

Eleventh Circuit Confirms Late Notice Killed Coverage for Assault and Murder Claims under Georgia Law

Recently, in Mt. Hawley Ins. Co. v. East Perimeter Pointe Apts.,¹ the Eleventh Circuit Court of Appeals upheld the denial of liability coverage for negligent security claims involving an assault and murder at an apartment complex in Georgia, finding that the insured owner of the complex and its property management firm waited too long to notify their insurers of the incidents. The court applied Georgia law to interpret the primary and excess liability insurance policies at issue, which follows the minority rule governing the coverage defense of late notice – i.e., an insurer can deny coverage to an insured who does not reasonably comply with the policy’s specific notice requirements, and a factual showing of actual prejudice to the insurer caused by the late notice is *not* required. Performing an evaluative test to determine if a reasonable person would think a claim would arise, the unanimous panel found that the coverage denial was proper when the apartment complex and management firm waited two years to notify the insurers of the assault and murder which occurred on the property.

In December 2015, Adrian Johnson was assaulted by a group of attackers during a visit to Marcus Wilder’s residence in an apartment complex owned by East Perimeter Pointe Apartments, LP (“East Perimeter”). When Wilder returned to his apartment after visiting Johnson in the hospital, he was murdered by an attacker hiding in his bedroom. Two years later, two lawsuits were filed against East Perimeter and its property management firm, Ventron Management, LLC (“Ventron”), for negligent security of the premises, alleging liability for the assault and murder injuries. East Perimeter and Ventron then tendered notice to their primary and excess liability insurance carriers, requesting both defense and indemnity coverage regarding the underlying suits. This was the first notice of the assault and murder events provided to the insurers, notwithstanding an incident report and written request to notify all potential carriers sent to the insureds two years earlier after the incidents occurred.

In response, the insurers filed an action for declaratory judgment that the insurers did not owe coverage based on the policies’ requirements to give notice of a potential claim “as soon as practicable.” The insurers alleged that because East Perimeter and Ventron waited two years before reporting the assault and murder on the premises, the notice requirements had been violated barring any coverage. The lower court agreed and denied coverage, and the insureds appealed.

On appeal, the Eleventh Circuit conducted a choice-of-law analysis under *lex loci contractus* – a contract interpretation principle which holds insurance policies are governed by the law of the state where they were made – to determine that Georgia law governed the interpretation of the liability policies at issue. In doing so, the court then affirmed and applied the well-established late notice coverage defense rule under Georgia law, that if an insurance policy includes a notice condition to coverage with which the insured unreasonably fails to comply, the insurer is not obligated to provide coverage for the claim. However, the court also identified an exception to this rule when an insured

¹2021 WL 2170426 (11th Cir. May 27, 2021).

can show that the failure to comply with the policy's notice requirements was justified, such as when the insured did not have knowledge of the potential claim event or could not have reasonably expected a claim to arise.

This Georgia standard is markedly distinguished from the more forgiving "notice-prejudice" rule followed by a majority of state jurisdictions, which holds that coverage may only be denied if the carrier can show it suffered actual prejudice as a result of the insured's untimely notice of the claim. Unlike the majority rule, Georgia law does not require an insurer to prove any prejudice resulted from the late notice to deny coverage for noncompliance with a policy's notice provisions.

East Perimeter and Ventron argued on appeal that the exception to Georgia's more stringent late notice rule should apply, as they did not learn of the claims until the underlying negligent security suits were filed because they did not know to inquire, and did not expect a liability claim to arise from the assault and murder. In considering this position, the Eleventh Circuit performed an evaluative test to determine whether it could properly conclude that no reasonable person would think a claim would arise, pursuant to which the court weighed whether the potential claim event was trivial or inconsequential. Due to the sheer gravity of the assault and murder, the court found that these potential claim events were neither. As such, the court determined the exception to the Georgia rule did not apply, and East Perimeter and Ventron were not entitled to coverage for failing to reasonably and timely comply with the notice requirements of the policies.

Ultimately, Mt. Hawley Ins. Co. v. East Perimeter Pointe Apts. serves as a poignant reminder to policyholders to ensure compliance with all duties and obligations under their insurance policy provisions, specifically in relation to insurer notice requirements. Insureds must be diligent in properly investigating and reporting all possible claim events to any carriers which may provide potential coverage. When in doubt, send the notice out!

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