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Late-Notice Defense for Insurance Coverage Is Still a Thing

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Notice provisions in insurance policies are there to inform an insurer of a claim in a timely manner so that the insurance company can properly investigate and address the claim. Most notice provisions are conditions precedent to an insurer's liability. While there has been some erosion to the defense of late-notice to coverage, a recent case shows that late notice is still a viable defense if you have the right facts.

In New York State Electric & Gas Corp. v. Century Indemnity Co., No. 18-1012-cv (2d Cir. Apr. 25, 2019) (Summary Order), the policyholder sought coverage for environmental contamination at its manufactured gas plant sites. The insurers denied coverage based on late notice of the occurrence. The district court granted summary judgment to the insurers and dismissed the case. The Second Circuit affirmed on appeal.

On appeal, the circuit court rejected the policyholder's claim that the insurers waived the right to disclaim coverage on late-notice grounds. The court found that the policyholder had not put forth evidence of a clear manifestation of intent to waive. The court rebuffed the argument that a draft letter disclaiming coverage on late-notice grounds, but never sent to the policyholder, was a waiver. An unreviewed, unsent letter cannot support a waiver because it could not have lulled the policyholder into sleeping on its rights, said the court. Moreover, the court found that the insurer had reserved its rights on other issues, one of which was whether late-notice barred coverage.

The court also rejected the claim that late notice was waived when one carrier disclaimed based on late notice for one policy number, but not on the policy number in issue here. The court pointed out that neither party could locate the relevant policy until this litigation started so there could not have been the requisite knowledge about the right to disclaim earlier on. Additionally, this carrier too explicitly reserved all of its rights under the policy even though it was initially unable to locate it.

The court was not concerned about whether notice had to be given as soon as practicable or only after the policyholder reasonably should have known that liability from the occurrence was likely to implicate the policy because under either standard, the court agreed that notice was untimely. There were multiple governmental investigations concerning its sites years before notice was provided and the policyholder really did not dispute that it should have known of the occurrences.

Instead, the policyholder argued that it could not have reasonably known that the policies would be implicated because of state law allocation of damages rules. The Second Circuit rejected this

argument as well, holding that the New York Court of Appeals had not ruled on the allocation subject until well after notice was given to the carriers. Thus, the court found no evidence supporting the policyholder's claim that it was reasonable for it to rely on state allocation rules.

The court found that as a matter of law the policyholder's notice was untimely. The policyholder should have known that the occurrences at its sites would likely implicate these policies by July 1991 and notice was not provided until November 1991 — these four months were enough to make it late and the order granting summary judgment dismissing the complaint was affirmed.

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