

Untimely Notice Does Not Remove Insurer from its Duty to Indemnify

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USA | August 5 2024

In a recent decision, the South Carolina Supreme Court refused to expand the “notice-prejudice rule” but still found that an insurer could not deny coverage based upon the insured’s failure to provide timely notice of an underlying lawsuit because the insured did not materially breach the insurance policy.

Covil Corporation v. Pennsylvania National Mutual Casualty Insurance Company arose from an underlying lawsuit involving asbestos-related illness. Covil Corporation (Covil) waited almost a year before providing notice of the lawsuit to Pennsylvania National Mutual Casualty Insurance Company (Penn National). By the time Covil finally provided notice to Penn National, mediation in the underlying lawsuit was less than 30 days away. Though Penn National attended mediation and showed a willingness to contribute to a possible settlement, the company ultimately did not do so.

Thereafter, Covil filed a breach of contract action against Penn National and moved for summary judgment on the issue of whether Penn National was required to contribute to the settlement. Penn National took the position that it did not receive timely notice of the underlying lawsuit and therefore, was not required to indemnify Covil. The Circuit Court granted Covil’s summary judgment motion, which was affirmed by the Court of Appeals.

On review, the South Carolina Supreme Court refused to expand the longstanding “notice-prejudice” rule. The Court noted that the notice provision in insurance policies are material terms and the failure of an insured to timely notify an insurer of pending litigation can forfeit coverage. But an exception exists where an innocent third-party’s rights will be jeopardized by such forfeiture. In such a case, an insurer must prove it was substantially prejudiced by the late notice.

The Court held that because the underlying plaintiff was fully compensated in the settlement of the underlying lawsuit, the notice-prejudice rule did not apply because no third-party’s rights were in jeopardy and Penn National did not have to prove prejudice. Thus, the Court declined to expand the notice-prejudice rule to all violations of notice provisions.

The Court ultimately held that the untimely notice was not a material breach of the insurance policy and consequently, Penn National still had a duty to indemnify Covil. Specifically, the Court focused its analysis on whether Penn National was deprived of the benefit it “reasonably expected” from the notice provision of the policy, which was Penn National’s right to receive notification of a lawsuit so that it could adequately defend Covil. Since Covil was represented by counsel hired by other insurers from the beginning of the case, the Court found that Penn National was not deprived the benefit of the notice provision of the policy and there was no harm from Covil’s late notice. Accordingly, the Court held that Covil’s breach was not material and Penn National cannot “escape liability due to untimely notice.”

Lastly, the Court was not persuaded by Penn National's arguments that the Products Hazard Exclusion and the Completed Operations Hazard Exclusion precluded coverage. Thus, the Court affirmed the Court of Appeals ruling, with modifications.

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