The North Carolina Court of Appeals recently resolved an important question to all businesses covered by liability insurance: does an insurance company’s duty to defend the insured against a claim “attach when the insurer receives notice or when a claim is filed?” The court adopted the majority rule that an insurance company’s duty to defend is not triggered until the insurer receives actual notice of the underlying action. *Kubit v. Mag Mut. Ins. Co.*, 2011 N.C. App. LEXIS 482 (March 15, 2011). This decision is important because it is common, for any number of reasons, for a significant period of time to elapse before an insured business notifies its insurance carrier of a claim, during which time substantial attorneys’ fees and other defense costs can accrue. It is now the law of North Carolina that such pre-notice fees and other costs cannot be recovered from the insurer. Thus, care should be taken to provide the earliest possible notice of any claim that is potentially covered under a liability policy.

The Court of Appeals’ decision also touched on a number of important issues to consider when notifying an insurance company of a claim:

- Notice must be timely. If a policy requires that notice be given “as soon as practicable” or “as soon as possible,” an unjustified failure to give timely notice might completely relieve an insurer of its duty to defend, leaving the insured business responsible for all defense costs. Though not discussed, the decision noted in passing that such delay can similarly relieve insurer of a duty to pay a judgment against the insured.

- Notice to an insurance agent may constitute notice to the insurer, but complications arise if the agent handles an insured’s policies with more than one insurance company. In *Kubit*, the insured notified its multi-carrier agent about a complaint, but such notice was given in the context of a renewal application for a policy with a different insurance company. Even though the same agent also sold the insurance policy at issue, notice was insufficient because “[t]he evidence does not support a finding that [the agent] was, under these circumstances, acting within the scope of any authority granted by [the insurance company at issue] or that the renewal...related to such authority.” Because this is a common scenario, the insured business should always instruct
its agent to promptly notify the proper insurance company \textit{and} provide written verification of the notice.

- If there is a notice dispute, the insured will be required to prove actual and timely notice to the insurer. It is therefore essential to keep date-stamped records that demonstrate the insurance company's receipt of notice, such as fax verifications, certified mail receipts, or emails.

We hope you find this advisory helpful, and invite you to contact one of Robinson Bradshaw's insurance coverage attorneys with any questions you may have.