

IN A MAJOR POLICY SHIFT, NEW YORK PLACES THE BURDEN ON INSURERS TO PROVE PREJUDICE WHEN A CLAIM NOTICE BY AN INSURED IS LATE

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New York Governor David A. Paterson signed legislation (the "Bill") on July 23, 2008 that mandates a major change with respect to the issue of proving prejudice caused by a late notice of a claim by an insured. The Bill² introduces a material prejudice standard and applies to insurance policies issued or delivered in New York on or after January 19, 2009.

The Bill provides that in any action where the insurer alleges that it was prejudiced by a late claim notice, the burden of proving such prejudice shall be on the insurer when the claim was made within two years after the time required under the policy. Prejudice is defined in the Bill as follows:

... the insurer's rights shall not be deemed prejudiced unless the failure to timely provide notice materially impairs the ability of the insurer to investigate or defend the claim.³

If the claim is made more than two years after the time required under the policy, the burden is upon the "insured, injured person or other claimant to prove that the insurer has not been prejudiced."⁴

Prior to the enactment of the Bill, an insurer could simply assert late notice and reject coverage of the claim without

having to show prejudice. As recently as 2005 in *Argo Corp. v. Greater New York Mutual Insurance Company*, 4 N.Y. 3d 332, 794 N.Y.S. 2d 704 (2005), the New York Court of Appeals, New York's highest court, upheld that standard.⁵ To effect the change in the law, the Bill amends both the New York Civil Practice Law and Rules ("CPLR") and the New York Insurance Law ("NYIL"). CPLR 3001 has been amended to add a provision that:

A party who has brought a claim for personal injury or wrongful death against another party may maintain a declaratory judgment action directly against the insurer of such other party, as provided in (NYIL 3420(a)(6))⁶

After establishing that the prejudice issue can be brought before a court as a declaratory judgment action, the Bill accomplishes its primary purpose⁷ of establishing standards and burdens for proving prejudice through amendments to NYIL Section 3420 (a), the Section that requires certain provisions to be included in liability policies covering personal injury and property damage. The amendments are built on the existing standard in NYIL Section 3420 (a) (4), which provides that failure by an insured, an injured person or other claimant to give timely notice of a claim to an insurer shall not invalidate the claim "if it shall be shown not to have been reasonably

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2. Designated New York Assembly Bill A11541 and New York State Senate Bill S8610. Both have the same text.

3. A11541, page 3, lines 29-31.

4. A11541, page 3, line 20-22, emphasis added.

5. In *Unigard Sec. Ins. Co. v. North River Ins. Co.*, 79 N.Y. 2d 576, 584 N.Y.S. 2d 290 (1992), the Court of Appeals created an exception for reinsurance, ruling that in a late notice situation, a reinsurer must show prejudice before it can be relieved of its obligations to perform under a contract.

6. A11541, page 1, lines 8-11.

7. The Bill also includes new procedures with respect to auto and personal lines insurance, whereby an injured person or other claimant can ask an insurer in writing whether the insurer has a policy(ies) in effect for a particular insured. The insurer has 60 days to provide the answer, including specification of the limits of any policy in effect, and has 45 days to seek additional identifying information from the person making the inquiry, if such additional information is needed.

possible to give such notice within the prescribed time and that notice was given as soon as reasonably possible thereafter.”⁸

The Bill adds subsections to NYIL Section 3420 (a) requiring liability policies covering personal injury and property damage to include:

A provision 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, injured person or other claimant, unless the failure to provide timely notice has prejudiced the insurer*⁹

and

A provision that, with respect to a claim arising out of death or personal injury of any person, if the insurer disclaims liability or denies coverage based on the failure to provide timely notice, then the injured person or other claimant may maintain an action directly against such insurer, *in which the sole question is the insurer’s disclaimer or denial based on the failure to provide timely notice*, unless within sixty days following such disclaimer or denial, the insured or the insurer: (A) initiates an action to declare the rights of the parties under the insurance policy; and (B) names the injured person or other claimant as a party to the action.¹⁰

The foregoing section, which adds NYIL 3420(a)(6), permits a declaratory judgment action by a claimant directly against an insurer, while preserving the right of the insured or the insurer to seek a declaratory judgment as well.

Key language in the Bill amends NYIL 3420 (c) to provide that:

... an irrebuttable presumption of prejudice shall apply if, prior to notice, the insured’s liability has been determined by a court of competent jurisdiction or by binding arbitration; or if the insured has resolved the claim or suit by settlement or other compromise.¹¹

The foregoing provision protects an insurer from having to fully litigate the prejudice issue if its insured makes a late claim for coverage after liability has been adjudicated or otherwise resolved.

By requiring proof of prejudice resulting from late notice, the Bill brings New York into line with most other jurisdictions, provides an advantage to policyholders and makes it more difficult for insurance companies to disclaim coverage in New York on the ground of late notice. **Because the Bill does not make the new procedures retroactive, the prior standard, as enunciated by the Court of Appeals in *Argo Corp. v. Greater New York Mutual Insurance Company*, will continue to apply to policies issued prior to January 19, 2009.**

8. A11541, page 2, lines 17-22.

9. A11541, page 2, lines 23-26, emphasis added. This new section expressly permits a claims-made policy to “provide that the claim shall be made during the policy period, any renewal thereof, or any extended reporting period.” (lines 28-30).

10. A11541, page 2, lines 34-43, emphasis added.

11. A11541, page 3, lines 24-28