

THE POLICYHOLDER ADVOCATE/IP COUNSELOR

NEWSLETTER

Volume 10, Issue 3: Summer 2006

LATE NOTICE ISSUES: OPPORTUNITIES AND PITFALLS IN INSURANCE RECOVERY FOR BUSINESS TORT CLAIMS

I. INTRODUCTION

Ten key forums will be examined in this article. Each has addressed late notice issues – some more recently than others – in a way that clarifies distinctions between them. Critically, in New York and Texas, late notice of a claim falling within “advertising injury” or “personal injury” coverage, i.e., business tort claims, is likely to be covered by a rigorous forfeiture rule, while Illinois employs a “reasonableness” test that permits prejudice to be an element but does not vary the right of the insured to obtain policy benefits if the date of notice is not itself reasonable. Prejudice is the test in the remaining forums – California, Pennsylvania, Michigan and Massachusetts – while a minority place the burden of showing no prejudice on the insured – Connecticut, Florida and Ohio.

II. LATE NOTICE RULES

A. Survey of Key Jurisdictions’ Late Notice Rules

California: *Root v. American Equity Specialty Ins. Co.*, 130 Cal. App. 4th 926, 30 Cal. Rptr. 3d 631 (2005) (“Under ‘notice-prejudice rule,’ unless an insurer can demonstrate actual prejudice from late notice of a claim, the insured’s failure to provide timely notice will not defeat coverage.”).

Connecticut: *National Pub. Co., Inc. v. Hartford Fire Ins. Co.*, 892 A.2d 261, 285-86 (Conn. App. Ct. 2006) (“ ‘In this state, an insurance policyholder who fails to give an insurer timely notice of an insurable loss does not forfeit his insurance coverage if he can prove that his delay did not prejudice his insurer.’ . . . ‘[O]ur Supreme Court held that an insured might be relieved from his contractual obligation to give [its] insurer timely notice of the occurrence of a loss if the insured could show that [its] delay in giving notice did not prejudice the insurer’ ”).

Florida: *Robinson v. Auto Owners Ins. Co.*, 718 So. 2d 1283, 1284 (Fla. Dist. Ct. App. 1998) (“An insured’s delay in notifying her insurer of an accident gives rise to a presumption that the insurer has been prejudiced. But that presumption may be rebutted by the insured’s demonstration that the insurer was not prejudiced by the late notice.”).

Illinois: *Country Mutual Ins. Co. v. Livorsi Marine, Inc.*, ___ N.E.2d ___, 2006 WL 1348722, at *4, *5 (Ill. 2006) (“A policy condition requiring notice ‘[a]s soon as practicable’ is interpreted to mean ‘within a reasonable time.’ . . . Whether notice has been given within a reasonable time depends on the facts and circumstances of each case. . . . [W]hen examining the facts and circumstances of each case to determine if notice was reasonable, ‘lack of prejudice may be a factor in determining the question of whether a reasonable notice was given in a particular case yet it is not a condition

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which will dispense with the requirement.’ . . . Other factors in the reasonableness analysis may include the specific language of the policy’s notice provision, the insured’s sophistication in commerce and insurance matters, the insured’s awareness of an event which may trigger insurance coverage, and the insured’s diligence in ascertaining whether policy coverage is available.” (citation omitted)).

Massachusetts: *Darcy v. Hartford Ins. Co.*, 554 N.E.2d 28, 31 (Mass. 1990) (“[B]reach of that provision [notice] by an insured is not an independently sufficient basis for an insurer to disclaim liability. Rather, the insurer must prove that its interests have been prejudiced by the insured’s failure to provide timely notice of the accident. See G.L. c. 175, § 112, as amended by St.1977, c. 437 . . . (insurer bears the burden of proving prejudice).”).

Michigan: *Century Indem. Co. v. Aero-Motive Co.*, 336 F. Supp. 2d 739, 755 (W.D. Mich. 2004) (“Prejudice may not be presumed. It is incumbent upon the insurer to demonstrate actual prejudice resulting from the insured’s delay. In determining whether an insurer has been prejudiced, a court may consider ‘whether the delay has materially impaired the insurer’s ability: (1) to investigate liability and damage issues; (2) to evaluate, negotiate, defend, or settle a claim or suit; (3) to pursue claims against third parties; (4) to contest the liability of the insured to a third party; and (4) (sic) to contest its liability to the insured.’ ” (citations omitted)).

New York: *Great Canal Realty Corp. v. Seneca Ins. Co., Inc.*, 833 N.E.2d 1196, 1197 (N.Y. 2005) (“Where a policy of liability insurance requires that notice of an occurrence be given ‘as soon as practicable,’ such notice must be accorded the carrier within a reasonable period of time. The insured’s failure to satisfy the notice requirement constitutes ‘a failure to comply with a condition precedent which, as a matter of law, vitiates the contract.’ Hence, the carrier need not show prejudice before disclaiming based on the insured’s failure to timely notify it of an occurrence. We have recognized that there may be circumstances that excuse a failure to give timely notice But . . . ‘the insured’s belief must be reasonable under all the circumstances, and it may be relevant on the issue of reasonableness, whether and to what extent, the insured has inquired into the circumstances of the accident or occurrence’” (citations omitted)).

Ohio: *Lepley v. Hartford Acc. and Indem. Co.*, 174 F. Supp. 2d 656, 662, 663 (N.D. Ohio 2001) (“A provision in an insurance policy requiring the insured to give notice to the insurer ‘as soon as practicable,’ requires that the notice be given within a reasonable time in light of all the surrounding facts and circumstances. . . . When the plaintiff does not give notice within a reasonable time, such ‘[u]nreasonable delay ... may be presumed prejudicial to the insurer’ . . . ‘Late notice is not fatal to an insured’s claim if the insurer cannot demonstrate prejudice.’ An unreasonable delay, however, raises a presumption of prejudice. . . . Unless the plaintiff shows that she did not prejudice the defendants, the presumption remains.” (citation omitted)).

Pennsylvania: *Rite Aid Corp. v. Liberty Mut. Fire Ins. Co.*, 414 F. Supp. 2d 508, 519 (M.D. Pa. 2005) (“Under Pennsylvania law, where the insured provides late notice of the potential claim, the insurance company will be relieved of its responsibilities under the policy only if it can prove actual prejudice resulting from the untimely notice.”).

Texas: *PAJ, Inc. v. Hanover Ins. Co.*, 170 S.W.3d 258, 263 (Tex. App. - Dallas 2005) (“ ‘There is no prejudice requirement under Texas law with respect to coverage for advertising injury.’ ”). (The same is true for ‘personal injury’ coverage.)

Instead, states that use the “notice-prejudice rule” require a showing of prejudice when an insurer seeks to escape policy obligations based on any type of delayed notice.

B. A Delay in Notice under “Ultimate Net Loss” Coverage Paired with a “Voluntary Payments” Provision May Preclude Defense Fee Reimbursement

Where there is a self-insured retention and a voluntary payments provision and fees used to defend a suit do not liquidate the amount of the self-insured retention, then, if notice is not promptly given of a claim, any fees incurred will be deemed pre-tender even if the amount of the self-insured retention is ultimately paid in the form of settlements or judgments. Thus, a defendant which believes that settlement or indemnity costs may exceed its self-insured retention will deprive itself of defense fee reimbursement benefits if it does not promptly give notice.

This is contrary to the practice of many risk managers, who want to evaluate how far into the self-insured retention the amount of fees goes before giving notice. This assumes that there is a liquidation opportunity for the fees incurred as against the self-insured retention, which is often not the case in newly written policy forms.

C. Insurance Brokers Who Advise Policyholders Not to Give the Insurer Notice May Be Liable for Affirmative Misrepresentation

Offense-based coverage permits the policyholder to argue no expectation of coverage. *See J.F. Meskill Enters., LLC v. Acuity*, No. 05-CV-2955, 2006 WL 903207, at *7 (N.D. Ohio Apr. 7, 2006) (“It is not readily apparent that the advertising injury provision includes claims of trade dress infringement.”). Thus, in this case, where the policyholder was sued for trade dress infringement, a broker was found not to be liable for professional negligence but affirmative misrepresentations when it advised an insured that a trade dress claim would not be covered under a standard form 1993 ISO policy provision including coverage for the “advertising injury” offense of “misappropriation of advertising ideas or style of doing business.”

The insurance broker’s argument in response to this claim of affirmative misrepresentation was that the insured should not have relied on the broker’s expertise in rendering an opinion about potential coverage because it could look at the policy itself and reach a different conclusion and seek legal counsel to support its own evaluation. While the court noted that the policyholder could have sought such an evaluation, there was no reason to suspect it needed one because it was not clear on the face of the policy that trade dress claims would be covered, and there was nothing about the language that would necessarily tell a layperson that the language would encompass such claims.

III. CONCLUSION

Unless a policyholder knows the claim is not covered and can definitively opine why, it is typically in its interest to promptly give notice of a claim. Further, the insurer is obligated to explain why it denied coverage. If its analysis is not thorough or appears premised on questionable assumptions, its views should be challenged.

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David A. Gauntlett is the author of *Insurance Coverage of Intellectual Property Assets* published by Aspen Law & Business. The book and supplements are available for \$160.00 plus tax where applicable; shipping and handling are free when full payment is enclosed with the order. To order, call Aspen Law & Business at **1-800-638-8437**.

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If you have a topic you would like to see addressed in future issues, please feel free to contact us with your suggestions.

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