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Laws on Late Notice of Insurance Claims Improved

On July 21, 2008, New York Governor David Paterson signed into law Chapter 388 of the Laws of New York 2008. This legislation contains amendments to §3420 of New York's Insurance Law and §3001 of the New York Civil Practice Law and Rules that, among other things, significantly improve New York law on late notice of insurance claims.

Chapter 388 is a watershed event in New York insurance law that is long overdue. Under New York's draconian "no prejudice" rule, policyholders often lost their insurance coverage due to technical breaches of insurance policy notice requirements that had no material impact on the insurance company.

The amendments, applicable only to liability insurance policies issued or delivered in New York covering personal injury or property damage, establish a "material prejudice" standard that makes it much harder for insurance companies to deny coverage on late notice grounds.

In addition, tort victims with personal injury or wrongful death claims may file a declaratory judgment action to determine the availability of insurance coverage where coverage has been denied for late notice.

Chapter 388 will take effect with regard to insurance policies issued after Jan. 19, 2009.

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The Old 'No Prejudice Standard'

• ***And Late Notice in New York.*** Prior to the current legislation, the consequences of late notice under New York law could be harsh. New York was among a minority of jurisdictions under whose law insurance coverage could be forfeited due to late notice even without any demonstrable harm to the insurance company. Absent a legally recognized excuse, such as a reasonable belief that the insured would not face liability, that the policy did not provide coverage, or other extenuating circumstance, late notice meant forfeiture of coverage. In some cases, even short delays of several weeks were found unreasonable and a proper basis for coverage denial.

In 1972, in the case of *Security Mutual Insurance v. Acker-Fitzsimmons Corp.*,[1] the New York Court of Appeals held that absent a valid excuse, failure to satisfy the notice provision in an insurance policy constituted grounds for denial of coverage. In that case, a building owner had an insurance policy mandating that he provide notice to his insurer "as soon as practicable" after any occurrence that caused injury.

When a fire occurred in the owner's building, three firefighters were injured. The owner heard "rumors" that firefighters were injured, and informed his insurance broker, telling him to inform the insurer. Believing that no concrete claim had been made, and since he thought there was "no liability anyway," the broker never informed the insurer. Even when the broker informed the insurer that there had been a fire, in anticipation of renewing the insurance policy, he never informed the insurer of the injuries. Nineteen months after the fire, the injured firefighters brought suit against the owner, who in turn notified the insurer.

The court held that the owner had violated the notice provision, as his notice was unreasonably late. Despite the owner and broker's good faith belief that there was no risk of liability, such belief was found unreasonable as it was not based upon any investigation. As such, they had an obligation to inform the insurer, and due to their breach of this obligation, the insurer was absolved from coverage. Prejudice to the insurer was not discussed.

The Court of Appeals continued to follow this reasoning through 2005, when it decided *Great Canal Realty Corp. v. Seneca Insurance Co.*[2] The court reiterated the holding that when a liability insurance policy contains a provision mandating notice "as soon as practicable" after an occurrence that could lead to liability, an insured must conduct reasonable investigation. The issue of prejudice was not addressed, and the insurer was excused from coverage. See also *St. Charles Hospital v. Royal Globe Insurance*.[3]

New York courts began shifting towards a material prejudice standard with respect to late notice beginning in the 1990s. The shift began with regard to reinsurance (as opposed to primary insurance coverage) in *Unigard v. North River*,[4] a Court of Appeals case from 1992. Then, in 2002, in *Brandon v. Nationwide*,[5] the Court of Appeals extended the material prejudice standard to "disclaimers of late service of legal papers," recognizing that New York had been one of the few jurisdictions that failed to consider the issue of prejudice.

Expectations that New York's highest court would complete the shift to a material prejudice standard were soon disappointed.

In the 2005 case of *Argo Corp. v. Greater New York Mutual Ins. Co.*,[6] the Court of Appeals upheld the no prejudice standard in the context of late notice of suit (as opposed to notice of occurrence) for liability insurance policies, finding that "late notice of lawsuit in the liability insurance context is so likely to be prejudicial to these concerns as to justify the application of the no-prejudice rule." In a companion case, *Rekemeyer v. State Farm*,[7] the Court of Appeals held that a showing of prejudice by the insurance company would be required where a policyholder gave timely notice of the occurrence giving rise to a claim, but merely failed to give timely notice of a resulting lawsuit.

Continued application of the no prejudice rule in many liability insurance cases demonstrated a need for legislative revision, a result finally achieved with enactment of Chapter 388.

New Rule and Its Impact

• ***The New Prejudice Requirement.*** At the core of Chapter 388 is a rule stating that, with regard to occurrence-based liability policies addressing personal injury or injury to property, all policies issued in New York must contain a provision that failure to give timely notice will not invalidate a claim unless it prejudices the insurer. In addition the policy must provide with respect to wrongful death or personal injury claims, that if the insurer disclaims liability based on late notice, a claimant may file a direct action against the insurer on the issue of late notice, unless the policyholder or insurer initiates an action within 60 days of the disclaimer, naming the claimant as a party to the action.

Chapter 388 sets forth specific guidelines, definitions, and time-frames for late notice and prejudice to an insurer, with regard to occurrence-based policies. Prejudice will only be found where the insured's late notice "materially impairs the ability of the insurer to investigate or defend the claim." If notice is provided to an insurer within two years of the time required by the policy, the insurer has the burden of demonstrating prejudice. If notice is provided later than two years after the required time, the burden falls on the policyholder or the claimant. An irrebuttable presumption of prejudice will apply only if, prior to notice, the insured's liability has been determined in court, or by arbitration or settlement.

The laws, applicable only to liability insurance policies…in N.Y. covering personal injury or property damage, establish a "material prejudice" standard that makes it harder for insurance firms to deny coverage on late-notice grounds.

Chapter 388 does contain an exception for claims-made policies. Such policies may contain provisions stating that "claims must be made" during a policy period, or the policy's renewal or extended reporting period. Pursuant to New York Insurance Regulation 121, claims are made under a claims-made policy when the insurer first receives notice, either from the third-party claimant or the policyholder.[8] As such, Chapter 388 carves out an exception from the "material prejudice" rule for claims-made policies, permitting policies to contain clauses that mandate reporting during the life of the policy or extended reporting period.

Declaratory Judgment Rule

Under Chapter 388, a party with a wrongful death or personal injury claim against a policyholder can now bring a claim for declaratory judgment directly against the policyholder's insurer if the insurer has disclaimed coverage due to late notice of the claim to the insurer, and neither the insured nor the insurer has filed a declaratory judgment action within 60 days of a disclaimer of coverage. Under the previous law, an injured party could only file direct action against a tortfeasor's insurer if a judgment against the tortfeasor remained unsatisfied for at least 30 days. While the new statute will not enable all aggrieved parties to pursue direct actions against insurers, it will enable a limited class of injured parties to determine coverage, and as such, whether litigation in pursuit of relief is worthwhile.

Conclusion

While coverage may still be lost on grounds of late notice, some of the more inequitable forfeitures may be avoided. Policyholders must still be vigilant in providing timely notice to their insurers but should face better prospects where coverage denial is predicated on late notice grounds. The new law only applies to liability insurance policies covering bodily injury or property damage issued or delivered in New York. It will not apply to claims made policies or other types of coverage such as directors and officers liability, professional liability of first party property policies that do not fall in this category.

1. 293 NE2d 76 (N.Y. 1972).
2. 833 NE2d 1196 (N.Y. 2005).
3. 795 N.Y.S.2d 343, (N.Y. App. Div. 2005). The Appellate Division reversed a lower court decision, holding that failure to notify an insurer in contravention of a notice provision in an insurance policy, allows the insurer to disclaim coverage. Id.
4. 594 NE2d 571 (N.Y. 1992).
5. 769 NE2d 810 (N.Y. 2002).
6. 827 NE2d 762 (N.Y. 2005).
7. 828 NE2d 970 (N.Y. 2005).
8. N.Y. Comp. Codes R. & Regs., tit. 11 §73.3(a)(1997).