In 2008, when New York State, by statute, adopted the notice prejudice rule, which requires an insurer to demonstrate prejudice in order to deny coverage based on late notice of claim, New York left behind a body of case law that had up until then strictly construed an insured’s timely notice obligations. In doing so, New York joined the vast majority of states that, whether by case law or statute, have constrained insurers from disclaiming on a late notice basis that is sometimes viewed as a technicality, and required insurers to show that the late notice actually impaired the insurer’s ability to defend or adjust the claim.

While not always expressly stated, it has been generally understood that, where adopted, the notice prejudice rule applies to notices of claim submitted under occurrence policies but not to notices of claim submitted under claims-made policies. The distinction is based on the nature of the risk covered by these policies. An occurrence policy provides coverage for loss from accidents and occurrences that take place during the policy period, regardless of when the claim against the insured is actually made. The timely notice obligation is merely a condition to coverage—it is the occurrence that triggers the insurer’s coverage obligations under the policy.

In contrast, a claims-made policy provides coverage only for claims made against the insured that were reported to the insurer during the policy period (or an applicable extended reporting period) regardless of when the covered act or incident took place (although sometimes subject to a retroactive date). Thus, under a claims-made policy, it is the assertion of the claim against the insured and reporting of the claim to the insurer that actually triggers coverage under the policy. Courts have generally enforced the insurer’s right to deny coverage where a claim is not made and reported until after expiration of the policy period of a claims-made policy, regardless of whether the insurer was prejudiced by the delayed notice. Consistent with this approach, the New York statute, while adopting the notice-prejudice rule for occurrence policies, expressly provides that “[w]ith respect to a claims-made policy, however, the policy may provide that the claim shall be made during the policy period....”

The courts of New Jersey adopted the notice prejudice rule for occurrence policies decades ahead of New York and at least as early as 1968 in Cooper v. Government Employees Insurance Co. Then, in the mid-1980s, in Zuckerman v. National Union, a case in which the insured submitted notice after expiration of a claims-made policy, the Supreme Court of New Jersey held that the notice prejudice rule does not apply to notice disputes under claims-made policies. Given New Jersey’s early embrace of the notice prejudice rule, however, it was surprising when, earlier this year, in Templo Fuente De Vida Corp.
the Supreme Court of New Jersey extended the Zuckerman ruling to hold that the notice prejudice rule does not apply and the insurer is not required to demonstrate prejudice to deny coverage for late notice of claim under a claims-made policy, even where the claim was reported during the policy period.

**Templo Fuente Claim**

The underlying dispute that would lead to the Templo Fuente De Vida Corp. insurance ruling began when Templo Fuente De Vida Corp., operators of a church and child care center in New Jersey, decided to relocate. After obtaining assurances regarding financing from a predecessor of First Independent Financial Group, Templo entered into an agreement to purchase land on which it planned to construct a new church and child care center. First Independent (or its predecessors) ultimately failed to provide the promised financing, and the real estate deal fell through, causing Templo alleged losses of over $1 million in commitment fees and down payments as well as additional damages.

Following the failure of the transaction, Templo filed a lawsuit against First Independent, its predecessor entities and certain individuals alleging breach of contract and tort claims. Templo did not serve its original complaint on the defendants, but served the amended complaint on Feb. 21, 2006. Ultimately, the lawsuit was resolved by a settlement pursuant to which the defendants agreed that they were liable to Templo for over $3 million. Under the terms of the settlement, defendants paid just over $100,000 to Templo and also assigned to Templo their right to recover the remaining amount due from First Independent’s insurance policy.

**The Insurance Dispute**

National Union had issued a Directors’ and Officers’ (D&O) Liability Insurance Policy to First Independent for the policy period from Jan. 1, 2006, to Jan. 1, 2007. The policy was a claims-made policy which covered claims first made against First Independent “during the Policy Period or the Discovery Period (if applicable) and reported to the Insurer pursuant to the terms of this policy.” The notice clause of the policy provided as follows:

```
(a) The Company or the Insureds shall, as condition precedent to the obligations of the Insurer under this policy, give written notice to the Insurer of any Claim made against an Insured as soon as practicable and either:
(1) anytime during the Policy Period or during the Discovery Period (if applicable); or
(2) within [30] days after the end of the Policy Period or the Discovery Period (if applicable), as long as such Claim is reported no later than [30] days after the date such Claim was first made against an Insured.
```

First Independent submitted notice of Templo’s claim to National Union on Aug. 28, 2006, well within the policy period, but over six months after First Independent had been served with the amended complaint. Over the next three years, National Union issued three different disclaimers; however, none of the disclaimers were based on late notice.

Following settlement of the underlying case and the assignment of First Independent’s insurance rights, Templo filed a declaratory judgment action against National Union. The parties each filed motions for summary judgment. The trial court, ruling on the motions, held that the insureds did not provide notice of claim “as soon as practicable” and that therefore coverage was barred under the terms of the policy, despite the fact that the claim was reported during the policy period. The court relied on New Jersey precedent set forth in Associated Metals & Minerals v. Dixon Chemical & Research, in which the New Jersey Supreme Court had held that a five-and-one-half-month delay in providing notice to the insurer under an occurrence policy was unreasonable. Consequently, the trial court ruled that the six-month delay between the time that First Independent received the amended complaint and the time that notice was provided to National Union was fatal to the insurance claim.

Templo argued that because the claim was both made and reported during the policy period, National Union was required to demonstrate prejudice in order to deny coverage for late notice. The trial court, however, relied on Zuckerman and rejected this argument on the grounds that the notice prejudice rule is not applicable to claims-made policies.

**New Jersey Appellate Division**

Prior to this case, it would have been reasonable to expect the New Jersey
courts to limit the scope of Zuckerman so that the notice prejudice rule does not apply to claims-made policies except where, unlike Zuckerman, the claim is made and reported during the policy period. In other words, insurers would have to demonstrate prejudice to deny coverage for late notice under a claims-made policy only where the insurer relies solely on the “as soon as practicable” requirement. Arguably, the “as soon as practicable” requirement is a condition that is analogous to the timely notice requirement found in most occurrence policies. Templo made this argument on appeal, but to no avail.

Instead, the New Jersey Appellate Division affirmed the trial court’s ruling, refusing to limit Zuckerman or require a showing of prejudice. The court explained that the National Union policy required notice to be provided both “as soon as practicable” and within the policy period: “... we discern no basis for distinguishing the court’s clear holding in Zuckerman from the facts in this case. Contrary to plaintiff’s contention, the court did not limit its holding to cases where notice first occurred outside the policy period and it plainly stated that ‘the Cooper doctrine’ that requires prejudice to be shown for occurrence policies has ‘no application whatsoever to a claims made policy...’”10 The Appellate Division also pointed out that Templo had conceded that the insureds did not provide notice “as soon as practicable.” While this may have been a tactical error, it does not appear to have been the basis for the Appellate Division’s holding.

Sophisticated Parties

On appeal, the New Jersey Supreme Court affirmed but narrowed the scope of the ruling and emphasized the sophistication of the insured. Specifically, the Supreme Court held that “because the Directors and Officers ‘claims made’ policy was not a contract of adhesion but was agreed to by sophisticated parties, the insurance company was not required to show that it suffered prejudice before disclaiming coverage on the basis of the insured’s failure to give timely notice of the claim.”11

The Supreme Court explained that the historic basis for treating claims-made policies differently from occurrence policies is based in large part on the differences between the types of policyholders. The equitable concerns that led to the adoption of the notice prejudice rule under Cooper were designed to protect unsophisticated consumers. According to the court, these same equitable concerns are not present in the context of a D&O policy negotiated by sophisticated parties.

Noting that First Independent was an incorporated business entity engaged in complex transactions—albeit with only 14 full-time employees—that had used a broker to procure the policy, the Supreme Court declined to issue a sweeping ruling “about the strictness of enforcing the ‘as soon as practicable’ notice requirements in ‘claims made’ policies generally.”12 Rather, the Supreme Court expressly limited its ruling to the enforcement of an unambiguous D&O policy negotiated by sophisticated parties. In addition, the court declined to issue a bright-line rule regarding the length of delay that would constitute an unreasonable delay in notice under a claims-made policy.

Looking Forward

Given New Jersey’s early adoption of the notice prejudice rule, the Templo Fuente De Vida Corp. holding was unexpected. Prior to this ruling, it seemed far more likely that the New Jersey Supreme Court would limit Zuckerman to cases where the claim was reported outside of the policy period, and require insurers to demonstrate prejudice in order to deny coverage for claims that were made and reported during the policy period, even if the claims were noticed a few months late.

It will be most interesting to see what impact this ruling has on the courts of other jurisdictions, including New York. New Jersey has a well-earned reputation as an insured-friendly venue. While the Supreme Court was careful to narrow the scope of the lower courts’ rulings, the ultimate decision still creates an undeniably insurer-friendly precedent. Whether the courts of other jurisdictions will follow suit remains to be seen.

2. Id.
7. Id.
8. Id.
12. Id.