



CHANGE IN NEW YORK INSURANCE LAW NOW REQUIRES SHOWING OF PREJUDICE BY INSURER

On July 21, 2008, New York State Governor David Paterson signed into law a Bill that will shift the tide of insurance law firmly in favor of the policyholder. Commonly referred to as the "No Prejudice" law, New York Insurance Law § 3420 will now permit claimants in personal injury or wrongful death suits to file a claim directly against a defendant insurance company to challenge a disclaimer based on failure to provide timely notice. Effective Jan. 17, 2009, the legislation provides policy holders and injured claimants with the opportunity to dispute an insurer's denial of coverage due to late notice.

LEGISLATIVE HISTORY

This new legislation was previously proposed and passed by the Senate and Assembly in 2007. The Bill was vetoed by former Governor Spitzer due to the inclusion of a proposed amendment to CPLR § 3001 which would permit a party who has brought a claim for personal injury or wrongful death to maintain a declaratory judgment action directly against the defendant insurer. Although Spitzer vetoed the Bill, he saw the importance of legislative reform with respect to the notice and prejudice standard. Shortly after being sworn in, Governor Paterson personally reintroduced the bill and signed it into law with the declaratory provision intact. The key reason for supporting the legislation was to "level the playing field" between the policy holder and insurer. This has been accomplished by prohibiting an insurer from denying coverage for a claim due to late notice unless the insurer is able to show actual prejudice as a result of the delayed notice.

CHANGES TO THE LAW

Under the new law, policy holders may not be denied coverage based on late notice to their carrier unless the delay has caused "material prejudice" to the insurance company. Moreover, if notice is provided to the insurer within two years of the time required under the policy, the burden to show prejudice falls on the insurer. If notice is provided more than two years after the time required under the policy, the burden to show that the insurer is not prejudiced falls on the insured, injured person or other claimant.¹

For the first time in New York State the new law also permits a direct action against an insurance company by an injured claimant, or one other than an insured, without first obtaining a recovery against the insured in an injury action. Section 3420(a)(6) of New York's Insurance Law now permits a direct action against an insurer if the insurer has disclaimed coverage on the ground of late notice, and neither the insurer nor the insured has not commenced a declaratory judgment action within 60 days after denial. An injured party, or other party claiming coverage under the policy, may bring an action directly against the insurer in which the sole question will be the validity of the insurer's late notice disclaimer or denial.

¹NY Ins Law § 3420(c)(2)(C)

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ADMISSIONS INFORMATION

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Section 3420(d)(1) of New York Insurance Law, ("Confirmation of Coverage"), also permits those seeking recovery of damages against an insured due to death or bodily injury to inquire of the insurer whether the insured had a liability insurance policy in effect on the date of the occurrence and the limits of coverage provided under that policy. The insurer has 60 days to respond to this inquiry, and faces the imposition of fees and penalties for noncompliance with the new section of the law pursuant to an amendment Section 2601(a) (the "Unfair Claim Settlement Practices Act"), also enacted as part of the new legislation.

IMPLICATIONS OF THE NEW LAW

The effects of this new legislation are not yet fully known, and it is likely that early litigation will define when an insurance company has been "materially prejudiced." One thing is certain: the statute marks a dramatic shift from prior common law which permitted a carrier to disclaim coverage, based on late notice, without a showing of prejudice. The new legislation clearly favors the policy holder; however, it does not change the benefits of prompt notice to the insured and insurer alike. Prompt notice of a claim is – and has always been - of critical importance both to the policyholder and the insurance company. When a policyholder waits to report a claim, evidence often can go stale, witnesses may disappear and memories may fade, all of which will make it easier for the insurance company to show prejudice in a later suit to disclaim coverage.

The new law speaks to the parties' rights, rather than to the wording or construction of the insurance policy and there appears to be few creative avenues to modify the policy language to address these changes. It will therefore be more critical that ever for insurers to pay close attention to the timing of any notice of claim to determine if – and to establish how - any tardiness may have caused direct and irreparable harm in their investigation of the claim. Immediate steps should be taken, and documented, to learn as much about the claim as possible, not only to aid in the eventual defense of any action for injuries, but also to provide ready proof of the good-faith efforts which may have been thwarted by the untimely notice, thus prejudicing the carriers rights.

Significantly, the Bill will not apply retroactively to policies already issued, but will have prospective effect only. Section 8 of the Bill states that it shall become effective 180 days after it is signed into law, and will apply only to policies issued after that 180-day period. Thus, policies issued prior to 2009 will be governed by traditional common law principles regarding prejudice and direct action claims and policies issued in 2009 will be subject to the new rules.

For more information regarding this change in law, contact David G. Brock at dbrock@jaeckle.com or 716.843.3811.