

## Developers Beware: Timely Notification of Design And Construction Defect Claims Required by Policies and State Law

09/26/19

As the developer of a project in New Jersey, you have secured insurance coverage for potential defect claims relating to your construction projects. You also require your contractors and design professionals to name you as an additional insured on their insurance policies. All of these insurance policies, however, are useless if you do not provide timely notice of claims to each of the policy insurers. In this post, we'll explore why and ways that developers can minimize the risk associated with potential forfeiture of coverage arising from an insurer's requirement for timely notification about design and construction defect claims.

### **Insurance Policies Require Timely Notification of Claims**

Both "occurrence" and "claims made" policies are likely to contain notice or reporting obligations mandating that the insured notify the insurer of claims filed against the insured "as soon as practicable," "within a reasonable time" or similar language. "Claims made" policies also require that notice be given by the insureds during the policy period or within a certain number of days after the policy expires.

### **The Legal Landscape: Timely Notification Tests**

The New Jersey Supreme Court has established tests for each type of policy to determine whether an insured has forfeited coverage by failing to timely notify the insurer of a claim or incident. Under an "occurrence" policy, the insurer must prove both that the insured breached the policy's notice provision and a likelihood of appreciable prejudice resulting from the untimely notice. That is, the insurer must also demonstrate that the delay impeded its ability to defend against the insured claim and that it would have had a meritorious defense to the claim had timely notice been provided. Under a "claims made" policy issued to a sophisticated insured, however, the insurer must prove only that the insured breached the policy's notice provision. For example, where an insured notified its insurer six months after learning of claims against it, the Court found that the insured did not comply with the policy's "as soon as practicable" notice requirement and held that the insurer could decline coverage even though the insured reported the claims within the "claims made" policy period.

### **Best Practices for Developers in New Jersey**

No matter what type of policy is in effect to provide coverage for construction and design defect claims, developers should respect notice provisions to minimize the risk of arming their insurers with potential arguments that the notice provisions were breached and coverage was thereby forfeited. Even letting notice correspondence slip through the cracks for a few months may be costly. Developers should also consider requiring their contractors and design professionals upon which they rely to agree to provide timely notification to their insurers of claims to ensure there will be funds to recover under claims of contribution and indemnification in the event that the developer is required to pay a homeowner or association for their contractors' or design professionals' negligence.

If you have questions about any aspect of construction defect law in New Jersey, contact Don Taylor at 732.855.6434 or Dan Kluska at 732.855.6033.

### **Attorneys**

- Donald E. Taylor
- Daniel J. Kluska

**Practice**

- Construction Law