



## LAW ALERT

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### Insurer Waived Ability to Disclaim Coverage

### After Failing to Provide Timely Reservation of Rights Notice to Underlying Claimant

On November 24, a United States District Court in D.C.,<sup>[1]</sup> presiding over an insurance coverage dispute involving an underlying legal malpractice claim, held that an insurer is obligated to pay any judgment the underlying claimant receives because the insurer did not timely notify the underlying claimant that the insurer reserved its right to disclaim coverage to the insured-attorney.

Atlanta Channel, Inc. (“ACI”) filed a legal malpractice lawsuit against its former attorney for allegedly submitting a defective application with the Federal Communications Commission in 1999. National Casualty Insurance Co. (“National Casualty”) insured the attorney under a professional liability policy. Although the alleged malpractice occurred in 1999, the attorney did not notify National Casualty until 2012. After receiving (potentially late) notice of the malpractice suit, National Casualty agreed to defend its insured-attorney under a reservation of rights (“ROR”), indicating that the insured-attorney breached his notice requirement under the terms of the professional liability policy by failing to provide National Casualty with timely notice. Notably, National Casualty did not contemporaneously provide the underlying claimant (i.e., ACI) with notice of the ROR.

National Casualty subsequently filed the subject declaratory judgment action, seeking a ruling that it had no obligation to defend or indemnify its insured-attorney based on the late notice. In issuing its decision against National Casualty, the Court relied on a Virginia statute,<sup>[2]</sup> which requires insurers to notify an underlying claimant within forty-five days of discovering that an insured breached the terms or conditions of an insurance contract.

As it was undisputed that National Casualty failed to provide the underlying claimant (i.e., ACI) with timely notice of its ROR, the Court held that the underlying claimant (i.e., ACI) could enforce any judgment against National Casualty, despite the insured-attorney’s breach of the insurance policy (and National Casualty’s timely disclaimer to the insured-attorney). In other words, the insurer’s failure to provide timely notice of the ROR to the injured party resulted in the insurer’s obligation to pay a claim it was not otherwise obligated to pay.

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**New York insurers beware** -- New York has a similar statute dealing with timely notice to underlying claimants, namely New York Insurance Law § 3420(d)(2). Insurance Law § 3420(d)(2) requires insurers to provide notice, within a reasonable amount of time, to the insured, the injured person or any other claimant, related to disclaimers or denials of coverage for death or bodily injury claims. Insurers must be keenly attentive to their notice obligations, or risk the possibility of waiving the ability to disclaim coverage.

Ruskin Moscou Faltischek, P.C. has a dedicated Insurance & Insurance Litigation Group with seasoned attorneys who regularly counsel clients on the full spectrum of insurance coverage and insurance defense issues (including timely notice and disclaimer obligations). Should you have any questions, please do not hesitate to contact us.

[1] In *National Casualty Insurance Company v. Solomon*, No. 20-699 (D.D.C. Nov. 24, 2020).

[2] In this case, Virginia law governed this issue.

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