



COUGHLIN DUFFY LLP

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GOVERNOR SPITZER VETOES LATE NOTICE/DECLARATORY JUDGMENT BILL

Proper notice is always a condition precedent to coverage under an insurance policy. In New York, an insured's unexcused delay in providing notice relieves the insurer of its duty to defend and indemnify regardless of whether the delay prejudiced the insurer. This is known as the "no prejudice" rule. Earlier this year, the New York legislature passed legislation intended to alter this rule. The legislation would have established a "material prejudice" rule with respect to liability insurance policies as well as created a right for claimants to bring declaratory judgment actions directly against insurers for determinations of the existence or extent of insurance coverage.

On August 1, 2007 Governor Spitzer vetoed the legislation in memo 98. Consequently, New York remains a no-prejudice jurisdiction, *i.e.* an insurer need not demonstrate that it was prejudiced by an insured's delay in providing notice before disclaiming coverage. The official veto memo is not yet available.

The proposed legislation provided that an insurer "shall not deny coverage for a claim based on the failure of an insured to give timely notice of claim unless the ... insurer ... is able to demonstrate that it has suffered material prejudice as a result of the delayed

notice." The legislation would have established a rebuttable presumption that insurers have not suffered prejudice as a result of late notice of claim. The legislation also provided that the law should be liberally construed to mitigate against the potential for a procedural denial of insurance coverage. Also, while under New York law a claimant cannot bring a direct action unless and until it has a judgment against an insured, the declaratory judgment provisions of the legislation provided that a claimant could bring an action against an insurer once it had made a "claim" against a policyholder. Governor Spitzer's veto extended to the entire legislation including both the late notice/no prejudice and direct action portions of it.

If there are any questions about the proposed legislation or Governor Spitzer's veto of it, please contact Justin Kinney or Rebecca Foote of our New York office.

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