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ALERT

Notice to Primary Insurer through Common Broker Does Not Constitute Notice to Excess Insurer

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The Illinois Appellate Court, Fourth Division, applying Illinois law, has held that notice provided to a primary insurer through the same broker who was designated to receive notice in an excess policy was not imputed to the excess insurer when there was no evidence that the notice was intended for anyone other than the primary insurer. *Federal Ins. Co. v. Lexington Ins. Co.*, 2011 WL 31860 (Ill. App. Ct. Jan. 3, 2011).

The insured was a detonator manufacturer that was sued when its product seriously injured the claimant. The insured gave verbal notice of the accident to its broker, which also happened to be the designated agent for receiving notice on behalf of the excess carrier, but the insured left it up to the broker to decide which carriers should be provided written notice. The broker provided notice to the primary carrier, but not to the excess carrier, although the primary and excess carriers were part of the same corporate family.

The court held that sufficient notice was not provided to the excess carrier. The court explained that the proper analysis of the sufficiency of notice is "whether the notice given objectively complied with the potential claim notice provisions of a policy." The relevant excess policy language provided that notice of a circumstance be provided "in writing, sent by registered or certified mail during the period of this Policy," to the common broker.

The appellate court found that the insured failed to comply with the notice of circumstance provision of the excess policy because there was no evidence that the insured notified "the entity designated in

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Item 4," the broker, either by telephone or in writing, that it should put the excess insurer on notice of the claimant's accident. The court rejected the insured's contention that notice to the broker of the incident by telephone the day after the accident was sufficient, particularly where the insured did not instruct the broker to provide notice to the excess carrier. The appellate court also agreed with the trial court that the notice provided to the primary insurer did not impute notice to the excess insurer, notwithstanding that they were corporate affiliates, because that notice did not identify the excess insurer and there was no evidence suggesting that the sender of the notice intended to notify anyone other than the primary insurer.