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New York Enacts Statute Requiring Insurer To Show Prejudice For Late Notice Defense

On July 23, 2008, New York Governor David A. Paterson announced that he signed a bill requiring insurers to establish prejudice when they contend that an insured had failed to provide timely notice of a claim. See Senate Bill 8610; Assembly Bill 11541. The bill changes the long-established "no prejudice" rule in New York. In addition, the bill allows a claimant to bring direct action against the insurer to challenge a late notice defense. The bill also requires insurers to disclose policy limits if requested by a claimant. Existing claims and policies are not affected by the bill, which applies only to "policies issued or delivered" in New York 180 days after the bill became law "and to any action under such a policy…."

Prejudice Requirement

Under the new statute, an insurer will need to establish prejudice when it asserts untimely notice as a coverage defense:

> A provision that failure to give any notice required to be given by such policy within the time prescribed therein shall not invalidate any claim made by the insured, injured person or any other claimant, unless the failure to provide timely notice has prejudiced the insurer….

N.Y. Ins. Law § 3420(a)(5). The statute describes what constitutes prejudice by providing that the "insurer's rights shall not be deemed prejudiced unless the" late notice "materially impairs the ability of the insurer to investigate or defend the claim." N.Y. Ins. Law § 3420(c)(2)(C).

The prejudice requirement does not apply to claims-made policies; such policies "may provide that the claim shall be made during the policy period, any renewal thereof, or any extended reporting period…." N.Y. Ins. Law § 3420(a)(5).

The statute also provides that an "irrebuttable presumption of prejudice shall apply if, prior to notice, the insured's liability has been determined by a court …, by binding arbitration …, or if the insured has resolved the claim or suit by settlement or other compromise." N.Y. Ins. Law § 3420(c)(2)(A). If the presumption does not apply, and notice is provided "within two years of the time required under the policy," the insurer has the burden "to prove that it has been prejudiced…." N.Y. Ins. Law § 3420(c)(2)(A). If notice is provided more than two years "after the time required under the policy," then the insured or claimant has the burden of demonstrating that the insurer has not been prejudiced.

Direct Action

In addition to creating the prejudice requirement described above, the statute also permits a claimant to bring a direct action against the insurer if the late notice defense is at issue. Specifically, "with respect to a claim arising out of death or personal injury…, if the insurer disclaims liability or denies coverage based upon the failure to provide timely notice," then the claimant or

injured party may sue the insurer. N.Y. Ins. Law § 3420(a)(6). The "sole question" in such a suit would be whether the insurer's disclaimer or coverage denial based on late notice is proper. *Id*.

The statute creates an exception to the claimant's ability to bring a direct action. If the insurer or the insured initiates suit to declare the parties' rights within 60 days of the disclaimer or denial, and the claimant or injured party is included as a party in the action, then the claimant or injured party cannot directly sue the insurer. N.Y. Ins. Law § 3420(a)(6).

Disclosure of Policy Limits

The statute also allows a claimant to inquire about the amount of available coverage. This requirement generally does not apply to excess or umbrella policies. N.Y. Ins. Law § 3420(d)(1)(A) (providing that the disclosure requirements apply only to policies subject to Section 3425, other than "excess liability or umbrella policy," or policies "used to satisfy a financial responsibility requirement imposed by law or regulation").

Within 60 days after receiving a written request by a claimant, the insurer is required to "specify the liability insurance limits of the coverage provided under the policy." N.Y. Ins. Law § 3420(d)(1)(B). In addition, if requested by the claimant, the insurer is required to "confirm … whether the insured had a liability insurance policy … in effect with the insurer on the date of the alleged occurrence…." *Id.*

The statute also addresses an insurer's obligations if the claimant does not provide "sufficient identifying information to allow the insurer, in the exercise of reasonable diligence," to determine whether there is a "liability insurance policy that may be relevant to the claim…." N.Y. Ins. Law § 3420(d)(1)(C). In such a case, the insurer must so advise the claimant in writing within 45 days and identify any additional information needed. If the requested information is provided, the insurer must disclose — within 45 days of receipt of the requested information — the policy limits and confirm that a policy was in effect at the relevant time.

Implications

The new statute is significant for several reasons. First, the statute's prejudice requirement for the late notice defense is a reversal of New York law established in a long line of judicial decisions. This change could have a significant effect on many claims. Second, in cases involving a disclaimer based on late notice, insurers need to be aware of the possibility that a claimant can bring a direct action to litigate the validity of the late notice defense. Third, insurers will need to ensure that the disclosure requirements discussed above, including related deadlines, are followed.

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