

## **Illinois Coverage Basics**

### *Illinois Supreme Court Opinion Applies New Analysis to Evaluate Insurer's Late Notice Defense*

Illinois is not known to be an insurer-friendly jurisdiction, but it has produced some of the most insurer-friendly late notice coverage law in the country. In Illinois, unlike most jurisdictions, an insurer can establish a late notice defense without proving that it was prejudiced by the delayed notice. Country Mutual Insurance Co. v. Livorsi Marine, Inc., 222 Ill.2d 303, 316-317, 856 N.E.2d 338, 34 (2006). The late notice defense has traditionally been judged by whether the notice given to the insurer was reasonable under the circumstances, and under that analysis Illinois courts have frequently ruled for insurers where notice was delayed even a few months.

In a recent ruling, however, the Illinois Supreme Court declined to enforce the notice provisions of a standard general liability policy, and the circumstances of the ruling suggest a possible shift in the Illinois Supreme Court's analysis of the late notice defense. See West American Insurance Co. v. Yorkville National Bank, No. 108285 (9/23/10). In the Yorkville National Bank case the Illinois Supreme Court rejected an insurer's late notice defense where it was undisputed that the first written notice of a suit was given to the insurer 27 months after the suit was filed and served on the insured. It is still too soon to know what the long term effects of the Yorkville National Bank ruling will be, but it appears that Illinois' law on late notice is changing.

The Yorkville National Bank opinion involves a late notice issue that arose under a general liability policy issued to a retail bank. In November 2000, an officer of the bank allegedly made defamatory statements about a local lawyer. In September 2001, the lawyer filed suit against the bank alleging defamation. In late 2001 or early 2002, the bank's president met with the bank's insurance broker and told him that the bank was "involved in a defamation lawsuit." The bank president asked the broker if the bank's general liability would cover the suit, and the insurance broker told him "probably not."

Later, the bank came to suspect that there might be coverage under its CGL policy that was in effect at the time of the alleged occurrence. The bank then served the insurer with written notice of the defamation suit in January 2004, which was 27 months after the suit had been filed and over three years after the alleged occurrence date. At the time the written notice was delivered to the insurer, the trial of the defamation case was scheduled to begin within two months.

The insurer denied coverage based on the bank's failure to comply with the notice provisions of the policy. The trial court ruled against the insurer in the ensuing coverage litigation, but the Illinois Appellate Court reversed, ruling that the notice given by the bank was late as a matter of law. On further appeal, the Illinois Supreme Court reinstated the trial court judgment, holding that the bank's notice was reasonable and complied with the policy's notice requirements.

Yorkville National Bank is an important development in Illinois law on the late notice defense. Although the case involves some unique factual features (e.g., the insurance agent was a member of the bank's Board of Directors), the analysis used by the Illinois Supreme Court to invalidate the insurer's late notice defense will undoubtedly become a focal point of insureds' arguments in future late notice cases under Illinois law.

The first thing to know about Yorkville National Bank is that the Illinois Supreme Court found that oral notice could satisfy the written notice requirements of a standard CGL policy. Although standard CGL policy issued to the bank expressly required written notice of suits and claims, the Illinois Supreme Court ruled that the oral notice delivered to the insurance agent was sufficient, even though actual written notice was ultimately not given to the insurer for 27 months after the suit was filed and served. This ruling affects the required form and means of the notice.

The second thing to know about Yorkville National Bank is that the Illinois Supreme Court excused the insured from compliance with the policy's requirements concerning the information that must be provided by an insured in its notice of an occurrence or suit. The notice given to the insurer in Yorkville National Bank was an oral statement made to the insurer's agent that merely reported that the bank was "involved in a defamation lawsuit." The Illinois Supreme Court held that this brief comment conveyed sufficient information to satisfy the policy's notice requirements. This ruling affects the required content of the notice.

The third thing to know about Yorkville National Bank is that the Illinois Supreme Court implicitly imposed a duty to investigate upon insurers, triggered by even such vague and noncompliant notice as the bank president's oral comment to the insurance agent that the bank was "involved in a defamation lawsuit." This ruling alters insurers' duty to investigate by requiring the insurer to commence an investigation even before receiving compliant notice of an occurrence or suit pursuant to the notice provisions of the policy.

The fourth thing to know about Yorkville National Bank is that the Illinois Supreme Court seems to have undermined the benchmarks for the length of delay in late notice cases. Although there is no rigid formula, ordinarily insureds' delays in giving notice in excess of one year have been considered to be unreasonably late and in violation of policies' notice requirements. Yet, in Yorkville National Bank the Illinois Supreme Court found that insurance coverage was available to the bank even where written notice was given 27 months after the filing of the underlying suit and more than 3 years after the alleged occurrence.

The Illinois Supreme Court did not acknowledge that it was changing the law in its Yorkville National Bank opinion, but this decision marks a very different analysis than the Illinois courts have employed to date. Going forward, it will be important for insurers to reevaluate late notice defenses in Illinois in light of the analysis of the Court in Yorkville National Bank.

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This newsletter provides information on recent legal developments. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship. If you have questions, please feel free to contact Jim Horstman (312.332.8494; [jkh@crayhuber.com](mailto:jkh@crayhuber.com)).