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ALERT

Coverage Precluded by Unreasonable Delay of Notice to Excess Insurer

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The Appellate Court of Illinois has held that a two-year delay in providing notice to an excess insurer was not reasonable, and therefore the insured was not entitled to coverage. *MHM Services, Inc. v. Assurance Co. of America*, 2012 WL 3156521 (Ill. App. Ct. Aug. 3, 2012).

The insured was a mental health services provider that contracted with the state department of corrections to evaluate inmates who have a history of sexually violent crimes. After failing to recommend that a particular inmate be indefinitely confined, the inmate was paroled and eight months later assaulted a female jogger. The jogger subsequently brought suit against the insured for negligence in connection with its pre-release screening of the inmate.

The insured had a commercial general liability policy that provided a $1 million limit of liability, subject to a $250,000 self-insured retention, as well as an umbrella policy that provided a $5 million excess layer of coverage. Upon receiving service of the jogger's complaint in June 2006, the insured tendered it to the commercial general liability carrier, which proceeded to defend the action. Over the next two years, the claim was actively litigated and the court issued several rulings against the insured. The parties also engaged in extensive settlement negotiations and once it appeared to the insured that the case could only be resolved for an amount in excess of $1 million, the insured for the first time provided notice to the excess insurer in July 2008.

Citing to the requirement in its policy that the insured provide notice of a suit "as soon as practicable," the excess insurer denied coverage. In the coverage litigation that followed, the appellate court

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found that the provision at issue required "notice to be made within a reasonable period of time in light of the facts and circumstances of the particular case." According to the court, the passage of time alone is not dispositive and it is necessary for the court to evaluate the validity of insured's excuse for failing to provide notice sooner. In this regard, the court identified five factors for consideration: (1) the specific language of the provision; (2) the insured's sophistication in insurance matters; (3) the insured's awareness of an event that may trigger coverage; (4) the insured's diligence in ascertaining whether the policy afforded coverage; and (5) whether the insured's delay caused prejudiced to the insurer.

Turning to the first factor, the court found that the notice provision mandated timely notice to the insurer "regardless of the amount of potential liability or whether [the insured] had reason to believe the . . . excess policy might be implicated." The court rejected the insured's argument that because the insurer had discretion to participate in the defense and settlement of the claim before the exhaustion of the underlying coverage, the insured had discretion to provide notice at that point as well.

As to the second factor, pointing out that the insured had secured primary and excess coverage, employed an in-house general counsel and retained coverage counsel, the court found that insured was sophisticated in insurance matters. The court held that this factor weighed in favor of finding that the insured's delay was unreasonable, but also noted that the factor is "not particularly helpful" to the analysis. The court similarly dismissed the relevance of the third factor because there was no evidence that the insured knew of the underlying tort before suit was filed.

Ultimately concluding that the insured's delay was unreasonable and therefore coverage unavailable, the court found that the fourth and fifth factors weighed against the insured. The court determined that the insured had not been diligent in ascertaining whether coverage was available under the excess policy, pointing out that shortly after the complaint was filed, the insured was aware that the jogger's claim was an "outlier" and not one of the "frivolous" lawsuits it typically saw that usually settled for $10,000. The court further pointed out that several months before the insured provided notice to the excess insurer, the judge in the case had issued a number of rulings against the insured and indicated his belief that a multi-million dollar settlement was warranted. In this regard, the court also found that the insurer was prejudiced by the delay because it did not have the opportunity to participate in the defense sooner and by the time the insurer received notice, "the only unanswered question was the specific dollar amount [the plaintiff] would receive from [the insured] for her injuries."