BY NORMAN H. DACHS AND JONATHAN A. DACHS

Belief in Nonliability as Excuse for Late Notice of Claim

Norman H. Dachs

Jonathan A. Dachs

It is well-established that where a contract of primary insurance requires notice "as soon as practicable" after an occurrence, the absence of timely notice of an occurrence is a failure to comply with a condition precedent which, as a matter of law, vitiates the contract.[1]

It is equally well-established that a provision in an insurance policy that requires the insured to give the insurer written notice of an occurrence "as soon as practicable" mandates that such notice be given within a reasonable time under the circumstances.[2]

New York law requires that the time of discovery of a loss or a claim for purposes of determining whether an insured has given notice "as soon as practicable" is "determined according to an objective test, based on the conclusions that a reasonable person would draw from the facts known to the insured."[3]

The courts have recognized that the requirement of timely notice is not "to be measured simply by how long it was before written notification came forth."[4] The mere passage of time does not in and of itself make the delay unreasonable; "[p]romptness is relative and measured by the circumstances."[5] The reason for the time taken by the insured to provide the requisite notice is "[m]ore crucial."[6] Thus, "the provision that notice be given 'as soon as practicable' call[s] for a determination of what was within a reasonable time in the light of the facts and circumstances of the case at hand."[7] While hindsight may often dictate a different conclusion, the rights of the insured must nonetheless be governed "by what foresight, based on the conditions existing at the time and place of the accident, required."[8]

Moreover, it is also well-established that when the facts of an occurrence are such that an insured acting in good faith would not reasonably believe that liability will result, or that the injured party would seek to hold it liable, notice of the occurrence will be deemed to have been given "as soon as practicable" if it is given promptly after the insured receives notice that a claim will, in fact, be made.[9] As recently stated by the Appellate Division, First Department, "At issue is not whether an insured believes that he or she will ultimately be found liable but whether he or she has a reasonable basis for a belief that no claim will be asserted against him or her."[10]

Seminal Cases

In the seminal case of *875 Forest Ave. Corp. v. Aetna Cas. & Sur. Co.*,[11] a three-year-old girl, the daughter of a tenant occupying a fourth-floor apartment in the insured's building, fell from the front window of the apartment, and was killed. Two days later, the president of the insured landlord, was informed of the accident by the building's caretaker. There was no evidence that the landlord was aware of any defective condition existing prior to the accident. Shortly after the accident, the child's mother vacated the apartment without having made any complaint to the landlord. The apartment was subsequently re-rented and no repairs were requested by or made for the new tenant. The first notice that the landlord received concerning any claim of liability was by letter dated Sept. 13, 1967—14 months after the accident—from the mother's attorney. The landlord then promptly informed its insurer of the claim and the events of July 16, 1966.

The question presented to the court on the landlord's declaratory judgment action was whether the landlord was obligated to report the incident "immediately upon its discovery of the fact that the child had fallen from the window of its building or whether under the circumstances of this case the [landlord's] notice, given promptly after it first received a claim, was given 'as soon as practicable.'"

The trial court found that the insurer was obligated to defend and indemnify the landlord, concluding that it was the insured's duty to report an accident "when circumstances are such that it would appear to the insured as a prudent man that an accident occurred for which he may be liable or may be sued." In affirming that decision, the First Department observed that "implicit in a number of the cases where late notice was excused is the principle that mere knowledge that an accident occurred does not always give rise to a duty upon the insured to report such accident to the insurer.... [The landlord's] knowledge of the accident at the time was not such as to lead it to believe that an accident occurred for which he may or could have been liable. There was nothing in the manner in which the accident occurred which would have suggested the possibility of a liability claim against the [landlord], and we believe it would be unfair (under the provisions of the subject policy) to charge [the landlord] in these circumstances when all it knew was simply that an injury occurred on its premises."

The Court of Appeals affirmed this holding, rejecting the insurer's contention that the landlord had breached the timely notice of the accident condition of the policy as a matter of law, and adopting the Appellate Division's conclusion that in the absence of any indication that a liability claim would be brought against the landlord, there was no violation of the policy's notice provision by failing to report the accident to the insurer until more than one year later, when the claim was made.

In another well-known case, *Merchants Mutual Ins. Co. v. Hoffman*,[12] a 15-year-old foster child under the custody and care of the Steuben County Department of Social Services (DSS), who was residing with the defendants/insureds, the Hoffmans, on their farm, sustained a broken arm on July 19, 1973 when his arm went into a hay bailer being driven by one of the insured's sons. Mrs. Hoffman immediately took the child to the hospital and promptly informed DSS of the injury. A caseworker went to the hospital and informed Mrs. Hoffman that DSS would take care of all of the medical bills. The child left the hospital shortly thereafter and continued to reside with the Hoffmans for a few more months. On Aug. 9, 1978—five years later—the

Norman H. Dachs *and* **Jonathan A. Dachs** *are with the firm of Shayne, Dachs, Corker, Sauer & Dachs, in Mineola.*

Belief in Nonliability as Excuse for Late Notice of Claim

Continued from page 3

child (now an adult) commenced a personal injury action against the Hoffmans. On Aug. 10, 1978, the very next day, the Hoffmans gave notice to the insurer of the occurrence and of the lawsuit.

Noting that "at the time of the accident there was no indication that anyone would pursue a claim and inasmuch as the agency [DSS] had taken care of the medical expenses, it was reasonable for [the Hoffmans] to conclude that they need do nothing further," the Fourth Department reversed the finding of the trial court, and granted judgment in favor of the Hoffmans and against Merchants, on the basis that the Hoffmans "demonstrated a good faith belief in nonliability and were not required to notify their insurers."

The Court of Appeals affirmed this determination, finding that "on the record before us, which involves an injury to a child placed in foster care with the insureds by the Department of Social Services which paid all medical expenses of the child and indicated no intention to sue, the weight of the evidence supports the determination of the Appellate Division that notice given by the insureds promptly after suit instituted against them by their former foster child was given 'as soon as practicable,' notwithstanding that the action was not begun until the foster child reached his majority and until five years after the occurrence."

Recent Decisions

Several recent appellate decisions have spoken to the question of whether the insured's late notice was or could be excused by a reasonable or good-faith belief in nonliability.

In *Tower Ins. Co. of New York v. Dyker Contractors Inc.*,[13] where the injury sustained by the underlying plaintiff resulted from the collapse of a stairway at a job site at which the insured was the general contractor; the insured's foreman notified its principal of the accident on the day it happened, and the injured party appeared on the site shortly after the accident with his leg in a cast, the court held that the insured failed to raise a triable issue of fact whether its belief in nonliability was reasonable so as to excuse its nine-month delay in notifying the insurer of the occurrence.

In *York Specialty Food Inc. v. Tower Ins. Co. of New York*,[14] where the record established that the insured knew of the accident within three days after it occurred but waited eight months to notify the insurer, never took any action to ascertain the possibility of its liability for the accident, and did not even question his employees, some of whom witnessed the accident and observed the injured party being taken away in an ambulance, the court held that, "Since he made no investigation at all, there is no basis for a good-faith belief in [the insured's] nonliability."

In *Avery & Avery, P.C. v. American Ins. Co.*,[15] a client of the insured's subtenant fell on the steps of the insured premises. The insured's principal was present in the building at the time of the accident, and the injured party mentioned something about the "bannister not going down to the bottom." The injured party was removed from the scene by paramedics. A few weeks later, one of the insured's employees learned that the injured party had died. The insured's principal acknowledged that she was aware that the injured party's relative took photographs of the scene of the accident and that the family was "exploring the possibility of a claim." Four months after the accident, the insured landlord's attorney received a letter of representation from an attorney for the injured party's estate, which advised the insured to notify its insurer. More than one month later, the insured's broker first notified the insurer. One week after that, an insurance adjuster spoke to the insured and was informed of the insured's knowledge of the decedent's relative's photo taking shortly after the accident. Three and a half weeks later, the insured disclaimed coverage on the ground of late notice of the claim.

In finding that the notice was late and upholding the disclaimer, the court noted that the insured had the burden of showing the reasonableness of the excuse for late notice, and that the issue was whether the insured had a reasonable belief that no claim would be asserted against it, rather than that any claim asserted against it would lack merit.

In *Tower Ins. Co. of New York v. Lin Hsin Long Co.*,[16] the accident involved a patron who slipped and fell on a floor on the insured's premises and had to be removed from the premises by a stretcher and placed in an ambulance. The insured, through its employees, knew of the accident on the day it took place, but apparently believed that no claim would be asserted against it because the accident was the patron's own fault. The insured did not give notice to the insurer until almost nine months after the accident. In a 3-2 decision, the First Department held that the insurer established as a matter of law that

the insured's notice was untimely, rejecting the insured's contention that it had a reasonable belief in nonliability. As stated by the court, quoting from *Paramount Ins. Co. v. Rosedale Gardens,* 293 AD2d 235, 240 (1st Dept. 2002), "the requirement of prompt notice of any occurrence that 'may result in a claim' should not be interpreted in a way that the insurer is compelled to relinquish its right to prompt notice and all the benefits that accrue therefrom—a timely investigation and the opportunity, if appropriate, to dispose of the claim in its early stages, an opportunity that might be irretrievably lost in the case of delayed notice—by placing undue emphasis on the liability assessment of one not trained or even knowledgeable in such matters."

And, in *Romeo v. Malta,*[17] where the record established that employees of the insured knew about the accident on the day it occurred, as the injured party fell while descending a staircase in its restaurant and was removed by the scene via ambulance, the court held that the insured's delay of nine months in notifying its insurer was not excused by the insured's "professed belief that the accident was plaintiff's fault and would result in no liability to itself."[18]

Questions of Fact Raised

In several other recent appellate decisions, the courts have found that genuine material issues of fact existed as to whether the insured had a reasonable belief in nonliability sufficient to excuse its late notice, which should be determined by a jury, rather than as a matter of law.

In *U.S. Underwriters Ins. Co. v. Carson,*[19] where the insured, the owner of the insured bar where a patron had been drinking shortly before his fatal car accident, first became aware of the accident when his bartender called him the day after it happened, the bartender was not advised by the investigating police officers of any details of the accident or whether alcohol was involved, and informed the bar owner that the individual did not appear intoxicated when he left the bar, on foot, the bar owner was never questioned by law enforcement officials and did not hear any media reports about the accident, and did not hear anything else about the accident until 10 months later, when he received a lawyer's letter advising of a potential claim, which he promptly forwarded to his insurance agent, the court held that this scenario "clearly raises questions of fact concerning the reasonableness of [the owner's] actions in waiting to notify [the insurer] that he might be subject to liability due to the fatal accident."

As recently stated by the Appellate Division, First Department, "At issue is not whether an insured believes that he or she will ultimately be found liable but whether he or she has a reasonable basis for a belief that no claim will be asserted against him or her."

In *Surgical Sock Shop II Inc. v. U.S. Underwriters Ins. Co.,*[20] where a pregnant woman fell on the staircase leading down to the insured's premises and the insured, through its employees, became aware of the incident contemporaneously with its occurrence or within a very short time thereafter, the court held that a triable issue of fact was raised by the affidavit of an employee in which she averred that upon hearing a noise on the stairwell, she went out to investigate and discovered the injured party sitting on the steps above the landing; the woman advised that she was all right and refused assistance or an ambulance and simply left without entering the insured's premises. The court further noted that if the injured party's completely contradictory version of the facts was believed, i.e., that she screamed for help and proclaimed that she was dying and her baby was dead, but the insured's employees refused to help her and she was unable to move for 30-40 minutes—the insured's belief in nonliability would not be reasonable.

In *North Country Ins. Co. v. Jandreau,*[21] the insured was the general contractor on a new home construction project and was present on the job site when a worker fell off the roof. The insured had previously informed the injured party's supervisor that no one should go on the roof due to weather conditions and the supervisor apparently agreed. The insured was informed the same day that the injured party was taken to a hospital and underwent leg surgery. The injured party's employer advised that it would inform its own insurer of the occurrence. It was not until

13 months later, after being served with a summons and complaint, that the insured notified the insurer of the occurrence.

On the basis of the insured's explanation that he did not contact his insurer because the injured party was working for a subcontractor, and was under the subcontractor's control and supervision at the time of the accident, the subcontractor had insurance and informed him that it would report the incident to its carrier, the insured did not hear from the injured party or his representatives at any time after the accident, until the lawsuit was commenced, and he believed there was no liability because the injured party was acting contrary to the insured's and the supervisor's advice not to go on the roof, the court affirmed the denial of summary judgment to the insurer, "in light of the preference for permitting a jury to decide the question of reasonableness."

Most recently, in *426-428 West 46th St. Owners Inc. v. Greater New York Mutual Ins. Co.*,[22] where the injured party fell down a staircase within the apartment she rented in the insured's building, the court held that there were triable issues of fact as to whether the insured's failure to timely notify its insurer was based on a good faith, reasonable belief of nonliability insofar as the building superintendent discovered the tenant lying on the floor inside her apartment, and there was evidence that she did not mention the details of what had happened or the nature of her condition.

The court concluded that, therefore, the insured had "no way of knowing that the tenant had fallen due to an allegedly defective staircase in her home, particularly in light of her previous claims to have suffered from a medical condition that prevented her from paying her rent in a timely manner for several months." Under these circumstances, the court concluded that the insured "had some justification for assuming that the tenant's hospitalization was attributable to a continuing medical illness or condition such as would raise a question of fact as to whether it was reasonable for them not to undertake any further inquiry into how she had come to be lying on her floor."[23]

Conclusion

As can be seen, the determination of whether the insured had a reasonable or good-faith belief in nonliability requires a careful analysis of the particular facts and circumstances of each case. While often the fact that the insured was aware of an accident with serious injuries will warrant the conclusion that notice should have been promptly given and delayed notice is not excused as a matter of law, under circumstances where knowledge of the accident and/or injuries is either lacking or justifiably clouded, a question of fact might be presented for a jury to determine.

1. See *Security Mut. Ins. Co. of N.Y. v. Acker-Fitzsimons Corp.*, 31 NY2d 436, 440-443 (1972) (failure to notify in a timely manner allowed insurer to disclaim coverage). See also *Argo Corp. v. Greater New York Mut. Ins. Co.*, 4 NY3d 332 (2005).

2. See *Great Canal Realty Corp. v. Seneca Ins. Co.*, 5 NY2d 742 (2005); *Security Mutual Insurance Co. v. Acker-Fitzsimmons Corp.*, supra; *Rushing v. Commercial Casualty Co.*, 251 NY 302 (1929); *Heydt Contracting Corp. v. American Home Assurance Co.*, 146 AD2d 497 (1st Dept. 1989).

3. *Utica Mutual Ins. Co. v. Fireman's Fund Ins. Co.*, 748 F.2d 118, 122 (2d Cir. 1984).

4. *Mighty Midgets Inc. v. Centennial Insurance Co.*, 47 NY2d 12, 19 (1979).

5. *Metropolitan Prop. & Cas. Ins. Co. v. Mancuso*, 93 NY2d 487 (1999); *Lauritano v. American Fidelity Fire Ins. Co.*, 3 AD2d 564 (1st Dept. 1957), aff'd 4 NY2d 1028 (1958).

6. *Mighty Midgets Inc. v. Centennial Ins. Co.*, supra.

7. *Mighty Midgets Inc. v. Centennial Ins. Co.*, supra; *Deso v. London & Lancashire Ind. Co. of Amer.*, 3 NY2d 127, 129 (1957); *State Farm Mut. Auto Ins. Co. v. Bush*, 46 AD2d 958 (3d Dept. 1974).

8. *Centennial Casualty Co. v. Lester*, 25 Misc.2d 496 (Sup. Ct. Nassau Co. 1960).

9. See *D'Aloia v. Travelers Ins. Co.*, 85 NY2d 825, 826 (1995).

10. *Long Island Lighting Co. v. Alianz Underwriters Ins. Co.*, 24 AD3d 172 (1st Dept. 2005) [citing *SSBSS Realty v. Pub. Serv. Mut. Ins. Co.*, 253 AD2d 583, 584 ([1st Dept.] 1998)].

11. 30 NY2d 726 (1972).

12. 86 AD2d 779 (4th Dept. 1982), aff'd. 56 NY2d 799 (1982).

13. 47AD3d 522 (1st Dept. 2008).

14. 47 AD3d 589 (1st Dept. 2008).

15. 51 AD3d 695 (2d Dept. 2008).

16. 50 AD3d 305 (1st Dept. 2008).

17. __AD3d__, __NYS2d__, 2008 N.Y. Slip Op. 07569, 2008 WL 4471093 (1st Dept. 2008).

18. See also, *Tower Ins. Co. of New York v. Saleh*, 18 Misc.3d 1119(A) (Sup. Ct. N.Y. Co. 2008) (no reasonable belief in nonliability where insured's employees were aware that police officer fell through open cellar door in insured's store, officer's coworkers took pictures and investigated the incident five minutes later, and requested copy of store's business certificate, and employees subsequently learned that officer had been hospitalized and walked with a limp, notwithstanding that officer said he was fine at the scene and officer's friends later told insured's employees that officer "was not going to sue"—"At issue is not whether an insured believes that he or she will ultimately be found liable but whether the circumstances known to the insured at the time would have suggested to a reasonable person the possibility of a claim against the insured"); *Tower Ins. Co. of New York v. Jaison John Realty Corp.*, 20 Misc.3d 1108(A) (Sup. Ct. N.Y. Co. 2008) (no reasonable belief in nonliability where the insured's principal was aware that railing on front steps had been removed, was advised by police on the date of the accident that the railings were cut down because someone had fallen on the steps—principal "had both the ability and the responsibility to investigate the outcome of the occurrence").

19. 49 AD3d 1061 (3d Dept. 2008).

20. 49 AD3d 859 (2d Dept 2008).

21. 50 AD3d 1429 (3d Dept. 2008).

22. __AD3d__, __NYS2d__, 2008 WL 4736906 (1st Dept. 2008).

23. See also, *Hanover Ins. Co. v. Straus*, 20 Misc.3d 1131(A) (Sup. Ct. Suffolk Co. 2008) (question of fact as to reasonableness of belief in nonliability in a case involving a dog bite where the insured, who was not home at the time, was informed by her daughter that there was an incident wherein the injured party fell in the street (and not on the insured's premises) after the insured's dog barked; the police were never called to the house; the injured party allegedly drove off in his truck; the dog was not vicious and was kept on a leash).