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Illinois Coverage Basics

Unreasonable Delay In An Insurer's Response To A Tender Of Defense Can Void Its Coverage Defenses.

Under Illinois law, a liability insurer that wants to preserve a defense to coverage must either: (a) defend under a reservation of rights, or (b) file a declaratory judgment action. (See Employers Insurance of Wausau v. Ehlco Liquidating Trust (1999), 186 Ill.2d 127, 708 N.E.2d 1122.) Failing to satisfy either of these options will result in a loss of the insurer's right to assert its coverage defenses. This rule gives rise to a number of important practical question for insurers, including: how *quickly* must an insurer respond to a tender? This is important, because responding too slowly to a tender can be as disastrous for an insurer is not responding at all.

Unlike some jurisdictions, Illinois has no statute or judicial decision which tells insurers specifically how many days they have to respond to a tender. Nevertheless, the Illinois courts have provided a small measure of guidance on the subject. Not surprisingly, the courts of Illinois hold that it is generally better to respond promptly to tenders rather than to respond slowly. But the critical question is "how late is *too* late?"

The courts have provided some bright line standards to help define the answer this question:

- First, the court rulings tell us that it is too late to file a declaratory judgment action or agree to defend under reservation if the underlying action has already been tried or otherwise gone to judgment. (See Zak v. Fidelity-Phenix Insurance Company (1966), 34 Ill.2d 438, 216 N.E.2d 113.)

- Second, an insurer's response to a tender is too late if the underlying case has already been settled. (See Employers Insurance, supra.)

- Third, when an insurer chooses to preserve its coverage position by filing a declaratory judgment action, it is required to only *file* the declaratory judgment action before the underlying case is resolved. It is not necessary for the insurer to also *obtain* a judgment in the declaratory judgment action before the underlying case is concluded. (See State Farm Fire & Casualty Company v. Martin (1999), 186 Ill.2d 367, 710 N.E.2d 1228.)

Beyond these few clear standards, the guidelines provided by the courts are fairly vague.

For example, the Illinois courts hold that even if an underlying case has not yet gone to judgment or been settled, an insurer's response to a tender may be too late if trial or settlement is "immanent." (See Westchester Fire Insurance Company v. G.Heileman Brewing Company, Inc., 321 Ill.App.3d 622, 747 N.E.2d 955 (1st Dist. 2001); Providence Hospital v. Rollins Burdick Hunter of Illinois, Inc., 824 F.Supp.131 (N.D.Ill. 1993).) There is no particular period of time that insurers can look to for a rule of thumb. Rather than looking at the length of the insurer's delay, courts will look to the reasons for the delay to determine its reasonableness. (See Central Mutual Insurance Company v. Kammerling, 212 Ill.App.3d 744, 751 N.E.2d 806 (1st Dist. 1991).)

Overall, insurers in Illinois are expected to state their coverage positions with "reasonable promptness." (See Krutsinger v. Illinois Casualty Company (1957), 10 Ill.2d 518, 141 N.E.2d 16.) As such, the longer the delay in an insurer's communication of its coverage position, the better its explanation for the delay needs to be. When there is any significant delay in an insurer's response to a tender, the best practice is for the claims representative to document the reasons for the delay in the claim file. In addition, the insured should be kept apprised of the status of the insurer's ongoing analysis of the tender.

The consequences for an insurer failing to timely respond to a tender and preserve its coverage defenses are extremely harsh. An insurer failing to timely take steps to defend under reservation or file a declaratory judgment action will be estopped (prohibited) from asserting its coverage defenses thereafter. (See Employers Insurance, supra.) Under the Illinois rule of estoppel, the test is not whether the insured was prejudiced by the insurer's conduct. (Id.) The test is simply whether the insured responded with reasonable promptness to the tender and undertook steps necessary to preserve its coverage defenses as prescribed by Illinois law.

Late efforts to preserve a coverage defense will have the same legal effect as if the insurer made no efforts whatsoever to preserve its coverage defenses. What constitutes "reasonable promptness" in a response to a tender will necessarily vary according to the particular facts surrounding a claim. In every case, however, an insurer should respond to a tender as soon as it reasonably can do so. And, to the extent that it cannot promptly respond, the claim file should clearly show why not. Whether the time clock is the insurer's friend or foe depends largely upon how well the claim file documents the investigative plan and reflects a reasonable explanation for the timing of the response to the tender.

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If you have questions or would like to discuss this newsletter's topic 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; jkh@crayhuber.com.

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