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Illinois Coverage Basics

Illinois' Powerful Late Notice Defense Becomes More Complicated in the Hands of the First District Appellate Court

The Illinois courts are not generally known for being particularly friendly to insurers in coverage litigation. An exception is Illinois' rule governing the late notice defense, which for several years has been one of the most insurer-friendly late notice standards anywhere in the country.

The Late Notice Defense Under Illinois Law

In Country Mutual Insurance Co. v. Livorsi Marine, Inc., 222 Ill.2d 303, 856 N.E.2d 338 (2006), the Illinois Supreme Court ruled that prejudice is not a necessary element of a "late notice" defense. Under the Country Mutual standard, 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 to prevail in a "late notice" defense. Prejudice caused by the late notice is one factor to be considered by the courts, but it is not an essential element that must be proved by an insurer to establish the late notice defense. Generally speaking, insureds' delays in giving notice within the range of six to ten months have been found to be fatal to insureds' demands for coverage.

Nevertheless, even a strong late notice defense may falter. The First District Appellate Court's opinion in Berglind v. Paintball Business Association, 2009 WL 5125671 (filed December 24, 2009) teaches that the late notice defense may not be as simple as it once seemed to be.

Berglind v. Paintball Business Association, et al.

The Berglind case involved a late notice issue under a commercial general liability policy. The insured was a paintball recreation facility. A patron on the premises was shot in the eye with a paintball and was taken from the scene by ambulance. The insured facility operator was sued by the injured minor. No one appeared on behalf of the insured and an order of default was entered against the paintball facility, which resulted in a judgment of $6,615,293 against the insured. The insurer did not receive notice until 11 months after the occurrence.

The trial court in Berglind held that the insured's 11-month delay in giving notice of the occurrence constituted a material breach of the conditions of the CGL policy and entered summary judgment in favor of the insurer. However, on appeal the First District Appellate Court reversed the trial court's judgment, finding that questions of fact precluded a determination of the late notice issue as a matter of law. The Appellate Court's analysis in Berglind is potentially applicable to many other cases involving late notice defenses.

The insured in Berglind confirmed that he knew it was his obligation to give the insurer immediate notice of injuries occurring at the paintball facility. The insured also confirmed that he knew the claimant had been hit in the eye with a paintball, was examined by a doctor at the scene and was taken to a hospital by ambulance. However, the insured thought the claimant was "fine." While the insured did not recall being served with the lawsuit, he testified that it was a busy and hectic time for him. He admitted that "[i]t is possible I just set it aside and totally forgot about it." He also admitted that when he received letters or other documents that he did not understand, he threw them away or placed them in a file.

The Appellate Court analyzed the insurers' late notice defense in Berglind under four criteria:

(1) The Insured's Sophistication The Appellate Court stated that it was the insurer's burden to prove that there was no question of fact. The court found that although the insured had operated the paintball facility for approximately eight years before the occurrence, and had dealt with one prior injury claim, those facts were not enough to qualify the insured as a sophisticated insured. Accordingly, the court held that there was "an issue of fact that needs to be decided" with respect to the insured's sophistication.

(2) The Insured's Awareness of the Occurrence The Appellate Court held that although the insured knew that the claimant had been hit in the eye by a paintball, it was not entirely unreasonable for the insured to believe that no claim would result. While the insured's assessment of the injury was erroneous, the court declined to find that was unreasonable as a matter of law for the insured to believe that no claim would result.

(3) The Insured's Diligence The Appellate Court found that a fact question existed as to whether the insured acted with diligence when it notified the insurer 11 months after the incident, because the insured claimed he did not recall whether he received a summons in the underlying case. In the court's view, this created a question of fact, and credibility determinations cannot be made on a motion for summary judgment.

(4) Prejudice The Appellate Court declined to find that the 11-month delay in notice of the occurrence was prejudicial, because the insurer received actual knowledge of the suit while there was still time for it to move to vacate the default judgment.

The Berglind opinion contains important lessons for liability insurers. Berglind instructs that insurers who seek summary judgment on the basis of late notice should attempt to make an evidentiary record to address the four criteria addressed by the Appellate Court's opinion: (1) the insured's level of sophistication, (2) the insured's awareness of the occurrence, (3) the insured's diligence and (4) the particular prejudice caused by the delayed notice. The burden of proof on each of these points rests with the insurer. Proving the length of the delay, without more, may no longer be sufficient for an insurer to sustain summary judgment based on late notice.

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