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NEWSLETTER

Insured's Delay of 58 Days in Notifying Insurer of Claim against It Precludes Coverage

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In a recent unpublished opinion, a California appellate court, applying New York law, held that an insured's delay of 58 days in reporting a claim made against it to its insurer was untimely and that the insurer's denial of coverage based on this late notice was proper. *Lincolnshire Mgmt., Inc. v. Seneca Ins. Co., Inc.,* No. 798139, 2002 WL 31058285 (Cal. App. 4th Sept. 16, 2002).

The insurer issued two policies, a business owners' policy and an umbrella policy, to its insureds, an investment banking firm and its executive officer, board of trustees, directors, stockholders and employees. Both policies contained notice of claim provisions. The business owners' policy provided that "[i]f a claim is made or suit is brought against the insured, the insured shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative." The umbrella policy required that "[w]hen an occurrence takes place which is reasonably likely to involve the insurance afforded hereunder written notice shall be given...to the company...as soon as practicable.... The insured shall give like notice of any claim made because of such occurrence."

In April 1997, the investment bank and some of its officers and directors were sued, in a counter-complaint from another action, for defamation and abuse of process. The record is unclear as to whether the investment bank had notice of the claim at that time because it was not served with the complaint. But the record reflects that the investment bank was aware of the complaint by July 9, 1997, when it retained defense attorneys in the matter. Furthermore, on August 14, 1997, the investment bank was served with a first amended counter-complaint. The investment bank did not notify the insurer of the claim until the insureds filed their defense to the amended counter-complaint 58 days later on September 5, 1997. The insurer denied coverage, and the insured filed suit.

The court ruled in favor of the insurer. As an initial matter, the court held that, applying California choice of law, New York law governed. The court reasoned that under California's "governmental interest analysis," New York had a greater interest in its law governing because both the insurer and the investment bank were New York corporations, the investment bank had its principal place of business in New York, the policies were

issued and delivered in New York and the dispute arose in New York. The court then held that the 58-day delay in notification was untimely under the policy. The court rejected the investment bank's argument that the policy only required notice upon service of legal process, reasoning that under the policy "notice is required if a claim is made or suit is brought, two distinct events." The court distinguished a recent New York case holding that a showing of prejudice was required for notice of suit provisions, reasoning that the issue in this case was whether notice of the claim had been given, not whether notice of a suit must be given after notice of a claim has been made. Additionally, the court rejected the investment bank's position that there were disputed issues of fact regarding whether or not the delay was longer than 58 days as irrelevant because a 58-day delay was in and of itself unreasonable. The court noted that "New York has drawn hard and fast lines establishing when notice is untimely as a matter of law, and—unfortunately—[the insureds are] on the far side of the line." The court pointed out that New York courts previously have found delays of 22 days, 51 days, one and a half months, four months, and three and a half months to be unreasonable.

The court also rejected the investment bank's position that the court should not permit extrinsic evidence to deny coverage or a defense. In particular, the insured argued that the insurer could not present evidence that the investment bank had retained defense counsel because it was not alleged in the underlying complaint. The California appellate court found that, while the four corners rule should apply where the court can make determinations from the complaint and the policy alone, in situations involving notice, "[f]acts bearing on when the insured first received notice of the claim will rarely be in the complaint, so extrinsic inquiry seems reasonable and necessary." The court dismissed the possibility that the delay was excused by the investment bank's good faith belief that there was no coverage or a good faith belief that there was no liability because the investment bank did not present any evidence that it had either of these beliefs at the time it was served with process. Finally, the court rejected the investment bank's argument that the insurer's two-month delay in disclaiming coverage precluded the insurer from denying coverage, an argument that was made by extrapolation from a New York law applying to insurance for motor vehicle accidents. The court dismissed this argument because the investment bank did not present any evidence that it was prejudiced by the two-month delay and the investment bank did not explain why the rules concerning liability insurance for motor vehicles should apply to this case.

For more information, please contact one of WRF's Professional Liability Attorneys at 202.719.7130.