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Insurance Litigation Alert

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Virginia Supreme Court Says Jury Should Determine Whether Notice of Claim Was Timely Under Contract For Homeowner's Liability Insurance

On June 9, 2011, the Virginia Supreme Court in *Dabney v. Augusta Mutual Ins. Co.,* 2011 Va. LEXIS 127 (June 9, 2011), reversed judgment in favor of an insurer, holding that whether an insured provided timely notice of claim was a question of fact for the jury. The court also reiterated the fundamental rule that a court may not enter judgment based on facts unless they are contained in the parties' pleadings.

Background
In April 2002, Pauline Dabney ("Dabney") was attacked by two pit bull dogs in her yard, causing injuries to her arm and shoulder. Dabney discovered that the dogs lived at the home of Elease Otey ("Otey"), and that Otey's boyfriend, Dwight Reynolds ("Reynolds"), was the owner of the dogs.

Further investigation revealed that Otey died shortly after the attack but that Otey held a homeowner's liability policy issued by Augusta Mutual Insurance Company (the "Augusta policy"). Among other conditions, the Augusta policy required that the insured "give written notice to [the insurer or the insurer's agent] as soon as is practical" in the event of an accident, occurrence or claim.

In June 2003, Dabney filed a motion for judgment against Reynolds and Thelma Jenkins ("Jenkins"), as administrator of Otey's estate, seeking damages for injuries sustained by Dabney. In May 2004, 254 days after Jenkins was served with the lawsuit, a letter was sent to Augusta notifying Augusta of Dabney's claim (the "May 2004 letter"). The May 2004 letter was sent to the address listed in the Augusta policy, but Augusta allegedly did not receive the letter because Augusta had relocated its offices. Subsequent notices concerning Dabney's claim were sent to Augusta in January 2005, April 2005 and May 2005 (collectively, the "2005 notices"). In June 2005, Augusta notified Dabney's attorney that it would not provide coverage based on the insured's alleged breach of the policy, i.e., Jenkins' failure to provide timely notice to Augusta of Dabney's claim.

The underlying personal injury action settled, and Jenkins assigned to Dabney the estate's claims against Augusta. In March 2006, Dabney filed a separate action for declaratory relief against Augusta and Jenkins, seeking a declaration that Augusta had a duty to defend and indemnify Otey's estate.

Augusta argued that it had no duty to defend or indemnify the estate because Jenkins breached the terms of the Augusta policy by failing to provide Augusta with timely written notice of Dabney's claim. In response, Dabney argued that Augusta waived its right to deny Dabney's claim due to Augusta's failure to comply with Section 38.2-2226 of the Code of Virginia, which requires an insurer to notify a claimant of the insurer's intent to rely on certain policy defenses within 45 days of the claim. The statute further provides that a failure to comply waives the defense.

At trial, Augusta moved to strike at the close of Dabney's evidence. First, Augusta contended that notice to Augusta, which was first sent 254 days after service of the underlying lawsuit, was untimely as a matter of law. Second, Augusta argued that the jury should not be allowed to consider evidence concerning the 2005 notices to Augusta because Dabney failed to allege any facts relating to the notices in her complaint

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for declaratory relief. Dabney's complaint only alleged that Jenkins gave notice of the claim to Augusta in May 2004.

The jury found that the May 2004 letter was never received by Augusta. The circuit court granted Augusta's motion to strike all evidence concerning the 2005 notices because Dabney's complaint failed to make any mention of them. This necessarily defeated Dabney's waiver argument under Section 38.2-2226, as Augusta had no obligation to notify Dabney of any asserted defenses in the absence of notice of the claim. Accordingly, the circuit court granted judgment in favor of Augusta and ruled that Augusta had no obligation to defend or indemnify Otey's estate because the Jenkins' notice of the claim was untimely as a matter of law. Dabney appealed to the Virginia Supreme Court.

Holding

Upon review, the Virginia Supreme Court held that the circuit court did not err in refusing to allow the jury to consider whether the insurer had notice of the claim in early 2005. The court explained that the case, as pled by the insured, was limited to the theory that the insurer received notice of the claim in May 2004. Where the insured failed to allege that the insurer received notice at any other time, the jury was properly barred from considering evidence of the 2005 notices. In doing so, the court reiterated the well-established principle that parties are bound by the allegations in their pleadings and a judgment cannot be based on facts that are not alleged in the pleadings. Without evidence of the 2005 notices, Dabney was unable to establish that Augusta waived its policy defense under Section 38.2-2226.

The Virginia Supreme Court also held that the circuit court erred in ruling that the insured's notice to the insurer was untimely as a matter of law. The court explained that, in Virginia, satisfaction of a policy's notice requirement is a condition precedent to coverage, but that satisfaction of that condition only requires "substantial compliance." Where, as in *Dabney*, the policy required that notice be provided "as soon as is practical," notice must be provided within a reasonable time after the accident. What constitutes a "reasonable time" depends on the facts and circumstances of each case.

The court further explained that whether notice was provided as required under the policy is an issue to be resolved by the finder of fact. Only where the facts concerning notice are undisputed may the question be decided by the court as a matter of law. But, when facts are disputed, inferences are uncertain or there are extenuating circumstances for the delay, the issue is one of fact for the jury. Moreover, with regard to the timeliness of notice, the court reiterated that, under Virginia law, there is no fixed number of days after which notice will be deemed untimely as a matter of law.

Implications

The *Dabney* decision reinforces several fundamental principles under Virginia law. First, the decision illustrates the well-established rule that a court will not award relief based on facts not alleged in the pleadings, thus emphasizing the importance of a well-drafted complaint. Policyholders, therefore, should be mindful to include specific allegations in support of any conditions precedent to coverage and the essential elements of each claim when drafting complaints for coverage.

Dabney also illustrates that questions of fact concerning coverage, including questions concerning compliance with a condition precedent, must be resolved by the finder of fact and cannot be decided as a matter of law. It is critical, therefore, that policyholders not only include all facts necessary to establish coverage and demonstrate compliance with conditions precedent in their pleadings, but that they *not* include additional facts that might unnecessarily give rise to questions and/or inferences that ultimately preclude the court from awarding judgment as a matter of law.

Finally, *Dabney* reiterates the rule in Virginia that absolute compliance with a policy's notice provision is not necessary to implicate coverage. Rather, as the court made clear, a policyholder need only demonstrate that it has *substantially complied* with the policy's notice requirement. Thus, as in *Dabney*, a delay of a mere 254 days did not necessarily mean that notice was untimely. Rather, timeliness was a question for the jury to consider based on all of the facts and circumstances surrounding the delay.

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