

## Insurance Recovery

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### **Second Circuit ‘Swipes Right’ on Notice Requirement for Tinder**

By [Lynda A. Bennett](#) and [Alexander B. Corson](#)

Policyholders frequently are vexed by the nuances of reporting requirements in claims-made policies, which generally provide coverage only for a “Claim” made during the policy period. While this may sound like a straightforward inquiry, the definition of “Claim” and the specific language used in a policy’s notice section may lead to a knee-jerk denial from an insurer followed by costly “form over substance” debates that may conclude with lasting financial consequences. As always, the words matter, and in this case, the days mattered too.

Last month, Tinder received a disappointing decision from the Second Circuit Court of Appeals, overturning its victory on a motion to dismiss filed by its insurer in a coverage action. Tinder received a letter in February 2016 from a consultant alleging that his contributions to the “super like” functionality of the popular dating app wrongfully went uncompensated. The consultant filed suit against Tinder on Wednesday, Aug. 17, 2016, and Tinder’s insurance broker provided notice at 8:42 a.m. on Monday, Aug. 22, 2016.

Tinder’s insurer denied coverage on the grounds that the February 2016 letter was a Claim and the policy had expired over the weekend, on Saturday, Aug. 20, 2016, rendering the notice untimely. The Second Circuit held that the letter in February 2016 was a Claim under the policy and remanded for consideration of whether Tinder’s obligation to provide notice during the policy period was suspended by a New York statute regarding the performance of contractual obligations falling on Saturday, Sunday, or a public holiday.

The opinion reinforces three best practices policyholders purchasing claims-made coverage should adhere to in order to avoid “gotcha” late-notice defenses.

#### **1. Understand the Meaning of ‘Claim’**

Policyholders frequently assume that nothing short of service of a formal lawsuit necessitates notice to their insurer. However, this is seldom the case—as Tinder learned the hard way—where a vast majority of claims-made policies define “Claim” to mean a “written demand” for monetary (and sometimes nonmonetary) relief. Had Tinder carefully reviewed its policy when the consultant made first contact, it might have realized the potential for the February 2016 letter to constitute a Claim and provided notice well before the policy expired, obviating the need for its trip to court (and the Second Circuit).

#### **2. Carefully Review Notice Requirements**

The policy issued to Tinder required notice during the policy period and included a 60-day grace period—but, the Second Circuit held, that grace period applied only for Claims made *during the last 60 days of the policy period*. As a result, even though Tinder provided notice the next business day after the policy expired, the 60-day grace period was of no value where the court concluded that the February 2016 letter was a Claim. Had Tinder realized that the policy contained this stringent limitation on the notice grace period, it might have expedited its notice to the insurer when it received the lawsuit three days *before* expiration of the policy period—avoiding the dispute over whether the

February 2016 letter or the lawsuit was the Claim for which notice was required. Additionally, Tinder might have reviewed and considered the impact of state amendatory endorsements included in many policies that sometimes modify the notice requirements and consequences of breaching those requirements notwithstanding the base policy language. Finally, on remand, Tinder should consider whether its policy contains state amendatory consistency or liberalization provisions that may be leveraged to override its out of market notice language.

### 3. Negotiate the Removal of Nonmarket Terms and Conditions

Tinder (and its broker) presumably expected the policy would respond to any Claim made during the policy period and reported within 60 days after its expiration. This is the market standard for claims-made policies, and it is not surprising that Tinder apparently operated under the assumption that it could report the Claim shortly after the policy expired since the whole point of the grace period is to avoid this very kind of “gotcha” late-notice defense. However, Tinder’s policy limitation of the grace period applying only to Claims made *during the last 60 days of the policy period* bucked that expectation and placed Tinder in a precarious position. Conducting regular policy audits and carefully reviewing new policies and renewals for nonmarket language—like this stringent limitation on the 60-day grace period in the policy issued to Tinder—are critical steps for corporate policyholders seeking to avoid gaps in coverage. Leveraging the knowledge of experienced coverage counsel *before* its dispute arose may have led to a different result for Tinder.

## Contacts

Please contact the listed attorneys for further information on the matters discussed herein.

### LYNDA A. BENNETT

Partner  
Chair, Insurance Recovery Group  
**T: 973.597.6338**  
[lbennett@lowenstein.com](mailto:lbennett@lowenstein.com)

### ALEXANDER B. CORSON

Associate  
**T: 973.597.6248**  
[acorson@lowenstein.com](mailto:acorson@lowenstein.com)

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