PLUNKETT COONEY

# Equitable Contribution, Late Notice Coverage Update

March 15, 2024

## Equitable Contribution – Sixth Circuit (Ohio Law)

***ACE Am. Ins. Co. v. Zurich Am. Ins. Co.***
No. 22-4054, 2024 WL 945246 (6th Cir. Mar. 5, 2024)

The U.S. Court of Appeals for the Sixth Circuit vacated the federal district court's grant of summary judgment in favor of Discover Property & Casualty Insurance Company (Discover) and Zurich American Insurance Company (Zurich) and against ACE American Insurance Company (ACE), remanding the case to the district court. ACE, Discover, and Zurich were primary insurers of Safelite Group, Inc. (Safelite), a windshield repair company. The issue in the case was whether ACE was entitled to equitable contribution against Discover and Zurich for defense costs incurred solely by ACE.

In August 2015, Safelite was sued by other windshield repair companies for Lanham Act violations, claiming Safelite's false advertising harmed them. After Safelite satisfied its deductible, ACE started paying Safelite's defense costs. Safelite did not notify Discover or Zurich about the lawsuit. Discover and Zurich did not learn about it until August 2019. By that time, ACE had paid nearly $5 million in defense costs. In October 2019, ACE informed Discover and Zurich that it intended to seek equitable contribution for Safelite's defense costs. The two insurers agreed to equally share future defense costs with ACE, but they refused to reimburse ACE for pre-tender defense costs incurred before the date they received notice of the case.

ACE commenced its lawsuit against the insurers, seeking equitable contribution for all past and future defense costs that it paid or will pay on Safelite's behalf. The parties agreed that the underlying lawsuit triggered a duty to defend and that the pre-tender defense costs were reasonable and necessary. The district court, however, concluded that Discover and Zurich had no duty to contribute because of the untimely notice and that a prejudice inquiry was unnecessary.

On appeal, the appellate court vacated the district court's judgment holding that the insurers shared a defense obligation, and instructing the district court to conduct a prejudice analysis to determine whether the untimely notice constituted a material breach of the Discover and Zurich insurance policies. For that reason, it remanded the case to the district court for a prejudice determination.

By: Joshua LaBar

## Late Notice – Colorado

***Gregory v. Safeco Ins. Co. of Am.***
Nos. 22SC399 and 22SC563, 2024 CO 13, 2024 WL 1040531 (Colo. Mar. 11, 2024)

The Supreme Court of Colorado extended the notice-prejudice rule to first-party occurrence homeowner policies, reversing two decisions from the underlying district courts.

In the first district court case, Karyn Gregory (Gregory) had a homeowner's policy with defendant Safeco, effective February 2017 through February 2018, which covered losses that occurred during the policy period. Additionally, the policy required that if the loss was caused by windstorm or hail, Gregory was to give notice within 365 days of the loss. In May of 2017, during the policy period, a hailstorm caused damage to Gregory's home, but she did not discover the damage until an inspection in preparation for sale of the home in October 2018. Gregory filed a claim with Safeco in October 2018, and Safeco denied the claim as untimely. The trial court granted summary judgment in favor of Safeco.

In the other decision, the Runkels held a homeowner's policy with Owners Insurance Company (Owners) effective February 2019 to February 2020, which applied to "losses, bodily injury, property damage and personal injury which occur during the policy term." The policy further provided in the case of "loss or damage by wind or hail, notice of the loss or damage must be given to us or our agency within one year after the date the loss or damage occurred." On July 5, 2019, a hailstorm damaged the Runkels' roof and other parts of their property, but they did not discover the damage until a contractor informed them around late spring or early summer of 2020. The Runkels notified Owners in July 2020, and filed a claim on July 15, 2020, 10 days after the expiration of the one-year notice period set forth in the policy. Like Safeco, Owners denied the claim, and the Runkels filed suit in district court, which granted summary judgment in favor of Owners.

Upon appeals by both Gregory and the Runkels, the Colorado Supreme Court was asked whether the notice-prejudice rule, generally applicable to uninsured, underinsured and third-party liability policies, would extend to first-party homeowner's occurrence-based policies. Ultimately, the Supreme Court ruled to extend the rule for two reasons.

First, "an occurrence entitles the insured to benefits under coverage that already exists, and timely notice is merely a condition of retaining that coverage," in contrast to a claims-made policy where "timely notice is an essential term of the insurance contract because notice is required during the policy period or within a short window thereafter."

Second, the Supreme Court relied upon "the policy considerations that we identified in *Clementi v. Nationwide Mutual Fire Insurance Company*, 16 P.3d 223, 229-30 (Colo. 2001)." In *Clementi*, the Supreme Court applied the notice-prejudice rule because public policy supports compensating tort

victims, insurers would receive an inequitable windfall due to a technicality of notice, and the insured has little bargaining power with homeowners' insurance policies. For these reasons, the judgements of the lower divisions were reversed and remanded with instructions to follow the analysis of *Clementi.*

Specifically, the Supreme Court instructed the lower courts to "first determine whether an insured's notice was timely or whether any delay was reasonable. If the court determines that the notice was timely or that any delay was reasonable, then the analysis ends there, and the court should conclude that coverage exists. If, however, a court determines that an insured's notice was untimely and that the delay was unreasonable, then the court moves to step two, which requires the court to determine whether the insurer was prejudiced by such untimely notice."

By: Shantinique Brooks