APPENDIX

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Stormo v. State Nat'l Ins. Co., 116 F.4th 39 (1st Cir. 2024)

Joan Stormo, as assignee of Peter T. Clark, Plaintiff, Appellant,
v.
State National Insurance Company, Defendant, Appellee.
No. 23-1792.
United States Court of Appeals, First Circuit.
September 19, 2024.
116 F.4th 39 (2024)

[116 F.4th 41]
Appeal from the United States District Court for the District of Massachusetts,
[Hon. F. Dennis Saylor, IV, U.S. District Judge].

[116 F.4th 42]
Zaheer A. Samee, with whom Frisoli & Associates was on brief, for appellant.

Sean P. Mahoney, with whom Joanna L. Young, Erica Sanders, and Kennedys CMK LLP were on brief, for appellee.

Before Barron, Chief Judge, Lynch and Kayatta, Circuit Judges.

KAYATTA, Circuit Judge.

Joan Stormo and her siblings hired attorney Peter Clark to represent them in a real estate transaction. Clark scuttled the deal, and Stormo sued him for malpractice. But Clark's professional-liability insurer, State National Insurance Company ("State National"), disclaimed coverage, contending that the claim fell under a so-called prior-knowledge exclusion

contained in Clark's policy. State National also reserved the right to later deny coverage based on Clark's fourteen-month delay in reporting the lawsuit.

Stormo prevailed in her lawsuit against Clark and was assigned his claims against State National. She then sued State National, arguing that the insurance company had breached its contractual obligations to indemnify Clark and, in so doing, violated Massachusetts law prohibiting unfair claim-settlement practices. For the reasons that follow, we affirm the district court's judgments in favor of State National.

I.

Twenty years ago, Stormo and her siblings hired Clark to represent them in a planned real estate sale. By the time they engaged Clark, the siblings had signed a purchase-and-sale agreement to sell land to real estate developer KGM Custom Homes ("KGM"). Clark derailed the sale. He incorrectly believed that a liquidated damages provision in the contract gave his clients "a right to rescind the contract on payment of KGM's development costs." *See K.G.M. Custom Homes, Inc. v. Prosky*, No. BRCV200401414, 2010 WL 11534424 (Mass. Super. Ct. Mar. 25, 2010). So as KGM finalized the approval process for its development plan, Clark informed the company that "his clients had another offer to purchase their property at a substantially higher price" and that the Stormo siblings "did not intend to sell the property to KGM." *Id.* He also behaved bizarrely at the closing, where the deal fell through.

Despite Clark's representations to the contrary, the Stormo siblings did intend to sell the property to KGM and did not have a higher offer on the property. *Id.* The family was reportedly stunned by the failure of the closing and Clark's conduct leading up to it. *Id.*

Clark's actions kicked off no fewer than four lawsuits, the last of which is the subject of this appeal.

A.

First, in December 2004, KGM sued the Stormo siblings, alleging that they had wrongfully repudiated the purchase-and-sale agreement by refusing to close the sale. *See id.*[1] At the trial, the Stormo siblings testified that they had no other offer, and they did not know why Clark had represented that they did. The trial court sided with KGM on its claims, adding that Clark's actions in his representation of the siblings "constituted a breach of both the implied covenant of good faith and fair dealing and the express covenant to sell the land." *Id.* KGM won compensatory damages. *K.G.M. Custom Homes, Inc. v. Prosky*, 468 Mass. 247, 10 N.E.3d 117, 120 (2014).

[116 F.4th 43]

Second, KGM sued Clark in December 2010 in Massachusetts Superior Court.[2] In its complaint, KGM alleged that Clark engaged in unfair and deceptive practices by making representations that caused the transaction with the Stormo siblings to fail. State National agreed to defend him in the action under his professional-liability policy. It retained a lawyer to represent Clark and settled the claim on his behalf. In total, State National paid $694,801.40 to defend and indemnify Clark in KGM's action against him.

Third, in October 2014, the Stormo siblings sued Clark in Massachusetts Superior Court for malpractice and several related claims arising out of Clark's

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[1] For consistency, we will refer to this litigation as "*KGM v. Stormo*."

[2] We will refer to this settled lawsuit as "*KGM v. Clark*."

representation of them in the failed KGM sale. See *Stormo v. Clark*, No. BRCV201401015, 2017 WL 9939783 (Mass. Super. Ct. Aug. 7, 2017). The complaint alleged that Clark had "actively worked to prevent the closing of the sale" through his fabrication of a higher offer, his misrepresentation of the Stormos' intentions, and his behavior at the closing. Complaint and Jury Demand ¶¶ 13-18, *Stormo*, 2017 WL 9939783(No. BRCV201401015). It also described the *KGM v. Stormo* lawsuit and alleged that Clark had "misadvised the plaintiffs by telling them that interest on KGM's damages would not begin to accrue until after exhaustion of all appeals and entry of final judgment in [that] litigation."[3] *Id.* ¶¶ 22, 26, 28.

Clark did not notify State National of the Stormos' claim against him until December 2015 — over a year after they filed their complaint. Once the insurance company learned of the action, it retained attorney Peter Hermes to advise it about its potential coverage obligations given Clark's late notice, and because the new action appeared related to the *KGM v. Stormo* complaint. Based on Hermes's advice, State National disclaimed any coverage for Stormo v. Clark, citing the policy's prior-knowledge exclusion. Given the *KGM v. Stormo* action — particularly the Stormo siblings' testimony about Clark's conduct leading up to the failed transaction — State National contended that "Clark knew or could have reasonably foreseen before [the effective date of the policy] that his conduct might be expected to be the basis of a claim." The company likewise reserved the right to later disclaim

[3] According to emails provided by Stormo, Clark no longer believed this by July 2010. At that point, he sent emails suggesting interest would have begun to accrue when the Stormo siblings breached the agreement.

coverage based on a provision in Clark's policy requiring that State National be given "prompt written notice" of any claims made against the insured. Clark objected to the denial of coverage via a demand letter under Massachusetts's consumer-protection statute, Mass. Gen. Laws ch. 93A, but State National held firm.

A jury found for Stormo against Clark, and the court entered judgment totaling over $5 million. The court also assigned to Stormo any claims of Clark's against State National. When State National refused to indemnify Clark by paying the judgment Stormo had won, Stormo (as Clark's assignee) sued State National in the U.S. District Court for the District of Massachusetts, beginning the lawsuit that ultimately gave rise to this appeal.

B.

Before delving further into the travel of this case and the issues presented on appeal, we describe Clark's policy with State

[116 F.4th 44]
National. Clark was a named insured on a "claims-made" professional-liability policy. The policy covered claims made against Clark during a specified period (March 16, 2010, through March 16, 2011) arising from any misconduct committed by Clark on or after March 1, 2002. The policy's total liability limit was $1 million. It also contained the following provisions, the relevance of which will become apparent:

First, it provided the "prior-knowledge exclusion" relied upon by State National to disclaim coverage:

> This policy does not apply to: ... any CLAIM arising out of any WRONGFUL ACT occurring

> prior to the effective date of this policy if ... the INSURED at or before the effective date knew or could have reasonably foreseen that such WRONGFUL ACT might be expected to be the basis of a CLAIM. However, this paragraph B. does not apply to any INSURED who had no knowledge of or could not have reasonably foreseen that any such WRONGFUL ACT might be expected to be the basis of a CLAIM....

Second, under the heading "LIMITS OF LIABIITY AND DEDUCTIBLE," and the subheading "MULTIPLE OF INSUREDS, CLAIMS, AND CLAIMANTS," the policy decreed that if two or more claims were to arise out of the same wrongful act, "[a]ll such CLAIMS ... shall be considered first made on the date on which the earliest CLAIM arising out of such WRONGFUL ACT was first made and all such CLAIMS are subject to the same limits of liability and deductible."

Finally, under the heading "CONDITIONS," and the subheading "INSURED'S DUTIES PRECEDENT TO COVERAGE," the policy stated that "[i]f a CLAIM is made against any INSURED, the INSURED must give prompt written notice to [State National]."

C.

We return to Stormo's litigation against State National in the District of Massachusetts. She pressed two claims against State National: first, that the insurance company had breached its contract with Clark; and second, that the insurance company had done so in violation of Mass. Gen. Laws chs. 93A and 176D, which prohibit unfair trade practices ("93A-176D claim"). The district court found that factual questions surrounding Stormo's breach-of-contract claim necessitated a trial. *See Stormo v. State Nat'l*

Ins. Co., No. CV 19-10034-FDS, 2021 WL 11652293, at *8 (D. Mass. Jan. 25, 2021). At the same time, it found that while State National's denial of coverage might have been based on an incorrect interpretation of its policy, the interpretation that Clark's claim fell under the prior-knowledge exclusion "was not unreasonable, and no evidence exist[ed] that [State National had] acted in bad faith." *Id.* at *16. Because such a showing would have been necessary to prove Stormo's 93A-176D claim, *see Bos. Symphony Orchestra, Inc. v. Com. Union Ins. Co.*, 406 Mass. 7, 545 N.E.2d 1156, 1160 (1989), the district court granted summary judgment to State National on Clark's 93A-176D claim.

Following a trial, a jury found for Stormo on her breach-of-contract claim against State National. It awarded Stormo $1,106,138.10 in damages, and judgment was entered accordingly. State National moved for judgment as a matter of law,[4] arguing that Stormo was not entitled to

[116 F.4th 45]
recover under Clark's policy, since Clark had breached his reporting obligations by failing to give prompt notice of Stormo's claim against him. In opposing State National's motion, Stormo argued that State National could not deny coverage for Clark's late notice alone; the insurance company had to prove it had been prejudiced by Clark's late notice. The district court sided with State National and granted judgment as a

[4] We use the now-preferred phrase "judgment as a matter of law" rather than the phrase "judgment notwithstanding the verdict" used by the parties and the district court. See 9B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2521 (3d ed. 2023).

matter of law. *Stormo v. State Nat'l Ins. Co.*, No. CV 19-10034-FDS, 2023 WL 5515823, at *1 (D. Mass. Aug. 25, 2023).

Stormo now appeals, urging us to reverse the judgment as a matter of law, to reinstate the jury's verdict, and to vacate the district court's grant of summary judgment to State National on her 93A-176D claim.

II.

A court may grant judgment as a matter of law "if a reasonable person could not have reached the conclusion of the jury." *White v. N.H. Dep't of Corr.*, 221 F.3d 254, 259 (1st Cir. 2000); see also Fed. R. Civ. P. 50(a)(1). "We review de novo the district court's judgment as a matter of law under Rule 50." *Lawes v. CSA Architects & Eng'rs LLP*, 963 F.3d 72, 90 (1st Cir. 2020). We likewise "review a district court's grant of summary judgment de novo, viewing the record in the light most favorable to the nonmovants and drawing all reasonable inferences in their favor." *Martínez v. Novo Nordisk Inc.*, 992 F.3d 12, 16 (1st Cir. 2021). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Finally, because this case is before us by virtue of diversity jurisdiction, see 28 U.S.C. § 1332, "we look to the relevant state law — here, Massachusetts law — to supply the substantive rules of decision." *President & Fellows of Harvard Coll. v. Zurich Am. Ins. Co.*, 77 F.4th 33, 37 (1st Cir. 2023) [hereinafter *Harvard College*].

III.

A.

An insurance company has two principal duties to the insured: a duty to indemnify and a duty to defend. *Bos. Symphony Orchestra, Inc.*, 545 N.E.2d at 1158. Generally, an insurance company's duty to indemnify is triggered when "a judgment within the policy coverage is rendered against" an insured. *Id.* By contrast, the duty to defend is "antecedent to" and "broader than" the duty to indemnify. *Id.* It arises when "the allegations in a complaint are reasonably susceptible of an interpretation that states or roughly sketches a claim covered by the policy terms." *Metro. Prop. & Cas. Ins. Co. v. Morrison*, 460 Mass. 352, 951 N.E.2d 662, 667 (2011) (quoting *Billings v. Com. Ins. Co.*, 458 Mass. 194, 936 N.E.2d 408, 414 (2010)). In its disclaimer of coverage for Stormo's claim against Clark, State National "deni[ed] any obligation to defend or indemnify Clark," effectively renouncing both duties.

Count one of Stormo's complaint challenges that renunciation in full, alleging that State National twice breached its insurance policy, both by denying its duty to defend Stormo's suit against Clark and by denying its duty to indemnify Clark. Count two then alleges that State National's refusal to indemnify and defend Clark was so unreasonable as to give rise to liability under Mass. Gen. Laws chs. 93A and 176D.

Count two presumes that State National's denial was wrongful in the first place. So in order to succeed on that count, Stormo

[116 F.4th 46]

must show (among other things) that the insurance company breached at least one of its duties to Clark. *See Home Ins. Co. v. Liberty Mut. Fire Ins. Co.*, 444 Mass. 599, 830 N.E.2d 186, 192 (2005). We therefore begin by assessing whether State National was relieved of its duty to indemnify Clark by virtue of his

untimely notice. We then consider whether Stormo has successfully claimed that State National breached its duty to defend.

1.

In arguing that State National breached its duty to indemnify, Stormo contends that Clark's failure to give prompt notice of Stormo's claims against him did not by itself absolve the insurance company of its coverage obligations. Rather, she asserts that State National must also show that it was prejudiced by the late notice in order to disclaim coverage. And since the district court found that "there is no evidence that [State National] was prejudiced in any way," Stormo argues that the company improperly denied coverage.

Recall that Clark's insurance policy required him as a "condition precedent to... coverage" to give State National "prompt written notice" "in the event of a claim" against him. Massachusetts law provides that when, as here, "the provisions of a policy are plainly and definitively expressed, the policy must be enforced in accordance with the terms." *Somerset Sav. Bank v. Chi. Title Ins. Co.*, 420 Mass. 422, 649 N.E.2d 1123, 1127 (1995). Nevertheless, in 1977, the Massachusetts legislature codified a notice-prejudice rule for certain types of insurance policies (including, for example, motor-vehicle policies but not professional-liability policies) at Mass. Gen. Laws Ann. ch. 175, § 112. That rule effectively precludes an insurer from raising late notice as a defense unless the lateness prejudiced the insurer.

In 1980, the Massachusetts Supreme Judicial Court ("SJC") extended the notice-prejudice rule to certain liability policies not covered by the statute, holding that "where an insurance company attempts to be relieved of its obligations ... on the ground of

untimely notice, the insurance company will be required to prove both that the notice provision was in fact breached and that the breach resulted in prejudice to its position." *Johnson Controls, Inc. v. Bowes*, 381 Mass. 278, 409 N.E.2d 185, 188 (1980).

But this notice-prejudice rule does not occupy the field. Ten years after *Johnson Controls*, in *Chas. T. Main, Inc. v. Fireman's Fund Ins. Co.*, the SJC determined that requiring a showing of prejudice did not make sense in all circumstances. 406 Mass. 862, 551 N.E.2d 28, 30 (1990). To that end, it distinguished between "occurrence policies," in which "[c]overage is effective... if the covered act ... occurs within the policy period, regardless of the date of discovery," and "claims-made policies," like the one at issue here, which "cover[] the insured for claims made during the policy year and reported within that period or a specified period thereafter regardless of when the covered act or omission occurred." *Id.* at 29. "[T]he purpose of a claims-made policy," *Chas T. Main* explained, "is to minimize the time between the insured event and the payment." *Id.* at 30. Because that purpose is inherently "frustrated" by lengthy delays in reporting claims, the SJC opined that "[p]rejudice for an untimely report" under the claims-made policy at issue in the case was "not an appropriate inquiry." *Id.*

Stormo does not dispute that the policy here is a claims-made policy: It covers claims made against the insured during the policy period rather than claims arising from covered acts occurring during the

[116 F.4th 47]

policy period. Stormo also does not contend that Clark gave State National prompt written notice of Stormo's claim against Clark. So, *Chas T. Main* on its face

indicates that there is no need for State National to prove that it was prejudiced by the late notice. *Id.*

Stormo contends, nevertheless, that if we more carefully parse Massachusetts law, we will see that whether prejudice is required to deny coverage for untimely notice actually does not turn solely on whether the policy is a claims-made or occurrence-based policy. Rather, Stormo says, it turns on the type of notice requirement in the policy.

Read by itself, the SJC opinion in *Chas T. Main* provides some support for this alternative reading. For in addition to contrasting occurrence-based and claims-made policies, the *Chas T. Main* court distinguished between two different types of reporting requirements commonly found in insurance policies: those requiring notice within the policy period (or shortly thereafter), and those requiring notice "as soon as practicable."[5] 551 N.E.2d at 29. In so doing, *Chas T. Main* linked the rationale for not requiring proof of prejudice to the function served by "policy period" notice language in a claims-made policy. *Id.* at 30.

Like claims-made policies, policy-period reporting requirements promote "fairness in rate setting" by reducing the amount of time between an insured event and an insurance payout. *Id.* at 29-30. The SJC thus opined in *Chas T. Main* that "the requirement that

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[5] An as-soon-as-practicable requirement "requires that notice of the claim be given to the insurer 'as soon as practicable' after the event which gives rise to coverage." *Chas T. Main*, 551 N.E.2d at 29. Under a "policy-period" reporting requirement, insureds must report claims "during the term of the policy or within a short period of time (thirty or sixty days) following the expiration of the policy." *Id.* Occurrence-based policies almost always have "as-soon-as-practicable" requirements, but either type of reporting requirement may appear in a claims-made policy. *Id.*; see also Jordan Plitt et al., 14 Couch on Insurance § 199.113 (3d ed. 2024).

notice of the claim be given in the policy period or shortly thereafter in the claims-made policy is of the essence in determining whether coverage exists." *Id.* at 30. Seizing on this discussion of reporting requirements, Stormo contends that the notice requirement in Clark's policy with State National ("prompt written notice") is more like an "as soon as practicable" notice requirement and that *Chas T. Main*'s exception to the notice-prejudice rule does not apply to the policy at issue even though it is a claims-made policy.

The problem for Stormo is that subsequent Massachusetts law has not viewed the language of the notice requirement as the variable that distinguishes policies that require proof of prejudice from those that do not. Indeed, the SJC has held that a claims-made policy with a notice requirement identical to Clark's — that the insurance company receive "prompt written notice" of new claims — was "not materially different" from the policy-period reporting requirement at issue in *Chas. T. Main*. *See Tenovsky v. All. Syndicate, Inc.*, 424 Mass. 678, 677 N.E.2d 1144, 1146 (1997). "Surely," the SJC reasoned, "'prompt' notice of 'claims made' requires that notice to the insurer be given no later than sixty days following the expiration of the policy period." *Id.* As in *Chas. T. Main*, then, the SJC in *Tenovsky* concluded that the insurance company was under no obligation to show prejudice in order to disclaim coverage based on the insured's late reporting. *Id.*

Though the policy at issue in this case contains the exact same "prompt written notice" requirement, Stormo advances a

[116 F.4th 48]

clever argument to distinguish *Tenovsky*. Recall that the policy in this case provides that, if two or more

claims were to "aris[e] out of a single WRONGFUL ACT or a series of WRONGFUL ACTS," then "all such CLAIMS ... shall be considered first made on the date on which the earliest CLAIM arising out of such WRONGFUL ACT was first made...." Stormo's claim against Clark — which was made in 2014 — is indisputably related to KGM's 2010 claim against Clark. After all, both claims arose out of Clark's conduct as the Stormo siblings' attorney during their failed property sale to KGM. As a result, the policy treats Stormo's claim against Clark as having been "made" at the same time as KGM's claim against Clark: in 2010. It would have been impossible for Clark to report Stormo's claim against him to State National in 2010; she would not file it for four more years. By contrast, the claim at issue in *Tenovsky* was made during the policy period. 677 N.E.2d at 1146. Hence, it was not impossible for the policyholder in *Tenovsky* to timely report the claim.

Due to this difference, Stormo argues that it would be "absurd" to treat the reporting requirement in Clark's policy the same as the reporting requirement in *Tenovsky*, even though they share the same language. Rather, since it was impossible for Clark to report Stormo's claim during the policy period, Stormo argues that our only option is to treat it as an as-soon-as-practicable requirement.

But the fact remains, no one contends that Clark gave timely notice under any formulation of the notice requirement. And we can find no indication that Massachusetts courts have construed *Chas. T. Main* as Stormo proposes; i.e., to treat differences in the wording of the notice requirement as dictating whether the notice-prejudice rule applies. Rather, we find in the case law a simple and consistent focus on whether the insurance policy is a "claims-made" or "occurrence-

based" policy, with the latter subject to the notice-prejudice rule and the former exempt.

Boyle v. Zurich American Insurance Co. demonstrates this approach. 472 Mass. 649, 36 N.E.3d 1229 (2015). In Boyle, the SJC looked back at Johnson Controls — the case applying the notice-prejudice rule to professional-liability policies — and stated that:

> The approach to notice obligations prescribed by *Johnson Controls* ... and its progeny concerns "occurrence"-based liability insurance policies like the one at issue in this case. Different considerations apply to "claims-made" policies. *See Chas. T. Main, Inc. v. Fireman's Fund Ins. Co.*, 406 Mass. 862, 863-64, 551 N.E.2d 28 (1990).

36 N.E.3d at 1236 n.8. In other words, the SJC in Boyle clearly implied that the insured's "notice obligations" hinged on whether the policy is a claims-made policy or an occurrence-based policy.

Lower courts in Massachusetts have also concluded that this is the governing rule. *See, e.g., Meadows Constr. Co. LLC v. Westchester Fire Ins. Co.*, 100 Mass. App.Ct. 1120, 180 N.E.3d 1032 (2022) (unpublished table decision) (describing *Chas. T. Main* as holding "that an insurer need not show it was prejudiced by late notice in the case of a 'claims made and reported' policy"); *Young Men's Christian Ass'n of Greater Worcester v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 65 Mass.App.Ct. 1121, 843 N.E.2d 722 (2006) (unpublished table decision) (citing *Chas T. Main* to support the proposition that "[p]rejudice ... is not a factor in determining the effect of late notice under a claims-made policy").

Just recently, our court had the occasion to survey this same case law. *See Harvard Coll.*, 77 F.4th at 38-

39. While our discussion of Massachusetts law in the context of

[116 F.4th 49]
Harvard College does not control our decision here, it does demonstrate that Massachusetts case law is most easily read as limiting the prejudice requirement to occurrence-based policies. In that case, we cited the "critical distinction that the SJC has made between occurrence-based and claims-made policies," and reiterated that "the SJC promulgated a general rule that an insurer need not demonstrate prejudice before denying coverage under a claims-made policy for the insured's failure to provide timely notice." *Id.* at 39. No subsequent Massachusetts decisions have called our reading into question. And this reading provides a more administrable rule with clarity for insureds and insurers.

2.

Stormo suggests that "if there were any doubt" about the application of the notice-prejudice rule to policies like Clark's, we "should certify a question of law" to the SJC. But it was Stormo who chose to bring this action in federal court, asking the district court to find a prejudice requirement where the SJC has not. As we admonished in Harvard College and cases before it, "a plaintiff who made a deliberate choice to sue in federal court rather than in a Massachusetts state court is not in a position to ask us to blaze a new trail that the Massachusetts courts have not invited." 77 F.4th at 39 (cleaned up). Nor is such a plaintiff well positioned to seek a change in decisionmakers after striking out with her original pick.

In sum, we agree with the district court that prejudice is irrelevant to this case given that all parties agree

that notice of Stormo's claim against Clark was not timely given under Clark's claims-made policy. "[B]ecause Clark's notice to [State National] was too late, the policy does not provide coverage." *Stormo*, 2023 WL 5515823, at *7. As such, State National had no duty to indemnify Clark and therefore could not possibly have breached that duty. Stormo is thus not entitled to recover based on State National's refusal to indemnify Clark.

B.

Having found that State National had no duty to indemnify Clark, we now consider the insurance company's potential liability for refusing to defend him. In Massachusetts, "a liability insurer owes a broad duty to defend its insured against any claims that create a potential for indemnity," *Boyle*, 36 N.E.3d at 1235 (quoting *Doe v. Liberty Mut. Ins. Co.*, 423 Mass. 366, 667 N.E.2d 1149, 1151 (2015)), even if the insurer "could eventually be determined to have no duty to indemnify the insured," *Metro. Prop. & Cas. Ins. Co.*, 951 N.E.2d at 668 (quoting 14 Couch on Insurance § 200:3 (3d ed. 2005)). "In order for the duty of defense to arise, the underlying complaint need only show, through general allegations, a possibility that the liability claim falls within the insurance coverage." *Billings*, 936 N.E. 2d at 414 (quoting *Sterilite Corp. v. Cont'l Cas. Co.*, 17 Mass.App.Ct. 316, 458 N.E.2d 338, 341 (1983)). Massachusetts courts have held that insurers are relieved of the duty to defend a claimant only "when the allegations in the underlying complaint 'lie expressly outside the policy coverage and its purpose.'" *Billings*, 936 N.E.2d at 414 (quoting *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 439 Mass. 387, 788 N.E.2d 522, 531 (2003)).

Explaining our disposition of the claim that State National breached its duty to defend Clark requires that we revisit in greater detail the travel of this case. Stormo's first count alleged that State National committed a breach of contract both by refusing to indemnify Clark and by refusing to defend Clark. In count two, Stormo

[116 F.4th 50]
further alleged that both refusals were so unreasonable as to constitute an unfair claims-settlement practice under Mass. Gen. Laws chs. 93A and 176D. The district court granted partial summary judgment to State National dismissing Stormo's 93A-176D claim in its entirety, but the contractual claim for breaches of the duties to defend and indemnify went to trial. Following trial, the jury returned a general verdict for Stormo on the breach-of-contract claim, without specifying which alleged duty or duties State National breached. But on State National's motion for judgment as a matter of law, the court set aside the verdict and entered judgment for State National on count one in its entirety based on Clark's failure to give timely notice of the claim.

Stormo opposed that disposition of the jury's verdict, but she never argued that she was entitled to hang on to the verdict based on a breach of the duty to defend even if Clark's late notice negated any duty to indemnify him. Rather, in opposing the post-verdict motion for judgment as a matter of law, she simply repeated her argument that since the late notice caused no prejudice, State National was obligated to provide coverage of Clark's claim. Her opposition motion mentioned the duty to defend only once, in service of an argument that she was entitled to damages beyond the remaining policy balance. She never

suggested — much less argued — that even if Clark's late notice defeated his indemnity coverage, State National was still liable for its failure to defend him. And when the district court issued its decision to enter a post-verdict judgment for State National because of Clark's late notice, Stormo did not complain that the court had failed to consider whether the verdict might rest on a finding that State National breached a duty to defend. Thus, before the district court, Stormo at least forfeited — if not waived — this argument. *See United States v. Delgado-Sánchez*, 849 F.3d 1, 6 (1st Cir. 2017).

Even on appeal, Stormo does not argue that the jury verdict can stand based on a breach of the duty to defend even if there was no duty to indemnify. Rather, she focuses on (or rather, briefly mentions) the duty to defend only in the context of challenging the district court's decision granting partial summary judgment dismissing the 93A-176D claim. Stormo has thus waived any standalone argument that State National breached its duty to defend Clark. *See id.* We must therefore affirm the judgment as a matter of law on the count-one claim that State National breached its policy either by failing to indemnify Clark or failing to defend him.

C.

In light of the foregoing, we have (1) a judgment by the district court on all aspects of the count-one breach-of-contract claim; (2) the assertion below and on appeal of only one argument for reversing that judgment (the notice-prejudice rule); (3) our rejection of that argument given that the relevant policy is a claims-made policy; and (4) the resulting affirmance of the judgment in favor of State National on count

one, including the claim for breach of the duty to defend.

This all means that the count-two 93A-176D claim for unreasonably breaching the policy lacks the necessary predicate: that there was such a breach in the first place. Because of the lack of timely notice under the claims-made policy, there was no duty to indemnify. And because Stormo has waived any objection to the dismissal of the contractual duty-to-defend claim, we find no breach of that contractual duty. Massachusetts law is clear that the 93A-176D claims in count two must therefore fail. *See Home Ins. Co.*, 830 N.E.2d at 192

[116 F.4th 51]
("An insurer does not commit a violation of [chapter 93A] when it rightfully declines to defend a claim that is not covered by its policy."); *see also Dryden Oil Co. of New England v. Travelers Indem. Co.*, 91 F.3d 278, 290 (1st Cir. 1996) (holding that where "defendants neither breached a contractual duty to defend ... nor a duty to indemnify," there was "[c]onsequently" no claim to be made under chapters 93A and 176D). So we therefore need not address Stormo's other arguments, all contingent on there being a section 93A claim.

IV.

For the foregoing reasons, we affirm the district court's judgments in favor of State National.

BARRON, Chief Judge, dissenting in part and concurring in the judgment in part.

I disagree with the majority's decision to affirm the grant of summary judgment to the insurer on the wrongful-denial-of-coverage claim that is before us in this appeal. The proper course, in my view, is to certify the novel state-law question on which that portion of the motion for summary judgment depends to the Supreme Judicial Court of Massachusetts ("SJC"). I thus, respectfully, dissent in part but otherwise concur in the judgment.

I.

This case involves a dispute over what is known as a claims-made insurance policy. Claims-made policies generally cover only claims made against the insured during the policy period. *Chas. T. Main, Inc. v. Fireman's Fund Ins. Co.*, 406 Mass. 862, 551 N.E.2d 28, 29 (1990). This claims-made policy is no different, save for one exception, the relevance of which will become apparent. Claims-made policies also always have provisions that require the insured to provide notice of the covered claims to the insurer. *Id.* This claims-made policy is, again, no different. In fact, it has two such provisions, a fact which, as I will explain, potentially bears on the proper resolution of this case.

One of the notice provisions — which I shall refer to as the "within-policy-period" notice provision — appears in the section of the policy that defines the scope of this policy's coverage. It provides that, within sixty days of the policy period's end, the insured must provide the insurer with notice of any claim made against the insured within the policy period. The other notice provision — which I shall refer to as the "prompt-written" notice provision — appears in the section of the

policy that identifies the insured's responsibilities prior to receiving payment, rather than the section outlining what is covered. It requires the insured to provide the insurer with "prompt-written" notice of any claim against the insured, without regard to when that claim was made against the insured.

The claim for which the insured here seeks coverage was first made against him only after the policy period had expired. One might think that the insured is therefore barred from obtaining coverage for that claim for reasons that have nothing to do with this policy's notice provisions. After all, as I have noted, claims-made policies generally cover only claims made against the insured during the policy period, and this one was not.

This claims-made policy, however, has an express provision that broadens the policy's scope of coverage. It does so by treating a claim made against the insured outside the policy period as having been made against the insured within that period whenever that claim is "related" to a prior within-the-policy-period claim. Moreover,

[116 F.4th 52]
the parties agree that the claim that is at issue here is such a "related" claim. They thus agree that — for purposes of this claims-made policy — the insured is seeking coverage for a claim that is deemed to have been made against the insured within the policy period, though in fact it was not.

That being so, the coverage dispute over this claim turns on the insured's compliance — or noncompliance — with the policy's notice provisions. To be sure, the insurer does not contend that the insured failed to comply with the policy's "within-policy-period" notice provision. The insurer does not even contend that this

notice provision applies to such a "related" claim — and, understandably so. In their nature, claims of that sort may not become known to the insured until much later than sixty days after the end of the policy period. It thus makes little sense to read the provision to require that notice of those claims be provided to the insurer within that period or sooner than sixty days thereafter. To provide such notice in that time frame, as to many "related" claims, would be factually impossible.

The insurer does contend, however, that this policy's separate "prompt-written" notice provision applies to "related" claims, and the insured does not argue otherwise. Moreover, the insured does not dispute the insurer's contention that he failed to comply with that provision, given that he first provided written notice to the insurer of this "related" claim more than a year after he had first learned of the claim's existence.

Thus, in the end, this coverage dispute turns on whether the insurer is required to show that it was prejudiced by the undisputed violation of the "prompt-written" notice provision. The insurer contends that it need not do so, while the insured contends the opposite.

The majority resolves this dispute in the insurer's favor. It does so based on the SJC's decision in *Tenovsky v. Alliance Syndicate, Inc.*, 424 Mass. 678, 677 N.E.2d 1144 (1997). It reads that decision to establish a general rule that an insurer need not show prejudice to deny coverage based on an insured's violation of a claims-made policy's "prompt-written" notice provision. I do not read *Tenovsky*, however, to establish this rule. Nor do I read it to address, more narrowly, whether prejudice must be shown to deny coverage based on an insured's violation of a claims-made policy's "prompt-written" notice provision that — like

the one at issue here — stands alongside a separate and express "within-policy-period" notice provision in the same policy.

To explain why, I will first review the precedent on which *Tenovsky* relied, *Chas. T. Main*. I will then return to *Tenovsky* itself. Finally, I will examine sources of authority beyond Massachusetts, which, as I will explain, themselves do little to assist us in predicting how the SJC would resolve what neither *Tenovsky* nor *Chas. T. Main* do.

II.

In *Chas. T. Main*, the SJC noted that there are generally two types of notice provisions to be found in insurance policies: "within-policy-period" notice provisions and "as-soon-as-practicable" notice provisions. 551 N.E.2d at 29. The SJC noted, too, that there are generally two types of insurance policies: claims-made policies and occurrence policies. *Id.* Finally, the SJC explained that there is a relationship between each type of notice provision and each type of insurance policy and that this relationship is of some relevance in determining whether and when an insurer must show prejudice to deny coverage based on an insured's failure to comply

[116 F.4th 53]
with an insurance policy's notice provision. *Id.* at 29-30.

Chas. T. Main acknowledged that, under an occurrence policy, an insurer must show prejudice before denying coverage based on an insured's failure to comply with an "as-soon-as-practicable" notice requirement, which, *Chas. T. Main* observed, is the type of notice provision that occurrence policies "almost always" have. *Id.* In doing so, the SJC reaffirmed its

earlier decision in *Johnson Controls, Inc. v. Bowes*, 381 Mass. 278, 409 N.E.2d 185 (1980). There the SJC held, in the context of an occurrence policy, that such a notice provision is subject to the notice-prejudice rule that Massachusetts law generally applies to notice provisions in insurance policies, even when a policy expressly makes compliance with that notice provision a condition precedent to coverage. *Johnson Controls*, 409 N.E.2d at 188.

Chas. T. Main went on to explain, however, that the notice-prejudice rule that applies to an "as-soon-as-practicable" notice provision does not apply to a claims-made policy's express "within-policy-period" notice provision. 551 N.E.2d at 30. And that is so, *Chas. T. Main* concluded, because of the role that "within-policy-period" notice provisions play in claims-made policies. *Id.*

In an occurrence policy, *Chas. T. Main* explained, "[c]overage is effective ... if the covered act or covered omission occurs within the policy period, regardless of the date of discovery." *Id.* at 29. As a result, in offering an occurrence policy, the insurer is necessarily accepting the risk that inflation poses to accurate rate-setting for such a policy. *See id.* Chas. T Main explained that, for this reason, a "within-policy-period" notice provision is "never" found in an occurrence policy, as that type of policy contemplates coverage for claims that the insured might discover only long after the policy period has expired. *See id.*

In contrast, *Chas. T. Main* explained, coverage works very differently in a claims-made policy. The whole object of a claims-made policy, *Chas. T. Main* noted, is to protect the insurer from the risk of inflation that inheres in insuring claims made long after the policy period. *Id.* at 30. And so, as *Chas. T. Main* put it, "the purpose of a claims-made policy" — unlike

the purpose of an occurrence policy — "is to minimize the time between the insured event and the payment." *Id.*

Therefore, *Chas. T. Main* explained, a "within-policy-period" notice provision is "always" found in a claims-made policy, as the purpose of that kind of policy is to ensure "fairness in rate-setting." *Id.* at 29. Indeed, *Chas. T. Main* went on to conclude, because the receipt of such notice "is of the essence in determining whether coverage exists," a claims-made policy — "[f]or that reason" — defines the "insured event [as both] ... the claim being made against the insured during the policy period and the claim being reported to the insurer within that same period or a slightly extended, and specified, period." *Id.* at 30 (emphases added).

In other words, *Chas. T. Main* reasoned, a notice provision of the "within-policy-period" kind in a claims-made policy is not — like an "as-soon-as-practicable" notice provision in an occurrence policy — merely useful to the insurer. *See id.* Because the "within-policy-period" notice provision supports the very reason that an insurer chooses to offer a claims-made policy rather than an occurrence policy, a claims-made policy would be "frustrated" if that kind of notice provision were not included in it. *See id.* at 30. *Chas. T. Main* therefore upheld the insurer's denial of coverage for noncompliance with the policy's express "within-policy-period" notice provision —

[116 F.4th 54]

notwithstanding an absence of any showing of prejudice — because "[p]rejudice for an untimely report in this instance ... is not an appropriate inquiry." *Id.* (emphasis added).

In so ruling, *Chas. T. Main* never directly addressed — at least in so many words — whether "as-soon-as-practicable" notice provisions in claims-made policies are subject to the same notice-prejudice rule that applies when they are found in occurrence policies. But *Chas. T. Main* did observe that while such notice provisions are "almost always" in occurrence policies, they also are "frequently" found in claims-made policies. *Id.* at 29. Moreover, as I have noted, in describing "as-soon-as-practicable" notice provisions, *Chas T. Main* noted that they enable the insurer's investigation of "facts and occurrences relating to liability." *Id. Chas. T. Main* also for that reason contrasted such notice provisions with "within-policy-period" provisions, which *Chas. T. Main* described as serving the very different and essential purpose of ensuring "fairness in rate-setting" in claims-made policies. *Id.* at 29-30.

In my view, then, it is hard to read *Chas. T. Main* to indicate that a "prompt-written" notice provision is "not materially different from," *Tenovsky*, 677 N.E.2d at 1146, a "within-policy-period" notice provision when both types of notice provisions are included in the same claims-made policy. *Chas. T. Main* suggests to me that, in such a policy, there is good reason to treat the "prompt-written" notice provision the same as the "as-soon-as-practicable" type of notice provision that *Chas. T. Main* describes as being only "frequently" in claims-made policies but "almost always" in occurrence policies. 551 N.E.2d at 29. In that situation, the "prompt-written" notice provision — if it is not to be redundant of the "within-policy-period" notice provision — would appear to be merely serving the nonessential end of facilitating the insurer's

investigatory capacity rather than ensuring the essential end of "fairness in rate-setting."[6]

Based on *Chas. T. Main*'s own analysis, in other words, there would appear to be a strong case for concluding that, because the "prompt-written" notice provision here is a companion to an express "within-policy-period" notice provision, it merely serves such a nonessential end, rather than the essential end of "fairness in rate-setting." *See id.* at 29-30. Accordingly, again based on *Chas. T. Main*'s own analysis, there would appear to be a strong case for concluding that this "prompt-written" notice provision is not "of the essence" to this claims-made policy. It would therefore appear to follow that, under *Chas. T. Main*, this notice provision is just as subject to the notice-prejudice rule as an "as-soon-as-practicable" notice provision in an occurrence policy. *See id.* at 30.

III.

If *Chas. T. Main* fails to show that the insurer here is not required to show prejudice before denying coverage based on the insured's violation of this policy's "prompt-written" notice provision, what does? The answer, according to the majority, is *Tenovsky*.

[116 F.4th 55]

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[6] Consistent with that conclusion, this policy's "prompt-written" notice provision, unlike this policy's inapplicable express "within-policy-period" notice provision, appears in the policy's section outlining conditions precedent to payment and not in its section defining the scope of its coverage. And the policy expressly states that "[n]othing contained [in the 'prompt-written' notice provision] shall be construed as limiting the reporting requirements of [the 'within-policy-period' notice provision]," further reinforcing the two provisions' distinct functions.

The majority reads that case to make clear that a "prompt-written" notice provision in a claims-made policy is always exempt from the notice-prejudice rule in the exact same way that *Chas. T. Main* deemed a "within-policy-period" notice provision to be exempt. It is for that reason — and that reason alone — that the majority holds that this insurer need not show prejudice to deny coverage based on the insured's violation of this claims-made policy's "prompt-written" notice provision. I cannot agree with that view of *Tenovsky*.

Tenovsky did hold that the insurer in the case before it was not required to show prejudice to deny coverage based on the insured's violation of the "prompt-written" notice provision in the claims-made policy at issue there. 677 N.E.2d at 1146. And it is true that the words of the "prompt-written" notice provision here are "identical" to the words in the "prompt-written" notice provision in *Tenovsky* itself. *See id.* But, although the majority seizes on that fact, I fail to see why that fact necessarily means that the two provisions are "identical" in any way that matters for purposes of determining whether prejudice need be shown to deny coverage based on the violation at issue here.

As was the case in *Tenovsky*, the inquiry into whether the insurer needs to show prejudice here necessarily hinges on the function — rather than the formal language — of the notice provision that the insured has violated. Because this notice provision appears in a claims-made policy that also has a "within-policy-period" notice provision, it seems most logical to treat this notice provision as an "as-soon-as-practicable" notice provision, notwithstanding that this provision does not use those precise words in describing when notice must be given. Indeed, it would be hard to see how else to treat the provision if it is to have any function independent of — and not superfluous to

— the "within-policy-period" notice provision in this policy, which the parties agree has no application to the claim for which coverage is being sought here.

Nonetheless, the majority concludes that *Tenovsky* instructs that an insurer may deny coverage based on an insured's violation of a "prompt-written" notice provision without showing prejudice so long as — and simply because — that provision is in a claims-made policy. Of course, in the case before us, the insured reported the claim long after the policy period ended. But I do not understand the majority to suggest that its understanding of *Tenovsky*'s exemption is limited to a circumstance in which notice is provided even later than the period that the "within-policy-period" itself gives for providing notice. The majority appears to be adopting a general rule for "prompt-written" notice provisions in claims-made policies — and so to be adopting a rule that applies even to a claims-made policy that, like this one, already independently requires notice to be given no later than sixty days after the policy period's end. The majority's logic therefore necessarily suggests that it would read *Tenovsky* to establish that an insurer could deny coverage without showing prejudice under a claims-made policy when the insured provides the insurer with notice within the policy period, but simply fails to do so as soon as practicable.[7]

[116 F.4th 56]

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[7] To the extent the majority means to suggest that a different case would be presented by a claims-made policy with a "within-policy-period" provision and a companion notice provision that expressly requires notice to be provided "as soon as practicable," I cannot see why we would think the SJC would make the notice-prejudice rule's application in such a case turn on that formal difference in the wording of the companion notice provision.

It is hard for me to see, though, how a "prompt-written" notice provision is ensuring "fairness in rate-setting" — rather than merely facilitating the insurer's investigatory interest — in requiring prompt notice of a claim not only made but also reported during the policy period. As a result, it is hard for me to see how the majority's view of *Tenovsky* accords with *Chas. T. Main*.

As I have explained, *Chas. T. Main* strongly indicates that notice provisions that serve only that investigatory — rather than "fairness in rate-setting" — end are not "of the essence" to either occurrence or claims-made policies. I thus do not see why we would interpret *Tenovsky* to embrace a rule that *Chas. T. Main* suggests makes little sense when nothing in *Tenovsky* so much as hints at an intention to deviate from *Chas. T. Main*. Nor do I see any language in *Tenovsky* that purports in any clear way to adopt the broad rule the majority derives from that case.[8]

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[8] Indeed, to the extent that *Tenovsky* can be read to suggest that the language of the "prompt-written" notice provision is itself outcome determinative, adhering to its literal interpretation would counsel an exceedingly odd result here. That is so because *Tenovsky* held that "[i]t is apparent from the language of the [claims-made insurance policy at issue in *Tenovsky*] just as it is apparent from the policy considered in *Chas. T. Main*, Inc., that the purpose of both policies' notice provision is to produce 'fairness in rate setting' by minimizing 'the time between the insured event and the payment.'" 677 N.E.2d at 1146. As such, *Tenovsky* held that "prompt," as used in that policy, must be interpreted to "require[] that notice to the insurer be given no later than sixty days following the expiration of the policy period." *Id.* If we applied the same interpretation to the "identical" language of the "prompt-written" notice provision at issue here, that provision would be identical to, and wholly redundant of, the existing "within-policy-period" notice provision that all agree does not apply to this specific claim. Insofar as the majority views *Tenovsky* as controlling, taking that holding to its logical conclusion would

Beyond that, the facts of *Tenovsky* gave the SJC no reason to even contemplate — let alone adopt — the categorical no-prejudice rule for "prompt-written notice" provisions that the majority attributes to that decision. Unlike the claims-made policy here, the one at issue there had no express "within-policy-period" notice provision. 677 N.E.2d at 1145. Thus, the "prompt-written" notice provision at issue in that case was not a mere companion notice provision, easily read to be akin to the kind of "as-soon-as-practicable" notice provisions that *Chas. T. Main* took such pains to distinguish from "within-policy-period" notice provisions. 551 N.E.2d at 29-30. It was the only notice provision in that policy at all. As such, it was the only provision in the policy that could have functioned to impose the kind of "within-the-policy" period reporting requirement that *Chas. T. Main* explained claims-made policies "always" have, see 551 N.E.2d at 29 (emphasis added).

Thus, in applying *Chas. T. Main* in *Tenovsky*, the SJC had distinct reasons — not present here — to treat the "prompt-written" notice provision there as if it were functionally "identical" to a "within-policy-period" notice provision, at least with respect to a claim made against the insured within the policy period (such as was at issue in that case) but only reported years after that period's end. 677 N.E.2d at 1145. And so, in applying *Chas. T. Main* in *Tenovsky*, the SJC had reasons — not present here — to conclude that the insurer must not have needed to show prejudice to deny coverage based on the insured's failure to satisfy the "prompt-written" notice provision there at issue.

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seem to exempt the insured from having had to provide any notice at all.

I recognize there is also nothing in *Tenovsky* to suggest that the SJC was contemplating

[116 F.4th 57]
a policy, like this one, with a relating-back provision that would allow a claim, itself made long after the expiration of the policy period, to nevertheless be treated as having been made within that period. I thus suppose, in consequence of this unique feature of this case, the SJC could be moved to conclude that the insurer here would not need to show prejudice to deny coverage based on the insured's failure to provide "prompt-written" notice, even if the insurer would indeed have to show prejudice to deny coverage on that basis if the claim at issue were not such a "related" one and instead had been made dilatorily but within the policy period in its own right.

But the majority does not suggest that feature of this case is relevant to the prejudice inquiry, given the categorical nature of the no-prejudice rule that it attributes to *Tenovsky*. And, in any event, there is good reason to doubt that the SJC would so rule. To do so, the SJC would have to overlook this insurer's choice, in agreeing to this claims-made policy's relating-back provision, to provide coverage for some late-discovered claims. The SJC thus would have to ignore this insurer's seeming choice — through that provision — to bargain away, at least as to such "related" claims, the interest in ensuring fairness in rate-setting that *Chas. T. Main* recognized that claims-made policy insurers generally have.[9]

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[9] The other precedents the majority cites do not conflict with my understanding of the state of Massachusetts law, as they either did not involve a claims-made policy at all, *see Boyle v. Zurich Am. Ins.*, 472 Mass. 649, 36 N.E.3d 1229 (2015), or concerned an insured's breach of a "within-policy-period" notice requirement,

IV.

That *Tenovsky* does not compel, and *Chas. T. Main* indeed points against, the majority's view of Massachusetts insurance law would seem sufficient to demonstrate that we confront the kind of state-law ambiguity that favors certification. I must consider, though, whether our own precedents or other sources of authority might nonetheless bring the clarity that is missing from the SJC's own precedents. They do not.

Starting with our own precedents, we have twice addressed how *Chas. T. Main* applies when it comes to the violation of a claims-made policy's notice provision. But each time we considered only a failure to comply with an express "within-policy-period" notice provision of the kind addressed in *Chas. T. Main* itself. *See President & Fellows of Harvard Coll. v. Zurich Am. Ins. Co.* ("Harvard College"), 77 F.4th 33, 38 (1st Cir. 2023); *Gargano v. Liberty Int'l Underwriters, Inc.*, 572 F.3d 45, 50 (1st Cir. 2009). Thus, in neither case did we have any reason to address — let alone endorse — the approach the majority here derives from *Tenovsky*. Nor have we otherwise had occasion to address this area of Massachusetts insurance law.

There are high-court rulings from other states that have addressed this area of insurance law. But, if anything, they only cast further doubt on the soundness of the majority's approach, because those precedents suggest that a "prompt-written" notice provision is subject to the notice-prejudice rule when it appears

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see Meadows Constr. Co. v. Westchester Fire Ins., 100 Mass.App.Ct. 1120, 180 N.E.3d 1032 (2022) (unpublished table decision); *Young Men's Christian Ass'n of Greater Worcester v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 65 Mass.App.Ct. 1121, 843 N.E.2d 722 (2006) (unpublished table decision).

alongside a claims-made policy's express "within-policy-period" notice provision.[10] Indeed, one

[116 F.4th 58]
of those decisions expressly relied on *Chas. T. Main* in so holding. *See Prodigy*, 288 S.W.3d at 381-82.

That said, I am aware of one state high court that has gone the other way. But it hardly shows that the SJC would rule for the insurer here, as that court held no prejudice needed to be shown only while emphasizing "the importance of the characteristics of [the insured in that case:] ... an incorporated business entity that engaged in complex financial transactions" and had negotiated for and procured the commercial liability policy at issue there through an insurance broker. *Templo Fuente de Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 224 N.J. 189, 129 A.3d 1069, 1080 (2016); see also id. at 1081 ("In this instance we need not make a sweeping statement about the strictness of enforcing the 'as soon as practicable' notice requirement in 'claims made' policies generally.").

Finally, there is some federal precedent — albeit not binding on us — suggesting that a showing of prejudice is sometimes required when an insurer seeks to deny coverage based on an insured's noncompliance

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[10] *See Prodigy Commc'ns Corp. v. Agric. Excess & Surplus Ins. Co.*, 288 S.W.3d 374, 382 (Tex. 2009) ("In a claims-made policy, when an insured gives notice of a claim within the policy period or other specified reporting period, the insurer must show that the insured's noncompliance with the policy's 'as soon as practicable' notice provision prejudiced the insurer before it may deny coverage."); *Sherwood Brands, Inc. v. Great Am. Ins. Co.*, 418 Md. 300, 13 A.3d 1268, 1288 (2011) (holding that the prejudice requirement "does apply... to claims-made policies in which the act triggering coverage occurs during the policy period, but the insured does not comply strictly with the policy's notice provisions").

with a claims-made policy's "as-soon-as-practicable" notice requirement. *See TRT Dev. Co. v. ACE Am. Ins. Co.*, 566 F. Supp. 3d 118, 127 (D.N.H. 2021) (predicting New Hampshire law); *Craft v. Phila. Indem. Ins. Co.*, 560 F. App'x 710, 715 (10th Cir. 2014) (certifying question to the Colorado Supreme Court). I note, too, that treatise writers have consistently endorsed the view that prejudice must be shown in such a circumstance.[11]

Based on this survey of authorities beyond the SJC, I would not go so far as to say that — at least given the novelty of the question presented — it is evident that the SJC would rule against the insurer here. But I certainly cannot say, based on this survey, that I am confident the SJC would, as the majority predicts, rule in the insurer's favor.

V.

The majority is right that we have stated that "a plaintiff who made a deliberate choice to sue in federal

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[11] See Restatement of the Law of Liability Insurance § 35 cmt. h (2019) ("*Prejudice is required when notice is late but given before the end of the reporting period.*"); 13 Steven Plitt, Daniel Maldonado, Joshua D. Rogers & Jordan R. Plitt, Couch on Insurance § 186:13 (3d ed. 2017) ("As a general statement, the prompt notice of claim requirement and the 'claims made' within the policy period requirement serve such different purposes, and are of such different basic character, that the principles applied to one should have little or nothing to do with the principles applied to the other."); John H. Mathias, John D. Shugrue & Thomas A. Marrinson, Insurance Coverage Disputes § 2.02[1][b] (2002) (concluding that an "as soon as practicable" notice requirement in claims-made policies "like ... in occurrence policies, is not an integral part of the insuring agreement itself. Rather, its purpose is to permit an insurer the opportunity to investigate facts relating to liability, and like similar notice requirements in occurrence policies, should not be read to bar coverage unless the insurer can show prejudice from noncompliance).

court rather than in a Massachusetts state court is not in a position to ask us to blaze a new trail that the Massachusetts courts have not invited." *Harvard Coll.*, 77 F.4th at 39 (cleaned

[116 F.4th 59]
up). Here, however, we have come to a fork in the road, and the plaintiff is merely asking us to choose one as-yet untrod state-law path over another. Thus, rather than make that choice unaided, I think it sensible to do what any prudent trekker would: ask for directions from an unusually reliable guide, especially when that guide's own map suggests reasons to be wary of opting for the road less traveled. Accordingly, because I would certify the underlying question of Massachusetts law to the SJC, I respectfully dissent from the decision to affirm the grant of summary judgment to the insurer on the insured's wrongful-denial-of-coverage claim.[12]

[12] Because the majority's decision about the notice-prejudice issue is antecedent to its decision affirming the grant of summary judgment on the plaintiff's Mass. Gen. Laws chs. 93A and 176D claim, I concur only in the judgment as to that claim, as I do agree with the district court's reasons for granting summary judgment on that claim.

Order of First Circuit denying rehearing and rehearing en banc, October 22, 2024

United States Court of Appeals
For the First Circuit

No. 23-1792

Joan Stormo, as assignee of Peter T. Clark,
Plaintiff - Appellant,

v.

State National Insurance Company,
Defendant - Appellee.

Before
Barron, Chief Judge
Lynch, Kayatta, Gelpi, Montecalvo,
Rikelman, and Aframe, Circuit Judges

ORDER OF COURT

Entered: October 22, 2024

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:
Anastasia Dubrovsky, Clerk

Stormo v. State Nat'l Ins. Co., Docket No. 1:19-cv-10034 (U.S.D. Mass. August 25, 2023), 2023 WL 5515823

Joan Stormo, as assignee of Peter T. Clark, Plaintiff,
v.
State National Insurance Company, Defendant.
Civil Action No. 19-10034-FDS.
United States District Court, D. Massachusetts.
August 25, 2023
2023 WL 5515823

Order on Defendant's Motion for Judgment Notwithstanding Verdict
Docket #230

F. DENNIS SAYLOR, IV, Chief District Judge.

This is a dispute over coverage under a "claims made" insurance policy with a "prompt written notice" requirement. Jurisdiction is based on diversity of citizenship.

After a trial, a jury found that defendant State National Insurance Company breached its legal-malpractice policy with its insured, Peter T. Clark. The jury awarded $1,106,138.10 to plaintiff Joan Stormo, Clark's assignee.

State National has moved for judgment notwithstanding the verdict. It argues that Stormo was not entitled to recover because Clark failed to give timely notice of the claim, as required by the policy.[1]

[1] It further argues, in the alternative, that its liability to Stormo must be limited to $305,198.60, the amount remaining under the

The policy at issue is a "claims made" policy (as opposed to an "occurrences" policy)

Page 2
that provides coverage for claims made against the insured within the relevant period. The policy requires that notice of such a claim be given to the insurer during the policy period or within 60 days thereafter, and that in any event the insured must give "prompt written notice" of such a claim.

Here, the claim was made in October 2014, and notice was not given by the insured until December 2015, nearly fourteen months later. The notice was therefore provided well outside the time limits of the policy.

Unfortunately for plaintiff, Massachusetts law provides for strict enforcement of specific notice requirements in a "claims made" policy. That is true even if the insurer had actual notice of the claim; even if it suffered no prejudice from the late notice; and without regard to the possibility that strict enforcement might lead to an unfair result. Indeed, earlier this month, the First Circuit, applying Massachusetts law, affirmed those very principles. *See President and Fellows of Harvard College v. Zurich American Insurance Co.,* 2023 WL 5089317 (1st Cir. Aug. 9, 2023).

Whether that is a sound policy is certainly open to question. But as the same First Circuit opinion noted, any modification of the policy is a matter for the Supreme Judicial Court, not a federal court sitting in diversity. *Id.* at *5. Accordingly—and with considerable sympathy for plaintiff and her family, who have suffered significant financial harm that may never be

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policy. Because the Court is granting the motion for failure to give timely notice, it does not reach the alternative ground.

redressed—the Court will grant the motion for judgment notwithstanding the verdict.

I. Background

In simplified terms, the factual background is as follows.

Joan Stormo hired Peter Clark, an attorney, to represent her in the sale of real estate to KGM Custom Homes, Inc., in 2004 and 2005. The sale failed to close, due in substantial part to the conduct of Clark. KGM then sued Stormo and Clark. *See* First Amended Complaint, *K.G.M.*

Page 3
Custom Homes Inc. v. Peter T. Clark., Bristol Superior Ct., BRCV2010-1084.

State National had issued a legal malpractice policy to Clark. The policy required State National to

> pay on behalf of any INSURED all DAMAGES in excess of the deductible which any INSURED becomes legally obligated to pay as a result of CLAIMS first made against any INSURED during the POLICY PERIOD and reported to the Company in writing during the POLICY PERIOD or within sixty (60) days thereafter, by reason of any WRONGFUL ACT occurring on or after the RETROACTIVE DATE, if any.

(Policy at 1). The policy had a $1,000,000 limit on each claim.

The policy provided that

> [i]f a CLAIM is made against any INSURED, the INSURED must give prompt written notice to the Company. However, breach of this condition shall not result in a denial of coverage with

> respect to any INSURED who had no knowledge of the CLAIM.

(*Id.* at 6).[2]

State National investigated, defended, and settled *KGM v. Clark* on behalf of Clark, which reduced the amount available under the policy to $305,198.60.

On October 6, 2014, after *KGM v. Clark* had settled, Stormo sued Clark for legal malpractice and violation of Mass. Gen. Laws. ch. 93A in Massachusetts Superior Court. Clark did not report the malpractice action against him to State National until December 1, 2015, almost fourteen months later.

On January 7, 2016, State National disclaimed coverage for the malpractice action pursuant to the policy's prompt-written-notice requirement and the prior-knowledge exclusion. Clark retained his own defense counsel.

On June 27, 2018, the Superior Court entered two judgments in favor of Stormo in her action against Clark: judgment on her malpractice claim for $1,243,416.62 and judgment on her Chapter 93A claim that was later amended to $3,769,627.53. The court also assigned to Stormo any claims that Clark

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[2] It also provided that it does not apply to

> any CLAIM arising out of any WRONGFUL ACT occurring prior to the effective date of this policy if ... the INSURED at or before the effective date knew or could have reasonably foreseen that such WRONGFUL ACT might be expected to be the basis of a CLAIM. However, this paragraph B. does not apply to any INSURED who had no knowledge of or could not have reasonably foreseen that any such WRONGFUL ACT might be expected to be the basis of a CLAIM.

(*Id.* at 4).

may have had against his professional-liability insurance carriers.[3]

Page 4

On January 7, 2019, Stormo filed this action against State National, contending that it breached the insurance contract with Clark by refusing to defend and indemnify him in the malpractice action. Her complaint asserted two claims: breach of contract and violation of Mass. Gen. Laws ch. 93A. The Court granted summary judgment in favor of State National on the Chapter 93A claim.

On February 14, 2023, following a five-day trial, a jury found in favor of Stormo on her breach of contract claim. The jury awarded Stormo $1,106,138.10.

State National has moved for judgment notwithstanding the verdict under Fed. R. Civ. P. 50(b), arguing (1) that Stormo was not entitled to recover under the malpractice-insurance policy because Clark breached its reporting requirements, and (2) in the alternative, that its liability to Stormo must be limited to $305,198.60, the coverage amount remaining under the policy.[4]

II. Legal Standard

A court may grant judgment as a matter of law after a trial. Fed. R. Civ. P. 50(b).

Page 5

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[3] "It is permissible and not uncommon for an insured to assign his or her rights against an insurer to the injured party." *Boyle v. Zurich American Ins. Co.*, 472 Mass. 649, 653 n.6 (2015).

[4] State National moved for judgment as a matter of law on those issues at the close of Stormo's evidence at trial and has properly renewed that motion under Rule 50(b).

A court should grant judgment as a matter of law "if a reasonable person could not have reached the conclusion of the jury." *White v. New Hampshire Dep't of Corrections,* 221 F.3d 254, 259 (1st Cir. 2000). The court must "construe the facts in the light most favorable to the jury verdict and draw any inferences in favor of the non-movant." *Sánchez v. Foley,* 972 F.3d 1, 10 (1st. Cir. 2020).

III. Analysis

State National contends that because Clark did not provide timely notice of the malpractice action, it was not obligated to defend and indemnify him. It further argues that it was not required to demonstrate prejudice to avoid coverage.

As noted, the policy requires the insured to give notice to State National within certain time constraints if a claim is made against the policyholder. (Policy at 6). A Massachusetts statute, Mass. Gen. Laws ch. 175, § 112, provides that the failure of an insured to "seasonably notify" the insurer may not result in a denial of coverage unless the insurer "has been prejudiced thereby."[5] Nonetheless, Massachusetts case law draws a distinction between different types of policies and different types of notice requirements, and the Supreme Judicial Court has held that § 112 does not

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[5] Specifically, the last sentence of § 112 provides as follows:

> An insurance company shall not deny insurance coverage to an insured because of failure of an insured to seasonably notify an insurance company of an occurrence, incident, claim or of a suit founded upon an occurrence, incident or claim, which may give rise to liability insured against unless the insurance company has been prejudiced thereby.

Mass. Gen. Laws ch. 175, § 112.

apply to "claims made" policies with specific notice requirements. A review of the principal cases is set forth below.

Page 6

A. Supreme Judicial Court Decisions

1. *Johnson Controls, Inc. v. Bowes*

In *Johnson Controls, Inc. v. Bowes,* 381 Mass. 278 (1980), the plaintiff sued an insurer to enforce a legal-malpractice judgment against its insured. The insured had waited seven months after being sued to notify his insurer of the claim. *Id.* at 279. The insurer disclaimed coverage, asserting that the insured had failed to provide timely notice as required by the policy. *Id.*

The policy at issue provided that "[i]n the event of an occurrence, written notice [with information concerning the occurrence] shall be given by or for the Insured to the [insurer] ... as soon as practicable" and that "[i]f claim is made or suit is brought against the Insured, the Insured shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative." *Id.* at 279 n.2. The policy was thus an "occurrence" policy with an "as soon as practicable" notice requirement.

The court held as follows:

> [W]here an insurance company attempts to be relieved of its obligations under a liability insurance policy not covered by [Mass. Gen. Laws. ch. 175, § 112], on the ground of untimely notice, the insurance company will be required to prove both that the notice provision was in fact breached and that the breach resulted in prejudice to its position.

Id. at 282.[6] In explaining its rationale for that holding, the court noted that "[a]lthough a majority of courts adhere to a strict contractual interpretation of notice provisions as a condition precedent to an insurer's liability, there is a recent trend to issue eschew technical forfeitures of insurance coverage unless the insurer has been materially prejudiced by virtue of late

Page 7
notification." *Id.* at 280. It quoted from a Pennsylvania Supreme Court opinion observing that an insurance policy is not a "private contract[] in the traditional sense," because it is "not a negotiated agreement; rather[,] its conditions are by and large dictated by the insurance company to the insured." *Id.* at 281 (quoting *Brakeman v. Potomac Ins. Co.,* 472 Pa. 66, 72 (1977).

The *Johnson Controls* court did not distinguish between claims-made and occurrence-based policies, or between different types of notice requirements. *Id.* at 280-82 (discussing various cases and secondary sources addressing notice clauses in insurance generally).

2. *Chas T. Main, Inc. v. Fireman's Insurance Co.*

[6] The first two sentences of § 112 apply to any "motor vehicle liability policy ... [and] any other policy insuring against liability for loss or damage on account of bodily injury or death, or for loss or damage resulting therefrom, or on account of damage to property," and address certain matters not relevant here. Mass. Gen. Laws. ch. 175, § 112. The last sentence, as noted above, provides that an insurer may not deny coverage due to a late notice unless it has been prejudiced; that sentence is not, on its face, limited to the types of policies identified in the first two sentences. The *Johnson Controls* court suggested, but did not expressly hold, that the third sentence was so limited. 381 Mass. at 280.

Ten years later, the SJC narrowed that holding considerably. In *Chas. T. Main, Inc. v. Fireman's Fund Ins. Co.*, 406 Mass. 862 (1990), the insured plaintiff had performed engineering services for a city. The city was sued by a subcontractor on that project, and in September 1984, the city brought suit against the insured. *Id.* at 863. The insured provided notice to its primary insurer, but did not provide it to its excess insurer until March 1987. *Id.* The excess insurer denied coverage on the ground that the notice was not timely. *Id.*

Although the reported opinion does not contain the exact language of the policy, the court noted that it was a "claims made" policy that required the insured to "report a claim within the policy period or a stated period thereafter." *Id.* at 866.

The court began its analysis by noting that

> [t]here are, in general, two types of notice requirements found in policies. One is a requirement that notice of the claim be given to the insurer "as soon as practicable" after the event which gives rise to coverage. This type of notice requirement is almost always found in occurrence policies and frequently is found in claims-made policies. The other type of notice provision requires reporting of the claim during the term of the policy or within a short period of time (thirty or sixty days) following the expiration of the policy. This type of notice is always found in claims-made policies and is never found in occurrence policies.

Id. at 864. The court concluded that the second type of notice provision (that requires reporting

of the claim during the term of the policy or within a short period of time thereafter) is intended to allow an insurer to "minimize the time between the insured event and the payment" so that the insurer can prospectively set accurate rates. *Id.* at 865. It then held that an insurer was not required to show prejudice if a claim was reported outside of the time period specified in the policy, because the filing of a late claim undermines "the primary purpose of insuring claims rather than occurrences." *Id.*

The court rejected the argument that the last sentence of Mass. Gen. Laws ch. 175, § 112—"An insurance company shall not deny insurance coverage to an insured because of failure of an insured to seasonably notify an insurance company of ... [a] claim ... unless the insurance company has been prejudiced thereby"—required a different result. Instead, it stated:

> We think, however, that § 112 applies only to the "as soon as practicable" type of notice and not to the "within the policy year" type of reporting requirement which is contained in the policy under review... . A requirement that an insurer on a claims-made policy must show that it was prejudiced by its insured's failure to report a claim within the policy period or a stated period thereafter would defeat the fundamental concept on which claims-made policies are premised. The likely result would be that claims-made policies, which offer substantial benefits to purchasers of insurance as well as insurance companies, would vanish from the scene. It would be unreasonable to think that the legislature intended such a result.

Chas. T. Main, 406 Mass. at 865-66. Finally, it rejected "any suggestion that we should declare as a matter of common law, *see* [*Johnson Controls*], that, to defeat coverage under a claimsmade policy, an insurer must show that it was prejudiced by its insured's noncompliance with a 'within the policy year' notice requirement." *Id.* at 866 n.3.[7]

Page 9

3. *Tenovsky v. Alliance Syndicate, Inc.*

In *Tenovsky v. Alliance Syndicate, Inc.,* 424 Mass. 678 (1997), the plaintiff was injured at a construction site. He alleged that the insured, a subcontractor, was responsible for his injury. *Id.* at 678. The plaintiff sought a declaratory judgment that the insurer was obliged to defend and indemnify the subcontractor. *Id.* at 679. The insurer argued that it was not so obligated because it had not received notice of the lawsuit against the insured until two and one-half years after the plaintiff had sent claims letters to the insured, and one and one-half years after the policy period expired. *Id.* at 680.

The policy at issue was a "claims made" policy, providing that "in the event that a claim is made against the insured, the insured must ensure that the insurer receives 'prompt written notice' of the claim." *Id.*

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[7] The SJC has reaffirmed the holding of *Johnson Controls*—that the insurer must demonstrate prejudice to avoid coverage even if the insured failed to comply with the notice requirements of the policy—with respect to "occurrence"-based policies on multiple occasions. *See, e.g., Darcy v. Hartford Ins. Co.,* 407 Mass. 481 (1990); *Sarnafil v. Peerless Ins. Co.,* 418 Mass. 295 (1994); *Boyle v. Zurich American Ins. Co.,* 472 Mass. 649 (2015).

The court held that the insurer was not required to provide coverage. It noted that "[s]urely[ ] 'prompt' notice of 'claims made' requires that notice to the insurer be given no later than sixty days following the expiration of the policy period." *Id.* at 681. It found that the policy at issue was "not materially different from the policy considered" in *Chas. T. Main. Id.*

> Both policies require that the claim, the insured event, be reported to the insurer during the term of the policy or at least promptly after its expiration. It is apparent from the language of the [policy], just as it is apparent from the policy considered in *Chas T. Main*, Inc., that the purpose of both policies' notice provision is to produce "fairness in rate setting" by minimizing "the time between the insured event and the payment." This case is controlled by *Chas. T. Main, Inc.* No further determination of prejudice to the insurer need be made.

Id.

B. *Harvard v. Zurich American*

That line of Massachusetts cases was recently applied by the First Circuit in *President and Fellows of Harvard College v. Zurich American Insurance Co.,* 2023 WL 5089317 (1st Cir. Aug. 9, 2023). There, Harvard was the insured on an excess policy that provided coverage on a

"claims made and reported" basis. *Id.* at *1. The policy covered claims that were made and reported to the insurer within the policy period (one year) and for a 90-day period thereafter. *Id.* at *2.

The university was sued in November 2014 for violating federal anti-discrimination law in its admissions processes, and promptly notified its primary insurance carrier. *Id.* It neglected, however, to notify the excess carrier until May 2017, long after the relevant policy period and the 90-day window had expired. *Id.* The excess insurer denied coverage on the ground that Harvard had failed to provide timely notice. *Id.*

Harvard then filed suit in federal district court, alleging breach of the policy. The district court granted summary judgment to the insurer. *Id.* On appeal, Harvard argued (1) that "the district court misapplied Massachusetts law when it determined that strict compliance with the excess policy's notice requirement was a prerequisite to coverage," and (2) "as a fall back ... propose[d] an alternative interpretation of the notice requirement and contend[ed] that issues of material fact remain as to whether that requirement was satisfied." *Id.* at *3. The First Circuit rejected both contentions.

As to the first argument, the court found that under Massachusetts law, "an insurer is not required to show prejudice before denying coverage due to an insured's failure to comply with the notice requirement of a claims-made policy." *Id.* Harvard argued that because the principal purpose of the notice requirement is to permit the insurer to set its rates based on accurate information, strict enforcement of the requirement "[should] not apply to circumstances in which in insurer has actual notice of a claim and can use that information to set its rates, notwithstanding the insured's failure to comply with the policy's notice requirement." *Id.* at *4. The court rejected that position summarily:

> Arguing that the policy's notice requirement should not be enforced because Zurich may have had actual notice of the claim is simply another way of arguing that Zurich was not prejudiced by the lack of timely written notice. To honor such an argument would impermissibly collapse the critical distinction that the SJC has made between occurrence-based and claims-made policies.

Id. (footnote omitted).

Harvard further argued that "to enforce the notice requirement in Zurich's excess policy would contravene sound public policy," because "[o]pportunistic insurers would be incentivized ... to draft convoluted notice provisions in the hope of duping customers into defaulting on their coverage." *Id.* at *5. As to that argument, the court observed:

> Whatever the merits of this contention—and we take no position on it—it is for Massachusetts courts, not for a federal court, to weight the policy implications of Massachusetts law. In diversity cases, we are followers: we must apply clear rules of law as those rules have been articulated by the highest court of the relevant state.

Id. (citation omitted).[8]

Finally, Harvard attempted to argue on appeal that the policy's notice requirement was ambiguous as to how a claim is to be "reported" to the insurer, and that

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[8] The court also noted that Harvard had elected to file the action in federal, rather than state, court, thereby forgoing the opportunity to argue for a modification of Massachusetts substantive law. *Id.* at *5.

"further discovery might reveal that a newspaper or other media outlet 'reported' the claim to Zurich by covering the story for the general public." *Id.* As to that claim, the court held that Harvard had forfeited the argument by raising it for the first time on appeal. *Id.*

C. Whether Clark Complied with the Policy's Notice Requirements

In light of that legal framework—and particularly in light of the First Circuit's opinion in *Harvard*—it is difficult to see how the jury verdict here can stand.

As noted, the policy is a "claims made" policy; it covers claims "made ... during the

Page 12
POLICY PERIOD." (Policy at 1). It requires that such claims be "reported ... during the POLICY PERIOD or within sixty [ ] days thereafter." (*Id.*). It further requires that the insured "give prompt written notice [of a claim] to [defendant]." (*Id.* at 6).

It is undisputed that notice of the claim was not given during the policy period, or within the sixty days that followed. And while it is unlikely that State National did not have actual notice of the claim, and there is no evidence that it was prejudiced in any way, those facts are legally irrelevant; all that matters, in this context, is the date that the claim was reported. And that date—which was fourteen months after the end of the coverage period—was well outside the time limits of the policy.

Under the circumstances, the Court sees no alternative but to grant the motion for judgment notwithstanding the verdict. While that is not an obviously sensible result, it is required by the terms of the policy and by Massachusetts law.

In short, because Clark's notice to the insurer of the malpractice action was too late, the policy does not provide coverage. By extension, plaintiff Stormo, as his assignee, cannot claim the benefits of the policy. Defendant is therefore entitled to judgment notwithstanding the verdict.

IV. Conclusion

For the foregoing reasons, the motion of defendant State National Insurance Company for judgment notwithstanding the verdict is GRANTED.

So Ordered.

Oral Ruling From the Bench, February 3, 2024 – U.S. District Court of Massachusetts

> On the notice issue, as near as I can make out, and reading *Charles [sic] T. Main*, *Gargano*, and the other cases cited, there are two types of notice that typically need to be made certainly under a claims made policy.
>
> Those cases make clear that with a claims made policy, notice must be made within the period of the policy or whatever time beyond that is permitted under the agreement, here 60 days, and that that notice is of the essence in the sense that failure to give that notice prohibits any claim.
>
> … There is also a separate notice requirement under this policy of giving prompt notice. The case law talks about notice given as soon as practicable. … I think under the case law, as I see it, even in a claims made policy, the insurer must show prejudice that the notice was not given promptly.
>
> And it's not -- I won't say that's 100 percent clear that that's correct, but I'm reasonably confident that that is true, and I'm going to proceed in accordance with that theory.

Stormo v. State Nat'l Ins. Co., Docket No. 1:19-cv-10034 (U.S.D.Mass., February 3, 2023) (four days before trial) (RA 759-60 in First Circuit record appendix)

Johnson Controls, Inc. v. Bowes, 381 Mass. 278, 49 N.E.2d 185 (1980)

Johnson Controls, Inc.
vs.
John T. Bowes & another. [1]
April 9, 1980 - August 5, 1980
Middlesex County
49 N.E.2d 185
381 Mass. 278

Present: HENNESSEY, C.J., QUIRICO, WILKINS, & ABRAMS, JJ.

An insurance company attempting to be relieved of its obligations under a liability insurance policy not covered by G. L. c. 175, Section 112, on the ground of untimely notice will be required, as to claims arising after the date of this opinion, to prove both that the notice provision was in fact breached and that the breach resulted in prejudice to its position. [280-283]

CIVIL ACTION commenced in the Superior Court on November 12, 1976.

The case was heard by Ronan, J., on motion for summary judgment.

After review was sought in the Appeals Court, the Supreme Judicial Court, on its own initiative, ordered direct appellate review.

Evan T. Lawson (Howard J. Wayne with him) for the plaintiff.

Stephen A. Moore (Jean F. Farrington with him) for the St. Paul Fire and Marine Insurance Company.

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[1] St. Paul Fire and Marine Insurance Company.

HENNESSEY, C.J. This is an action by Johnson Controls, Inc. (Johnson), to reach and apply the proceeds of legal malpractice insurance policies issued by St. Paul Fire and Marine Insurance Company (St. Paul) to attorney John T. Bowes (Bowes). See G. L. c. 214, Section 3 (6). A judge of the Superior Court in Middlesex County granted St. Paul's motion for summary judgment and entered a judgment dismissing

[381 Mass. 279]
Johnson's claim. The appeal was transferred to this court on our own motion.

Between 1960 and 1972 Bowes, then a member of the Massachusetts bar, was retained by Johnson to perform legal services in its behalf. St. Paul issued Bowes legal malpractice insurance policies, which were in effect from July, 1962, to July, 1968, and had a $1,000,000 an occurrence limit of liability.

On June 4, 1973, Johnson brought an action against Bowes in the Superior Court in Norfolk County charging six counts of negligence in his performance of legal services. On January 10, 1974, counsel for Johnson notified St. Paul of the malpractice action against Bowes. Counsel also provided St. Paul with copies of the declaration and writ and rescheduled a deposition of Bowes from January 30 to February 13, 1974, at the request of St. Paul's representative. On February 7, 1974, St. Paul notified Bowes that it disclaimed coverage and would not honor the claim or provide a defense. St. Paul based its disclaimer on Bowes's failures to give written notification of the claim and to forward suit papers to the company in violation of the provisions of his insurance contract.[2]

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[2] The insurance contract between Bowes and St. Paul provided, in part: (1) "In the event of an occurrence, written notice

A copy of St. Paul's letter to Bowes was sent to attorneys for Johnson.

Subsequently, Johnson's action in Norfolk County against Bowes was referred to a master, who found that Bowes had been negligent in all six instances claimed by Johnson. The master's report was confirmed, and Johnson was awarded judgment against Bowes in the amount of $31,698.28 plus $27.50 for costs. The judgment has not been satisfied.

[381 Mass. 280]

Johnson raises several issues in this appeal, but we reach only the first wherein Johnson urges this court to reexamine the present rule, applicable to some liability insurance, that the failure of an insured to comply with the notice requirements of a policy, in the absence of estoppel or waiver and regardless of lack of prejudice to the insurer, bars recovery. *See Spooner v. General Accident Fire & Life Assurance Corp.*, 379 Mass. 377, 378 (1979), and cases cited. In *Spooner v. General Accident Fire & Life Assurance Corp.*, supra at 379, we noted that the notice requirement was "an aspect of contract law that we [had] not previously questioned." In sharp contrast to the case at bar, however, Spooner involved a motor vehicle liability insurance policy, one of the types of policies affected by a prospective legislative amendment of the notice

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containing particulars sufficient to identify the Insured and also reasonably obtainable information with respect to the time, place or circumstances thereof, and the names and address [sic] of the injured and of available witnesses shall be given by or for the Insured to the Company or any of its authorized agents as soon as practicable." (2) "If claim is made or suit is brought against the Insured, the Insured shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative."

requirement.[3] *Id.* at 379-380. This court deferred to the Legislature's determination that the change in common law should be prospective only and refused the plaintiff's request that we "depart retroactively from the meaning and import that we have given for at least two generations to a significant condition of contracts of insurance." *Id.* The policy in the instant case does not come within the confines of the legislative amendment. Consequently, it presents a more appropriate vehicle for reconsideration of our common law.

Although a majority of courts adhere to a strict contractual interpretation of notice provisions as a condition precedent to an insurer's liability, there is a recent trend to eschew such technical forfeitures of insurance coverage unless the insurer has been materially prejudiced by virtue of late notification. See generally 8 J.A. Appleman, Insurance Law and Practice Section 4732 (1962); 13 G. Couch, Insurance Section 49:88 (2d ed. 1965); Comment, The Materiality of Prejudice to the Insurer as a Result of the Insured's

[381 Mass. 281]
Failure to Give Timely Notice, 74 Dick. L. Rev. 260 (1970). In rejecting the strict contractual approach, the Supreme Court of Pennsylvania stated: "The rationale underlying the strict contractual approach reflected in our past decisions is that courts should not presume to interfere with the freedom of private contracts and redraft insurance policy provisions where

[3] The Legislature's passage of St. 1977, c. 437, amending G. L. c. 175, Section 112, prohibits an insurer from denying coverage on a motor vehicle insurance policy or other policy compensating for bodily injury, death, or property damage because of failure of the insured to give seasonable notice, unless the insurer has been prejudiced thereby.

the intent of the parties is expressed by clear and unambiguous language. We are of the opinion, however, that this argument, based on the view that insurance policies are private contracts in the traditional sense, is no longer persuasive. Such a position fails to recognize the true nature of the relationship between insurance companies and their insureds. An insurance contract is not a negotiated agreement; rather its conditions are by and large dictated by the insurance company to the insured. The only aspect of the contract over which the insured can 'bargain' is the monetary amount of coverage." *Brakeman v. Potomac Ins. Co.*, 472 Pa. 66, 72 (1977). Courts have also been influenced to adopt a more liberal approach to the notice question because the classic contractual approach involves a forfeiture. In *Cooper v. Government Employees Ins. Co.*, 51 N.J. 86, 93-94 (1968), the court commented: "[A]lthough the policy may speak of the notice provision in terms of 'condition precedent,'... nonetheless what is involved is a forfeiture, for the carrier seeks, on account of a breach of that provision, to deny the insured the very thing paid for. This is not to belittle the need for notice of an accident, but rather to put the subject in perspective. Thus viewed, it becomes unreasonable to read the provision unrealistically or to find that the carrier may forfeit the coverage, even though there is no likelihood that it was prejudiced by the breach. To do so would be unfair to insureds." *See Miller v. Marcantel*, 221 So. 2d 557, 559 (La. App. 1969); Restatement (Second) of Contracts Section 255 (Tent. Draft No. 7, 1972).

The basic purpose of a strict interpretation of a notice clause is to enable an insurer to make "seasonable investigation of the facts relating to liability." *Bayer & Mingolla*

[381 Mass. 282]
Constr. Co. v. Deschenes, 348 Mass. 594, 600 (1965). "Such a requirement protects the insurance company from fraudulent claims, as well as invalid claims made in good faith, by allowing the insurance company to gain early control of the proceedings... . [A] reasonable notice clause is designed to protect the insurance company from being placed in a substantially less favorable position than it would have been in had timely notice been provided, e.g., being forced to pay a claim against which it has not had an opportunity to defend effectively. In short, the function of a notice requirement is to protect the insurance company's interests from being prejudiced. Where the insurance company's interests have not been harmed by a late notice, even in the absence of extenuating circumstances to excuse the tardiness, the reason behind the notice condition in the policy is lacking, and it follows neither logic nor fairness to relieve the insurance company of its obligations under the policy in such a situation." *Brakeman v. Potomac Ins. Co.*, supra at 74-75. *See Miller v. Marcantel*, supra at 559.

In light of the foregoing reasoning, we are of the opinion that our prior decisions relative to the delayed notice of an accident and the delayed notice of the institution of a suit have been too restrictive and should be changed. Accordingly, we hold that where an insurance company attempts to be relieved of its obligations under a liability insurance policy not covered by G. L. c. 175, Section 112, on the ground of untimely notice, the insurance company will be required to prove both that the notice provision was in fact breached and that the breach resulted in prejudice to its position. *See, e.g., Lindus v. Northern Ins. Co.*, 103 Ariz. 160 (1968); *Miller v. Marcantel*, supra; *Cooper v. Government Employees Ins. Co.*, supra; *Fox v. National Sav. Ins. Co.*,

424 P.2d 19 (Okla. 1967); *Lusch v. Aetna Cas. & Sur. Co.*, 272 Or. 593 (1975); *Pickering v. American Employers Ins. Co.*, 109 R.I. 143 (1971); *Factory Mut. Liab. Ins. Co. v. Kennedy*, 256 S.C. 376 (1971); *Oregon Auto. Ins. Co. v. Salzberg*, 85 Wash. 2d 372 (1975). However, because our reform of the notice requirement constitutes "a drastic or

[381 Mass. 283]
radical incursion upon existing law," which would disturb retroactively the contractual arrangements of the insurer and the insured, we confine our decision to claims arising after the date of this opinion.[4] *Diaz v.*

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[4] We note that an alternative to our wholly prospective overruling would be a limited retroactive application to the claim before us. Such selective retroactive application has been justified, in part, because it encourages socially beneficial attacks on outmoded doctrines. *E.g., Molitor v. Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11, 28 (1959), cert. denied, 362 U.S. 968 (1960) (charitable immunity); *Kojis v. Doctors Hosp.*, 12 Wis. 2d 367, 374 (1961) (charitable immunity). However, the unevenness of such a change in doctrine has been criticized: "This combination of partly prospective and partly retroactive overruling offers only a little more encouragement to attacks on outmoded doctrine than the inducement a claimant and his attorney would find in the hope of persuading the court to overrule retroactively. The advantage from this added degree of encouragement, such as it may be, probably is outweighed by the disadvantage of uneven treatment ... . It is true that some unevenness is an inevitable consequence of any change in doctrine, regardless of the choice among methods of change. But it seems preferable that a court reduce the element of unevenness more than is possible under decisions applying a new rule retroactively only to the case before the court, or to that and closely related cases." R.E. Keeton, Venturing to Do Justice 36 (1969). As we have stated, the change of existing law involves a previously unquestioned aspect of contract law, in which reliance interests exert a strong influence. We conclude, therefore, that a wholly prospective overruling is more appropriate in the instant case. We are cognizant

Eli Lilly & Co., 364 Mass. 153, 167 (1973). R.E. Keeton, Venturing to Do Justice 25-53 (1969). It follows that the Superior Court's order dismissing Johnson's claim is affirmed.

So ordered.

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of the fact that in spite of our prospective limitation there will be a period of adjustment in which insurers may be exposed to increased liability, but we do not think such a limited impact justifies a strict adherence to precedent.

Chas. T. Main, Inc. v. Fireman's Fund Ins. Co.,
46 Mass. 862, 551 N.E.2d 28 (1990)

Chas. T. Main, Inc.
vs.
Fireman's Fund Insurance Company & another.[1]
Suffolk County
December 5, 1989 - March 8, 1990
551 N.E.2d 28
406 Mass. 862

Present: LIACOS, C.J., ABRAMS, NOLAN, O'CONNOR, & GREANEY, JJ.

An insurance company attempting to be relieved of its obligations under a professional liability insurance policy written on a "claims made" basis and not covered by G. L. c. 175, Section 112, on the ground of untimely notice was not required to demonstrate that the breach resulted in prejudice to its position. [863-866]

CIVIL ACTION commenced in the Superior Court Department on September 29, 1987.

The case was heard by Paul K. Connolly, J., on motions for summary judgment.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Kenneth J. Mickiewicz (Richard S. Nicholson with him) for the plaintiff.

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[1] American Insurance Company which is affiliated with Fireman's Fund Insurance.

John P. Ryan (Robert G. Eaton with him) for the defendants.

Acheson H. Callaghan, Jr., Steven L. Schreckinger & Michael T. Gass, for Medical Malpractice Joint Underwriting Association of Massachusetts & another, amici curiae, submitted a brief.

NOLAN, J. In a complaint which contains counts for breach of contract, and violations of G. L. c. 93A, Sections 2, 11 (1988 ed.) (Consumer Protection Act), and G. L. c. 176D, Section 3 (1988 ed.) (unfair or deceptive acts in the insurance industry),

[406 Mass. 863]
the plaintiff seeks recovery based on its insurance policy with the defendants.

The plaintiff's motion for summary judgment was denied and summary judgment was entered for the defendants. See Mass. R. Civ. P. 56 (c), 365 Mass. 824 (1974). The plaintiff appealed and we transferred the case to this court on our own motion. We affirm.

From the material presented to the judge, we learn that in 1977, the city of Lakeland, Florida, hired the plaintiff to provide professional services as consulting engineer for the design and construction of an extension to a power generation facility. On September 14, 1984, when sued by a subcontractor on this job, Lakeland named the plaintiff as a "counter-defendant." At the time that this claim was asserted by Lakeland, the plaintiff maintained primary professional liability coverage with CNA Insurance Companies (CNA) and excess insurance coverage with the defendants. These policies were in effect during the period May 1, 1984, to May 1, 1985, and all were written on a "claims made" basis, as we shall discuss. The plaintiff gave notice of the Lakeland claim to CNA on or about

September 20, 1984. However, the plaintiff did not give notice of the Lakeland claim to the defendants until March, 1987. The defendants denied coverage because, they contended, the notice was untimely. We agree.

The only issue is whether the defendants are required to demonstrate prejudice resulting from the untimeliness of the notice. Although the parties argue the issue of choice of law as between the law of Massachusetts and the law of Florida, we need not discuss this issue because we decide that Massachusetts law coincides with Florida law on the relevant issues and we, accordingly, apply Massachusetts law.

Requirement of timely notice. This case involves a claims-made insurance policy. Our analysis requires an understanding of the difference between such policies and occurrence policies. Coverage is effective in an occurrence policy if the covered act or covered omission occurs within the policy period, regardless of the date of discovery. A claims-made policy

[406 Mass. 864]
covers the insured for claims made during the policy year and reported within that period or a specified period thereafter regardless of when the covered act or omission occurred.

There are, in general, two types of notice requirements found in policies. One is a requirement that notice of the claim be given to the insurer "as soon as practicable" after the event which gives rise to coverage. This type of notice requirement is almost always found in occurrence policies and frequently is found in claims-made policies. The other type of notice provision requires reporting of the claim during the term of the policy or within a short period of time (thirty or sixty days) following the expiration of the policy. This

type of notice is always found in claims-made policies and is never found in occurrence policies.

The purposes of the two types of reporting requirements differ sharply. The purpose of a notice requirement, "as soon as practicable," is to permit an insurer to make an investigation of the facts and occurrence relating to liability. *See Bayer & Mingolla Constr. Co. v. Deschenes*, 348 Mass. 594, 600 (1965). However, fairness in rate setting is the purpose of a requirement that notice of a claim be given within the policy period or shortly thereafter, as we explain below.

An insurer has a difficult time setting rates in these inflationary, and otherwise rapidly changing, times, especially in connection with occurrence policies. The insurer may not be in a position to make good on its promise to indemnify the insured until many years after the insurced event, that is, the occurrence, has happened. For example, in 1990, an insurer may promise to indemnify its insured for losses the insured may incur due to occurrences during that calendar year. Assume that, in 1990 the average broken leg brings $10,000 in settlement or verdict. The rate is likely to be based on that hypothesis or on an assumption of a rate of inflation that may be too low. Also, the rate setter must guess at the likely period between occurrences and payoff dates. If the claim for the broken leg is not made against the insured until 1995 (or 2000), the insurer may end up paying $30,000 for that injury, an amount no one could have predicted.

[406 Mass. 865]
The closer in time that the insured event and the insurer's payoff are, the more predictable the amount of the payment will be, and the more likely it is that rates will fairly reflect the risks taken by the insurer. The purpose of a claims-made policy is to minimize the

time between the insured event and the payment. For that reason, the insured event is the claim being made against the insured during the policy period and the claim being reported to the insurer within that same period or a slightly extended, and specified, period. If a claim is made against an insured, but the insurer does not know about it until years later, the primary purpose of insuring claims rather than occurrences is frustrated. Accordingly, the requirement that notice of the claim be given in the policy period or shortly thereafter in the claims-made policy is of the essence in determining whether coverage exists. Prejudice for an untimely report in this instance is not an appropriate inquiry.

The plaintiff relies heavily on the last sentence of G. L. c. 175, Section 112,[2] in support of its argument that an insurer may not rely on lateness of notice to avoid coverage in the absence of demonstrated

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[2] General Laws c. 175, Section 112 (1988 ed.), provides: "The liability of any company under a motor vehicle liability policy, as defined in section thirty-four A of chapter ninety, or under any other policy insuring against liability for loss or damage on account of bodily injury or death, or for loss or damage resulting therefrom, or on account of damage to property, shall become absolute whenever the loss or damage for which the insured is responsible occurs, and the satisfaction by the insured of a final judgment for such loss or damage shall not be a condition precedent to the right or duty of the company to make payment on account of said loss or damage. No such contract of insurance shall be cancelled or annulled by any agreement between the company and the insured after the said insured has become responsible for such loss or damage, and any such cancellation or annulment shall be void. An insurance company shall not deny insurance coverage to an insured because of failure of an insured to seasonably notify an insurance company of an occurrence, incident, claim or of a suit founded upon an occurrence, incident or claim, which may give rise to liability insured against unless the insurance company has been prejudiced thereby."

prejudice. We think, however, that Section 112 applies only to the "as soon as practicable" type of notice and not to the "within the policy year" type of reporting requirement which is contained in the policy under

[406 Mass. 866]
review in this case and was not met. A requirement that an insurer on a claims-made policy must show that it was prejudiced by its insured's failure to report a claim within the policy period or a stated period thereafter would defeat the fundamental concept on which claims-made policies are premised. The likely result would be that claims-made policies, which offer substantial benefits to purchasers of insurance as well as insurance companies, would vanish from the scene. It would be unreasonable to think that the Legislature intended such a result.[3]

Judgment affirmed.

[3] For the same reason, we reject any suggestion that we should declare as a matter of common law, *see Johnson Controls, Inc. v. Bowes*, 381 Mass. 278 (1980), that, to defeat coverage under a claims-made policy, an insurer must show that it was prejudiced by its insured's noncompliance with a "within the policy year" notice requirement.

Tenovsky v. Alliance Syndicate, Inc. 424 Mass. 678, 677 N.E.2d 1144 (1997)

Norman Tenovsky & another[1]
vs.
Alliance Syndicate, Inc., & others.[2]
December 4, 1996 - April 9, 1997
Suffolk County
677 N.E.2d 1144
424 Mass. 678

Present: WILKINS, C.J., ABRAMS, LYNCH, O'CONNOR, & GREANEY, JJ.

Related Cases: 40 Mass. App. Ct. 204

"Prompt" notice of a claim under a "claims-made" policy of insurance requires notice to the insurer be given during the policy period or no later than sixty days after the expiration of the policy period: where an insured under such a policy failed to give the insurer notice for more than two and one-half years after the insured received the claims and more than a year and one-half after the policy period expired, the insurer had no liability under the policy. [679-681]

CIVIL ACTION commenced in the Superior Court Department on July 19, 1991.

The case was heard by Hiller B. Zobel, J., on motions for summary judgment.

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[1] Cecile A. Tenovsky.

[2] G & H Steel Services, Inc.; Liberty Mutual Insurance Company; and Turner Construction Company. This appeal does not involve Liberty Mutual Insurance Company or Turner Construction Company.

After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Richard J. Riley for Alliance Syndicate, Inc.

Nancy M. McLean for the plaintiffs.

O'CONNOR, J. On October 15, 1987, the plaintiff Norman Tenovsky (Tenovsky), while employed by United Steel Erectors, Inc., as an ironworker, was seriously injured at a construction site. He alleges that the negligence of the defendant G & H Steel Services, Inc. (G & H Steel), caused his injuries. G & H Steel was a subcontractor on the job and was insured against personal injury liability by the defendant Alliance Syndicate, Inc. (Alliance).

[424 Mass. 679]

Tenovsky and his wife, Cecile A. Tenovsky, brought a tort action alleging personal injuries and loss of consortium against Turner Construction Company, the general contractor at the site of the accident, and G & H Steel. That action is not before us. In the action that is before us, the plaintiffs sought a declaratory judgment in the Superior Court that would establish that Alliance must defend G & H Steel in the plaintiffs' tort action and, subject to the limits of its coverage, must pay the plaintiffs whatever damages the plaintiffs may be awarded in their tort action against G & H Steel.

The plaintiffs and Alliance filed cross motions for summary judgment. Relying principally on *Chas. T. Main, Inc. v. Fireman's Fund Ins. Co.*, 406 Mass. 862 (1990), a Superior Court judge concluded that the liability insurance policy issued by Alliance to G & H Steel was a claims-made policy and that G & H Steel's notice to Alliance of the plaintiffs' claims against G &

H Steel as a matter of law was too late to entitle G & H Steel to a defense or indemnification, thus defeating the plaintiffs' "reach and apply" claims. The judge denied the plaintiffs' motion for summary judgment and allowed Alliance's cross motion. The following judgment was entered on the docket: "Neither Alliance Insurance Group nor Alliance Syndicate, Inc. has any liability, whether by way of indemnity or otherwise, to any party herein on account of any injury said to have been suffered by Norman Tenovsky on or about Oct. 15, 1987."

The plaintiffs appealed. Reasoning that the insurance policy in this case was materially different from the policy involved in *Chas T. Main, Inc. v. Fireman's Fund Ins. Co.*, supra, the Appeals Court, 40 Mass. App. Ct. 204 (1996), reversed the judgment in favor of Alliance and ordered that the case be remanded to the Superior Court for further proceedings to be focused in large measure on whether any late notice of claim prejudiced Alliance. See G. L. c. 175, s. 112. We granted Alliance's application for further appellate review. We now affirm the judgment entered in the Superior Court.

The significant provisions of the Alliance policy are as follows. Section I, entitled "Coverages," states that coverage is provided "only if a claim for damages because of the 'bodily injury' or 'property damage' is first made against any insured during the policy period. (1) A claim by a person or organization seeking damages will be deemed to have been made

[424 Mass. 680]

when notice of such claim is received and recorded by any insured or by us, whichever comes first." With regard to the policy's notice requirement, Section IV of the policy, entitled "Commercial General Liability

Conditions," provides that, in the event that a claim is made against the insured, the insured must ensure that the insurer receives "prompt written notice" of the claim. That section also requires the insured to "[i]mmediately send [Alliance] copies of any demands, notices, summonses or legal papers received in connection with the claim or 'suit.'"

On June 23, 1988 and July 8, 1988, the plaintiffs advised G & H Steel by certified mail of their claims arising out of Tenovsky's injuries sustained on October 15, 1987. As the Appeals Court observes, id. at 205, "Alliance does not appear to dispute that the claim letters written by the plaintiffs to G & H Steel in June and July of 1988 were during the policy period and constituted a valid claim under the policy." However, G & H Steel did not forward the plaintiffs' letters to Alliance or notify Alliance in any way of the plaintiffs' claims.

The plaintiffs commenced their tort action against G & H Steel and Turner Construction Company on October 9, 1990. Alliance received copies of the summons and complaint on or about December 17, 1990, which was two and one-half years after G & H Steel received the plaintiffs' claim letters and one and one-half years after the policy period expired. This was Alliance's first notice of the claims.

In this case and in *Chas. T. Main, Inc.*, personal injury claims were first made known to the insured during the policy period but the insurer first received notice of those claims two to three years after the claims were made. The policies in both cases purported to be, and were, claims-made policies. The *Chas. T. Main, Inc.*, policy provided that for coverage, the insurer must receive notice of claim during the policy period or within sixty days after the expiration of the policy. In the present case, the policy requires that the

insured, G & H Steel, provide the insurer, Alliance, "prompt written notice" of a claim and "[i]mmediately send [Alliance] copies of any demands, notices, summonses or legal papers received in connection with the claim or 'suit.'"

"[F]airness in rate setting is the purpose of a requirement that notice of a claim be given within the policy period or

[424 Mass. 681]
shortly thereafter," *id.* at 864, and, to that end, a typical claims-made policy "minimize[s] the time between the insured event and the payment." *Id.* at 865. "The closer in time that the insured event and the insurer's payoff are, the more predictable the amount of the payment will be, and the more likely it is that rates will fairly reflect the risks taken by the insurer.... If a claim is made against an insured, but the insurer does not know about it until years later, the primary purpose of insuring claims rather than occurrences is frustrated. Accordingly, the requirement that notice of the claim be given in the policy period or shortly thereafter in the claims-made policy period is of the essence in determining whether coverage exists. Prejudice [to the insurer as a result of] an untimely report in [such an] instance is not an appropriate inquiry." *Id.*

Surely, "prompt" notice of "claims made" requires that notice to the insurer be given no later than sixty days following the expiration of the policy period. The policy in this case, then, calling for promptness in notification, is not materially different from the policy considered in *Chas. T. Main, Inc.*, supra. Both policies require that the claim, the insured event, be reported to the insurer during the term of the policy or at least promptly after its expiration. It is apparent from the language of the Alliance policy, just as it is apparent

from the policy considered in *Chas T. Main*, Inc., that the purpose of both policies' notice provision is to produce "fairness in rate setting" by minimizing "the time between the insured event and the payment." This case is controlled by *Chas. T. Main, Inc.*, supra. No further determination of prejudice to the insurer need be made. "Prejudice for an untimely report in this instance is not an appropriate inquiry." *Id.* at 865. The judgment entered in the Superior Court is affirmed.

So ordered.

Tenovsky v. Alliance Insurance Group,
40 Mass. App. Ct. 204, 626 N.E.2d 716 (1996)

Norman Tenovsky & another[1]
vs.
Alliance Insurance Group & others.[2]
January 18, 1995 - March 22, 1996
Suffolk County
626 N.E.2d 716
40 Mass. App. Ct. 204

Further appellate review granted,
422 Mass. 1108 (1996).

Related Cases: 424 Mass. 678

Present: BROWN, SMITH, & JACOBS, JJ.

Where the provisions of an insurance policy required that claims be made during the policy period but did not expressly require the insured to give notice to the insurer of such claims within the policy period, a Superior Court judge erred in ordering judgment in favor of an insurer with respect to its obligation to indemnify or defend claims that were properly made within the policy period but which the insured did not

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[1] Cecile A. *Tenovsky*.

[2] The other defendants named in the complaint are G & H Steel Services, Inc., Liberty Mutual Insurance Company, and Turner Construction Company. The defendant Alliance Insurance Group is also referred to by the parties and in some pleadings as Alliance Syndicate, Inc. The judgment appealed from states that "[n]either Alliance Insurance Group nor Alliance Syndicate, Inc. has any liability ... on account of any injury said to have been suffered by Norman *Tenovsky* on or about October 15, 1987."

report to the insurer until more than two years later, when a civil action was filed. [205-208]

CIVIL ACTION commenced in the Superior Court Department on July 19, 1991.

The case was heard by Hiller B. Zobel, J., on motions for summary judgment.

Nancy M. McLean for the plaintiffs.

Richard J. Riley for Alliance Syndicate, Inc.

BROWN, J. The plaintiffs, Norman and Cecile A. Tenovsky, appeal from summary judgment entered for the defendant Alliance Insurance Group (Alliance), in a declaratory judgment action in which cross motions for summary judgment were filed. A Superior Court judge concluded that the insurance

[40 Mass. App. Ct. 205]

policy at issue is a so-called claims-made policy, that the case was controlled by *Chas. T. Main, Inc. v. Fireman's Fund Ins. Co.*, 406 Mass. 862 (1990), and that, since the insured, G & H Steel Services, Inc. (G & H Steel), failed to notify Alliance until over three years after the incident giving rise to the claim, Alliance, as matter of law, was under no obligation to indemnify or defend G & H Steel in a tort action brought by the plaintiffs.

The material before the judge discloses the following pertinent facts. On October 15, 1987, the plaintiff Norman Tenovsky was injured on the job while walking through a partially constructed building. He alleges that G & H Steel was responsible for defective workmanship that caused his injury. On June 23, 1988, and again on July 8, 1988, the plaintiffs, by certified mail, advised G & H Steel of their "claim." G & H Steel, however, never forwarded the plaintiffs' claim letters to Alliance.

On October 1, 1990, the plaintiffs filed an action in the Superior Court. Alliance, until this point unaware of the claim, received a copy of the summons and complaint from G & H Steel in November of 1990. On December 19, 1990, Alliance-not having seen the 1988 claim letters-wrote G & H Steel that the plaintiffs' claim did not appear to be covered by the policy. According to Alliance's December 19 letter, "[a]s this is a claims made policy, any claim must be made and reported during the policy period.... [I]t is clear that a claim was not made until after your policy had expired."

We turn to the policy. Alliance had issued the policy to G & H Steel for the period of June 16, 1988, through June 16, 1989. It appears that the policy is some species of claims-made policy.[3] On appeal, Alliance does not appear to dispute that the claim letters written by the plaintiffs to G & H Steel in June and July of 1988 were during the policy period and

[40 Mass. App. Ct. 206]
constituted a valid claim under the policy.[4] There remains, however, the issue whether Alliance also had

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[3] G & H Steel had specifically requested a claims-made policy, and, in so doing, paid a lower premium rate than it would have if the policy were an occurrence policy. The policy, in two instances, purports to provide claims-made coverage. The words "Provides Claims Made Coverage" appear at the top of page one of the policy. In addition, the words "Commercial General Liability (Claims-Made)" appear in the policy's declarations. Additional language in the policy consistent with typical claims-made policies is discussed in note 5, infra. See generally *Chas. T. Main, Inc. v. Fireman's Fund Ins. Co.*, 406 Mass. at 863-864; *National Union Fire Ins. Co. v. Talcott*, 931 F.2d 166, 168 (1st Cir. 1991).

[4] The first section of the policy, entitled "Coverages," provides that "this insurance applies to 'bodily injury' ... only if a claim for damages is first made against any insured during the policy

to receive notice of the plaintiffs, claim within the policy period.

By its terms, the policy requires only that G & H Steel provide Alliance with "prompt written notice" of any claims or suits and "immediately send [Alliance] copies of any demands, notices, summonses or legal papers received in connection with the claim or 'suit.'" *Compare Johnson Controls, Inc. v. Bowes*, 381 Mass. 278, 279 n.2 (1980) (policy provided, in part, that, "[i]f claim is made or suit is brought against the Insured, the Insured shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative"). Again, while the policy has elaborate provisions requiring that claims be received in the policy year (or within a slightly extended, and specified, period), nowhere in the policy is it expressly stated that G & H Steel is required to report claims to Alliance within the policy period.[5] We must be careful not to blur the distinction

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period... . A claim by a person or organization seeking damages will be deemed to have been made when notice of such claim is received and recorded by any insured or by us [Alliance], whichever comes first."

[5] G & H Steel's insurance with Alliance was canceled as of January 1, 1989 (and, consequently, G & H Steel received a "return premium" of $67,485). Alliance argues that, under a provision of the policy applicable in the event of cancellation, "G & H Steel had sixty days after cancellation in which to notify Alliance of the claim made against it by the [plaintiffs]. Yet G & H Steel failed to report the [plaintiffs'] claim within the extended reporting period." Provisions for an extended reporting period are typical in claims-made policies, *Chas. T. Main v. Fireman's Fund Ins. Co.*, 406 Mass. at 864, and the presence of such a provision in the policy before us supports our conclusion that this is a claims-made policy. (If the Alliance policy were an occurrence policy, as opposed to a claims-made policy, this language would have been inappropriate. "Coverage is effective in an occurrence policy if the covered act or covered omission occurs within the policy period,

between making a claim and notifying an insurer of a claim that has been made. The two acts are different in many ways, and the policy before us has requirements for

[40 Mass. App. Ct. 207]
making a claim (to the insured or the insurer) that are separate and distinct from the requirements for notifying the insurer of a claim that has been made. *See Cardin v. Royal Ins. Co.*, 394 Mass. 450, 453 (1985) (language in policy will be construed according to its ordinary meaning).

Our reading of *Chas. T. Main, Inc. v. Fireman's Fund Ins. Co.*, 406 Mass. at 864-865, leads us to conclude that the policy in that case differed materially from the policy before us. That opinion speaks of "two types of notice requirements found in policies. One is a requirement that notice of the claim be given to the insurer 'as soon as practicable, after the event which gives rise to coverage.... The other type of notice provision requires reporting of the claim during the term of the policy or within a short period of time (thirty or sixty days) following the expiration of the policy." *Id.* at 864. The policy in the *Chas. T. Main* case had a "'within the policy year, type of reporting requirement which ... was not met." *Id.* at 865-866. *See also National Union Ins. Co. v. Talcott*, 931 F.2d 166, 167 (1st Cir. 1991) ("policy specifically provided that all claims brought against the insured had to be reported during the policy period in which the claim was first made").

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regardless of the date of discovery." *Id.* at 863.) We do not, however, agree with Alliance's interpretation of the provision. The extended reporting period provision in the policy before us applies only to the making of a claim; there is no language providing for an extension of any reporting period for notice to an insurer of a claim having been made.

As we have made clear above, the policy before us does not have a requirement that notice be given to the insurer "within the policy year"; rather, it has a requirement that G & H Steel provide Alliance with "prompt written notice" of a claim and "immediately send [Alliance] copies of any demands, notices, summonses or legal papers received in connection with the claim or 'suit.'"

There is also the argument that a claims-made policy need not contain an express requirement that the insurer receive notice within the policy period; according to Alliance, *Chas. T. Main, Inc. v. Fireman's Fund Ins. Co.*, 406 Mass. at 864-866, teaches that all claims-made policies require notice to the insurer within the policy period. We are unwilling to read that opinion so broadly, especially where the policy in that case is distinguishable in critical respects from the policy before us.

Accordingly, G & H Steel's failure to notify Alliance of the plaintiffs' claim within the policy year did not justify Alliance's denial of coverage, and summary judgment in favor of Alliance on that basis should not have entered. There may be other grounds for denial of coverage: specifically, Alliance

[40 Mass. App. Ct. 208]
could argue that G & H Steel failed to provide Alliance with "prompt written notice" of the plaintiffs, claim. As to this issue, however, Alliance may not rely on lateness of notice to avoid coverage in the absence of demonstrated prejudice. See *Chas. T. Main, Inc. v. Fireman's Fund Ins. Co.*, 406 Mass. at 865-866 (G. L. c. 175, s. 112, while not applicable to the "within the year" reporting requirement, does apply to the "soon

as practicable" type of notice). *See also Johnson Controls, Inc. v. Bowes*, 381 Mass. at 282.[6]

The judgment is reversed, and the case is remanded to the Superior Court for further proceedings consistent with this opinion.[7]

So ordered.

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[6] The motion judge did not base his finding of no coverage on a determination that Alliance was prejudiced by late notification, as evidenced by his statement that, "given the applicable controlling authority, *Chas. T. Main, Inc. v. Fireman's Fund Insurance Co.*, supra at 865-866, this Court need not enter into such a calculus." In dictum, however, he noted that "an unexplained three-year hiatus is per se unfairly prejudicial." We disagree. A three-year delay is not uncommon in tort cases given the generally applicable statute of limitations, G. L. c. 260, s. 2A. Any analysis of the prejudice issue in this case appears to be quite complex and could involve deciding issues of disputed fact.

[7] Deciding as we do, we decline the plaintiffs' invitation to find that claims-made policies violate the public policy of the Commonwealth.