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HEADLINE: Determining the Timeliness of a Disclaimer of Coverage

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BODY:

An insurance carrier's denial of liability coverage to its insured will have dramatic effects on the course of a personal injury case and thus it is not surprising that the timeliness of an insurer's disclaimer of coverage has generated considerable litigation and commentary. Insurance Law Section 3420[d] imposes upon an insurer the obligation to provide "written notice as soon as is reasonably possible of such a disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant." It is applicable only to liability policies delivered or issued for delivery in New York, affording coverage for death or bodily injury and arising from an accident occurring within the state.

Disclaimers not within the purview of Insurance Law Section 3420, property damage claims, for example, are not subject to its stringent requirements. [n1]

While in certain cases the courts have held that delays as minimal as 30 or 45 days may nullify a disclaimer, typically, the timeliness of the disclaimer is a question of fact. [n2] "It is only in the exceptional case that the issue may be decided as a matter of law," the court ruled in *Aetna Casualty & Surety Company v. Brice*. [n3]

In *Sphere v. Block*, [n4] a 45-day delay was held reasonable; in *Dryden Mutual Insurance Company v. Greaser*, [n5] it was 27 days; and it was less than one month in *Kramer v. Geico*. [n6]

Timeliness Measurement

The timeliness of the disclaimer is measured from the date the insurer first learns of the accident or from the time the insurer becomes aware of sufficient facts to disclaim coverage.

In determining the efficacy of the disclaimer, the court will evaluate the actions of the insurer and the reason offered for the delay. [n7]

In *2540 Associates, Inc. v. Assicurazioni, Generali, Spa*, [n8] the court held:

While plaintiff is correct that a two-month delay in issuing a notice of disclaimer is unreasonable ... the moment from which the timeliness of an insurer's disclaimer is measured is the date on which it first received information that would disqualify the claim, not the date on which it receives the insured's notice of claim.

Where the grounds for disclaimer are immediately apparent, such as late notice, a disclaimer issued some 30 days after notice of the accident was received has been held unreasonable as a matter of law.

In *West 16th Street Tenants Corp. v. Public Service Mutual Insurance Company*, [n9] Public Service disclaimed based on the failure of the plaintiff to give notice of any occurrence that might give rise to a claim as soon as practicable. The five-month delay by the plaintiff in providing notice was "obvious from the face of the notice of claim and the accompanying Complaint."

Previously, the court in *Nationwide Mutual Insurance Company v. Steiner* [n10] held that a 41-day delay in disclaiming coverage for failure to provide timely notice of accident was untimely as a matter of law. Such minimal delays, however, apply only where the insurer provides no explanation or excuse for its delay in disclaiming coverage. See *Hartford Insurance Company v. County of Nassau*, [n11] where a delay of two months was held unreasonable as a matter of law. As noted by the court in *Hartford*:

Although a two [2] month delay may often be easily justified, if in fact there be justification, no attempt was made to do so in this case, and speculation as to possible legitimate reasons for the delay is inappropriate. It is the responsibility of the insurer to explain its delay; it is not the function of the Courts to engage in speculation as to what might have happened in order to remedy a failure of proof.

Investigation Excuse

A frequent excuse proffered by the insurer is the need to engage in investigation. [n12] In *State Farm Mutual Automobile Insurance Company v. Daniels*, [n13] the Appellate Division, Fourth Department, determined that a disclaimer issued 56 days after the carrier was first notified of the accident and three weeks after the insurance carrier's investigation was complete, was reasonable.

In contrast, the Third Department in *Squires v. Robert Marini Builders, Inc.* [n14] invalidated a disclaimer issued 42 days after notice of claim was given, despite the insurer's argument that it needed to investigate the claim before issuing its disclaimer. The court found that the insurer had the information necessary to immediately determine whether one of its policy exclusions applied.

As evidenced by *Squires*, merely citing a need for investigation will not suffice and the court will look beyond the justification to determine its legitimacy. See *Consolidated Edison v. Hartford Insurance Company*, [n15] where a four-and-a-half-month delay from the issuance of an internal memo summarizing the grounds for disclaiming was untimely, and *Mt. Vernon Fire Insurance Company v. City of New York*, [n16] where an 83-day delay from receipt of an investigator's report was held untimely.

Reasonableness is determined based upon the circumstances of each case and requires a determination as to whether the insurer acted diligently in completing its investigation.

[n17]

In *Federal Insurance Company v. Provenzano*, [n18] the insurer disclaimed based upon the livery exclusion in its policy. The insurer received its investigator's report approximately three months after the accident, but did not disclaim for another four months, citing a desire to obtain statements from two passengers who were on the bus on the date of the accident. The court disagreed, finding that the insurer had sufficient facts to disclaim upon receipt of its investigator's initial report and unreasonably waited to disclaim.

An inability to properly investigate an incident may provide a justification for a brief delay in disclaimer. [n19]

Furthermore, the ability of an insurer to conduct an investigation into other grounds for disclaimer so as to avoid piecemeal denials of coverage has been upheld. [n20]

While an insurer is afforded a reasonable time to investigate a claim and determine if a disclaimer is warranted, a reservation of rights has no relevance to the question of whether the insurer has timely sent a notice of disclaimer of liability or denial of coverage. [n21] A reservation of rights does not toll the time to issue a disclaimer and is certainly not a substitute for a disclaimer.

Required Contents

While there has been considerable litigation vis- -vis the timeliness of a disclaimer, so to has there been substantial litigation into the issue of its required contents and more particularly, its specificity.

In the seminal case *General Accident v. Cirucci*, [n22] notice was provided by the injured third party but the disclaimer cited only the insured's failure to report the accident. The court, strictly interpreting the specificity required under Insurance Law Section 3420, held that the defense of late notice by the injured third-party was not preserved. [n23]

This applies, however, only where the injured party has exercised its independent right to provide notice to the insurer. [n24] Discussing the specificity required in a disclaimer, the court in *Abreu v. Huang* [n25] held:

An insurer's justification for denying coverage is strictly limited to those grounds stated in the notice of disclaimer. ... An insurer which has denied liability on a specific ground may not thereafter shift the basis for its disclaimer to another ground known to it at the time of its original repudiation.

However, a second disclaimer may set forth additional facts supporting the grounds for the initial disclaimer.

Finally, we would feel remiss were we not to mention disclaimers in the context of uninsured/underinsured coverage. While a petition to stay arbitration may serve as a notice of disclaimer, [n26] the carrier remains obligated to timely disclaim. [n27]

Conclusion

An insurance carrier must exercise diligence in investigating a claim that has been presented and must conduct a prompt and thorough investigation in order to comply with Insurance Law Section 3420 and its requirements for timely and specific disclaimers of

coverage.

While piecemeal denials are disfavored over one comprehensive denial of coverage, the investigation engaged in by the carrier must be legitimate and not just an attempt to subvert the obligation to issue a timely disclaimer.

FootNotes:

[n1]. [Smith v. General Accident Insurance Company](#), 295 AD2d 738, 744 NYS2d 59 [3rd Dept. 2002].

[n2]. [Allstate Insurance Company v. Gross](#), 27 NY2d 263 [1970].

[n3]. [72 AD2d 927](#), [422 NYS2d 203](#) [4th Dept. 1979].

[n4]. [265 AD2d 78](#); [705 NYS2d 623](#) [2nd Dept. 2000].

[n5]. [269 AD2d 792](#); [702 NYS2d 479](#) [4th Dept. 2000].

[n6]. [269 AD2d 567](#); [703 NYS2d 514](#) [2nd Dept. 2000].

[n7]. See [State of New York v. General Star Indemnity Company](#), 299 AD2d 537; [751 NYS2d](#)

[47](#) [2nd Dept 2002]; [Kramer v. Interboro Mutual Indemnity Insurance Company](#), 176 AD2d 308, 574 NYS2d 575 [2nd Dept. 1991]; [Hartford Insurance Company v. County of Nassau](#), 46 NY2d 1028 [1979]; [New York Central Mutual Fire Insurance Company v. Markowitz](#), 147 AD2d 461, 37 NYS2d 571 [2nd Dept. 1989]; and [Massachusetts Bay Insurance Company v. Pendleton](#), 159 AD2d 770, 551 NYS2d 992 [3rd Dept. 1990].

[n8]. [271 AD2d 282](#); [707 NYS2d 59](#) [1st Dept. 2000].

[n9]. [736 NYS2d 34](#), [290 AD2d 278](#) [1st Dept. 2002].

[n10]. [199 AD2d 507](#), [605 NYS2d 391](#) [2nd Dept. 1993].

[n11]. [46 NY2d 1028](#) [1979].

[n12]. [Allstate Insurance Company v. Souffrant](#), 221 AD2d 434, 633 NYS2d 575 [2nd Dept. 1995].

[n13]. [269 AD2d 860](#); [703 NYS2d 796](#) [4th Dept. 2000].

[n14]. [293 AD2d 808](#), [739 NYS2d 777](#) [3rd Dept. 2002].

[n15]. [203 AD2d 83](#), [610 NYS2d 219](#) [1st Dept. 1994].

[n16]. [236 AD2d 296](#), [653 NYS2d 582](#) [1st Dept. 1997].

[n17]. See [Allstate Insurance Company v. Souffrant](#), *supra* at note 12; [Nova Casualty Company v. Charbonneau](#), 185 AD2d 490, 585 NYS2d 876 [3rd Dept. 1992].

[n18]. [751 NYS2d 567](#), 2002 App. Div. LEXIS 12326 [2nd Dept. 2002].

[n19]. [Interboro Mutual Indemnity Insurance Company v. Gatterdum](#), 163 AD2d 788, 558 NYS2d 749 [3rd Dept. 1990 citing [Norfolk and Dedham Mutual Fire Insurance Company v. Petrizzi](#), 121 AD2d 276, 503 NYS2d 51 [1st Dept. 1986].

[n20]. [Wilczak v. Ruda & Capozzi, Inc.](#), 203 AD2d 944, 611 NYS2d 73 [4th Dept. 1994]; [2540 Associates, Inc.](#), *supra* at note 8.

[n21]. [Hartford Insurance Company v. County of Nassau](#), 46 NY2d 1028 [1979]; [Allstate Insurance Company v. Gross](#), 27 NY2d 263 [1970].

[n22]. [46 NY2d 862](#) [1979].

[n23]. [State Farm Mutual v. Cooper](#), 2003 N.Y. Slip Op. 11680 [2nd Dept. 2003]; [Legion Insurance Company v. Weiss](#), 282 AD2d 576, 723 NYS2d 235 [2nd Dept. 2001]; [Vanegas v. Nationwide Mutual Fire Ins Co.](#), 282 AD2d 671, 723 NYS2d 516 [2nd Dept. 2001]; [Hazen v. Otswego Fire Insurance Company](#), 286 AD2d 708, 730 NYS2d 156 [2nd Dept. 2001]; [Utica Mutual Insurance Company v. Gath](#), 265 AD2d 805, 695 NYS2d 839 [4th Dept. 1999];

[Eagle](#)

[Insurance Company v. Ortega](#), 251 AD2d 282, 674 NYS2d 56 [2nd Dept. 1998].

[n24]. [Legion](#), *supra* at note 23, and see [Agway Insurance Company v. Alvarez](#), 258 AD2d 487, 684 NYS2d 635 [2nd Dept. 1999].

[n25]. [751 NYS2d 583](#), 2002 App. Div. 12391 [2nd Dept. 2002].

[n26]. [Aetna Casualty v. Scirica](#), 170 AD2d 448, 565 NYS2d 557 [2nd Dept. 1991]; [Allstate v. Jimenez](#), 78 NY2d 1054 [1991].

[n27]. [Aull v. Progressive Cas. Inc. Co.](#), 300 AD2d 302, 751 NYS2d 292 [2nd Dept. 2002].