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Illinois Appellate Court Address Late Notice

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In W. Bend Mut. Ins. Co. v. TRRS Corp., 2022 IL App (2d) 210506, the 2nd District Court of Appeals for the State of Illinois addressed whether summary judgment granted to West Bend Insurance Company ("West Bend") on the grounds of breach of the insurance policy's notice provision was sustainable on appeal. The insured had procured a commercial general liability and workers' compensation policy with West Bend. An employee was injured on the job but instead of reporting the injury to West Bend, the insured agreed to compensate the employee for his lost wages and medical expenses—which was the same action taken by the insured in connection with a similar injury to the same employee several years earlier. Despite this arrangement, 11 months after the injury took place the employee filed a workers' compensation claim and a personal injury suit against the insured. It was at that point that the insured notified West Bend.

West Bend initiated a declaratory judgment action, and the trial court granted judgment in favor of West Bend on the grounds that the insured's 11-month delay in providing notice was per se unreasonable and dispositive. On appeal, the insured argued that the reasonableness of notice to West Bend was a question of fact and precluded summary judgment. In agreeing with the insured, the Appellate Court began its analysis by examining the policy language that required that notice be provided "at once if injury occurs that may be covered by this policy." Although the Court acknowledged that no Illinois cases have construed the phrase "at once", it is synonymous with the term "immediately" and therefore should be interpreted to mean "within a reasonable time" or "as soon as practicable".

Turning to the basis for its ruling, the Appellate Court cited to the Illinois Supreme Court case of *W. Am. Ins. Co. v. Yorkville Nat'l Bank*, 345 Ill. Dec. 445, 939 N.E.2d 288 (2010) for the propositions that "[t]he timeliness of an insured's notice to its insurer generally is a question of fact for the trier of fact" and "a lengthy delay in providing notice is not an absolute bar to coverage provided the insured's reason for the delay is justifiable under the circumstances." The Appellate Court also set forth the factors generally applied by Illinois Courts in addressing late notice which are: (1) the specific language of the policy's notice provision; (2) the insured's sophistication in commerce and insurance matters; (3) the insured's awareness of an event that may trigger insurance coverage; (4) the insured's diligence in ascertaining whether policy coverage is available; and (5) prejudice to the insurer.

The trial court had considered three of the five listed factors: the language of the policy; whether the insured's general manager was a sophisticated insured; and the insured's awareness of the injury. According to the Appellate Court, however, those factors were insufficient to be dispositive. In particular, the Appellate Court was critical of the fact that the trial court neglected to consider the insured's assertions regarding whether its late notice was reasonable. The Court noted that the insured had testified that he decided not to report the injury because it was to the same shoulder that the employee had previously injured, and he was worried that it might be excluded from coverage as a "pre-existing condition". This, as well as several other similar assertions, led the Appellate Court to conclude that there existed facially valid reasons for the insured to doubt that the claim would have been covered by West Bend.

Again, citing *Yorkville*, the Court noted that "Courts have recognized that an insured's reasonable belief of noncoverage under a policy may be an acceptable excuse for the failure to give timely notice, even where the delay is lengthy." The Appellate Court thereafter concluded by holding that it could not say the 11-month delay in notification was unreasonable as a matter of law under the facts and circumstances of this case. Therefore, questions remained that precluded summary judgment such that the trial court ruling was vacated.