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Prejudice Rule Applies To Property Claims, Colo. Justices Say

By **Hope Patti**

Law360 (March 11, 2024, 7:22 PM EDT) -- A rule excusing some policyholders for filing late claims applies to occurrence-based, first-party homeowners' property policies, a divided Colorado Supreme Court held Monday, reversing two insurers' wins in a pair of coverage disputes over hail damage.

In a **4-3 ruling**, the majority said public policy considerations identified in the court's 2001 ruling in Clementi v. Nationwide Mutual Fire Insurance Co. supports application of the notice-prejudice rule, which requires insurers to show that they suffered prejudice from late notice of a claim before they can deny coverage on that basis.

"Our recent cases have consistently applied the notice-prejudice rule to occurrence policies like those at issue, in which the purpose of notice is to allow an insurer to investigate and defend against the claim and is not a fundamental term defining the temporal boundaries of coverage (unlike in a claims-made policy)," Justice Richard L. Gabriel said for the majority.

The high court has previously held that the notice-prejudice rule does not apply to claims-made policies because a date-certain notice requirement is an essential term of such insurance contracts.

"The same principle does not apply in the context of occurrence policies," Justice Gabriel said, adding that holding otherwise "effectively converts the policies at issue to claims-made policies, notwithstanding the insurers' failure to comply with any of the statutory requirements for such policies."

In the two cases before the high court, Safeco Insurance Co. of America and Owners Insurance Co. denied their respective policyholders' claims for hail damage because the homeowners notified their insurers after the one-year notice period set forth in their policies.

Safeco's policyholder, Karyn Gregory, said she discovered hail damage 18 months after the May 2017 storm that caused it, while Lisa Runkel and Sylvan T. Runkel III found damage from a July 2019 hailstorm within the notice period but didn't report it to Owners until 10 days after the period had ended.

After filing suit against Safeco in December 2019, the court ruled in favor of the insurer on the basis that Gregory's claim was untimely and unreasonable. An appeals **panel affirmed**, finding that Colorado's "traditional approach" to late-claim notices relieved Safeco of its coverage obligations regardless of whether the insurer was prejudiced by the delay.

The Runkels also sued Owners after the insurer denied their claim as untimely; however, the court found that the notice-prejudice rule didn't apply and held that the policy clearly required the Runkels to provide notice within one year of damage. An appeals panel affirmed, citing the court's previous ruling in Gregory.

The high court **later granted** the policyholders' separate petitions for writ of certiorari and **heard oral arguments** in October.

Colorado courts have historically not considered insurer prejudice in coverage disputes over late notice, Justice Gabriel said. Instead, they have followed the "traditional approach" applied in the high court's 1909 ruling in Barclay v. London Guarantee & Accident Co.

The high court departed from the traditional approach in Clementi, when it applied the notice-prejudice rule in the context of an uninsured motorist claim, according to the ruling.

In Clementi, the court noted three policy concerns for departing from the traditional approach — the adhesive nature of insurance contracts, the public's interest in compensating tort victims and the inequity of allowing an insurer to receive a windfall from a technicality — which "apply with equal force here," Justice Gabriel said.

Though Gregory and the Runkels are not "tort victims per se," Justice Gabriel noted that the reasons for compensating tort victims apply equally to the coverage suits at issue.

"The insureds here are in essentially the same position as tort victims, given that they experienced losses through no fault of their own and they had purchased insurance to protect themselves from such losses," the justice said.

In cases involving occurrence-based, first-party homeowners' policies, courts must follow the two-step approach to analyzing late notice coverage outlined in Clementi, the majority held.

First, courts must determine whether an insured's notice was timely or whether any delay was reasonable. If notice was timely or delay was reasonable, then the analysis ends there and coverage exists. But if notice was untimely and delay was unreasonable, then the court must determine whether the insurer was prejudiced by such untimely notice, which is up to the insurer to prove.

As such, the court remanded Gregory's suit to give Safeco an opportunity to establish prejudice from the late notice and remanded the Runkels' suit to determine whether the couple's late notice was unreasonable.

In a dissenting opinion, Justice Melissa Hart said the majority's extension of the notice-prejudice rule relies on a misunderstanding of the insurance market. Chief Justice Brian D. Boatright and Justice Monica M. Márquez joined in the dissent.

In extending the rule to first-party homeowners' property insurance claims, "the majority creates a new, exceedingly abstract 'public policy' that it concludes should override Colorado's long-standing protection of the freedom to contract," Justice Hart said. "I fear this, together with the majority's limited understanding of the insurance industry, will have far-reaching consequences on the availability and cost of insurance in our state."

Representatives of the parties did not immediately respond to requests for comment Monday.

Gregory is represented by David M. Roth of The Roth Group.

Safeco is represented by Brian J. Spano, Kendra N. Beckwith and Holly C. White of Lewis Roca Rothgerber Christie LLP.

The Runkels are represented by Rodney J. Monheit and Katherine E. Goodrich of MoGo LLC.

Owners is represented by Adam P. O'Brien and Lindsay M. Dunn of Wells Anderson & Race LLC.

The cases are Gregory v. Safeco Insurance Co. of America, case number 2022SC399, and Runkel et al. v. Owners Insurance Co., case number 2022SC563, in the Colorado Supreme Court.

--Additional reporting by Thy Vo. Editing by Emma Brauer.