FIFTH DIVISION
June 30, 2011

No. 1-10-0831

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

INGALLS MEMORIAL HOSPITAL,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County, Illinois,
	)	County Department,
	)	Chancery Division.
	)	
	)	No. 08 CH 28468
v.	)	
	)	
EXECUTIVE RISK INDEMNITY, INC.,	)	Honorable
	)	Nancy J. Arnold,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE JOSEPH GORDON delivered the judgment of the court. Presiding Justice Fitzgerald Smith and Justice Epstein concurred in the judgment.

ORDER

HELD: Summary judgment in favor of defendant-insurance company was appropriate where plaintiff-insured did not provide notice of a claim as soon as practicable, as required under the policies.

This declaratory judgment action arose out of an employment discrimination case filed by Cheryl Street against her former employer, plaintiff Ingalls Memorial Hospital ("Ingalls"). Ingalls sought coverage under the claims-made insurance policies issued to it by defendant Executive Risk Indemnity Inc. ("ERI"). ERI denied coverage, claiming that Ingalls did not provide ERI with timely notice of Street's claim. On cross-motions for summary judgment, the trial court entered judgment in favor of ERI, finding that Ingalls did not submit its claim in a timely manner and this appeal followed.

I. BACKGROUND

A. The Policies

In 2004, ERI issued to Ingalls two claims-made Directors, Officers and Trustees Liability Insurance Policies, with consecutive policy periods running from July 1, 2004 to July 1, 2005 ("the 2004 policy") and from July 1, 2005 to July 1, 2006 ("the 2005 policy") (collectively, "the policies").[1] The policies are identical, except for the coverage periods. Each policy's stated limit of liability is $10 million in excess of a $150,000 retention.

The policies themselves contain the following relevant provisions. First, at the top of the page entitled "declarations," the following appears:

> "NOTICE: This is a claims made indemnity policy which applies only to any 'claim' first made during the 'policy period' against the 'insureds' 'for a wrongful act.' The limit of liability available to pay damages or settlements shall be reduced by 'defense expenses,'

[1]A claims made insurance policy is defined as "[a]n agreement to indemnify against all claims made during a specified period, regardless of when the incidents that gave rise to the claims occurred." *Blacks's Law Dictionary* 809 (7th ed. 1999).

> and 'defense expenses' shall be applied against the retention. This policy does not provide for any duty by the underwriter to defend any 'insured.'"

The policies' insuring agreements describe the nature of the coverage provided by each policy and state, in pertinent part:

> "(A) The Underwriter will pay on behalf of Insured Persons Loss from Claims first made against them during the Policy Period, except for Loss which the Insured Entity pays to or on behalf of the Insured Persons as indemnification.
>
> (B) The Underwriter will pay on behalf of the Insured Entity Loss from Claims first made against the Insured Persons during the Policy Period which the Insured Entity pays to or on behalf of the Insured Persons as indemnification."

Both policies also include the following applicable definitions:

> "(B) 'Claim' means (1) written notice received by an Insured that any person or entity intends to hold any Insured responsible for a Wrongful Act, or (2) a legal, injunctive, or administrative proceeding against an Insured Person solely by reason of his or her status as such.
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> ***
>
> (G) 'Loss' means any amount, including Defense Expenses

in excess of the applicable retention and not exceeding the Limit of Liability which an Insured is obligated to pay as a result of a Claim, except that Loss shall not include punitive or exemplary damages, the multiplied portion of any multiplied damage award, fines, taxes or penalties, and matters which are uninsurable under law pursuant to which this Policy shall be construed.

***

(K) 'Wrongful Act' means any actual or alleged error, omission, misstatement, misleading statement or breach of duty (1) by any Insured Person *** or (2) with respect to coverage under the Insuring Agreement C, by the Insured Entity."

The policies further stipulate, in a section entitled "Conditions," that:

"A Claim shall be deemed made when the Underwriter is notified *** or when such Claim is first made or asserted against an Insured, whichever occurs first. *** If, during the Policy Period any Claim is made, as a condition precedent to their right to payment the Insureds shall give the Underwriter written notice by certified mail of such Claim as soon as practicable after such claim is first made."

Both policies also contain a duty to defend endorsement, which states that:

"(1) The Underwriter will have the right and duty to defend any Claim, regardless of whether such Claim is false, fraudulent or

> groundless; provided, that the Underwriter will have no obligation to defend or continue to defend any claim after the Limit of Liability under this Policy has been exhausted by the payment of Loss, including Defense Expenses. No Insured may admit any liability for or settle any Claim without the Underwriter's written consent. The Underwriter will have the right to make investigations and conduct negotiations with respect to any Claim that the Underwriter deems appropriate.
>
> ***
>
> (2) The term 'Defense Expenses' will also include reasonable legal fees and expenses incurred on behalf of an Insured in the defense of a Claim."

The policies are further modified by an endorsement entitled "Endorsement No. 10 Failure to Maintain Insurance Exclusion. This endorsement states, in pertinent part, that ERI will not provide coverage "for Claims based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving the failure to obtain, effect or maintain any form, policy, plan or program of insurance, including without limitation self-insurance, stop loss or provider excess insurance."

B. The Street Claim

On March 4, 2005, Cheryl Street, a former employee of Ingalls, filed a charge of employment discrimination under the Americans with Disabilities Act with the EEOC. In that charge, Street alleged that:

> "On March 22, 2004, I suffered a work related injury which caused me to be disabled. *** During my meeting with [Ingalls'] Occupational Health Manager, I was told that I could not return to my present position or for any work position until I did not need a disability accommodation. Finally, since on or around May 28, 2004, I have been denied my right to file for short and long term disability because I have filed a workers compensation claim."

On May 10, 2006, the EEOC terminated its processing of Street's charge and issued her a Notice of Right to Sue letter. On May 30, 2006, Street filed a complaint in Federal Court, alleging violations of the Americans with Disabilities Act and ERISA. Upon receipt of the complaint, Ingalls assigned the law firm of Seyfarth Shaw LLP to act as defense counsel. In a letter dated June 14, 2006, Ingalls notified ERI of the complaint.

On August 29, 2006, ERI informed Ingalls that it would not provide coverage for Ingalls' defense of the complaint. ERI stated that under the policies, Street's EEOC charge and her complaint were considered a single claim and, because the EEOC charge was filed on March 7, 2005, but Ingalls did not notify ERI of the matter until June 14, 2006, that notice "was not as soon as practicable, and thus, there is no coverage under the Policy."

In August 2008, Ingalls initiated the instant action against ERI, seeking a declaratory judgment finding that ERI was obligated to defend and indemnify Ingalls pursuant to the policies. Ingalls filed a motion for summary judgment in August 2009, asserting that because the policies were excess insurance policies whose coverage was not triggered until the $150,000 "self-insured retention" was exhausted, its notice to ERI in June 2006 was timely.

In support of its motion, Ingalls provided the affidavit of its vice president and general counsel, Diane Jacoby. Jacoby averred that Ingalls received Street's EEOC claim on March 10, 2005 and concluded that it was without merit and that any recovery would be nominal. She further averred that prior to the filing of Street's lawsuit, she had no information that the defense of that lawsuit would exceed the policies' $150,000 retention.

ERI filed its cross-motion for summary judgment in October 2009. In its memorandum in support of that motion, ERI argued that the policies were not, as Ingalls contended, excess insurance policies, and therefore Ingalls was required to provide notice of Street's claim as soon after her initial EEOC charge as practicable. With its motion, ERI included portions of the deposition of Diane Jacoby's. In that deposition, Jacoby testified that she neither considered or thought it necessary to notify ERI of Street's EEOC charge, and that she did not review the policies when she received the charge. She further testified that Street's EEOC charge "would probably fit into" the definition of a claim as used in the policies. Jacoby also stated that Ingalls did not purchase any primary insurance and opined that even if the 2004 policy contained no retention, she would still consider it an excess policy. When asked what in the policy, other than the retention, made her believe it was an excess policy, Jacoby was unable to cite any other specific provision.

Following a February 9, 2010 hearing, the trial court agreed with ERI, and granted its motion for summary judgment, declaring that ERI "did not owe a duty to defend or a duty to indemnify [Ingalls] under either the 2004 Policy or the 2005 Policy in connection with the underlying EEOC Charge instituted by [Street]." This appeal followed.

II. ANALYSIS

On appeal, Ingalls argues that the trial court erred in granting summary judgment in favor of ERI. It contends that because the policies were issued on an excess basis and ambiguous, it was not required to notify ERI of Street's claim at the time she filed her EEOC charge, but rather when she filed her lawsuit against Ingalls. It further contends that ERI suffered no prejudice from its delay. We disagree.

Summary judgment is appropriate where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (735 ILCS 5/2-1005(c) (West 2000)). We review an order granting summary judgment *de novo*. *General Casualty Insurance Co. v. Lacey*, 199 Ill. 2d 281, 284 (2002).

Here, the parties filed cross-motions for summary judgment and do not dispute the essential facts. Instead, this dispute is over the interpretation of the policies, namely whether Ingalls' delay in notifying ERI of the Street claim was given in a timely manner under the policies. "The construction of the provisions of an insurance policy is a question of law, subject to *de novo* review." *Zurich Insurance Co. v. Walsh Construction Co. Of Illinois*, 352 Ill. App. 3d 504, 507 (2004). The primary objective of such an inquiry is to ascertain and give effect to the intent of the parties. *American States Insurance Co. v. Koloms*, 177 Ill. 2d 473, 479-80 (1997). In order to do this, a court must look at the policy as a whole and "take into account the type of insurance purchased, the nature of the risks involved, and the overall purpose of the contract." *Koloms*, 177 Ill. 2d at 479.

Applying these principles to the instant case, we first consider Ingalls' contention that

because the policies issued by ERI are not triggered until the $150,000 retention is met, those policies were issued on an excess basis and, therefore, Ingalls had no duty to notify ERI of the Street claim until the retention could have been exceeded, which occurred once Street filed her lawsuit, not when her claim first arose. In support of this claim, Ingalls relies on the cases which suggest that notice to an excess carrier is only required "when it appears likely that the excess policy will be implicated." *Zurich Ins. Co. v. Walsh Construction Co. Of Illinois*, 352 Ill. App. 3d 504, 509-510 (2004). ERI, however, asserts that because the policies are not excess and were instead issued as primary insurance, Ingalls did not provide notice in a timely manner as required by the policies. We agree with ERI, and need not determine whether notice would have been satisfactory if the policies were issued on an excess basis.

Our courts have noted that "[p]rimary and excess policies 'inherently serve different functions, cover different risks and attach at different stages.' " *Travelers Indemnity Co. v. American Casualty Company of Reading, PA*, 337 Ill. App. 3d 435, 439 (2003), quoting *Federal Insurance Co. v. St. Paul Fire & Marine Insurance Co.*, 271 Ill. App. 3d 1117, 1122 (1995). A "primary policy typically covers claims starting at the first dollar of loss or the first dollar in excess of a deductible or self-retention *** [while] an excess policy is triggered after the limits of the primary policy have been exhausted." *Travelers Indemnity Co.*, 337 Ill. App. 3d at 439, citing 1 Eric Mills Holmes & Mark S. Rhodes, Holmes's Appleman on Insurance, 2d § 2.16 (1996). "Primary policies generally impose on the insurer a duty of defense separate from the duty to indemnify the insured against the claim." *Krusinski Construction Co. v. Northbrook Property & Casualty Insurance Co.*, 326 Ill. App. 3d 210, 219 (2001).

On the other hand, our supreme court has explained that excess insurance "provides a

secondary level of coverage for the insured. Such coverage protects an insured in those instances where a judgment or a settlement exceeds the primary policy's limits of liability. This type of insurance coverage attaches only after a predetermined amount of primary insurance has been exhausted." *Roberts v. Northland Insurance Co.*, 185 Ill. 2d 262, 276-77 (1998) (Freeman, C.J., concurring in part and dissenting in part, joined by Miller and McMorrow, JJ.). "Rather than providing a duty to defend, most excess policies require the excess insurer to indemnify the insured for the costs of the defense as part of the "ultimate net loss" against which the policy insures." *Krusinski*, 326 Ill. App. 3d at 219.

In order to determine whether a policy is a primary or excess policy, we "must construe the policies as a whole and [review] the underlying policy considerations." *Travelers Indemnity Co.*, 337 Ill. App. 3d at 440, citing *Illinois Emcasco Insurance Co. v. Continental Casualty Co.*, 139 Ill. App. 3d 130, 133 (1985).

Here, when viewed as a whole, there can be no question that the policies were issued on a primary basis. The language of the policies themselves foreclose on the possibility of their issuance on an excess basis. Tellingly, the policies make no mention of being excess insurance, and do not mandate the exhaustion of the retention before Ingalls' duty to notify or ERI's duty to defend is triggered. This comes in stark contrast to the policies at issue in the cases relied upon by Ingalls which explicitly state that they were issued on an excess basis. See *Zurich*, 352 Ill. App. 3d 504, 506 (2004) (policy issued in "excess of *** any other valid and collectible insurance."), *Travelers Indemnity Co.*, 337 Ill. App. 3d at 437 ("It is the intent of this policy to apply to the amount of loss which is more than the limit of the other insurance."), *Missouri Pacific R. & R. Co. v. International Ins. Co.*, 388 Ill. App. 3d 69, 73(1997) (insurer only

responsible for losses "in excess of" the retained limit or the limits of other insurance policies carried by the insured), *AAA Disposal Systems, Inc. v. Aetna Cas. and Sur. Co.*, 355 Ill. App. 3d 275 (2005).

Furthermore, Endorsement No. 10 to the policies implies that the policies were issued as primary, rather than excess insurance. That endorsement states that "no coverage will be available under this Policy for Claims *** in any way involving the failure to obtain, effect or maintain any *** insurance, including without limitation *self-insurace*, stop loss or provider *excess insurance*." (emphasis added). This language, which indicates that the policies will not cover claims stemming from Ingalls' failure to obtain an excess insurance policy, implicitly suggests that the policies in question are not excess insurance but instead are, as ERI contends, primary in nature. Ingalls has cited nothing in the policies in question which suggest otherwise, and to accept their interpretation of the policies as excess, in light of this endorsement, would render this endorsement meaningless.

We are reluctant to accept Ingalls' argument that we should redefine the policies' $150,000 retention as a "self-insured retention," ("SIR") which, it argues, would act as a primary policy, thus transforming the policies' $10 million limit into excess coverage. It is worth noting that the words "self-insured retention" appear nowhere in the policies, nor does Ingalls point to anything in the policies that suggests the retention in any way represents primary insurance. While courts have held that SIR's may act as primary insurance (See *Missouri Pacific R. & R. Co.*, 288 Ill.App. 3d 69 (1997)), here, Ingalls has offered nothing in support of its theory that the retention contained in the policies amounts to a primary self-insurance policy, or that it is anything other than what it appears to be on its face, namely the amount that Ingalls must spend

in defense of a claim before the policy limits are implicated. We disagree with Ingalls' unsupported contention that the size of the $150,000 retention is consistent with it being a form of primary self insurance, particularly given the fact that that amount represents a mere 1.5% of the $10 million total limit of the policies' coverage.

Moreover, treating the retention as primary insurance and the policy limits as excess would render much of the policy language meaningless. The policies' notice provisions require notice of a claim "as soon as practicable." If the parties intended for this to really mean "as soon as practicable after a claim is first made, but only after the possibility for the exhaustion of the retention arises," then presumably the language of the policies would reflect this intention. In the same vein, nowhere in the duty to defend endorsement are ERI's rights or duties in any way conditioned upon the exhaustion of the retention. The policies are explicitly clear on this issue, stating that ERI has the right and duty to investigate, negotiate, settle, and defend *any* claim without requiring Ingalls to first expend $150,000.

With respect to the endorsement imposing a duty to defend, we see no merit in Ingalls' claim that "ambiguities" require us to treat them as excess and therefore disregard the notice provisions. Ingalls argues that because the declarations pages of the policies states that there is no duty to defend, but Endorsement Number 6 states that ERI "will have the right and duty to defend any Claim," there exists a "patent ambiguity" in the policies which must be resolved in its favor. We cannot agree with that analysis because the endorsement makes it abundantly clear that the duty does exist.

When determining whether a policy is ambiguous, a "court must construe the policy in its entirety giving effect to all parts of the policy as possible, including endorsements." *Central*

Illinois Public Service Co. v. Allianz Underwriters Insurance Co., 240 Ill. App. 3d 598, 602 (1992). "If the terms of the policy are clean and unambiguous, they must be given their plain and ordinary meaning." *Koloms*, 177 Ill. 2d at 479. Courts will not distort the language of a policy to find an ambiguity. *Dixon Distributing Co. v. Hanover Insurance Co.*, 161 Ill. 2d 433, 441 (1994).

Here, with respect to the duty to defend, Endorsement Number 6 clearly indicates that ERI does, in fact, have a duty to defend Ingalls against any claim, which contradicts the language in the declarations page of the policies. That endorsement explicitly deletes language in the policies which stated that ERI did not have a duty to defend, and is listed on the declarations page as one of the endorsements modifying the policy. This endorsement does not, as Ingalls suggests, create an ambiguity. Our courts have explicitly held that in such cases, the language of an endorsement overrides any policy language to the contrary. *Tribune Co. v. Allstate Insurance Co.*, 306 Ill. App. 3d 779, 784 (1999), citing *Allianz Underwriters*, 240 Ill. App. 3d at 604. ("endorsements supersede conflicting policy provisions."). Therefore, we believe the language of the policies clear, and refuse to find any ambiguities as Ingalls suggests.

Having determined that the policies at issue were unambiguously issued on a primary basis, we must now turn to the question of whether Ingalls' response time under the notice provisions of the policies was reasonable. In Illinois, notice provisions requiring an insured to notify its insurer of claims as soon as practicable "impose valid prerequisites to insurance coverage" and require an insured to provide notice "within a reasonable time," which is dependant on the facts and circumstances of each case. *Country Mutual Insurance Co. v. Livorsi Marine, Inc.*, 222 Ill. 2d 303, 311-12 (2006). Such provisions are not mere technical requirements, but rather are conditions precedent to the triggering of an insurance company's

contractual duties. *Berglind v. Paintball Business Association*, 402 Ill. App. 3d 76, 85 (2010), citing *Zurich*, 352 Ill. App. 3d at 508. The purpose of such a provision "is to ensure that the insurer will be able to timely investigate and defend claims against its insured." *Berglind*, 402 Ill. App. 3d at 85. "An insured's breach of a notice clause *** by failing to give reasonable notice will defeat the right of the insured to recover under the policy." *West American Insurance Co. v. Yorkville National Bank*, 238 Ill. 2d 177, 185 (2010). Generally, whether notice is provided within a reasonable time is a question of fact. "However, when there is no controversy as to the facts, the question of what constitutes 'within a reasonable time' becomes a question of law. *Berglind*, 402 Ill. App. 3d at 86, citing *Olivieri v. Coronet Insurance Co.*, 173 Ill. App. 3d 867, 871(1987).

Illinois courts have considered the following factors in determining whether notice was reasonable: (1) the specific language of the policy's notice provision; (2) the degree of the insured's sophistication in the area of commerce and insurance; (3) the insured's awareness that an event giving rise to a claim under the policy has taken place; (4) the insured's diligence and reasonable care in ascertaining whether policy coverage is available; and (5) prejudice to the insurer. *Livorsi*, 222 Ill. 2d at 313, *Northbrook Property & Casualty Insurance Co. v. Applied Systems, Inc.*, 313 Ill. App. 3d 457, 466 (2000). An analysis of each of the factors outlined above amply supports the conclusion that the notice provided by Ingalls was deficient.

The first factor requires that we look at the specific language of the policies, which, in this case, requires Ingalls to notify ERI of any claim "as soon as practicable after such claim is first made." Under the policies, a claim is defined as "written notice received by an Insured that any person or entity intends to hold any Insured responsible for a Wrongful Act," and a claim is

deemed made when it is "first made or asserted against [Ingalls]." The language of these provisions is sufficiently understandable and devoid of any special conditions or circumstances. As outlined above, nothing in the policies supports Ingalls' belief that notice was not required until the $150,000 retention was exhausted. The language of the notice provision is abundantly clear: Ingalls was required to notify ERI of the Street claim as soon as practicable, and therefore we find that this factor mitigates in favor of an unreasonable delay.

The second factor requires us to evaluate the insured's level of sophistication. The record indicates that Ingalls is a hospital with its own legal department, over 500 employees, and multiple insurance policies. It retains in-house counsel, as well as outside counsel, any of whom could have reviewed the policies at issue, and is therefore presumed to be sophisticated in the areas of commerce and insurance. Accordingly, this factor, as well, supports an unreasonable delay.

The third factor is the insured's awareness of an event that may trigger insurance coverage. The record indicates that Ingalls received notice of Street's EEOC charge in March 2005, and that it understood that charge to represent a claim as defined in the policies. Thus, it is undisputed that Ingalls became aware that the potential for insurance coverage existed in March 2005, over a year before notice was provided to ERI. Consequently, this factor weighs in favor of an unreasonable delay by Ingalls.

The fourth factor we must consider is the insured's diligence and reasonable care in ascertaining whether policy coverage is available once a claim arises. With respect to this factor, our courts have held that even lengthy delays in providing notice are not absolute bars to coverage when those delays are justifiable under the circumstances. See *Northbrook Property*,

313 Ill. App. 3d 457, 465 (2000). Here, there is no question that Ingalls' 15 month delay is sufficiently long to warrant a denial. When faced with similar policies, our courts have found shorter delays unreasonable as a matter of law. See *IMC Global v. Continental Insurance Co.*, 378 Ill. App. 3d 797, 807-08 (2007) (13 months), *Hartford Casualty Insurance Co. v. Snyders*, 153 Ill. App. 3d 1040, 1043 (1987) (7 months), *Equity General Insurance Co. v. Patis*, 119 Ill. App. 3d 232, 236 (1983) (5 months). See also *Northbrook Property*, 313 Ill. App. 3d at 469 (17 months).

Here, the parties do not dispute that the March 4, 2005 EEOC charge constituted a claim, or that Ingalls waited over 15 months after learning of that claim to notify ERI. Diane Jacoby, Ingalls' vice president and general counsel, stated in her deposition that while Street's EEOC charge likely constituted a claim under the policies, Ingalls' opinion that notice was not necessary at the time of the charge because the $150,000 retention had yet to be exhausted at that point.

While our "[c]ourts have recognized that an insured's belief of non-coverage under a policy may be an acceptable excuse where the insured, acting as a reasonably prudent person, believed the occurrence or lawsuit was not covered by the policy," in this case, Ingalls' belief was unreasonable as a matter of law. *Northbrook Property*, 313 Ill. App. 3d at 467. As previously indicated, nothing in the policies' notice provision is conditioned upon the possibility of exhaustion. The policies explicitly state that once a claim arises, Ingalls must notify ERI, in writing, "as soon as practicable" in order coverage to attach, with no mention of exhaustion of the retention before that duty to notify is triggered.

Even if we were to accept Ingalls' contention that the remote possibility of damages exceeding the retention was sufficient to delay notice, which we do not, here, Ingalls' refusal to

notify ERI was premised upon its own determination that Street's claim was meritless. This contention is contravened by the explicit language of the duty to defend endorsement, which explicitly states that ERI's duty to defend Ingalls against any claim applies "regardless of whether such Claim is false, fraudulent or groundless." This language makes it clear that the provisions of the policies are applicable as soon as a claim arises, regardless of whether such claim is frivolous or not.

In light of the clear language of the policies, we cannot say that Ingalls' acted diligently when it waited over a year to notify ERI of the EEOC charge, and therefore find that this factor mitigates in favor of an unreasonable delay.

Fifth, we must determine whether ERI suffered any prejudice as a result of Ingalls' late notice. Generally, an insurer is not required to prove that it was prejudiced by an insured's breach of a notice provision because "the controlling issue is not whether the insurer's interests have been compromised by the insured's inaction but only whether reasonable notice has been given." *Northbrook Property*, 313 Ill. App. 3d at 466. Nevertheless, it is a factor which warrants consideration in determining whether notice has been given in a reasonable time. *Montgomery Ward & Co. v. Home Insurance Co.*, 324 Ill. App. 3d 441, 449 (2001). "[O]nce it is determined that the insurer did not receive reasonable notice of an occurrence or a lawsuit, the policyholder may not recover under the policy." *Livorsi*, 222 Ill. 2d at 317.

Here, ERI claims that it suffered prejudice because Ingalls' late notice deprived it of the opportunity to settle the Street claim before her complaint was filed, and thus potentially avoid indemnifying Ingalls for the costs of defending the subsequent lawsuit. We agree. It is undisputed that ERI did not receive any notice of the Street claim until it was notified by Ingalls

13 months after it arose. The duty to defend endorsement explicitly gives ERI the right to negotiate and, with Ingalls' written approval, settle "any claims" made against Ingalls, and does not condition that right upon the exhaustion of the retention. By waiting 13 months to notify ERI of the Street claim, Ingalls was deprived of the opportunity to attempt to settle with her before litigation arose, and therefore this factor also mitigates in favor of an unreasonable delay. Moreover, even if there was no prejudice to ERI in this case, a fact with which we cannot agree, the absence of that prejudice would not be a dispositive factor. See *Livorsi*, 222 Ill. 2d at 316-17 ("even if there is no prejudice to the insurer, a policyholder still must give reasonable notice according to the terms of the insurance policy.").

Under these circumstances, these factors emphatically support the trial court's finding that Ingalls' delay in providing notice to ERI cannot be considered reasonable. Accordingly, we agree with the trial court that Ingalls' delay constituted a breach of the notice provision that precluded its right to enforce the policies, and find that summary judgment in favor of ERI was warranted.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the circuit court.

Affirmed.