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News Concerning Recent Insurance Corporate and Regulatory Issues

August 13, 2007

NEW YORK INSURANCE DEPARTMENT PROPOSES LEGISLATION TO BAR DENIAL OF CLAIMS ON THE GROUND OF LATE NOTICE.

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Within two days after New York Governor Eliot Spitzer vetoed legislation that would have prevented a property/casualty insurer from denying a claim on the ground of late notice without a showing of material prejudice, the New York Insurance Department (the "Department") proposed amendments to the New York Insurance Law to accomplish that objective. The proposed amendments also permit an insured, an injured person or other claimant to request insurance coverage information in writing from an insurance company.

The Governor's veto, reported in the August 8, 2007 issue of the Insurance Corporate and Regulatory ALERT!, offered support for a requirement that material prejudice must be shown as a condition for denying a claim on late notice grounds, but observed that the legislation had been passed quickly without hearings and without affording interested parties a chance to present their views. The Department's draft proposal to amend the Insurance Law, issued on August 3, 2007, provides an opportunity for input and public debate.

The key language of the Department's draft, presented as amendments to New York Insurance Law § 3420 (a), the section that lists standard provisions in liability insurance contracts, provides, in the subsection addressing late notice provisions (with emphasis added), that late notice shall not invalidate a claim:

> (4) (ii) except with respect to a claims-made policy (as defined pursuant to a regulation promulgated by the superintendent), *unless the insurer demonstrates that the failure to provide timely notice has prejudiced the insurer's rights.* The insurer's rights shall not be deemed prejudiced unless the insurer demonstrates that such failure hampers or hinders the insurer's ability to effectively investigate, negotiate, settle, or defend the claim.

> (5) A provision that if the insurer disclaims liability or denies coverage based upon the failure to provide timely notice, and if, within one hundred eighty days following such disclaimer or denial, the insured does not initiate an action against the insurer appealing such a determination, *an injured person or other claimant may maintain an action directly against the insurer on the sole question of whether the insurer's rights have been prejudiced,* as provided in paragraph (4) of this subsection.

Subsection (4) of the foregoing proposed amendment does not use the term "material" prejudice, as was the case with the vetoed legislation. The proposed amendment places the burden of proof on the insurer to prove prejudice. Thus, another part of the amendment - to New York Insurance Law § 3420 (c) - provides (with emphasis added) that:

> (2) If an action is maintained under the provisions of subparagraph (ii) of paragraph four, or paragraph five, of subsection (a) of this section, *the burden shall be upon the insurer to prove that it has been prejudiced by the failure to provide timely notice.* The determination in any action maintained under the provisions of paragraph five of subsection (a) of this section shall be binding upon the parties in any subsequent action brought pursuant to the provisions of paragraph (2) of subsection (a) of this section.

The "subsequent action" referred to in the foregoing paragraph is the existing statutory right of a party who has obtained a judgment against an insured to bring a direct action against the insurer if the judgment has not been paid by the insured within thirty days after service of notice of entry of the judgment. Accordingly, the amendment prevents the insurer from re-litigating the prejudice issue in an action to recover a judgment.

The Department's draft also proposes an amendment to New York Insurance Law § 3420 (d) to provide a mechanism for an insured, an injured person or other claimant to determine the extent of insurance coverage before litigation is commenced. The proposed language provides that:

> (d) (1) Upon written request by an insured, injured person or other claimant, within forty-five days of the request, an insurer shall:
>
> (i) confirm whether the insured had a liability insurance policy in effect with the insurer on the date of the alleged occurrence: and
>
> (ii) specify the liability insurance limits of coverage provided under the policy

The foregoing amendment differs sharply from the vetoed measure, which would have amended the New York Civil Practice Law and Rules to permit a declaratory judgment action to be brought against an insurer to determine the existence and extent of insurance coverage. This proposal utilizes a simple notice approach to obtain insurance coverage information. In addition, to add teeth

to the process, the Department has proposed an amendment to the unfair claim settlement practices section of the New York Insurance Law to make failure by an insurer to promptly disclose coverage information an unfair practice.

If the Department decides to go forward with its proposed amendments, it will need to locate a sponsor in the New York Senate or Assembly to introduce the legislation when the New York Legislature is back in session and to move it through the committee process.

If you would like more information on this or any other insurance, reinsurance or insolvency regulatory actions, please feel free to contact Francine L. Semaya, Esq., Chair, Insurance Corporate and Regulatory Practice Group, at (212) 908-1270, fsemaya@cozen.com or William K. Broudy, Esq. at (212) 908-1289, wbroudy@cozen.com. Comments in this Insurance Corporate and Regulatory Alert! are not intended to provide legal advice. Readers should not act or rely on information in the Alert! without seeking specific legal advice.