

## **Amendment to New York Insurance Law Requires Insurers to Prove Prejudice in Order to Deny Coverage for Late Notice**

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On July 23, New York Governor David A. Paterson approved a revision to New York's Insurance Law heralding important and long-awaited changes in favor of policyholders.

### **Revised Section 3420**

The new law revises Section 3420 of New York's Insurance Law bringing it into line with the majority of states which require a liability insurer to prove that it has been prejudiced by late notice in order to deny coverage on that basis. Previously, an insurer could avoid coverage if it could demonstrate that the insured had provided untimely notice. Now, if an insurer receives notice of a claim by or on behalf of an insured within two years of that claim, the insurer cannot avoid its duty to defend unless it can prove that it has been prejudiced by the late notice.

To prove prejudice, the insurer must show that its ability to investigate or defend the claim has been materially impaired. Ins. § 3420(c)(2)(C). If notice of a claim is received more than two years after the claim is filed, the burden shifts to the insured to show that the insurer has not been prejudiced. Also, and consistent with the majority rule in the United States, an irrebuttable presumption of prejudice applies if, before providing notice, "the insured's liability has been determined by a court . . . or binding arbitration . . . or if the insured has resolved the claim or suit by settlement or other compromise." Ins. § 3420(c)(2)(B).

The new law also provides:

- A plaintiff in a bodily injury or wrongful death action may ask the defendant's liability insurer(s) for written confirmation that a policy was issued to the defendant and the amount of coverage provided by the policy, and failure to provide the requested information can subject the insurer(s) to liability for unfair claim settlement practices. Ins. § 3420(d)(1)(B) and § 2601(a)(6).
- A plaintiff may bring a direct action against an insurer seeking declaratory relief challenging a denial of coverage based on late notice in the event that the policyholder does not bring such an action. Ins. § 3420(a)(6).

- There is no change in claims-made insurance policies that require claims be made “during the policy period, any renewal thereof, or any extended reporting period” in order for there to be coverage. Ins. § 3420(a)(5).

## Impact on Policyholders

According to the New York State Legislature, the changes to the late-notice provision are designed to correct the longstanding inequity that allowed insurers to collect “billions of dollars in premiums annually, and disclaim coverage over an inconsequential technicality.” The new law will alleviate the “hardship placed on those who pay their premiums timely only to find at a time of need that their policy is not available.” Bill A11541 Summary.

The change to Section 3420, which takes effect on January 19, 2009, has been a long time coming and will significantly impact the way coverage cases are litigated in New York. For policies issued or delivered in New York, policyholders will no longer search for another jurisdiction or battle over choice of law just to avoid the application of New York’s unfavorable “late notice” law.

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