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Federal District Court Finds Coverage Barred Because of Lack of Allegations of Damage During the Policy Period and Because of Late Notice

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In *American Bankers Ins. Co. of Florida v. National Fire Ins. Co. of Hartford*, 2020 WL 5630017 (Sept. 21, 2020), the Northern District of California of the United States District Court had occasion to consider whether allegations in an underlying complaint triggered a duty to defend and a late notice defense to coverage.

The underlying actions were a suit against the City of Walnut Creek for damages from flooding allegedly caused by the City's failure to develop and maintain its storm drains. The City settled the cases then sued its liability insurers who issued its coverage in the period 1968 to 1986 for indemnification of the amounts spent to defend and settle the cases. The published decision involved three Travelers' policies issued to the City between 1968 and 1976, as to which Travelers sought summary judgment as to the lack of coverage in its policies.

The district court first found that the definition of an "occurrence" in the policies, in one policy "an event or a continuous or repeated exposure to conditions which causes injury to person or damage to property during the policy period" and in the other two "an accident, including injurious exposure to conditions, which results during the period this policy is in effect, in bodily injury or property damage," fell within the rule of *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, that injury or damage during the policy period must occur in order for the policy to be triggered. The court agreed with Travelers that while there were allegations of flooding for many years, the only claims/allegations of property damage were for the period 2000 and later. Therefore the property damage coverage in the policies was never triggered.

Alternatively, the district court considered whether the City failed to give timely notice to Travelers, unduly prejudicing it. The policies required the City to give notice "as soon as practicable" and to forward to the insurer every demand notice or summons received by the City. The City stated that it did not know of the existence of the policies before it gave notice in 2017, fourteen years after the first suit was filed. The court stated that no evidence was provided as to the City's diligence in looking for its insurance coverage. It also credited Travelers' evidence that the City had given notice of a different suit in 1993 so the City was aware of at least one of the policies.

Mere delay is insufficient to bar coverage as under California law which requires the insurer to prove that it was prejudiced by the undue delay in order for coverage to be barred. Travelers argued that it was prejudiced by the inability to select defense counsel and because it was denied the opportunity to participate in settlement negotiations. The court cast doubt that the evidence was sufficient to show Travelers would have paid less for the defense or achieved a better result if it had controlled the defense, but it did find particularly significant that the insurer could not participate in settlement discussions. Based on that, it agreed that Travelers was substantially prejudiced by the delay, so coverage was barred on that grounds as well.