

Estee Lauder Decision Highlights Waiver Argument's Challenges

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Policyholders often seek to challenge an insurer's denial of coverage on the grounds that the insurer waived a defense relied upon to deny coverage. On September 15, 2016, the Court of Appeals in *Estee Lauder Inc. v. OneBeacon Ins. Group, LLC*, 2016 N.Y. LEXIS 2788 (2016) reaffirmed that a waiver argument can be a challenging one to make because it requires a fact-intensive inquiry regarding whether the insurer actually intended to waive a coverage defense.

By way of background, Estee Lauder initiated this coverage action in 2005, claiming that OneBeacon wrongfully denied defense and indemnity costs in connection with environmental pollution claims asserted against Estee Lauder. Importantly, when the claim was noticed, OneBeacon reserved the right to deny coverage based upon late notice in 1999, but in a series of letters issued in 2002, the insurer did not reference its late notice defense.

In the coverage action, OneBeacon included the late notice defense in its answer even though this defense was omitted from its 2002 letters. OneBeacon later withdrew the defense from its amended answer, but subsequently, after a particular ruling by the Court of Appeals, sought leave to again include the late notice defense in its answer.

The Appellate Division, First Department, rejected OneBeacon's motion to amend its answer to reassert the late notice defense. The court found that the insurer had waived its right to assert the affirmative defense of late notice in the litigation by failing to specifically raise late notice as a ground for denial in the 2002 letters. The court observed that OneBeacon was aware of its potential late notice defense long before it issued the disclaimer letters, as evidenced by the 1999 letters which included the defense. Therefore, the court reasoned that failure to include the defense in the later disclaimer letter amounted to a waiver.

The Court of Appeals reversed in a very brief decision, holding that OneBeacon could not be said to have waived its late notice defense as a matter of law. The Court noted that the common law waiver standard requires "an examination of all factors," and here, OneBeacon identified the late notice defense in 1999 before relying on a general reservation of rights included in the 2002 disclaimer letters. Therefore, although late notice was not specifically raised in OneBeacon's disclaimer letters, the Court found that issues of fact existed as to whether the insurer intended to waive its late notice defense. Accordingly, the Court granted OneBeacon leave to amend its answer to reassert the late notice defense.

The Takeaway

The Estee Lauder decision highlights the reluctance of New York courts to find waiver as a matter of law where the insurer can raise an issue of fact as to its intent during the claims-handling process. This is so because the burden of finding waiver is a heavy one; the insured must prove that the insurer "clearly manifested an intent to abandon their late-notice defense."

The lesson for policyholders is to give timely notice of all claims to avoid a late notice problem completely. The takeaway for insurers is to make their intent clear regarding all their defenses and reservation of rights during the claims-handling process to avoid the need to litigate this fact-intensive issue.

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