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# Developments In New York Insurance Law: New York Joins States That Require Prejudice To Insurers For Disclaimer of Coverage Based on Late Notice; Allows Direct Actions Against Insurers

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**OVERVIEW**

On July 23, 2008, New York Governor Paterson signed into law amendments to § 3001 of the New York Civil Practice Law and Rules and § 3420 of the New York Insurance Law to (i) prohibit certain liability insurers from denying coverage for a claim based upon the failure to provide timely notice, unless the insurer suffers "prejudice" as a result of the delayed notice, and (ii) permit a claimant in a personal injury or wrongful death suit to maintain an action directly against an insurer to challenge the insurer's denial of coverage based on the failure to provide timely notice. New York Senate Bill 8610; New York Assembly Bill 11541.

**LATE NOTICE**

New York courts historically have held, with minor exceptions, that an insured's compliance with the notice provisions of an insurance policy operates as a condition precedent to coverage and that an insurer need not show prejudice to rely on the defense of late notice. *See Security Mut. Ins. Co. of New York v. Acker-Fitzsimons Corp.*, 31 N.Y.2d 436, 440-41 (1972); *Great Canal Realty Corp. v. Seneca Ins. Co., Inc.*, 5 N.Y.3d 742, 743 (2005); *Rekemeyer v. State Farm Mut. Auto. Ins. Co.*, 4 N.Y.3d 468, 476 (2005). The new legislation more closely aligns New York with the majority of other states' position on the notice-prejudice rule.

The amendment to New York Insurance Law § 3420 provides that failure to give notice of a claim to an insurer within the time period prescribed in the policy will not invalidate the claim unless the insurer can show that it was prejudiced by the late notice. The insurer's rights would not be considered prejudiced unless the untimely notice "materially impairs the ability of the insurer to investigate or defend the claim." If notice is given within two years of the time required by the policy, the burden of proof regarding prejudice rests on the insurer and if later, the insured. If notice is provided to the insurer after the insured's liability is determined by a court or arbitrator, or if the insured has settled the claim, then an irrebuttable presumption of prejudice would apply. Expressly exempted from the prejudice requirement are claims-made policies, which the legislation states may still "provide that the claim shall be made during the policy period, any renewal thereof, or any extended reporting period."

**DIRECT ACTIONS**

The new legislation also affects New York law regarding direct actions against insurers. Under New York Insurance Law § 3420(a)(2), a claimant previously could sue an insurer directly only when the claimant had obtained judgment against the insured and the judgment remained unsatisfied for 30 days. Now, a claimant in an action arising out of personal injury or wrongful death may sue an insurer directly, and prior to obtaining a judgment against the insured, if the insurer disclaims liability or denies coverage based on the failure to provide timely notice. This pre-judgment direct action would be limited, however, to challenging the insurer's denial of coverage based on the failure to provide timely notice. Moreover, the action would be prohibited if within 60 days following the disclaimer or denial of coverage, the insured or insurer commences a declaratory judgment action naming the injured person or other claimant as a party to the action.

The amendments also establish a process for a claimant to receive confirmation from an insurer that the insured had an insurance policy in effect on the alleged occurrence date and the limits of the policy.

**EFFECTIVE DATE**

The amendments will take effect 180 days after they are enacted into law, and apply to policies issued or delivered in New York on or after such date and to any action maintained under such a policy.

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