



## Insurance and Reinsurance Legal Update

### **New York Joins Majority of States in Requiring Prejudice to Deny Coverage for "Late Notice" under Occurrence Policies - and Other Changes to New York Insurance Law**

On July 23, 2008, the governor signed into law a bill that amends New York Insurance Law § 3420, instituting a prejudice requirement for an insurer's denial of a personal injury or wrongful death claim based on the insured's or claimant's late notice of the claim under "occurrence" policies. The law takes effect on January 19, 2009 and will apply to occurrence-based policies *issued or delivered in New York* after that date. The Insurance Department will be promulgating regulations to implement the law.

#### **Prejudice Required to Disclaim Based on Late Notice**

A new subdivision of § 3420(a)(5) was enacted, which provides 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, the injured party or any other claimant *unless the failure to provide timely notice has prejudiced the insurer*.

To find prejudice, the insurer must prove that the failure to timely provide notice to the insurer materially impairs the ability of the insurer to investigate or timely defend the claim. See § 3420(c)(2). The prejudice requirement does not apply to claims made policies.

#### **Burdens of Proof to Demonstrate Prejudice**

Under the new law, an insurer has the burden of proving it was prejudiced if the late notice was provided within two years of the date on which the insured or claimant should have provided notice of the occurrence or claim under the terms of the policy. The burden shifts to the claimant and/or insured if notice was provided more than two years after the time for notice set forth in the policy. If, however, the insured's liability was determined by a court or arbitrator before notice was provided or if the insured settled a case prior to notifying the insurer, there is an irrebutable presumption of prejudice regardless of when notice was given.

Because most "occurrence" policies require that notice be given "as soon as practicable" (or other similar language), the exact date on which the burden shifts to the insured will be difficult to ascertain with precision. Future regulations may further clarify this part of the statute.

#### **No Quid Pro Quo - Insurers Still Must Timely Disclaim or Coverage Defenses Invalid**

There is no *quid pro quo* for insurers in this law. The amendments to the statute do not alter an insurer's obligation to provide *prompt* notice (generally within 30 days) to a claimant or insured of a disclaimer or its coverage defenses. Untimely disclaimers will still result in the forfeiture of coverage defenses, based on policy conditions and exclusions.

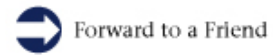
#### **Additional Changes: (1) Limited Direct Action for Claimants and (2) Obligation to Confirm Coverage**

Two additional changes to the Insurance Law are noteworthy:

- Personal injury claimants may now file a direct action against an insurer before judgment enters in the liability lawsuit on the sole question of coverage where late notice is the basis of a denial. All other actions against an insurer must await judgment in the liability lawsuit.
- Primary personal lines insurers now have an obligation to confirm coverage within 60 days of receipt of a written request by a personal injury claimant. If an insurer does not have sufficient information to confirm coverage, the insurer must request the necessary information within 45 days of receipt of notice. The insurer then has an

additional 45 days to confirm coverage upon receipt of the necessary information.

For more information about this update, please contact:



**Elizabeth C. Sackett**

Robinson & Cole LLP  
One Boston Place  
Boston, MA 02108  
617-557-5946

[esackett@rc.com](mailto:esackett@rc.com)

**Barbara O'Donnell**

Robinson & Cole LLP  
One Boston Place  
Boston, MA 02108  
617-557-5945

[bodonnell@rc.com](mailto:bodonnell@rc.com)

**Diane L. Bucci**

Robinson & Cole LLP  
695 East Main Street  
Stamford, CT 06904  
203-462-7558

[dbucci@rc.com](mailto:dbucci@rc.com)

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