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Three-Year Delay Not "Prompt Notice," But Insurer Not "Appreciably Prejudiced" Either, New Jersey Court Holds

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In *Harleysville Preferred Insurance Company v. East Coast Painting & Maintenance, LLC*, 2019 U.S. Dist. LEXIS 135295 (D.N.J. Aug. 12, 2019) (East Coast Painting), the U.S. District Court for the District of New Jersey held that an insurer, which received notice of a bodily injury accident ***three years*** after it happened, was not "appreciably prejudiced" by such late notice, even as the court acknowledged notice three years later did not satisfy the policy's "prompt notice" condition. The court also held that the policy's "Operational Exclusion," which excluded coverage for bodily injury arising out of the operation of "cherry pickers and similar devices," did not apply because the accident arose out of the use of a "scissor lift," which is not a device similar to a cherry picker.

East Coast Painting arose out of a Queens, New York bridge-painting project, during which an employee of the insured, East Coast Painting and Maintenance LLC was injured while "standing on a scissor lift mounted to the back of a truck," owned and operated by East Coast. The employee sued various project-related entities which, in turn, joined East Coast as a defendant. East Coast sought coverage under its business auto policy, and the insurer agreed to defend the insured under a reservation of rights. The insurer subsequently sought a declaration that it did not owe coverage based on, among other things, the policy's "Operational Exclusion," and the insured's failure to satisfy the policy's "prompt notice" condition. The insurer moved for summary judgment on both of those bases, but the court in *East Coast Painting* denied the motion.

As for the insurer's "prompt notice" defense, the court in *East Coast Painting* concluded that, the insured's notice to the insurer was not prompt because it did not receive notice until three years after the accident. But, the court added, the inquiry does not end there. "[T]his Court must determine whether [the insurer] was ***appreciably prejudiced*** by that delay." Reviewing the facts, the court held that the insurer was not "appreciably prejudiced," even though during the three-year delay the lift truck was "not properly maintained" or "in the same condition it was at the time of the Accident." The court observed that the insurer had "***ample other evidence*** with which it can defend itself," such as experts who inspected the lift truck and opined about the cause of the accident." [Emphasis added.] Further, "there are multiple contemporaneous accident reports," "a list of the East Coast employees on site at the time," "photographs of the lift truck and its location when [the employee] was injured," and "depositions of [the employee] and others regarding the events at issue." Thus, the court held, the insurer was not prejudiced and summary judgment was inappropriate.

The *East Coast Painting* court also held that the policy's "Operational Exclusion" did not apply to exclude coverage for the employee's bodily injury damages. The exclusion applied to bodily injury arising out of the operation of equipment listed in the policy's definition of "mobile equipment," which included "cherry pickers and similar devices" mounted on trucks. The insurer argued that the "scissor lift" was a device similar to a cherry picker, but the court disagreed. Adopting the

reasoning in an unpublished New Jersey Superior Court, Appellate Division case, *Clemente v. N.J. Transit*, 2015 N.J. Super. Unpub. LEXIS 2599 (N.J. Super. Ct. App. Div. Nov. 12, 2015), which noted OSHA's regulations distinguishing between scissor lifts and cherry pickers, the court in *East Coast Painting* held that a scissor lift is not similar to a cherry picker, and therefore the "Operational Exclusion" did not apply to bar coverage. "[H]ad the insurer intended to exclude the operation of all types of chassis mounted lifting devices from coverage under the auto policy," the court explained, "it could easily have done so."

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