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## INSURANCE COVERAGE UPDATE Notice/Prejudice & Disclaimers

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Most policies of insurance, whether personal or commercial, auto or homeowners, include a condition requiring an insured to provide notice of an occurrence or loss to the insurer as soon as practicable or as soon as reasonably possible. Absent an excuse for the delay, notice provided by the insured more than a month after the loss is typically held to be untimely, often as a matter of law. This is exemplified by the 1<sup>st</sup> Department's recent decision in *Juvenex Ltd. v. Burlington Ins. Co.*, 2009 NY Slip Opinion 05166 (1<sup>st</sup> Dept. 2009).

In *Juvenex*, the court held that the insured's delay of two months in giving the insurer notice of the claim was unreasonable as a matter of law, citing *2130 Williamsbridge Corp. v. Inner State Indem. Co.*, 55 AD 3d 371 (2008). Addressing the right of an injured party to provide notice to the insurer, the court declined to consider the plaintiff's argument that notice of the claim provided to the defendant by the injured person was timely, noting that, in any event, it would consider the injured claimant's delay in providing notice to the insurer also unreasonable as a matter of law.

An even shorter delay was held to be unreasonable in *Young Israel v. Guideone Mutual Insurance Company*, 2008 WL 2277599 (1st Dept. 2008), where the court held that the insured's 40 day delay in notifying the insurer of the accident was unreasonable as a matter of law. The court rejected the insured's proffered excuse for the delay, to wit, a reasonable belief in nonliability, as the accident involved a rear end collision by the insureds and the claimant was removed from the accident by ambulance.

While, as demonstrated by the court's decision in *Young Israel, supra*, a good faith belief of non-liability may excuse or explain a failure to give timely notice, the insured bears the burden of demonstrating that the delay in giving notice was reasonable. *Travelers Indemnity Company v. Worthy*, 281 AD2d 411 (2<sup>nd</sup> Dept. 2001). The issue of whether an insured possesses a reasonable good faith belief as to its non-liability is ordinarily a question of fact. *Argentina v. Otsego Mutual Fire Insurance Company*, 86 NY2d 748 (1995).

In *Argentina*, although the insureds notified their liability insurer 171 days after a slip and fall accident by the insureds' brother, the court concluded that the insureds had a reasonable good faith belief in non-liability, based, in part, on the close familial relationship between the insureds and the accident victim.

In *Kambousi Rest., Inc. v. Burlington Ins. Co.*, 2009 NY Slip Op 00241 (1<sup>st</sup> Dept. 2009), the court held the insured's notice given 6 months after the incident was excused based upon his reasonable belief in nonliability and the insurer was thus obligated to defend and, if necessary, indemnify their insured.

In *422-428 West 46<sup>th</sup> Street Owners, Inc. v. Greater NY Mutual Ins. Co.*, 2008 Slip Opinion 08257 (1<sup>st</sup> Dept. 2008), the court held that despite a ten month delay by the insured in notifying the insurer of the incident, questions of fact existed as to whether the failure was excused based upon the insured's good faith, reasonable belief of non-liability.

The caselaw demonstrates that the courts strictly construe the insured's proffered excuses for their delay in providing notice, though not as strictly as the courts construe the timeliness of an insurer's denial.

### **Insurance Law 3420 Amendments**

In July 2008, New York's governor signed into law legislation which significantly altered an insurer's ability to rely on late notice as a defense to coverage. The law imposes a prejudice requirement on insurers who seek to disclaim coverage based upon their insured's late notice of the loss. Until the recent amendment to Insurance Law § 3420, New York was in the minority of states that did not require an insurer to demonstrate that they were prejudiced by the insured's untimely notice of the loss or claim in order to disclaim coverage. The following is a summary of the key points of the law.

#### **Effective Date**

The law applies to claims made under policies issued or renewed 180 days after the bill became law, to wit, January 17, 2009. Thus a claim that occurred on January 30, 2009 is not governed by the prejudice requirement unless the policy under which defense and indemnity is sought either inception or was renewed after January 17, 2009.

#### **Prejudice**

The legislation constitutes a significant change to New York law by imposing a prejudice requirement on an insurer seeking to disclaim coverage based upon the insured's late notice of the claim or occurrence. To establish prejudice, the insurer must demonstrate that the failure to timely provide notice materially impairs the ability of the insurer to investigate or timely defend the claim.

The law imposes a burden of proof such that if notice is given within 2 years of the time required, there is a presumption that the insurer has not been prejudiced and the burden will be upon the insurer to demonstrate prejudice. If the notice is given more than two years after it was required, prejudice is presumed and the insured, injured party or other claimant has the burden to show that the insurer was not prejudiced.

An irrebutable presumption of prejudice will apply where the insured's liability has been established by a court or by binding arbitration or where the insured has resolved the claim through settlement or otherwise.

### **Direct Action**

The legislation also overrules, at least partially, the Court of Appeals' holding in *Lang v. Hanover*, 3 NY3d 350 (2004). In particular, a new §3420(a)(6) allows the injured party in bodily injury and wrongful death cases to bring a direct action to establish the validity of the insurer's disclaimer or denial where the denial is based upon the failure to provide timely notice and neither the insurer or insured has commenced a declaratory judgment action within sixty (60) days of the denial

### **Policy Disclosure**

Finally, the law obligates insurers issuing certain types of coverage to disclose the existence of a policy and its limits. Specifically, with respect to liability policies subject to §3425 of the Insurance Law, that is, personal lines auto or homeowner's policies, but excluding excess or umbrella policies, or a policy used to satisfy a financial responsibility requirement imposed by law, an insurer who receives a written request for coverage confirmation by an injured person or any other claimant must respond within sixty (60) days advising whether the insured had a policy and if so, its limits.

If the insurer does not have sufficient information to allow the insurer, with reasonable diligence to provide the information, the insurer shall advise the person making the inquiry. Once the information is thereafter provided, the insurer has an additional (45) days to respond unless a court or arbitrator has granted the insurer additional time. A failure to comply with the written request to confirm coverage could result in Insurance Department sanctions. There is much uncertainty on the part of the industry regarding this aspect of the legislation and it is anticipated that the Insurance Department will provide further guidance.

### **Timeliness of Disclaimer**

While the insured has an obligation to comply with its contractual duty to provide timely notice of loss and suit, Insurance Law §3420 requires an insurer seeking to disclaim to do so promptly where the policy was issued or delivered in New York, the loss happened in New York and the claim seeks recovery for damages for bodily injury or death. The requirement has been strictly construed by the courts, such that disclaimers issued in excess of 30 days from the date that the insurer knew or should have known of the policy exclusion or breach of condition will be held untimely, thereby nullifying the coverage denial.

In *New York City Housing Authority v. Underwriters at Lloyd's, London*, 2009 NY Slip Opinion 02977 (2<sup>nd</sup> Dept. 2009), the court held that the insurer's disclaimer issued more than three months after the plaintiff sent notice of the claim and 73 days after the plaintiff turned over the file in the underlying case was not compliant with Insurance Law §3420(d)'s requirement that a disclaimer be issued as soon as is reasonably possible. The court further found that the

defendant insurer failed to raise a question of fact by asserting that the delay was necessitated by its investigation since the ground for the disclaimer was apparent, at the latest, when the insurer received the case file. In addition to its failure to demonstrate a need for the investigation, the insurer did not provide detailed information demonstrating that the investigation was conducted diligently and further, the insured's failure to provide the insurer with timely notice of the occurrence did not excuse the defendant's unreasonable delay in disclaiming.

The Court of Appeals in *Continental Casualty Co. v. Stradford*, 2008 Slip Opinion 09256 (2008) addressed the timeliness of the disclaimer of coverage issued by Continental based upon the alleged lack of cooperation by dentist/insured, Terrance Stradford, under a professional liability insurance policy. The sole issue before the Court of Appeals was the timeliness of the disclaimer. The court, noting the difficulty in establishing the date from which the timeliness of the disclaimer is measured in a lack of cooperation situation, and the heavy burden placed upon an insurer to sustain this particular disclaimer of coverage, agreed that the time when Continental's letters were returned unclaimed was the date from which the timeliness of the disclaimer should be measured. Thus, the court held that a question of fact existed as to the reasonableness of the approximate two month delay in issuing the disclaimer of coverage.

In *Industry City Mgmt. v. Atlantic Mutual Ins. Co.*, 2009 NY Slip Opinion 05681 (1<sup>st</sup> Dept. 2009), the court held that a letter written to Atlantic Mutual on Industry's behalf by its own insurer's claims administrator constituted timely notice to Atlantic Mutual within the meaning of Insurance Law §3420 and, as such, the insurer was obligated to issue a timely disclaimer of coverage. The disclaimer was not issued until seven months later and thus, the court held that it was untimely and therefore ineffective.

In *Guzman v. Nationwide Mutual Fire Ins. Co.*, 2009 NY Slip Opinion 04193 (2<sup>nd</sup> Dept. 2009), the court reversed the trial court and granted the plaintiff's motion for summary judgment in a direct action pursuant to Insurance Law §3420(a)(2) which sought recovery of an unsatisfied judgment against the defendant's insured. Interestingly, it appears from the brief decision that the first notice of the loss was the insurer's receipt of a judgment with notice of entry against their insured. The court held that the defendant's 51 day delay before disclaiming coverage on April 4, 2003 on the grounds of late notice was unreasonable as a matter of law, citing *First Financial Ins. Co. v. Jetco Contracting Corp.*, 1 NY3d 64; *Sirius American Ins. Co. v. Vigo Construction Co.*, 48 AD3d 450; *Reyes v. Diamond State Ins. Co.*, 35 AD3d 830; *Matter of Allstate Ins. Co. v. Swinton*, 27 AD3d 462; *Moore v. Ewing*, 9 AD3d 484. Thus, the court held that the plaintiff's motion for summary judgment on the complaint should have been granted.

## Conclusion

The amendments to Insurance Law §3420 represent a dramatic change to an insurer's ability to disclaim coverage based upon late notice, requiring, most notably, an insurer to demonstrate prejudice to support such a disclaimer. Based upon the burden of proof included in the legislation, it is expected that late notice denials will decrease significantly once the effect of the new law is realized. With respect to the timeliness of disclaimers, the courts continue to invalidate denials issued more than 30 days after the basis to disclaim was known or should have been known to the insurer.