

ALERT

Insured's Failure to Provide Notice of Claim to Excess Insurer Until After an Adverse Jury Verdict Prejudiced the Excess Insurer

August 13, 2012

The United States Court of Appeals for the Fifth Circuit, applying Texas law, has held that an excess insurer was prejudiced when it was not notified of a claim until after a jury verdict was entered against the insured. *Berkley Regional Insurance Co. v. Philadelphia Indemnity Insurance Co.*, 2012 WL 3126739 (5th Cir. Aug. 2, 2012). The appellate court, however, noted that factual issues existed with regard to whether the excess insurer received "constructive notice" of the claim. This issue was not addressed on appeal, and the court's opinion was without prejudice to the factual development of this issue on remand.

A primary insurer defended an insured under a general liability policy in connection with an underlying "slip-and-fall" case with damages potentially in excess of \$1 million. The primary policy had a \$1 million per occurrence limit of liability. The insured also had a \$20 million excess/umbrella policy. The parties agreed, for purposes of the appeal, that the excess insurer did not receive notice of the underlying lawsuit at the same time as the primary insurer. The parties to the underlying suit engaged in settlement discussions and a mediation, but the case ultimately went to trial. The jury reached a verdict against the insured and awarded damages in excess of \$1.6 million. On the day of the verdict, the insured demanded that the excess insurer pay the amount of damages in excess of the primary policy.

The excess insurer denied coverage based on late notice and raised additional coverage defenses. Through a series of assignments, another insurer was assigned the insured's and judgment-creditor's

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rights against the excess insurer and pursued the coverage litigation against the excess insurer. The district court concluded that the excess insurer had not been prejudiced by the late notice, and the appellate court considered whether the failure to give notice to an excess insurer until after an adverse jury verdict constituted evidence of prejudice that would forfeit coverage.

The appellate court noted that, under Texas law, a showing of prejudice to the insurer from late notice required showing that some purpose of the notice requirement had been impaired by the delay. The court elaborated that an insurer's loss of the "valuable rights" to join the investigation of a claim, to settle a claim, or to control the defense of a claim could all prejudice the insurer. Although the court stated that the delay of notice to an insurer after an underlying case was well advanced in litigation was not necessarily prejudicial, the court nevertheless concluded that, in this case, the excess insurer was not notified until "after all material aspects of the trial process had concluded and an adverse jury verdict was entered." The excess insurer therefore lost the opportunity to conduct its own investigation or evaluation of the case and, "[m]ost importantly, [the excess insurer] lost a seat at the mediation table." The court therefore concluded that the excess insurer presented sufficient facts to support its position that it was prejudiced by the late notice and reversed the grant of summary judgment in favor of the other party. The order was without prejudice to the factual issue of whether the excess insurer received "constructive notice" of the claim, and the court remanded the litigation for further proceedings.

The opinion is available [here](#).