



# Case Alert

## Montana Supreme Court Holds That Insurers Must Demonstrate Prejudice from Late Notice

In an important pro policyholder decision, on May 29, 2015 the Supreme Court of the State of Montana, *Atl. Cas. Ins. Co. v. Greytak*, 376 Mont. 546, 347 P.3d 263 (2014), held that an insurer cannot avoid their obligation to defend and indemnify an insured simply due to a failure to receive timely notice without demonstrating that they suffered some prejudice as a result. The Supreme Court was responding to a certified question from the Court of Appeals for the Ninth Circuit, seeking clarification as to whether Montana law applies the “notice-prejudice” rule, and whether the insurer could bar coverage by relying on a policy provision requiring the insured to notify the insurer of a covered event “as soon as practicable,” without demonstrating actual prejudice caused by the delay.

The underlying matter involved GTL, a construction company insured by Atlantic Casualty Insurance Company, who filed suit against Greytak in March, 2010 for non-payment related to a construction project. Greytak responded by sending a letter to GTL stating that it had grounds for counterclaims regarding construction defects and then actually filed counterclaims in November, 2010. An agreement was reached between GTL and Greytak months later, whereby GTL was to notify Atlantic of Greytak’s counterclaims; and if Atlantic did not appear in the case to defend or file a declaratory action, GTL would permit a \$624,685 judgment in favor of Greytak to be entered. GTL first notified Atlantic of Greytak’s counterclaims on May 23, 2011, after the settlement agreement and over one year after the assertion of the counterclaims by

Greytak. Atlantic sued GTL and Greytak in the United States District Court for the District of Montana, seeking a declaration that it was not required to defend GTL from Greytak’s counterclaims or pay the judgment.

The issue came to the Ninth Circuit after the district court granted Atlantic’s summary judgment motion, holding that the insurer was not obligated to cover a judgment against GTL as it had not been given timely notice. Citing *Steadele v. Colony Ins. Co.*, 361 Mont. 459 (2011), the district court found further that pursuant to Montana law, Atlantic had no requirement to establish that it has been prejudiced due to the lack of timely notice regarding claims against the insured.

Atlantic argued to the district court that in *Steadele* (where the policy in question contained the same “as soon as practicable” language), the Montana Supreme Court had directly addressed this issue and not articulated any notice-prejudice requirement. In addressing the Ninth Circuit’s certified question, the Montana Supreme Court clarified that *Steadele*, while not expressly referencing it, “should not be read to renounce the notice-prejudice rule.” Rather, in *Steadele*, the Court upheld summary judgment for the insurer after concluding that the insurer had actually been prejudiced due to lack of notice.

The Court discussed that the purpose of the notice-prejudice rule is to protect the insured from losing coverage due to a merely technical failure in compliance with policy obligations, holding that,

“...an insurer who does not receive timely notice required by the terms of an insurance policy must demonstrate prejudice from the lack of notice...”. It also noted, however, that an insured might not be covered where an insurer can demonstrate prejudice due to a lack of policy required notice.

Nonetheless, the Court did not address that question, as it fell outside the scope of the question certified by the Ninth Circuit.

For further information please contact Brendan C. Holt at [bch@sdvlaw.com](mailto:bch@sdvlaw.com) or 203.287.2124.

Two separate special concurrences, both agreeing with the broader clarification that Montana embraces the notice-prejudice rule, did however, argue that a finding of prejudice as a matter of law was warranted.