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Alerts

Twenty-Seven Months Not Sufficient Delay for Late Notice Where Insurer Deemed to Have Actual Notice of Underlying Lawsuit

December 22, 2010
Insurance Coverage Alert

On September 24, 2001, a bank and its vice-president were sued for defamation. The defamatory statements at the heart of the underlying complaint were allegedly made in November 2000. At that time, the bank was covered by a commercial general liability policy and umbrella policy (collectively, "the Policy") issued by an insurer. The Policy provided that, in the event of a claim or suit against any insured, the bank must "notify [the insurer] as soon as practicable" and "must see to it that [the insurer] receive written notice of the claim or 'suit' as soon as practicable." Additionally, the Policy required that the bank "immediately send [the insurer] copies of any demands, notices, summonses or legal papers received in connection with the claim or 'suit.'"

The defamation lawsuit was the underlying case at issue in *West American Ins. Co. v. Yorkville National Bank,*238 Ill. 2d 177, 2010 WL 3704985 (2010). In *West American Ins. Co.*, the bank alleged that the insurer received oral notice of the underlying lawsuit on several occasions before receiving written notice on January 19, 2004. Specifically the bank's president had testified that in late-2001 or early-2002, he met with the insurer's authorized agent and informed the agent that he was involved in a defamation suit and asked whether the claim was covered. The agent replied, "[P]robably not. Most of those policies are written the same way anyway." Furthermore, the bank president allegedly met with a second agent of the insurer, who also intimated that the Policy would probably not cover the lawsuit. Additionally, prior to January 19, 2004, the underlying lawsuit was discussed at three meetings before the bank's board of directors. The board's meetings were attended by the insurer's agent in his capacity as a board member.

The trial court ruled in favor of the bank. But the Illinois Appellate Court, Third District, reversed, finding that the bank breached the Policy's notice clause as a matter of law. On appeal, the Illinois Supreme Court overturned the appellate court's decision. Applying the five-factor test for timeliness set forth by the Illinois Supreme Court in *Country Mutual Ins. Co. v. Livorsi*, 222 Ill. 2d 303, 856 N.E.2d 338 (2006), the Court determined that the notice of the defamation suit was given within a reasonable time and did not violate the notice provision of the Policy, despite written notice having been tendered by the insured approximately 27 months after the underlying lawsuit was filed. Specifically, the Court held that the trial court's ruling was not against the manifest weight of the evidence. In so ruling, the Supreme Court relied on the trial court's finding that the bank president's conversation with the insurer's agent in late-2001 or early-2002, coupled with the mention of the lawsuit at the bank's board meeting while the agent was in attendance "tipped [the scales] in favor of the insured as to diligence, and thus the delayed written notice was reasonable."

The Illinois Supreme Court also found that the bank president's late-2001 or early-2002 conversation with the insurer's agent, as well as the agent's attendance at the board meetings when the lawsuit was discussed, constituted actual notice to the insurer of the underlying lawsuit. The Court found that despite the fact that the language of the Policy's notice provision required written notice, if the insurer had actual notice of the lawsuit, Illinois law dictated that the insurer could not suffer prejudice as a result of an insured's failure to give timely notice of the claim. The Court reached this determination even though neither the insurer nor its authorized agent ever received a copy of the actual complaint or a detailed description of the claims therein until the January 19, 2004, official notice date. Notably, the conversations between the bank president and the agent contained no specific information about the lawsuit except for the names of the parties and the general description of the defamation action. In fact, the bank president misidentified the location of the

court where the lawsuit was filed. Nevertheless, the Court held that the insurer, through its authorized agent, possessed sufficient information to locate and defend the action and should have known that the defamation lawsuit was potentially covered by the Policy. Accordingly, the Court affirmed the trial court's judgment in favor of the insured.

Practice Note

By interjecting the "actual notice" of an insurer as a factor in the analysis of whether an insured has reasonably complied with the notice provision of an insurance policy, the Illinois Supreme Court has, minimally, created an argument for insureds that oral notification of a claim sufficiently satisfies a written notice requirement in the policy, despite unambiguous policy language to the contrary. Insurers should investigate any communications, including oral communications, between an insured and the insurer's agents and/or representatives. Once an insurer has determined that notice of a lawsuit has been communicated to its authorized agent, even orally, the insurer should follow up with the insured and determine whether the insured is seeking coverage for the action.

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