

Insurer Not Required to Show Prejudice to Deny Coverage Based on Late Notice

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The United States Court of Appeals for the Eleventh Circuit, applying Georgia law, has held that a 21-month delay in providing notice to an insurer was unreasonable as a matter of law where the insured failed to justify such delay and that the insurer was not required to show prejudice to deny coverage. *OneBeacon Am. Ins. Co. v. Catholic Diocese of Savannah*, 2012 WL 1939104 (11th Cir. May 30, 2012). Furthermore, the court concluded that the insurer had not waived its coverage defense by providing a defense to the insured subject to a reservation of rights.

An insurer issued liability policies to a church organization for a period beginning on an unknown date through February 1980. In April 2006, a lawsuit was filed against the organization in which the plaintiff alleged that the organization was vicariously liable for the acts of an employee that occurred between 1978 and 1982. The church organization filed an answer in May 2006 but did not notify the insurer of the lawsuit until January 2008. The organization contended that it could not locate the policies prior to January 2008.

The insurer initially denied coverage for the lawsuit based on the insured's late notice of the lawsuit but later agreed to provide a defense subject to a reservation of rights. Following the settlement of the underlying lawsuit, the insurer filed a declaratory judgment action against the insured, which filed a counterclaim for bad faith and negligent claims handling. The trial court granted summary judgment in favor of the insurer.

On appeal, the insured argued that the insurer waived its coverage defenses by failing to file for declaratory relief immediately. The court concluded that the insured's rights in the underlying litigation had been protected and that it had not been prejudiced by the insurer's delay in seeking a declaratory judgment. Accordingly, the court held that the insurer had not waived its coverage defenses.

The court then considered the organization's undisputed 21-month delay in providing notice of the lawsuit to the insurer. The court noted that the insured had the burden of justifying its delay. The court concluded that the organization's argument that it had provided notice as soon as it discovered the policies was insufficient. In particular, no evidence showed the insured's diligence in efforts to locate the policies or to notify the insurer, and the single conclusory affidavit submitted in support of the insured's position was held insufficient as a matter of law to create an issue of material fact. In addition, the insurer was not required to show prejudice as a result of the late notice to deny coverage. Rather, under Georgia law, the insurer's failure to show

prejudice was considered one of many factors to be considered.

Finally, the court stated that the insured's bad faith claim failed because, under Georgia law, there could be no recovery for bad faith absent coverage.

The court therefore affirmed the trial court's summary judgment order in favor of the insurer.