ARONBERG GOLDGEHN

Insurance Coverage Update

October 9, 2018

Illinois Appellate Court Revisits the *Ehlco* Estoppel Doctrine in the "Claims Made and Reported" Context

The Illinois Appellate Court recently reaffirmed an insurer's right to disclaim coverage under a "claims made and reported" policy when the insured fails to report the claim within the policy period. The court also addressed the application of Illinois' estoppel doctrine, and the question of whether the insurer risks being estopped from raising coverage defenses if it does not either file a declaratory judgment action or defend the insured under a reservation of rights in this situation. The court determined that the insurer, which did not take either of those actions, was not estopped from disclaiming coverage where the claim was not reported within the policy period. *Southwest Disabilities Services & Support v. ProAssurance Specialty Ins. Co., Inc*., 2018 IL App (1st) 171670 (2018).

In *ProAssurance*, the insured corporation brought a declaratory judgment action against the insurer for coverage regarding an underlying personal injury lawsuit. The insured alleged that *ProAssurance* breached its duty to defend the underlying lawsuit and, pursuant to Illinois estoppel rules, was therefore estopped from asserting any coverage defenses in the matter.

The insurer issued a claims made-based liability insurance policy to the insured social services provider, and the policy required that the insured report the claim or suit during the policy period. Nine months after the policy was cancelled, the insured reported a personal injury suit brought on behalf of a former resident of the insured's facility, and the insurer denied coverage.

In affirming the trial court's granting of the insurer's motion for judgment on the pleadings, the Illinois Appellate Court held that the claim was not first reported during the policy period, as required by the insuring agreement, and therefore never properly triggered a duty to defend. The court rejected the insured's argument, pursuant to *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill.2d 127 (1999), that the insurer was estopped from denying coverage because it did not either defend under reservation of rights or timely file a declaratory judgment action. The court further noted that, in making this argument, the insured was improperly conflating a late-notice defense normally associated with "occurrence-based" policies – the situation in *Ehlco* – with the coverage requirements of the insured's claims made policy. The *ProAssurance* court reasoned that the *Ehlco* estoppel doctrine does not apply when reporting of a claim within the policy period is required to trigger coverage in the first instance.

The 1st District Court also distinguished this case from a similar case the court decided in 2010 – *Uhlich Children's Advantage Network v. Nat'l Union Fire Co*., 398 Ill. App. 3d 710 (1st Dist. 2010). There, the insured brought a declaratory judgment action seeking coverage under a "claims made and reported" policy for an underlying discrimination action. The discrimination case originated from an EEOC charge filed during the first of two consecutive policy periods, but the claim was not reported to the insurer until the second policy period. The

insurer contested coverage, and denied a duty to defend, because the claim was not reported during the same period in which it was made.

The *Uhlich* court agreed that the insured did not give timely notice, as the insured received the EEOC charge during the first policy period but did not report it to the insurer until the second policy period." The court, however, applied the *Ehlco* estoppel doctrine, stating "[a]ccordingly, but for *Ehlco*, defendants would not have had a duty to defend UCAN." The *Uhlich* court found that the "claims made and reported" insurer could not simply disclaim coverage based on the insured's failure to report the claim during the policy period, and was required to either defend under reservation of rights or file a declaratory action to avoid the estoppel finding. Consequently, the *Uhlich* decision did exactly what the *ProAssurance* court said should not be done – it conflated the notice condition of an "occurrence-based" policy with the timely reporting requirement of a claims made policy.

Rather than expressly reject the reasoning and conclusion of its earlier *Uhlich* decision, the *ProAssurance* court briefly distinguished it, stating that *Uhlich* was "inapplicable because the insureds in that case first made their claims during the period when concurrent policies were still in effect." In fact, the policies in *Uhlich* were consecutive, not "concurrent". And, as described above, the relevant claim was made during one policy period and reported during the other policy period.

Comment

It is difficult to reconcile *ProAssurance* with the earlier decision by the same court in *Uhlich*. But *ProAssurance*, the most recent opinion, clearly finds the *Ehlco* estoppel doctrine inapplicable where a coverage disclaimer is based on an insured's failure to properly report a claim under a "claims made and reported" policy.

If you have any questions about this Update, please contact the author listed below or the Aronberg Goldgehn attorney with whom you normally consult:

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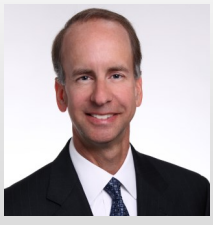
Upcoming Event

2018 PLUS Conference I November 7-9 I San Diego CA



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Aronberg Goldgehn Members Chris Bannon, Tom Hanekamp and Amber LaFevers are looking forward to networking with other professional liability insurance professionals next month at the PLUS conference in San Diego.

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