

# Client Alert

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## Second Circuit Reminds Policyholders to Remain Vigilant About Providing Timely Notice in New York

The US Court of Appeals for the Second Circuit recently held that New York's statutory rule requiring insurers to show prejudice from any alleged late notice applies only to policies issued or delivered in New York, thus reminding policyholders that they must continue to provide almost immediate notice to insurers for losses arising under New York law or risk forfeiting coverage even if the failure to provide notice results in no harm to their insurer. *Indian Harbor Ins. Co. v. San Diego*, No. 13-4244-cv, 2014 WL 4922143 (2d Cir. Oct. 2, 2014).

### Background

The City of San Diego sought coverage from Indian Harbor Insurance Company for three pollution liability claims. Indian Harbor denied coverage on the basis that the City had failed to provide notice of potential claims "as soon as practicable," as required by the policy. Indian Harbor then filed a lawsuit requesting that the court declare that the City's late notice absolved Indian Harbor of its coverage obligations. The district court found in favor of Indian Harbor and the Second Circuit affirmed.

### The Decision on Appeal

On appeal, the City argued that New York law required Indian Harbor to establish prejudice resulting from the City's late notice. The City based its argument on a New York statute that applies to policies "issued or delivered" in New York. When applicable, the statute precludes insurers from denying claims because of late notice unless the insurer suffers prejudice. Indian Harbor made no apparent attempt to demonstrate prejudice and the City argued, therefore, that late notice could not serve as the basis for denial of the claim.

The Second Circuit rejected the City's argument, finding that no reasonable factfinder could conclude that the policy had been issued in New York. The New York notice statute, therefore, did not apply. The Second Circuit also rejected the City's argument that the New York statute created a new public policy and therefore changed New York's common-law rule that insurers are not required to show prejudice resulting from late notice. The court noted that the legislature limited the applicability of the statute to policies "issued or delivered" in New York and that the legislature could have changed the common-law rule for all policies if it wanted to do so.

Finally, the Second Circuit affirmed the district court's finding that a 58-day delay by the City in providing notice of one of its pollution claims constituted late notice. In reaching that conclusion, the court found that the City failed to present any evidence that its 58-day delay should be considered reasonable.

### Insurance Implications

*Indian Harbor* serves as a reminder of the importance of complying with all contractual conditions to coverage as set forth in potentially applicable insurance policies. As in *Indian Harbor*, depending on the jurisdiction, even a two-month delay in providing notice is long enough to jeopardize coverage. *Indian Harbor* underscores, therefore, the import of knowing your coverage and any specific conditions to

coverage *before* a loss occurs, so that when a loss occurs, timely notice and any other time-sensitive requirements for coverage can be satisfied without risk of forfeiting coverage due to contractual noncompliance.

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