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Partners Jeremy S. Macklin and Mark F. Wolfe Secure Seventh Circuit Win for Insurer Client in Late Notice Dispute

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In a written decision dated August 12, 2019, authored by Chief Judge Diane P. Wood, the U.S. Court of Appeals for the Seventh Circuit ruled in favor of Traub Lieberman's insurer client, affirming the District Court's grant of summary judgment in the insurer's favor. Partners, Jeremy S. Macklin and Mark F. Wolfe, represented the insurer client in the District Court and before the Seventh Circuit. Macklin argued the case before the Seventh Circuit on behalf of the insurer on May 28, 2019.

The insurer client issued an excess liability policy to Deerfield Construction, a telecommunications construction company, which incorporated the notice requirements of the primary liability insurance policy issued by American States Insurance Company. The insured's employee was involved in an automobile accident in 2008, during the effective dates of the excess liability policy. A lawsuit arising from the accident was filed and served in 2009. While Deerfield Construction, through its retained insurance intermediary, provided immediate notice of the accident and lawsuit to the primary liability insurer, the insurer client did not receive notice of either the accident or the lawsuit from any source until December 2014, approximately six weeks before trial.

Following a \$2.3 million judgment, the insurer client filed a complaint for declaratory judgment seeking a finding that Deerfield Construction materially breached the excess liability policy by not providing reasonable notice of the accident or the lawsuit, as required by the policy. The District Court found that the notice given to the insurer client was unreasonable as a matter of law. The District Court rejected Deerfield Construction's argument that an insurance broker involved in the purchase of the excess liability policy, Arthur J. Gallagher, was the insurer client's apparent agent for purposes of accepting notice. The District Court also rejected Deerfield Construction's argument that the insurer client's acts of requesting discovery, reviewing trial reports, and participating in settlement discussions raised equitable estoppel concerns.

The Seventh Circuit affirmed the District Court's grant of summary judgment in the insurer client's favor. The Seventh Circuit weighed the five late notice factors set forth in *W. Am. Ins. Co. v. Yorkville Nat. Bank*, 238 Ill. 2d 177 (Ill. 2010), and held that all five factors either weighed in favor of a finding that notice was unreasonably late or were neutral. The Seventh Circuit's late notice analysis also took into account the "totality of the circumstances" to hold, the "conclusion is irresistible that Deerfield's notice was untimely and unreasonable as a matter of law."

The Seventh Circuit also rejected Deerfield Construction's apparent agency and estoppel defenses. Regarding estoppel, the Seventh Circuit held that the insurer client's "minimal participation at the trial stage of the [underlying] case was not the type of 'misrepresentation' that gives rise to equitable estoppel." As to apparent agency, the Seventh Circuit summarily rejected each of Deerfield Construction's attempts to create a factual issue, holding that only the conduct of the insurer client (rather words and conduct of Deerfield Construction's insurance intermediary) can create an apparent agency relationship, and the insurer client took no such action.

The written ruling can be found here: *Landmark Am. Ins. Co. v. Deerfield Constr. Co., et al.*, No. 18-2205 (7th Cir. Aug. 12, 2019).