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Summary of LVMPD v. Coregis Insurance Co., 127 Nev. Adv. Op. No. 47

Charles Gianelloni

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CIVIL PROCEDURE

Summary

Consolidated appeals from a district court summary judgment in an insurance action and from a post-judgment order denying an NRCP 60(b)² motion. In district court, Judge Linda Marie Bell held that the Las Vegas Metropolitan Police Department waited too long before informing Coregis Insurance Co. of a potential claim. Therefore, Judge Bell granted Coregis's Motion for Summary Judgment, concluding that the notice was clearly late and that Coregis was prejudiced by the late notice.

Disposition/Outcome

The Supreme Court of Nevada held that there were genuine issues of material fact regarding the timeliness of the Las Vegas Metropolitan Police Department's notice. Thus, summary judgment was not appropriate. Additionally, the Court concluded that when an insurer denies coverage of a claim based on failure to comply with contractual notice requirements, the insurer must demonstrate that the notice was late and that it was prejudiced by the late notice.

Factual and Procedural History

In 1994, the Estate of Erin DeLew sued the Las Vegas Metropolitan Police Department ("LVMPD") in a wrongful death action for covering up evidence. The DeLew Estate also filed a separate civil rights action against LVMPD in 1996, arguing conspiracy and a cover-up. Ultimately, the Ninth Circuit held that the civil rights claim could not commence until after the wrongful death action concluded. Thus, after the wrongful death action settled, the DeLew Estate filed a second civil rights action in January, 2000.

In 2005, a U.S. District Court vacated a 2002 summary judgment in favor of LVMPD as a discovery sanction; LVMPD had failed to provide a majority of the documents requested by the DeLew Estate. Thus, LVMPD and DeLew began settlement negotiations in August 2006.

LVMPD is self-insured up to \$1 million dollars, but carries excess insurance for up to \$10 million through Coregis Insurance Company ("Coregis"). The Coregis insurance policy contains four different sections, including a law enforcement liability section. The first three sections mandated that LVMPD notify Coregis of a claim when a claimant's demand totaled 50 percent or more of the self-insured retention amount. But the law enforcement liability section required LVMPD to provide Coregis notice of a possible claim as "soon as practicable." That same section also stated that LVMPD was solely responsible for investigation, settlement, defense, and final disposition of any claim.

¹ By Charles Gianelloni

² NEV. R. CIV. P. 60.

In August 2006, the DeLew Estate made its first settlement offer for \$4.5 million. LVMPD notified Coregis of the lawsuit on November 6, 2006. Coregis denied coverage because LVMPD failed to provide timely notice of the lawsuit. Then, LVMPD requested reconsideration and invited Coregis to attend settlement conferences; Coregis declined. Ultimately, LVMPD settled the suit for \$1.475 million, plus \$803,136.58 in fees and costs. After settlement, LVMPD filed a declaratory judgment seeking a judicial determination that Coregis was required to defend and indemnify LVMPD under the insurance policy.

Discussion

Summary Judgment

Justice Gibbons authored the unanimous opinion of the Court, sitting en banc. The Court quickly established that material issues of fact did exist because the determination of whether notice was late is highly fact-intensive when an excess insurance policy is involved. Generally, excess carriers do not require notice of a claim until it seems likely that the claim will exceed the limits of the primary insurer. However, when compliance with a term in the policy is required, it is the insurer that bears the burden of proof.

With those policy considerations in mind, the Court looked at the notice provisions in the contract and the facts in the case. Three sections of the contract required notice once a demand was made in excess of \$500,000; the fourth required notice as soon as practicable. However, that fourth provision also stated that LVMPD was solely responsible for settlement and defense of the case.

Viewing the facts in light of the policy provisions, the Court determined that notice when the case was dormant in the late 1990's and early 2000's would have been futile. Instead, LVMPD sent notice as soon as it received a settlement demand in excess of \$500,000. Thus, LVMPD complied with the first three provisions of the contract. Additionally, the Court determined compliance with the "as soon as practicable" policy language did not mean immediate notice was required for compliance. Instead, that language calls for reasonable notice under the facts of the case. And given that excess insurance carriers generally do not require notice until there is likelihood that a claim will exceed the limits of the primary insurer, summary judgment was inappropriate under these facts.

Late-Notice Defense

The Court relied on the language of NAC 686A.660(4), which states that insurers may not be relieved of obligations where an insured provides late notice of a claim "unless failure to comply prejudices the insurer's rights."³ Additionally, a majority of jurisdictions interpret similar statutes to mean that the insurer bears the burden of proving prejudice. But the Court was also concerned with the practical and equitable considerations surrounding who should bear the burden.

The Court determined that most insurance policies are adhesion contracts, under which equity principles support placing the burden of proof on the insurer. It also determined that forcing the insured

³ NEV. ADMIN. CODE § 686A.660(4) (2006).

party to bear the burden of proving that the insurer was not prejudiced by the late notice would be impractical. Doing so would require that the insured prove a negative – that the insurer was *not* prejudiced by the late notice. Thus, the Court adopted a notice-prejudice rule. In order for an insurer to deny coverage of a claim based on the insured's late notice of a claim, the insurer must show (1) that the notice was late and (2) that it has been prejudiced by the late notice.

Conclusion

Summary judgment was inappropriate because there were still genuine issues of material fact as to whether notice was late. Additionally, when an insurer denies coverage of a claim because notice of the claim was late, the insurer must show (1) that notice was late and (2) that it was prejudiced by the late notice. Thus, the Court reversed the judgment of the district court and remanded the matter.