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NEWSLETTER

Court Upholds Denial Based on Late Notice and Rejects Estoppel and Waiver Arguments

January 2009

A federal district court, applying Michigan law, has held that an insurer was not precluded by principles of equitable estoppel or waiver from denying coverage for lawsuits based on late notice. *State Bar of Mich. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 2008 WL 4901108 (E.D. Mich. Nov. 10, 2008). The court also held that the insurer was not required to show prejudice in order to deny coverage based on late notice under the claims-made policies at issue.

The insurer issued two claims-made policies to the State Bar of Michigan: one for the period July 18, 2001, to July 18, 2002, and another for the period from July 18, 2002, to July 18, 2003. The notice provisions in the policies stated that "[t]he Insureds shall, as a condition precedent to the obligations of the Insurer under this policy, give written notice to the Insurer of any Claim made against an Insured as soon as practicable and either: (1) anytime during the Policy Year or during the Discovery Period (if applicable); or (2) within 30 days after the end of the Policy Year or the Discovery Period (if applicable), as long as such Claim is reported no later than 30 days after the date such Claim was first made against an Insured."

A lawsuit was filed during each of the two policy periods, but the State Bar of Michigan failed to provide notice of either lawsuit until April 2, 2004. The insurer denied coverage because the claims were not reported during the policy periods in which they were first made or within 30 days of the expiration of the policies.

In the declaratory judgment action that followed, the court noted that the State Bar of Michigan had conceded that it did not provide timely notice of either lawsuit and that, absent a valid excuse, coverage would be barred.

The State Bar first argued that the insurer was equitably estopped from denying coverage because the State Bar had justifiably relied on an erroneous denial of coverage by a different insurer as to a prior lawsuit filed before the inception of the July 18, 2001, policy period in determining that it could not obtain coverage for the two subsequent lawsuits. The State Bar also contended that it had justifiably relied on alleged statements by a representative of the insurer indicating that the State Bar "should not bother to submit" the two lawsuits because they would not be covered for the same reasons that the prior lawsuit was not covered. The court rejected these arguments.

The State Bar also argued that the insurer was equitably estopped from denying coverage because it had failed to ask about pending claims during the renewal application process for the second policy period. The State Bar contended that the pending claims question would have revealed the existence of the first lawsuit during the first policy period and also would have led to timely notice of the second lawsuit during the second policy period. The court noted that silence or inaction could only support an equitable estoppel argument where the silent party had a duty to act. Because the insurer did not have a duty to inquire about pending claims, the court found no basis for equitably estopping the insurer from relying on the notice provision.

The court also rejected the State Bar's argument that the insurer should be estopped from denying coverage because it had failed to timely respond to the policyholder's request for coverage. The court found that the evidence supported a finding that the insurer had waited about five months between receiving the first written notice of the lawsuits and denying coverage. The court concluded that this delay was more similar to the reasonable four-month delay allowed in *Fire Insurance Exchange v. Fox,* 423 N.W.2d 325, 327 (Mich. Ct. App. 1988) than the unreasonable two-year delay prohibited in *Meirthew v. Last*, 135 N.W.2d 353, 356 (Mich. 1965). In any event, these cases were inapplicable, according to the court, because the insurer had no duty to defend the policyholder under the policies, and the insurer had never undertaken or promised to undertake the State Bar's defense.

Next, the court considered whether the insurer's alleged failure to raise late notice as a defense in its initial denial letter had waived or estopped its ability to rely on that defense. The court found to the contrary that the insurer had identified late notice as a defense to coverage in its initial denial letter and, furthermore, that the State Bar had failed to demonstrate any prejudice or detrimental reliance resulting from the insurer's purported failure to raise the late notice defense.

Finally, relying on *Shubiner v. New England Insurance Co.*, 523 N.W.2d 635, 636 (Mich. Ct. App. 1994), and *Dellar v. Frankenmuth Mutual Insurance Co.*, 433 N.W.2d 380, 382-83 (Mich. Ct. App. 1988), the court held that the insurer did not have to prove prejudice to rely on a late notice defense under a claims-made policy.