably be expected to be the basis of a claim or suit made against your firm (referred to by many insurers, and hereafter, as a potential claim);

¹ *President and Fellows of Harvard College v. Zurich American Ins. Co.*, 2022 WL 16639238 (D. Mass. Nov. 2, 2022).
<https://fingfx.thomsonreuters.com/gfx/legaldocs/akpeqgymnpr/harvard-v-zurich-order-2022-11-02.pdf>

- Review all terms and conditions in your firm's policy, including excess and supporting policies or Memoranda of Insurance, to make sure you understand them, particularly your duties and responsibilities to properly, timely, and fully report any suit, claim or potential claim, as required under those terms;
- In particular, understand the difference between a claim and a potential claim, which often have different applicable notice timing requirements. In order to effectively leverage the protection of the potential claim notice feature consider training professionals on what constitutes a potential claim and implementing a process to regularly poll professionals for knowledge of a claim or potential claim;
- Implement policies and procedures intended to ensure your firm's proper and timely notice to all of its primary and excess insurers of any claims or potential claims in the proper form, under the correct policy period, and directed to the proper addressee at the correct address with a copy to your insurance professional;
- Retain documentation of all notices sent to insurers, and all written acknowledgments of your firm's notice of any claim or potential claim from the insurers and any designated representatives; and
- If you are unclear about any of the terms or language in your insurance policy, you should make sure to consult with your firm's counsel and inquire with your insurance broker.

If you would like to discuss any of the reporting terms and conditions under your firm's current policies, please contact our Accounting Firm Service Team.

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