

1991

Busch Development v. State Farm and Royal Insurance : Unknown

Utah Supreme Court

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February 17, 1987

9/19859

Mr. Geoffrey Butler
Clerk of the Supreme Court
State of Utah
332 State Capitol Building
Salt Lake City, Utah 84114

Re: Bush Development v. State Farm and Royal Insurance
Case No. 19859

Dear Mr. Butler:

At the hearing of oral argument in the above matter on Wednesday, February 11, 1987, the court inquired whether cases from other jurisdictions offer helpful definitions of prejudice to the insurance carrier from late notice of claim, and whether in any cases, the insured successfully enforced coverage where first notice of claim was after trial on the merits of the liability action against the insured.

In the following cases, "prejudice" was interpreted to mean lost opportunity to investigate, to try to negotiate a compromise, to select defense counsel, and to monitor the defense. No case was found which allowed coverage for a claim where first notice was given after trial and judgment on the merits against the insured.

In Washington v. Federal Kemper Insurance Company, 482 A.2d 503 (Md. App. 1984) the court held that Maryland's requirement of "actual prejudice" was met by proof that Kemper's rights to investigate, evaluate coverage, choose defense counsel and attempt to settle were denied. The court rejected the view that proof of actual prejudice required establishing a substantial likelihood that if the cooperation clause or notice clause had not been breached, the insured would not have been held liable.

This case involved notice of claim given to the insurance company after trial on the merits and judgment against the insured. The trial court finding of no coverage under these circumstances was affirmed.

In Milwaukee Guardian Insurance Inc. v. Reichart, 479 N.E.2d 1340 (Ind. Ct. App. 1985), the appellate court reversed a

FILED
FEB 19 1987

Mr. Geoffrey Butler
February 17, 1987
Page 2

trial court judgment for the insured and entered judgment as a matter of law for the insurance carrier, where notice was first given after a trial on the merits.

In this case, the insured employed skillful counsel who successfully defended the liability action. The insured argued that because of his success at trial, the carrier was not prejudiced by his delay in giving notice. The appellate court rejected this contention and found that prejudice was established as a matter of law where the company was denied any opportunity to offer settlement or to guide the course of litigation, or to select its own attorney.

Felice v. St. Paul Fire and Marine Insurance Company, 711 P.2d 1066 (Wash. App. 1985) affirmed a summary judgment for the attorney's malpractice insurer where the attorney gave notice after trial on the merits and judgment against him. The court observed that the issue of prejudice is generally a material issue of fact that would preclude summary judgment. However, in this instance there was prejudice as a matter of law, making summary judgment proper. The delay prejudiced the company because it was precluded from investigating and evaluating the case prior to trial.

In Gerrard Realty Corp. v. American States Insurance Company, 277 N.W.2d 863 (Wisc. 1979), judgment for the insurer was affirmed on a finding that as a matter of law the carrier was prejudiced by not receiving notice until after trial and judgment, twenty-two months after suit was filed against the insured.

See also Pennsylvania General Insurance Company v. Becton, 475 A.2d 1032 (R.I. 1984) (prejudice because of loss of opportunity to investigate and examine); Velkers v. Glens Falls Insurance Company, 226 A.2d 448 (N.J. 1967) (prejudice from loss of opportunity for timely investigation, examination of evidence, and chance to compromise and settle).

In Weaver Brothers Inc. v. Chappel, 684 P.2d 123 (Alaska 1984), which appellant cites and relies on, the insured was dead, certainly a mitigating factor in a claim of failure of notice. Further, notice was given prior to adjudication of the contribution claim which would have bound the estate of the insured.

Mr. Geoffrey Butler
February 17, 1987
Page 3

Please submit the enclosed copies of this letter to the members of the court for their consideration in this appeal. Thank you for your cooperation.

Yours very truly,

STRONG & HANNI

By 

Roger H. Bullock

RHB:dw

Enclosures (10)

cc: Darwin C. Hansen w/encl.
Karen J. McClurg w/encl.