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Court Finds Issues of Fact With Regard to Claim of Late Notice Under Bumbershoot Policy

Jason P. Minkin and Jonathan A. Cipriani of the firm of BatesCarey in Chicago have sent in this note on the decision of the US District Court for the District of Connecticut in Tilcon N.Y., Inc., v. Indemn. Ins. Co. of N. Am., 2017 WL 1948420 (D. Conn. May 10, 2017). They write:-

Under Connecticut law, an insurer seeking to disclaim coverage based on late notice under an occurrence-based policy bears the burden of showing prejudice. A recent decision of the U.S. District Court for the District of Connecticut applied this principle, denying summary judgment to allow a factual inquiry into whether the insurer had been prejudiced, in recognition of the need to balance the interests of insurer and insured.

The Occurrence
The coverage dispute arose between Tilcon New York, Inc., a company providing road construction services, operating quarries, and producing construction materials that are transported between New York and New Jersey by truck, barge, and rail. Tilcon uses tugboats, or push boats, to maneuver barges to docks for the purpose of loading gravel and stone aggregate onto the barges for delivery to construction sites. Tilcon was insured through a primary protection and indemnity ("P&I") policy, as well as a commercial marine bumbershoot policy issued by Indemnity Insurance Co. of North America ("IINA").

The underlying occurrence took place in October 2004, when a Tilcon employee was allegedly injured by a snapped cable while working aboard a barge. The Tilcon employee claimed serious neurocognitive injuries, and ultimately sued Tilcon in September 2007.

The Coverage Dispute
While the case involved many disputed coverage issues, relevant to the discussion here is IINA's defense based on late notice. The primary P&I insurer had tendered its limits towards the settlement of the underlying suit; hence, the remaining coverage dispute involved Tilcon's bumbershoot policy, issued by IINA. The bumbershoot policy provided that Tilcon would provide notice of a claim to IINA "as soon as practicable" "whenever [Tilcon] has information from which [Tilcon] may reasonably conclude that an occurrence covered hereunder involved injuries or damages which in the event that [Tilcon] should be held liable, is likely to involve this policy…

In a prior ruling in the case, the court determined that Connecticut law would govern the dispute, to the extent no federal admiralty law was on point. Applying Connecticut case law,

the Tilcon court noted that the duty to give notice does not arise until facts develop which suggest to a reasonably prudent person that liability may have been incurred. The insured must give notice within a reasonable time thereafter. Tilcon, 2017 WL 1948420 at *12 (citing Arrowood Indem. Co. v. King, 304 Conn. 179, 199 (2012)).

The Tilcon court concluded that IINA had made out a prima facie case that Tilcon had not complied with the notice provision. The court noted that the underlying injury occurred in the fall of 2004. By September 2006, an independent medical exam (IME) had been prepared in connection with the Tilcon employee's workers' compensation claim, concluding that he had suffered neurocognitive disabilities such that he could not return to his work as a barge trimmer. The employee underwent a total of five IMEs between September 2006 and December 2007, which Tilcon's counsel had characterized in a 2009 email to Tilcon's claims adjuster. Tilcon also had actual notice of a claim that could have given rise to liability as of the filing of the lawsuit against it in 2007. Tilcon did not report the claim to IINA until 2012. This, the court found, was a breach of the IINA policy's notice obligation.

But despite this breach, issues of fact precluded summary judgment as to whether IINA had been prejudiced. IINA conceded that Connecticut law requires an insurer claiming notice to demonstrate prejudice by a preponderance of evidence. Tilcon offered three reasons why IINA had not been prejudiced. First, IINA did not review the claim for three months after first receiving notice in 2012. Second, IINA appointed coverage counsel but allegedly never intended to associate in defense of the underlying case. Third, IINA had denied coverage on unrelated grounds, and therefore, reporting the claim earlier would simply have resulted in Tilcon being informed of a denial earlier. In response, the employee who handled the claim for IINA testified that IINA indeed wanted to participate in the defense of the underlying suit, specifically a summary judgment motion, and would have used a different defense counsel, but was deprived of its opportunity to participate by Tilcon's voluntary settlement of the claim over IINA's objection.

The court found that these competing factual claims required resolution at trial. The court noted that Connecticut's Arrowood decision shifted the burden of proof of demonstrating prejudice to the insurer, but that Connecticut law still recognizes the principle that a proper balance of the insured's and insurer's interests requires a factual inquiry into whether the insurer has in fact been prejudiced.

Conclusion

In Tilcon, the court employed a fact-driven, reasonably-prudent-person analysis to determine whether an occurrence-based policy's notice provision has been breached. In the event late notice is established, the court will balance the insurer's and insured's interests to evaluate whether the insurer has been prejudiced. A factual record either documenting or refuting prejudice will be critical to the determination of the late notice defense.