September 2011

Nevada Supreme Court Follows Majority and Adopts Notice-Prejudice Rule For Claims Under Liability Insurance Contracts

On August 4, 2011, the Supreme Court of Nevada in *Las Vegas Metro. Police Dep't v. Coregis Ins. Co.*, 256 P.3d 958 (Nev. Aug. 4, 2011), reversed judgment in favor of an insurer and adopted the notice-prejudice rule, which requires an insurer asserting a late-notice defense to prove it was prejudiced by a policyholder's untimely notice of a claim. The court also held factual issues concerning the timeliness of the policyholder's notice rendered summary judgment for the insurer inappropriate.

Background

In 1996, the Las Vegas Metropolitan Police Department ("LVMPD") was named as a defendant in a federal civil rights action that alleged LVMPD conspired to cover up evidence concerning a wrongful death action. On appeal, the U.S. Court of Appeals for the Ninth Circuit concluded that the plaintiff had a possible claim against LVMPD, but that any claim was premature because the underlying wrongful death action had not yet been resolved. The civil rights suit was therefore dismissed.

In 2000, after the wrongful death action had settled, the plaintiff again brought a federal civil rights action against LVMPD. In 2002, the court awarded summary judgment in favor of LVMPD. That award was vacated on November 15, 2005, as a discovery sanction based on LVMPD's failure to produce requested documents after being ordered to do so by the court.

LVMPD was self-insured for $1,000,000 for liability relating to police officer actions. LVMPD also was insured by Coregis Insurance Company ("Coregis") under a contract for excess liability insurance, which provided an additional $10,000,000 of coverage in excess to LVMPD's $1,000,000 self-insured retention (the "Coregis policy"). The Coregis policy contained four discrete coverage sections, including coverages for general liability, automobile liability, public entity errors and omissions, and law enforcement liability. The first three sections required LVMPD to notify Coregis of a claim when the claimant's demand totaled $500,000 or more. The law enforcement liability section contained a different notice provision, which required LVMPD to notify Coregis of any claim "as soon as practicable." The provision also required that LVMPD "immediately" furnish Coregis with copies of any demands or other legal documents. The law enforcement liability section further stated that LVMPD was "solely responsible for the investigation, settlement, defense and final disposition of any claim made … against [LVMPD] to which [the law enforcement liability section] would apply."

In August 2006, LVMPD received a settlement demand of $4.5 million in the civil rights action. On November 6, 2006, LVMPD provided Coregis with its first notice of the civil rights lawsuit. After acknowledging the action, Coregis denied coverage, asserting that LVMPD's notice of the lawsuit was untimely, as was LVPMD's notice of its potential liability, which stemmed from an incident that occurred some ten years earlier. LVMPD eventually settled the civil rights action for $1.47 million, while incurring defense costs of $803,136.58.

After settlement, LVMPD initiated a declaratory judgment action to recover from Coregis the amounts that LVMPD was required to pay in defense and settlement of the civil rights litigation. On motions for summary judgment, the district court found that no coverage was owed and granted judgment in favor of Coregis, finding that LVMPD failed to timely notify Coregis of the civil rights lawsuit. The district court further held that, although Coregis was under no obligation to show prejudice from LVMPD's late notice, Coregis showed prejudice based on the discovery sanction that overturned LVMPD's summary judgment and increased the costs of litigation and settlement.

Holding

On appeal, the Nevada Supreme Court reversed the district court's summary judgment award in favor of Coregis, finding that issues of fact remained as to the timing of LVMPD's notice.

The court then addressed the policy's notice provisions and concluded that, even though the law enforcement section of the policy required that LVMPD "immediately" provide Coregis with copies of legal documents, other sections of the Coregis policy required that LVMPD be "solely responsible for the investigation, settlement, defense and final disposition of any claim." The court noted that, despite the inconsistency between the two notice provisions, Coregis relied on both in support of its coverage denial. Thus, because Coregis relied on aspects of both provisions, the court concluded that it was not unreasonable for LVMPD to do the same and believe that it need not provide notice to Coregis until a demand was made in excess of $500,000.

The Nevada Supreme Court also addressed whether a delay in notifying the insurer of a claim must result in prejudice. Prior to *LVMPD*, the judicially prescribed rule in Nevada was that an insurer need not show prejudice to deny coverage based on untimely notice of claim. That had been the rule since 1950, when the Nevada Supreme Court last addressed the issue in *Ins. Co. v. Cassinelli*, 216 P.2d 606 (Nev. 1950). In *Cassinelli*, the Nevada Supreme Court followed what was then the majority rule and held that, where a policyholder failed to provide timely notice to its insurer, the policyholder was precluded from bringing a claim, whether the insurer was prejudiced by the late notice or not. In 1980, the Nevada Insurance Department eroded the *Cassinelli* rule somewhat when the department adopted NAC 686A.660(4), which limited an insurer's ability to deny coverage based on a policyholder's failure to comply with an insurance policy's timely notice requirement to instances where "the failure to comply prejudices the insurer's rights."

Assessing the notice-prejudice issue again in connection with *LVMPD*, the court again looked to how the majority of other jurisdictions have treated the issue. The court found that, since 1950, a majority of jurisdictions have adopted the notice-prejudice rule.[1] Further, the court found that, of the jurisdictions that

[1] Other states that require a showing of prejudice based on untimely notice include: **Alaska** (*Weaver Bros.* v. *Chappel*, 684 P.2d 123, 125 (Alaska 1984)); **Arizona** (*Globe Indem. Co. v. Bloomfield*, 562 P.2d 1372, 1374 (Ariz. Ct. App. 1977)); **California** (*Ins. Co. of Pa. v. Associated Int'l Ins. Co.*, 922 F.2d 516, 524 (9th Cir. 1990) (applying California law)); **Colorado** (*Clementi v. Nationwide Mut. Fire Ins. Co.*, 16 P.3d 223, 228 (Colo. 2001)); **Connecticut** (*Aetna Cas. & Sur. Co.*, 538 A.2d 219, 223 (Conn. 1988)); **Delaware** (*State Farm Mut. Auto. Ins. Co. v. Johnson*, 320 A.2d 345, 347 (Del. 1974)); **Florida** (*Warren v. State Farm Mut. Auto. Ins. Co.*, 899 So.2d 1090 (Fla 2005) (rebuttable presumption of prejudice)); **Hawaii** (*Standard Oil Co. of Cal. v. Hawaiian Ins. & Guar. Co.*, 654 P.2d 1345, 1349 n.4 (Haw. 1982)); **Indiana** (*Lumpkins v. Grange Mut. Co.*, 553 N.E. 2d 871, 874 (Ind. Ct. App. 1990) (rebuttable presumption of prejudice)); **Iowa** (*Wade v. Continental Ins. Co.*, 514 F.2d 304, 305 (8th Cir. 1975) (applying Iowa law) (rebuttable presumption of prejudice)); **Kansas** (*Phico Ins. Co v. Providers Ins. Co.*, 888 F.2d 663, 668 (10th Cir. 1989) (applying Kansas law)); **Kentucky** (*Jones v. Bituminous Cas. Corp.*, 821 S.W.2d 798, 803 (Ky. 1991)); **Louisiana** (*Champion v. Panel Era Mfg. Co.*, 410 So. 2d 1230 (La. Ct. App. 1982)); **Maine** (*Ouellette v. Maine Bonding & Cas. Co.*, 495 A.2d 1232, 1235 (Me. 1985)); **Maryland** (*Prince George's County v. Local Gov. Ins. Trust*, 879 A.2d 81, 96-97 (Md. 2005)); **Massachusetts** (*Johnson Controls, Inc. v. Bowes*, 409 N.E.2d 185, 188 (Mass. 1980)); **Michigan** (*Associated Indem. Corp. v. Dow Chem. Co.*, 248 F. Supp. 2d 629, 646 (E.D. Mich. 2003)); **Minnesota** (*Reliance Ins. Co. v. St. Paul Ins. Co.*, 239 N.W.2d 922, 925 (Minn. 1976)); **Mississippi** (*Hague v. Liberty Mut. Ins. Co.*, 571 F.2d 262 (5th Cir. 1979) (applying Mississipi law)); **Missouri** (*Gannon Int'l Ltd. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 2006 WL 288096, at *2 (E.D. Mo. 2006) (applying Missouri law)); **Montana** (*State Farm Mut. Auto. Ins. Co. v. Murnion*, 439 F.2d 945, 947-48 (9th Cir. 1971) (applying Montana law)); **Nebraska** (*Mefferd v. Sieler*

require a showing of prejudice, a majority place that burden on the insurer. The court adopted those majority rules, reasoning that it is less difficult for the insurer to show prejudice than for the policyholder to prove a negative and demonstrate that its untimely notice had *not* prejudiced the insurer. The court also reasoned that because insurance policies typically are contracts of adhesion, equity favored placing the burden on the insurer. Similarly, the court reasoned that because the notice provision is intended as a protection for the insurer, the insurer should bear the burden of proving that it should apply as a bar to coverage.

Implications

While *LVMPD* continues to recognize that it is the language of the insurance contract that first determines the parties' rights and obligations, the decision also places Nevada squarely among the majority of jurisdictions that require an insurer to prove it has been prejudiced by untimely notice before it may rely on that defense to avoid coverage.

The decision also recognizes that questions of fact as to whether any untimely notice has caused prejudice and the reason(s) for any delay in notice may render summary judgment on a late-notice defense inappropriate.

Finally, *LVMPD* reiterates the long-recognized and widely applied rule that conflicting or ambiguous provisions in an insurance policy should be construed against an insurer and in favor of coverage, particularly where the policyholder was not involved in the drafting process or in negotiating the policy provision in question.

& Co., 267 Neb. 532, 536 (Neb. 2004)); **New Hampshire** (*Dover Mills P'ship v. Commercial Union Ins. Co.*, 740 A.2d 1064, 1067 (N.H. 1999)); **New Jersey** (*Cooper v. Gov't Employees Ins. Co.*, 237 A.2d 870, 873-74 (N.J. 1968)); **New Mexico** (*Found. Reserve Ins. Co. v. Esquibel*, 607 P.2d 1150, 1152 (N.M. 1980) (requiring substantial prejudice)); **New York** (2008 N.Y. Laws §§2-6 to be codified as N.Y. Ins. Law § 3420(a)(4)(McKinney 2008) (applying to policies issued after January 2009)); **North Carolina** (*State Auto Prop. & Cas. Ins. Co. v. Travelers Indem. Co. of Am.*, 343 F.3d 249, 261 (4th Cir. 2003) (applying North Carolina law)); **North Dakota** (*Finstad v. Steiger Tractor*, 301 N.W.2d 392 (N.D. 1981)); **Ohio** (*Helman v. Hartford Fire Ins. Co.*, 105 Ohio App. 3d 617, 624 (Ohio Ct. App.1995) (rebuttable presumption of prejudice)); **Oklahoma** (*Indep. School Dist. No. 1 of Tulsa County v. Jackson*, 608 P.2d 1153, 1155-56 (Okla. 1980)); **Oregon** (*Halsey v. Fireman's Fund Ins. Co.*, 681 P.2d 168, 170-171 (Or. 1984)); **Pennsylvania** (*Brakeman v. Potomac Ins. Co.*, 371 A.2d 193, 1977(Penn. 1977)); **Rhode Island** (*A&W Artesian Well Co. v. Aetna Cas. & Sur. Co.*, 463 A.2d 1381, 1382 (R.I. 1983)); **South Carolina** (*Factory Liab. Ins. Co v. Kennedy*, 182 S.E.2d 727, 729-30 (S.C. 1971) (requiring substantial prejudice)); **South Dakota** (*Auto-Owners Ins. Co. v Hansen Hous. Inc.*, 2000 S.D. 13, 31 (S.D. 2000)); **Tennessee** (*Alcazar v. Hayes*, 982 S.W. 2d 845 (Tenn. 1998)); **Texas** (*Gen. Portland Cement Co. v. United States of Am.*, 438 F. Supp. 27 (N.D. Tex. 1977) (applying to general liability policies issued after May 1, 1976)); **Utah** (Utah Code Ann. § 31A-21-312(2)); **Vermont** (*Ziman v. Employers Fire Ins. Co.*, 494 F.2d 196, 198 (2d Cir. 1974) (applying Vermont law)); **Washington** (*Churchill v. Factory Mut. Ins. Co.*, 234 F. Supp. 2d 1182, 1190 (W.D. Wash. 2002)); **West Virginia** (*State Auto. Mut. Ins. Co. v. Youler*, 396 S.E.2d 737 (W. Va. 1990)); and **Wisconsin** (*Gerrard Realty Corp. v. Amer. States Ins. Co.*, 277 N.W.2d 863, 872 (1979) (applying Wisconsin law)).

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