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Late Notice to Your Insurer? Lack of Prejudice May Be Able to Help

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Most insurance policies seek notice from the insured "as soon as practicable." In certain jurisdictions, an insurance company cannot void coverage by arguing that the insured's notice was somehow "late" unless the insurer can show that it has been prejudiced. This is referred to as the "notice-prejudice" rule. Because insurance is a state-law issue, the law on this issue varies from state to state.

Illinois follows a hybrid rule on notice. When the insurance policy does not identify notice as a condition precedent, then Illinois follows the "notice-prejudice" rule; however, when the policy does identify notice as a condition precedent to coverage, then the absence of prejudice to the insurer is a factor that the court can consider in deciding whether the policyholder's delay in giving notice was reasonable. Thus, courts applying Illinois law may recognize prejudice to the insurers as a factor in the analysis. The Supreme Court of Illinois held in *Emps. Ins. of Wausau v. Ehlco Liquidating Tr.*, 186 Ill. 2d 127, 137 (1999) that insurance companies that breach their duty to defend may be estopped from relying on a late-notice defense to avoid their coverage obligations.

In keeping with that holding, recently, an Illinois federal court in *Old Republic Insurance Company v. Ideal Aviation Illinois, LLC et al*., No. 23-cv-2728 (S.D. Ill. Oct. 11, 2024), held an insurer had an obligation to defend its insureds, who gave notice 10 months after it became aware of the underlying incident, because the insureds' notice was considered "as soon as practicable" under the policy and the facts.

Background

The insureds were in the business of renting an aircraft and maintained insurance on the aircraft from Old Republic (the "Insurer").

The relevant aviation policy provided liability coverage for amounts the insureds became liable to pay because of bodily injury suffered by anyone, including passengers, caused by an occurrence and arising out of the ownership, maintenance or use of the aircraft. The policy required the insureds to give the insurer written notice "as soon as practicable" after an occurrence.

On July 5, 2021, an individual was struck and injured by the propeller of the aircraft owned and maintained by the insureds. The insureds were informed of the incident on the day it happened. More than 10 months later, on May 24, 2022, the insureds first notified its insurer in writing of the incident.

On July 3, 2023, the injured individual filed a lawsuit against the insureds and alleged that they were negligent in the duties to ensure the aircraft was airworthy and properly maintained. Shortly thereafter, in August 2023, the insurer sought a declaratory judgment that, among other things, it did not have a duty to defend the insureds because written notice was not given "as soon as practicable," which was required under the policy.

Holding and Analysis

The Illinois Supreme Court has explained that, where an insurance policy requires notice "as soon as practicable," it means notice must be given "within a reasonable time," which will depend on the facts and circumstances of each case.

In determining whether notice was given within a reasonable time, the Illinois Supreme Court has considered: (1) the specific language of the policy's notice provision; (2) the insured's sophistication in commerce and insurance matters; (3) the insured's awareness of an event that may trigger insurance coverage; (4) the insured's diligence in ascertaining whether policy coverage is available; and (5) prejudice to the insurer.

In turn, the court considered each factor with respect to the relevant facts of the case.

First, the court analyzed the language of the notice provision and found it was not complicated and uses mandatory language—"written notice *shall be* given." Because the insureds did not claim that its delay was caused by its inability to understand the details required in the notice, the court found this factor weighed in favor of finding the delay was unreasonable.

Second, the court considered the insureds sophistication in commerce and insurance matters. The court explained that the insurer is likely more sophisticated, but explained that nothing suggested that the insureds did not understand how insurance works or the obligations under the notice provision. Regardless, the court found that this factor weighed in favor of the insureds' delay being reasonable.

Third, the court considered whether the insureds were aware of the incident. The injured party testified that he spoke on the phone with the insureds the afternoon of his injury. Since the insureds knew of the incident, the injuries and the potential for litigation the day of the accident, the court found that this factor weighed in finding a 10-month delay was unreasonable.

Fourth, the court considered the insureds' diligence in ascertaining policy coverage. The court explained that from an objective standpoint, it was reasonable to expect the insureds to look into insurance coverage soon after it learned that the aircraft struck the victim. The court found that this factor weighed in favor of finding notice was not given within a reasonable time.

Fifth, the court considered the prejudice to the insurer. The court explained that the insurer did not point to any prejudice it suffered because it did not learn of the incident in writing within 10 months after it happened. For example, the insurer did not argue that the aircraft was not in the same condition as it was on July 5, 2021. The insurer also did not argue that it lost an opportunity to evaluate the individual's injuries when they were fresh so that it could later tease out health issues that may have no connection to the accident. As a result, the court found that the lack of any

prejudice weighed in favor of finding written notice was given in a reasonable time.

The court considered an additional factor that neither party argued but the court found important. Even though the insurer did not receive written notice until May 2022, it received that notice more than a year before the underlying lawsuit was filed in July 2023. Accordingly, the insurer had more than a year to investigate and negotiate with the underlying claimant to "head off a lawsuit." So, the court found this additional factor weighed in favor of notice being given within a reasonable time.

Ultimately, the court found that the 10-month delay was reasonable and explained that even though prejudice is not necessary to find a late notice unreasonable, it gave it weight because it fits "hand-in-glove with the purpose of the notice requirement—'afford[ing] the insurer an opportunity to make a timely and thorough investigation and to gather and preserve possible evidence.'"

Takeaways

The court's decision highlights the importance of giving notice to an insurer as soon as possible.

As explained above, policies generally require that notice be given within a reasonable amount of time. One of the most common reasons for denied claims is late notice to the insurer. But a late-notice analysis is not a one-size fits all approach. Claims-made policies differ from occurrence-based policies because under claims-made policies coverage is triggered on the making of a claim, not when the loss was incurred. Some courts have made distinctions and have held that the notice-prejudice rule still applies to claims-made policies while other courts have held the rule only applies to occurrence policies.

Because the analysis may differ depending on the type of policy and notice language, policyholders should read their policies carefully and submit insurance claims within the time periods identified by their policies. Notice should be given early and often. Policyholders should involve coverage counsel early to ensure compliance with all policy provisions. Coverage counsel can also identify potential weaknesses in an insurer's denial with respect to late notice.

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