

SIXTH CIRCUIT (KENTUCKY LAW) REQUIRES EXCESS INSURER TO ESTABLISH THAT LATE NOTICE CAUSED ACTUAL PREJUDICE

Insurance Law Practice Group

March 31, 2009

Author: Stephen P. Brown
Direct: (248) 594-6304
sbrown@plunkettcooney.com

In the case of *Old Republic Ins. Co. v. Underwriters Safety & Claims, Inc.*, 2009 WL 32704 (6th Cir. Jan. 7, 2009), the Sixth Circuit Court of Appeals, applying Kentucky law, held that an excess insurer that received late notice of a workers' compensation claim beyond the stated period in the excess policy was nonetheless required to establish prejudice.

Old Republic issued an excess-liability policy to the City of Louisville. The city was self-insured up to \$250,000 for workers' compensation claims. A city employee was injured on the job on March 9, 1987. Between 1987 and 2004, the city paid disability benefits to the injured employee, who was found to be totally and permanently disabled on April 30, 1998. By late July 2004, when Old Republic received notice of the claim for the first time, the city had already made payments exceeding its \$250,000 self-insured retention.

Pursuant to the terms of the Old Republic policy, the city was required to provide immediate notice in any case involving "disability for a period of nine months or more." Furthermore, the policy required the city to provide immediate notice if a case involves "total permanent disability." Therefore, the city was required to provide notice, at the latest, on April 30, 1998 when total and permanent disability was decided, or, at the earliest, in January 1988 when the employee had been disabled for nine months.

The district court ruled that Old Republic was entitled to notice in 1988 but that it must show that it was prejudiced as a result of the late notice. The district court concluded that Old Republic suffered prejudice because it was exposed to liability without having the right to participate or control the investigation and resolution of the claim. The city argued on appeal that, under the case of *Jones v. Bituminous Cas. Corp.*, 821 S.W.2d 798 (Ky. 1991), Old Republic was required to establish a reasonable probability that it suffered prejudice because of the late notice. Old Republic argued that *Jones* only applied to primary liability insurers and did not extend to excess insurers.

The Sixth Circuit agreed with the city and extended the holding in *Jones* to excess liability insurers. The Sixth Circuit examined four factors the *Jones* court discussed and applied those to Old Republic. First, the insurance policy was a contract of adhesion, and in this case was a pre-printed form contract that did not include any individually bargained-for provisions. Second, the policy did not make clear that coverage could be denied if notice was not timely provided.

Third, denying coverage due to late notice would be against public policy because the insurance, like that in *Jones*, was statutorily mandated. Fourth, allowing Old Republic to avoid its coverage obligations without establishing prejudice would result in a windfall in the form of the premiums it received.

After weighing these factors, the Sixth Circuit ruled that “Old Republic must show a reasonable probability that it was substantially prejudiced by the late notice.” *Underwriters Safety*, 2009 WL 32704. The Sixth Circuit further stated that “something more than the loss of the right to participate in defense of the claim is necessary in order to show prejudice. Prejudice requires “injury or damage.” The Sixth Circuit then remanded the case to the district court to determine whether “Old Republic might have achieved a more favorable resolution” had it been given proper notice.

Therefore, under Kentucky law as interpreted by the Sixth Circuit Court of Appeals, an excess insurer must establish substantial prejudice in the form of injury or damage in order to deny coverage based on late notice. Regardless of how late the notice is, the prejudice will not be presumed. Furthermore, the loss of opportunity to participate in the insured's defense and/or resolution of the claim will not constitute prejudice. The insurer must establish actual injury or damage, thus setting a high standard for insurers to meet before denying coverage based on late notice. However, it is important to note that *Underwriters Safety* involved statutorily mandated workers' compensation insurance, which may be an important distinguishing factor in the application of this decision.

Should you have any questions about *Underwriters Safety*, or about late notice in general, please feel free to contact any member of Plunkett Cooney's Insurance Practice Group. [Click here to view a practice group directory.](#) In the alternative, please contact Stephen Brown at (248) 594-6304 or Patrick Winters at (248) 594-6321.