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Illinois State Appellate Court Rules That Insurer Properly Denied Coverage Based on Insured's Late Notice

An Illinois intermediate appellate court found that the insured's failure to comply with the notice conditions in a contract for general liability insurance barred coverage. *Board of Education of Township High School District No. 211, Cook County, Illinois v. TIG Insurance Company*, No. 1-05-1732 (Ill. App. 3d Div. December 26, 2007). The Board of Education of Township High School District No. 211, Cook County, Illinois ("Board") tendered a claim to TIG Insurance Company ("TIG") for the costs of asbestos removal from its buildings. The Board had learned eight years earlier that its buildings contained friable asbestos.

Background

TIG had issued policies to the Board for the periods April 1, 1981 through April 1, 1984 and April 1, 1984 through April 1, 1986. The policies required the Board to "immediately" provide notice "of any occurrence the cost of which is likely to result in payment." The parties did not dispute that the Board discovered friable asbestos in its school buildings in June 1983. Upon the advice of the remediation contractors retained by the Board, the Board commissioned the asbestos remediation plan in 1985, which was completed in 1994. The Board provided TIG with notice that it intended to recover these remediation costs under its policies with TIG by tendering its claim in July of 1991.

TIG rejected the Board's tender based on late notice, contending that the Board was first aware of the friable asbestos conditions, i.e., the "occurrence," more than eight years before tendering its claim to TIG. The Board, in turn, filed an action

seeking a declaration from the court that TIG owed the Board coverage under its policies. Each side moved for summary judgment, and the trial court granted judgment to TIG based upon the Board's failure to provide timely notice of an "occurrence."

The Court's Ruling

On appeal, the court found that, under Illinois law, the factors that determine reasonableness of notice are: "(1) the language of the policy itself; (2) whether the insured can be considered sophisticated in the instant area of commerce and insurance; (3) when the insured became aware of the occurrence; and (4) the diligence of the insured in determining the availability of coverage after it learns of the occurrence." The appellate court also noted that under Illinois law, there are two other significant factors that are commonly reviewed, which are: (1) whether the insurer was prejudiced by the delay; and (2) if the insurer had actual notice of the "occurrence." However, as the appellate court noted, neither factor alone is dispositive, and the Illinois Supreme Court has not required a finding of prejudice in order for an insurer to properly disclaim coverage based on late notice under an insurance policy containing similar notice conditions. Applying these factors, the court held that the Board's unexplained eight-year delay in reporting the claim to TIG meant that the Board failed to provide timely notice as required under the policies and barred its claims.

The Board made several arguments in support of its contention that TIG had "actual notice" much earlier than 1991 that

its buildings contained friable asbestos. First, the Board contended that TIG's agent toured the school buildings in 1984 and saw the posted asbestos warning signs, thereby imputing actual knowledge of the "occurrence" to TIG. The appellate court rejected this contention because there was no evidence that the insurance agent even saw the asbestos warning signs during his tours of the school buildings. In addition, the court noted that even if the agent did see the signs, "the mere presence of asbestos in some of the Board's buildings would not have sufficed to give the agent notice that a claim for damages from friable asbestos was forthcoming."

Second, the Board contended that because it had sued various asbestos manufacturers, distributors, and sellers in 1989 to recover asbestos-removal costs and expenses, and some of those defendants were insured by TIG, TIG had at that time actual notice about the friable asbestos conditions and associated damage at the school buildings. The court also rejected this contention and ruled that an insurer is not "liable to investigate and determine whether there are possible collateral claims forthcoming from other insureds when some of the insurer's insureds are sued for damages." The court reasoned that the terms and conditions of the insurance contract define and control the duties and obligations of the parties to that specific insurance contract and, to hold otherwise, would vitiate the parties' contractual obligations. The court also viewed the Board's lawsuits as evidence that the Board was a sophisticated insured, rather than providing TIG with notice of its claim. The court remarked that the lawsuits marked yet another point in time when the Board realized that its buildings were damaged by the friable asbestos, and could have notified TIG of its claim. Therefore, the court held that TIG did not have "actual notice" of the Board's claim before July of 1991, when the Board formally tendered its claim.

The Board also contended that the notice requirement under the insurance policy was not a condition precedent to coverage. The court dismissed this contention, noting that Illinois courts have routinely held that similar notice provisions are conditions precedent that must be satisfied to have coverage under an insurance policy. The Board also argued that at the time it discovered that its buildings contained friable asbestos there was no legal precedent suggesting that an insured could recover its costs for asbestos removal under an insurance policy. The court dismissed this contention, citing that the Illinois Supreme Court ruled as early as 1989 that buildings containing asbestos were "damaged" for the purposes of insurance coverage. The court further noted that in that same year, the Board recognized that it had sustained building damage due to the presence of friable asbestos because it sued various vendors to recover its damages.

The Board further contended that there were multiple "occurrences" at issue because the asbestos in its buildings continued to enter into a friable state, and that each time that happened was a separate "occurrence." The Board argued that each "occurrence" created a different notice obligation. In rejecting the Board's contention, the court distinguished asbestos from the environmental cases that the Board relied upon. Finding that the environmental cases contained separate and distinct events that could be easily identified as the separate causes of the alleged property damage, the court refused to find that there were multiple "occurrences." The court found that it was virtually impossible to determine when each asbestos fiber became friable and, for that reason, concluded that the release of the asbestos fibers should be considered one "occurrence."

Finally, the court found that there was no satisfactory explanation for the Board's eight-year delay in notifying TIG of its

claim. The Board had commissioned a study, hired consultants, and approved a plan to remediate, and then sued the various asbestos vendors to recover its damages. The court also found that this delay prejudiced TIG because the Board had already commissioned and removed most of the friable asbestos from each of its school buildings by the time it tendered its claim to TIG. As a result, the court ruled that TIG had lost its ability to independently determine which buildings, or portions of the buildings, contained friable asbestos and, therefore, caused a danger or may have caused "property damage" under its insurance policies.

Implication

Under Illinois law, late notice is a viable defense and does not require that the insurer demonstrate that it was prejudiced by the delay in order to prevail on this coverage defense. Rather, prejudice is but one factor that an Illinois court may consider, along with the policy language, the sophistication of the insured, when the insured became aware of the "occurrence" and its actions to seek coverage after learning of the "occurrence." Also, as the *Board of Education* case illustrates, the notice requirement is a condition precedent to coverage under the insurance contract, and the insured may not rely on evidence that the insurer may have knowledge of a potential claim by virtue of another claim or suit against another of the insurer's insureds to absolve the insured of its separate obligations under that specific insurance contract to provide proper notice. The insured must comply with the terms and conditions of its respective insurance contract, which governs the parties' obligations under that contract.

If you have any questions about this Alert, or insurance coverage matters in general, please contact one of the attorneys listed in this Alert.

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