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Commentary

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I. Introduction

Liability policies typically require the insured to provide prompt notice of a claim or suit. Notice is regarded as a condition precedent to the insurer's duty to defend or indemnify.[1] The notice provisions in a typical liability policy seem straightforward. However, issues surrounding notice become complicated when an additional insured, who is typically not a party to the insurance contract and sometimes unnamed in a policy, is involved. Under those situations, courts have had to address, among other issues, the sophistication and resources of the additional insured, whether the additional insured is aware that coverage potentially exists or even that policies potentially exist, whether the jurisdiction requires the additional insured to actually tender the claim or suit or whether another insured's tender of the claim or suit is sufficient and whether there was late notice or no notice at all by the additional insured. Different jurisdictions have reached different results.

II. Overview

A. Texas

Texas has a body of case law addressing situations involving late notice or no notice at all by additional insureds. The Supreme Court of Texas has consistently held that an insurer has no duty to defend or to indemnify an insured unless the insured forwards the suit papers and requests a defense in compliance with the policy's notice-of-suit conditions.[2]

In *Weaver v. Hartford Accident & Indemnity Co.*,[3] an omnibus insured, Clyde Busch, was involved in a motor vehicle accident. Busch was an employee of J.C. Thomas Enterprises and was driving his employer's truck at the time of the accident. Notice was given to Hartford who conducted an investigation.

The claimant eventually sued Busch seeking damages of $11,800. Busch did not forward the suit paperwork to Hartford. He also did not file an answer. Busch testified, however, that he unequivocally told Hartford, during its investigation of the accident, that he was not operating the truck with Thomas Enterprises' permission at the time of the accident.

The plaintiff filed an amended petition in which he added Thomas Enterprises as a defendant, alleging that Busch was an employee of Thomas Enterprises acting within the course and scope of his employment, and increased the damages sought to $201,800. The plaintiff served Thomas Enterprises who promptly provided the suit paperwork to Hartford. Busch, however, was never served with the amended petition.

Thomas Enterprises' answer denied that Busch was in the course and scope of his employment at the time of the accident. The plaintiff then non-suited Thomas Enterprises from his lawsuit and obtained a default judgment against Busch for $114,433.96. Hartford's policy limits were $100,000 per person.

The plaintiff then sued Hartford seeking to recover the default judgment amount against Busch. The plaintiff alleged that the accident was caused by the negligent operation of the Thomas Enterprises truck, that the truck was operated by Busch with the permission of his employer and that the policy covered the accident. A special issue was submitted which asked whether Busch was an "insured" under the Hartford policy. The jury answered affirmatively and judgment was entered in favor of the plaintiff for $100,000.

The court observed that not only did Hartford not refuse to defendant Busch, but because of Busch's statement during Hartford's investigation of the accident that he was not operating the vehicle with the permission of Thomas Enterprises, Hartford had no reason to believe that Busch expected Hartford to defend him.

The *Weaver* court distinguished an earlier case in which the Supreme Court of Texas held that timely notice of the accident (as opposed to forwarding suit paperwork) by the named insured alone fully satisfied the provision of the insurance policy requiring notice by the "insured," and that it was not also necessary for the omnibus insured to give notice of the accident.[4] The court reasoned that "[o]bviously, that purpose can be fully satisfied when notice of an accident is received from one insured only."[5]

Weaver explained that different purposes are served by the requirement that the insured immediately forward to the insurer "every demand, notice, summons or other process received by him or his representative."[6] One purpose is to enable the insurer to control the litigation and impose a defense.[7] A more basic purpose, however, is to advise the insurer that an insured has been served with process and that the insurer is expected to timely file an answer.[8]

The court noted that the need for notice of service was especially evident in the case because Busch was never served with the amended petition.[9] Since Busch had not entered an appearance in the case, service of the amended petition on him was required because the demand was increased from $11,800 to $201,800.[10]

The court held that Hartford had no duty to voluntarily undertake a defense for Busch.[11] The court reasoned that, under the facts of the case, Hartford would have been gratuitously subjecting itself to liability if it had entered an appearance for Busch, who had failed to comply with the policy's notice provisions, who had told Hartford he was not a permissive user and who had never been served with process in a suit which sought damages in excess of the policy limits.[12]

Following *Weaver*, the Supreme Court of Texas in *National Union Fire Insurance Co. v. Crocker*[13] addressed another situation in which an additional insured did not forward the suit paperwork to the insurer. *Crocker* involved a nursing home resident injured by a swinging door. The injured resident sued the nursing home as well as the nursing home employee. The nursing home had a commercial general liability policy. Because the employee was acting within the course and scope of his employment, he qualified as an additional insured under the policy.

The insurer defended the named insured nursing home, but did not defend the employee even though the claims were covered against him by the policy and the insurer knew he was a named defendant in the lawsuit. The employee was served with the suit papers, but he did not forward them to the insurer or otherwise inform it that he had been sued and did not request a defense from his employer or the insurer. The employee never answered the suit and did not appear at trial. National Union attempted to contact the employee about the claim, but the certified mail addressed to the employee was returned and repeated phone message were not returned. The trial court eventually entered a $1-million default judgment against the employee.

The plaintiff sued Nation Union, the insurer, to collect the judgment against the defaulted employee. National Union argued that the additional insured employee never triggered the duty to defend because he failed to forward the suit papers or otherwise notify National Union that he had been sued and he did not ask National Union to defend him.

The policy provided:

> Before coverage will apply, you must notify us as soon as possible of an occurrence or offense which may result in a claim or suit against you.

> Notice should include:
>
> - How, when and where the occurrence or offense took place;
> - Names and addresses of any witnesses and injured people;
> - Nature and location of any injury or damage.
>
> Before coverage will apply, you must notify us in writing of any claim or suit against you as soon as possible. You must:
>
> - immediately record the specifics of the claim and the date you received it;
> - send us copies of all demands, suit papers or other legal documents you receive, as soon as possible.

The Fifth Circuit certified three questions to the Supreme Court of Texas. The first question was:

> Where an additional insured does not and cannot be presumed to know of coverage under an insurer's liability policy, does an insurer that has knowledge that a suit implicating policy coverage has been filed against its additional insured have a duty to inform the additional insured of the available coverage?

The Supreme Court of Texas answered the first certified question in the negative.[14] The court acknowledged that, while in *Weaver*, the court did not directly address the additional insured's ignorance of the policy, the court nevertheless held that the insurer had no duty to inject itself gratuitously into a lawsuit by defending an additional insured who had not requested a defense and who failed to comply with the policy's notification conditions.[15]

The court discussed that it unanimously reaffirmed *Weaver's* holding several years later in *Harwell v. State Farm Mutual Automobile Insurance Co.*, where the court said that the insurer did not have to "gratuitously subject[ ] itself to liability," until Harwell, the administrator of the estate of an additional insured, fulfilled her duty to notify the insurer of service of the suit against her.[16]

The *Crocker* court did not need to address the Fifth Circuit's second certified question because it was contingent upon the court answering the first certified question in the affirmative.[17] The court therefore skipped to the third certified question which was:

> Does proof of an insurer's actual knowledge of service of process in a suit against its additional insured, when such knowledge is obtained in sufficient time to provide a defense for the insured, establish as a matter of law the absence of prejudice to the insurer from the additional insured's failure to comply with the notice-of-suit provisions of the policy?

The Fifth Circuit asked this question in light of changes in Texas law that took place after *Weaver*.[18] The *Crocker* court explained that the changes consisted of the Texas Department of Insurance issuing a mandatory endorsement "which requires a showing of prejudice in certain suits before an insurer may use 'late notice' to deny coverage."[19] As cited to by *Crocker*, the endorsement stated:

> As respects *bodily injury* liability coverage and *property damage* liability coverage, unless the company is prejudiced by the *insured's* failure to comply with the requirement, any provision of this policy requiring the *insured* to give notice of action, *occurrence* or loss, or requiring the *insured* to forward demands, notices, summons or other legal process, shall not bar liability under this policy.[20]

The court answered the third certified question in the negative.[21] The court reasoned that National Union was obviously prejudiced because it was exposed to a $1-million judgment. The court stated that the question was not whether National Union suffered exposure to a financial risk, but whether it should be estopped to deny coverage because it was aware that the additional insured employee had been sued and served and had ample time to defend him.[22] The court said the answer had to be "no" because National Union had no duty to notify the additional insured of coverage and no duty to defend him until he notified National Union that he had been served with process and expected National Union to defend him.[23]

The *Crocker* court distinguished a case in which it had recently held that late notice of a covered claim would not defeat coverage unless the insurer was actually

prejudiced.[24] The court explained that the issue in *PAJ, Inc. v. Hanover Insurance Co.* was whether a named insured's untimely compliance with the notice-of-suit provision was excused if the delay did not prejudice the insurer.[25] The court pointed out the "fundamental differences" between *PAJ* and *Crocker*: in *PAJ*, the named insured requested coverage under the policy several months after "as soon as [was] practicable."[26] In *Crocker*, the additional insured's notice was not late; it was nonexistent.[27] Accordingly, the *Crocker* court distinguished between late notice and no notice at all.[28]

The *Crocker* court remarked in a footnote that the jury rejected Crocker's claim against the nursing home because the jury refused to find that the employee was negligent.[29] The instruction charge asked whether the nursing home had acted negligently "by and through its agents acting within the course and scope of their employment."[30] The jury's "no negligence" finding as to the nursing home, based upon its employee's alleged misconduct, necessarily indicated it would have similarly concluded "no negligence" if asked about the employee himself.[31] His actions were litigated notwithstanding his absence, and the jury granted a complete victory to the defense.[32] Accordingly, the jury's findings were directly contrary to the default judgment entered against the employee on the severed claims.[33]

The court explained that the requirement that an additional insured provide notice that it has been served with process is driven by a purpose distinct from the purpose underlying the requirement for notice of a claim or occurrence.[34] Notice of service of process lets the insurer know that the insured is subject to default and expects the insurer to interpose a defense.[35] The court further explained that an insurer cannot necessarily assume that an insured who has been served but has not given notice to the insurer is looking to the insurer to provide a defense.[36] The court described that potential insureds, for many reasons, may opt against seeking a defense from the insurer.[37] An insured may opt out against invoking coverage because it wants to hire its own counsel and control its own defense.[38] Indeed, the nursing home's counsel believed that the employee had hired his own counsel to control his own defense.[39] Retained defense counsel for the nursing home had asked the employee before his deposition if he could speak to him and the employee "refused on the basis that he was waiting for a call from his attorney.[40] [The nursing home's counsel] assumed that [the employee] had an attorney and did not want to talk to [the nursing home's counsel] on that basis."[41]

Under *Crocker*, insurers in Texas "owe no duty to provide an unsought, uninvited, unrequested, unsolicited defense."[42] The Supreme Court of Texas has declined to impose an extra-contractual duty on liability insurers that would force them to keep track of potential litigants who may or may not be additional insureds, may or may not be entitled to coverage and may or may not expect a defense to a claim.[43] Accordingly, because insurers need not provide coverage to additional insureds who never seek it, the insurer in *Crocker* had no duty to inform its additional insured of available coverage or to voluntarily undertake a defense for him and the insurer's actual knowledge did not establish lack of prejudice as a matter of law.[44]

B. Florida

Florida has a scarcity of case law addressing additional insureds' obligations under notice provisions. One Florida federal court, in an unpublished but well-researched opinion, held that if an insurer receives actual notice of a lawsuit against its insured, even from another insured, the insurer's duty to defend is triggered at the time that it receives actual notice of the lawsuit.[45] In *Scottsdale Insurance Company v. Shageer*, Scottsdale insured a gentleman's club. The actively negligent defendant worked as an exotic dancer at the club. One night, as she was walking around the top of the bar to collect tips, a customer slapped her on the buttocks. The dancer claimed that, as a reaction, she instinctively kicked her leg back at the customer, striking him in the face and causing him injuries. The dancer claimed it was an accident as she did not mean to hurt the customer; she was only reacting.

The customer sued the dancer and the nightclub. Scottsdale defended its named insured nightclub under a reservation of rights. The dancer, however, never requested Scottsdale to defend her, and a default was entered against her in the underlying suit. Months later, Scottsdale learned that the plaintiff dropped the nightclub from the lawsuit. Scottsdale suspected the plaintiff's strategy reason for dropping the nightclub was to proceed against the dancer, who was undefended, to obtain a higher judgment for damages and, in turn, seek to collect that judgment from the insurer. Scottsdale thereafter reached out to the dancer to offer her a defense.

The dancer stated that no one at the nightclub told her that an attorney for their insurer would defend her or that the nightclub blamed her for the incident. Nor did Scottsdale tell her that an attorney would defend her pending a determination of coverage, and she did not realize she was without counsel during her deposition until the underlying plaintiff's counsel began asking her whether she was aware that the nightclub blamed her for causing the incident. Scottsdale stated that as a result of it not assuming her defense, a default was entered against her. Nearly a year after the underlying litigation began, Scottsdale sent the dancer a letter stating it would defend her in the underlying lawsuit subject to a determination of coverage.

Scottsdale moved for summary judgment in its coverage action on the basis that it had no duty to defend or indemnify the dancer for claims and damages alleged by the claimant in the underlying lawsuit. Scottsdale argued that the dancer's act of intentionally kicking the claimant was not a covered "occurrence" under the policy and the claimant's claims and damages were excluded from coverage by the expected or intended injury exclusion under the policy. Furthermore, Scottsdale argued that the dancer did not qualify as an additional insured because she was an independent contractor, not an employee of the named insured nightclub. Finally, Scottsdale argued that it had no duty to defend or indemnify the dancer because she never formally requested a defense.

The court found that genuine issues of fact surrounded whether the dancer intentionally kicked the claimant and whether she was an independent contractor versus an employee. As far as whether Scottsdale had no duty to defend or indemnify because the dancer never tendered the defense, Scottsdale relied heavily on precedent from the Seventh Circuit Court of Appeals to argue that the dancer never tendered her defense and mere knowledge by the insurer of a potentially covered claim is not enough to constitute a tender.[46]

Scottsdale did not dispute that it knew about the underlying lawsuit. Indeed, it actively defended its named insured nightclub in the underlying suit and was currently defending the dancer in that suit. Instead, Scottsdale argued that the dancer failed to provide a "formal tender," and that failure relieved Scottsdale of its obligation to defend her. The court distinguished the Seventh Circuit Court of Appeals precedent that Scottsdale relied upon by explaining that in *Aetna Casualty and Surety Company v. Chicago Insurance Co.*, the insured knew he was covered by multiple policies.[47] In *Shageer*, the record evidence showed that the dancer was unaware that, as a possible employee of the nightclub, she might have been an insured under the policy.[48] The *Shageer* court also distinguished *Hartford Accident and Indemnity Co. v. Gulf Insurance Co.* where the Seventh Circuit noted, without deciding, that "there would necessarily be differences between a 'large and sophisticated governmental entity that is advised and assisted by its own counsel' versus 'unschooled laymen' who may be excused from any sort of active tender" with respect to the requirements of notice.[49]

The *Shageer* court remarked that the dancer "may indeed constitute an 'unschooled layman' given that she was under the mistaken impression that she was represented by counsel during her deposition and only discovered during the deposition that the [the nightclub] blamed her for the incident."[50] The court further remarked that Scottsdale's representative stated "it reached out to [the dancer] to 'protect its interests' in the underlying case."[51] The court took issue with this, stating:

> It seems particularly unjust for an insurer to "protect its interests" by reaching out to a potential insured in an underlying action, only to allow that insurer to obtain a ruling that it has no duty to defend because the potential insured did not provide a formal tender.[52]

The *Shageer* court stated that there was precedent from other jurisdictions, including Illinois and Georgia, supporting the position that "[i]f an insurer receives actual notice of a lawsuit against its insured, even if from another insured, its duty to defend is triggered at the time it receives actual notice of the law suit."[53]

The district court's ruling in *Shageer* does not appear to run afoul of Florida law so that the Supreme Court of Florida would reject the district court's *Erie* guess,[54] especially under similar circumstances where the insurer already knew about the lawsuit and was defending another insured in the same lawsuit. If the Supreme Court of Florida were to address this issue, it seems plausible that Florida's high court would agree with *Shageer*'s approach.

III. Conclusion

Applying a liability policy's notice requirements to a purported or actual additional insured can raise many issues, including, but not limited to, the sophistication and resources of the additional insured, whether the additional insured is aware that coverage potentially exists or that policies potentially exist, whether the jurisdiction requires the additional insured to actually tender the claim or suit or whether another insured's tender of the claim or suit is sufficient and whether there was late notice or no notice at all by the additional insured. Courts will look at the policy language, including the policy definitions and notice provisions, the facts of the situation and legal precedent in determining the issues.

Endnotes

1. *See, e.g.*, Pharr v. Cont'l Cas. Co., 429 So. 2d 1018, 1019 (Ala. 1983); Builders Ins. v. Tenenbaum, 757 S.E.2d 669, 674 (Ga. Ct. App. 2014); Allstate Floridian Ins. Co. v. Farmer, 104 So. 3d 1242, 1248 (Fla. 5th DCA 2012).

2. Hudson v. City of Houston, 392 S.W.3d 714, 725-26 (Tex. App. 2011) (*citing* Nat'l Union Fire Ins. Co. v. Crocker, 246 S.W.3d 603, 610 (Tex. 2008); Harwell v. State Farm Mut. Auto. Ins. Co., 896 S.W.2d 170, 174-75 (Tex. 1995); Weaver v. Hartford Accident & Indem. Co., 570 S.W.2d 367, 370 (Tex. 1978)).

3. 570 S.W.2d at 367.

4. *Id.* at 369 (*citing* Employers Cas. Co. v. Glens Falls Ins. Co., 484 S.W.2d 570 (Tex. 1972)).

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 370.

10. *Id.*

11. *Id.*

12. *Id.*

13. 246 S.W.3d 603 (Tex. 2008).

14. *Id.* at 606.

15. *Id.* at 608.

16. *Id.* (quoting Harwell v. State Farm Mut. Auto. Ins. Co., 896 S.W.2d 170, 172, 174 (Tex. 1995)).

17. *Id.* at 606 at fn. 9.

18. *Id.* at 608-9.

19. *Id.* at 609.

20. *Id.* at fn. 32 (emphasis in original).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* (*citing* PAJ, Inc. v. Hanover Ins. Co., 243 S.W.3d 630 (Tex. 2007)).

25. *Id.* at 609.

26. *Id.*

27. *Id.*

28. A Texas appeals court, relying upon *Crocker* for the distinction between tardy notice and no notice at all, found that "wholly lacking notice as opposed to merely late notice, supports a finding of prejudice as a matter of law." *Maryland Cas. Co. v. American Home Assurance Co.*, 277 S.W.3d 107, 117 (Tex. App. 2009).

29. *Id.* at 607 fn. 22.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 609.

35. *Id.* at 609-10.

36. *Id.* at 610.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 610.

42. *Id.*

43. *Id.*

44. *Id.*

45. *See* Scottsdale Ins. Co. v. Shageer, 2010 WL 4961166 (S.D. Fla. Dec. 1, 2010).

46. *Id.* at *7.

47. *Id.* (*citing* Aetna Cas. & Sur. Co. v. Chicago Ins. Co., 994 F.2d 1254 (7th Cir. 1993)).

48. *Id.*

49. *Id.* (*citing* Hartford Accident and Indem. Co. v. Gulf Ins. Co., 776 F.2d 1380, 1383 (7th Cir. 1985)).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at *8 (*citing* 14 Couch on Ins. § 200.3.1 (Westlaw 2010) *citing* Federated Mut. Ins. Co. v. State Farm Mut. Auto. Ins. 668 N.E.2d 627 (Ill App. Ct. 1996); BBL-McCarthy, LLC v. Baldwin Paving Co., 646 S.E.2d 682, 686 (Ga. Ct. App. 2007)).

54. *See* Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) (in diversity jurisdiction cases, a federal district court must apply the substantive law of whichever state it is sitting in, as though it was a state court of that state; if there is no state precedent, the court must guess how the state would address the matter at issue). ■

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