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Illinois Coverage Basics

Illinois Supreme Court Confirms That Prejudice Is Not Required For “Late Notice” Defense

In Country Mutual Ins. Co. v. Livorsi Marine, Inc., 222 Ill.2d 303, 856 N.E.2d 338 (2006), the Illinois Supreme Court recently clarified the requirements that an insurer must prove to establish a “late notice” coverage defense. The Illinois Supreme Court held that prejudice is not a necessary element of the “late notice” defense, but will be considered as one factor in determining whether notice received from an insured was unreasonably late. Under the Country Mutual ruling, if a court finds that an insured did not provide notice within a reasonable amount of time, an insurer is not required to establish that it was prejudiced by the untimely notice to prevail in a “late notice” defense.

In Country Mutual, the plaintiff and defendant in the underlying lawsuit both were insureds under separate Country Mutual policies. They sued each other but then waited more than twenty months before providing notice of their respective lawsuits to Country Mutual. Because both parties were Country Mutual insureds, they argued that Country Mutual could not possibly have been prejudiced by their failure to provide timely notice. For the purposes of analyzing the “late notice” issue, the Court implicitly accepted that Country Mutual would be unable to prove that it had suffered actual prejudice as a result of the insureds’ late notice.

The Court in Country Mutual began its analysis by recognizing that notice provisions “impose valid prerequisites to insurance coverage.” The Court also noted that “A policy condition requiring notice ‘[a]s soon as practicable’ should be interpreted to mean ‘within a reasonable time.’” Id. Finally, the Court confirmed that “[w]hether notice has been given within a reasonable time depends on the facts and circumstances of each case,” and “[b]reaching a policy’s notice clause by failing to give reasonable notice will defeat the right of the insured party to recover under the policy.” Id.

Reviewing the history of Illinois case law on the “late notice” defense, the Court in Country Mutual noted that a majority of intermediate Appellate Court rulings in Illinois have followed the rule that the presence of prejudice is only one of the circumstances to be examined by a court to determine whether notice has been given within a reasonable time. However, in recent years a minority of Illinois courts, beginning with Rice v. AAA Aerostar, Inc., 294 Ill.App.3d 801, 690 N.E.2d 1067 (4th Dist. 1998), has challenged the majority rule by attempting to create two different late notice standards based upon the two distinct notice requirements contained in liability policies, one standard relating to notice of an occurrence and a second standard relating to notice of a lawsuit.

Courts following the minority view in Illinois have held that when notice of a *lawsuit* is at issue “the rule is that the insurer is required to show that it was prejudiced by the insured's omission or delay in order to escape liability on its policy.” *Id.*, 294 Ill.App.3d at 807-08. In contrast, when notice of an *occurrence* is at issue, those courts have held that a showing of prejudice is not required.

In Country Mutual the Illinois Supreme Court expressly overruled Rice and other intermediate Appellate Court cases following the minority view, adopting a more bright-line test for “late notice” cases and clarifying the place of prejudice in the late notice analysis. The Court instructed:

- “The presence or absence of prejudice to the insurer is one factor to consider when determining whether a policyholder has fulfilled any policy condition requiring reasonable notice.”
- Other factors to be considered in determining whether notice was given within a reasonable time 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.
- “[O]nce it is determined that the insurer did not receive reasonable notice of an occurrence or a lawsuit, the policyholder may not recover under the policy, regardless of whether the lack of reasonable notice prejudiced the insurer.”
- The above-stated rules apply regardless of whether the notice at issue is notice of an occurrence or notice of a lawsuit.

Based on these factors, the Country Mutual court determined, as a matter of law, that the insureds’ twenty-month delay in providing notice was unreasonably and inexcusably late. Although the court assumed that the insurer could not establish prejudice as a result the delayed notice, no showing of prejudice was required for the insurer to prove the late notice coverage defense.

The implications of the Country Mutual decision for liability insurers in Illinois are very significant. This decision from the Illinois Supreme Court firmly and finally confirms that a showing of prejudice is not necessary in order for an insurer to prevail in a late notice defense, whether late notice of an *occurrence* or late notice of a *suit* is presented. Thus, the Country Mutual decision provides insurers with better opportunities to pursue a late notice defense through dispositive motion. If notice was not given within a reasonable time, the insurer can move for summary judgment without having to prove that it was prejudiced by the late notice.

If you have questions or would like to discuss the subject of this article further, please feel free to contact James K. Horstman at Cray Huber Horstman Heil & VanAusdal LLC, 303 West Madison Street, Suite 2200, Chicago IL 60606; 312-332-8494; or jkh@crayhuber.com.