Can Casual Conversations With the Insured Waive a Written Notice of Claim Clause?

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An insurance policy required that the insured "immediately record the specifics of the claim" and "see to it that we receive written notice of the claim . . . as soon as practicable."

The insured waited 27 months before giving its insurer written notice of a defamation suit.

The Appellate Court held that the insured had breached the written notice clause, and that the presence or absence of actual notice had no bearing on the issue.

But last week, a divided Illinois Supreme Court reversed. *West American Insurance Co. v. Yorkville National Bank*, [pdf] No. 108285.

The plaintiff offered testimony of several casual contacts with representatives of the insurer following the filing of the lawsuit.

The president of the insured told an insurance agent "in passing" that the insured had "a defamation suit in Ottawa" -- the suit was in Joliet -- and it was a "he said/she said sort of thing." The president said nothing about when the alleged defamation took place, nor did he provide the agent with a copy of the complaint, nor did he offer to send any additional information. The agent said the suit was "probably not" covered, but the president never pursued the matter.

Later, the president met another insurance agent. He vaguely referred to a defamation suit and asked whether the policy would cover it. The agent gave "basically the same response."

Finally, the defamation suit was briefly mentioned at three meetings of the bank board of directors, although apparently no information was recounted about where the suit was filed, when the incident allegedly took place, or who the parties to the lawsuit were.

The majority held that the timeliness of an insured's notice was judged by a five factor test: (1) the specific language of the policy's notice provision; (2) the insured's sophistication in commerce and insurance matters; (3) the insured's awareness of an event that may trigger insurance coverage; (4) the insured's diligence in ascertaining whether policy coverage is available; and (5) prejudice to the insurer.

The Court held that the first factor weighed in neither direction, and the second and third weighed against a finding of reasonable delay.

However, the Court held that the fourth factor weighed heavily in favor of a finding of reasonableness. An insurer is deemed to have "actual notice," the Court found, where it has sufficient information to locate and defend the suit. The Court held that the casual conversations between officers of the insured and various agents were sufficient for the insurer to "locate and defend" the action, and taken together, the factors weighed in favor of finding the insured's delay in notice reasonable.

Justice Charles Freeman dissented. "[I]t is apparent," Justice Freeman wrote, "that [the insured] breached each and every reporting obligation it agreed to as a condition of coverage."

Justice Freeman strongly condemned the majority's decision:

By ignoring the settled rules of insurance policy construction . . . the majority redirects the focus of analysis away from compliance with policy provisions to an unworkable and problematic case-by-case examination, requiring swearing contests between the insurer and insured as to whether and when notice was provided . . . today's opinion . . . effectively overrules decades of precedent establishing that notice provisions are conditions precedent to coverage under a policy.