

Late Notice and Voluntary Payments Preclude Coverage Even Where Insurer May Have Knowledge of the Claim

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The United States District Court for the Southern District of New York, applying New York law, has held that a general liability insurer could rely on late notice and voluntary payments defenses to coverage where the insured had not properly provided notice for at least two years after a claim was made or sought consent before making payments for cleanup of contamination. *Travelers Indemnity Co. v. Northrop Grumman Corp.*, 2014 WL 721637 (S.D.N.Y. Feb. 25, 2014). The court found no coverage was available even though the insurer allegedly had independent knowledge of the claim and some of the contamination and remediation efforts at issue because the insurer at no time waived its right to written notice.

The general liability policies at issue covered several policy years and required that the policyholder, immediately, provide notice to the insurer of any claim and forward the relevant claim document to the insurer and, as soon as practicable, provide written notice in the event of property damage. The policyholder did not provide notice to the insurer of property damage despite many facts exposing groundwater contamination at a certain facility through the late 1970s. In January 1984, the policyholder sent to the insurer a December 1983 letter from the state Department of Environmental Conservation initiating a formal adversarial proceeding regarding the facility. The letter was sent to an address that was not the business or other address for the insurer, and no insurer witness recalled seeing it. The insurer was orally informed of the Department's requests concerning the facility at a 1989 meeting, and some of the insurer's internal memoranda discussed the matter, but the insured did not

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request coverage in writing until 2012. The insured argued that the insurer had received adequate notice before that time. The insured argued in addition that the requirement to give notice of additional claims made in 2002 was excused because the insurer had indicated it would not defend prior administrative proceedings or claims for equitable relief.

The court found that the policyholder's late notice precluded coverage. Prior to 1983, the court found that, even if the insured, as a legal matter, could argue that it had a good faith belief that it was not liable, and therefore was not required to provide notice of property damage, no such belief was reasonable in light of the factual evidence of contamination. Notice was therefore required. The court found further that the insured's 1984 letter sent to the wrong address was not effective notice, even though that address had been provided by the insurer for communications involving an unrelated claim.

Moreover, the court found that the insurer's knowledge of the Department proceedings in fact would not eliminate the insured's notice obligations. Neither oral discussions with the insurer nor internal memoranda by the insurer concerning the claim waived the insurer's right to receive written notice as required by the policies. The insurer's own memoranda did not cure late notice because they were written two years after a claim was made – a period the court found to be neither "immediately" nor "as soon as practicable." According to the court, "a two-year delay in the context of this type of matter is untimely as a matter of law." And the insurer's indication that it would not cover certain equitable obligations was not an across-the-board denial of coverage that in some cases may excuse notice.

The court also found that coverage was barred by policy language prohibiting an insured, except at his own cost, from voluntarily making any payment. The policyholder had incurred more than \$40 million in clean-up and remediation costs at the relevant facility without the insurer's consent. The policyholder argued that the insurer had waived its right to rely on the policies' voluntary payments provisions by refusing to participate in the process or to provide a defense. The court rejected this argument. At no time, found the court, did the insurer receive notice of the purpose or amounts of payments by the policyholder or intentionally waive its rights with respect to such payments.

The opinion is available, as amended with clerical corrections on March 7, 2014, [here](#).