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Wrong War, Wrong Time, Wrong Enemy: Insurance Company Claims Of Late Notice Should Not Sustain Refusals To Defend

[T]his strategy would involve us in the wrong war, at the wrong place, at the wrong time, and with the wrong enemy.

Omar Bradley, testifying before the Committee on Armed Services and Committee on Foreign Affairs, U.S. Senate, May 15, 1951.¹

Those of us with long memories may recall that, during the 2004 presidential campaign, considerable attention was paid by the presidential candidates to the expression “wrong war, wrong time.” They debated about which one coined the phrase and whether it

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applied to the war in Iraq.

As shown above, the answer is that none of them coined the phrase; it originated with U.S. Gen. Omar Bradley in the context of the Korean War. But — putting aside its various uses in the 2004 campaign — the phrase applies equally as well to insurance company denials of coverage on grounds of late notice, when underlying actions are pending.

Insurance companies routinely attempt to avoid their coverage obligations under liability policies on grounds of late notice. Every year, millions of dollars in insurance proceeds are for-

feited because courts and insurance companies decide that the policyholders’ notice was late.

The dilemma is particularly acute when insurance companies refuse to defend policyholders against ongoing actions on late notice grounds. When that happens, policyholders are deprived of the essential benefit of a defense at the moment they need it most. The problem is that, if the claims of late notice subsequently are found to lack merit, the policyholders cannot be made whole by being reimbursed for defense costs that they paid. Those policyholders still were denied the benefit of their bargain: i.e., the peace of mind of being defended by their insurance companies when they were under attack from others.

This problem should never arise because late notice should never be presented by insurance companies, or accepted by courts, as a valid ground for insurance companies to deny a defense. Late notice is a factual issue. It is beyond dispute that factual issues have no bearing on the duty to defend. Rather, the duty to defend arises whenever the nature of third-party claims against policyholders *potentially* fall within the scope of the insurance policies at issue.

This concept is fundamental to liability insurance policies. For decades, the standard policy has provided, in pertinent part, that “the [insurance] company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent...” As this standard provision shows, what matters are the allegations, not the actual facts.

Courts in at least five states understand this issue and have correctly refused to explore allegations of late notice while underlying actions are pending. These courts are the U.S. District Courts for the Western District of Louisiana, the District of Colorado, the District of Vermont, the Western District of Michigan and the Northern District of California.²

Ironically, however, there are many policyholders who fail to appreciate this issue — an understandable failing, considering the burdens inherent in fighting a two-front war. Nevertheless, when policyholders overlook the issue and plunge into a debate about whether or not their notice was late, not only do they add unnecessarily to their litigation burdens but they miss valuable opportunities to show the courts why factual

issues of late notice should not be reached at that time.

The better approach for policyholders facing insurance company denials on grounds of late notice is to argue as follows:

1. The plain language of standard liability policies yields no support for the argument that late notice can forfeit an insurance company's duty to defend against an ongoing action. The insuring agreement establishes a comprehensive obligation on the insurance company's part to defend the policy against "any" suit seeking damages, regardless of whether the allegations are "groundless, false or fraudulent."

2. Conversely, standard notice provisions do not state clearly and unambiguously that a failure to provide timely notice will void the insurance company's duty to defend. Because most states hold that ambiguities in insurance policies should be construed against the insurance company drafters, the absence of such specificity leads to the opposite conclusion.

3. There is no other provision in a standard liability policy that requires policyholders to prove timely notice in order to trigger an insurance company's duty to defend against an ongoing action. The insurance industry's preferred target – the "no action" clause – does not establish proof of timely notice as a condition precedent to seeking a defense in an ongoing action. At most, it establishes that

late notice is an issue to be raised after the underlying action is over.

4. Basic insurance law principles militate against resolving factual allegations of late notice prior to resolving the duty to defend. Construing an insurance policy in this manner violates the basic principle that insurance policies should be construed to effect coverage, rather than to defeat it. It similarly ignores the fact that the law abhors forfeitures, particularly forfeitures of insurance coverage for which policyholders have paid full premiums.

5. Equitable considerations compel the same result. From an equitable perspective, the efficacy of an insurance policy is put to the test when a policyholder requests a defense. At that time, the policyholder often is desperate and the insurance company holds all the cards. Courts should make clear to insurance companies that it is unacceptable to put their own interests first in a situation that already is weighted in their favor.

6. Finally, as a matter of simple economics, it is unfair to favor insurance companies over policyholders. Policyholders paid substantial premiums in return for being promised a defense by their insurance companies. Whenever there are disputes about duties to defend, those disputes should be resolved in favor of the policyholders that paid the premiums — and against the insurance companies that cashed the checks.

¹ Bartlett, *FAMILIAR QUOTATIONS* 685 (16 ed. 1992).

² See *Resolution Trust Corp. v. Walker*, Civ. No. 92-0430 (W.D. La. Feb. 25, 1994); *AMAX Research & Dev., Inc. v. Continental Ins. Co.*, Case No. 91 CV3793 (D. Colo. October 28, 1993); *M.A. Indus. v. Maryland Cas. Co.*, 1:92 CV 02659 HTW (N.D. Ga. July 1, 1993); *Vermont Gas Sys., Inc. v. U.S. Fidelity & Guar. Co.*, 805 F.Supp. 227 (D.Vt. 1992); *Upjohn Co. v. Aetna Casualty & Sur. Co.*, 768 F. Supp. 1186, 1203 (W.D. Mich. 1990); *Hirschberg v. Lumbermens Mut. Cas. Co.*, 798 F. Supp. 600, 602 (N.D. Cal. 1992).

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