



COUGHLIN DUFFY LLP

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Justin N. Kinney, Esq.
Member

Wall Street Plaza
88 Pine Street, 5th Floor
New York, New York 10005
Tel (212) 612-4983
Fax (212) 480-3899

jkinney@coughlinduffy.com



Peter B. Fallon, Esq.
Associate

P.O. Box 1917
350 Mount Kemble Avenue
Morristown, New Jersey 07962
Tel (973) 631-6032
Fax (973) 267-6442

pfallon@coughlinduffy.com

www.coughlinduffy.com

New York Dramatically Alters Insurance Law Concerning Late Notice

On July 21, 2008, Governor Paterson signed a bill that dramatically changes New York's Insurance Law concerning late notice. Principally, the new law eliminates New York's long-standing "no prejudice" rule and requires that an insurer demonstrate that there has been a material impairment of the defense or investigation of the claim before it can avoid coverage on late notice grounds. The new law is scheduled to take effect on January 17, 2009, and applies to liability policies issued or delivered in New York on or after that date. The stated reason for the elimination of the "no prejudice" rule was the "inequitable outcome [under the current law] with insurers collecting billions of dollars in premiums annually, and disclaiming coverage over an inconsequential technicality."

Currently, late notice is an absolute defense to coverage under a liability policy irrespective of prejudice to the insurer. Under the new law, all policies subject to the law must include a provision advising insureds 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 party or any other claimant, unless the failure to provide timely notice has prejudiced the insurer." Although the new law does not define "prejudice," it does state that "[t]he 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."

The new law further provides for a division of the burden of proof on the issue of prejudice that is dependent on the timing of the notice. If the notice is provided within two years of the time required by the policy, the insurer bears the burden of proving that it has been prejudiced by the untimely notice. However, if the notice is provided beyond two years, the insured bears the burden of proving that the insurer was not prejudiced. The new law also includes an irrebuttable presumption of prejudice if the insured's liability has been properly determined in a legal proceeding or if it has otherwise resolved the claim prior to notification to the insurer.

In addition to excising the "no prejudice" rule, the new law creates a direct cause of action against insurers who deny a personal injury or wrongful death claim based on late notice. Injured parties or other claimants can institute such an action in which the sole issue would be the insurer's denial on late notice grounds, provided that neither the insurer nor the insured previously instituted a declaratory judgment action in which the claimant is named within sixty (60) days of the insurer's denial.

Another section of the new law provides that claimants seeking confirmation of availability of primary insurance coverage from an insurer must have their inquiries answered within sixty (60) days, or otherwise be notified within forty-

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five (45) days of the need for additional information. New York Insurance Law Section 3420(d) still requires an insurer to provide written notice of a disclaimer or denial of liability “as soon as is reasonably possible”. Therefore, the deadlines for providing confirmation of coverage in the new law should not be viewed as providing an insurer with protection against a Section 3420(d) claim for failing to disclaim or deny as soon as reasonably possible.

The new law will significantly impact insurers issuing liability policies to be issued or delivered in New York in both underwriting and claims handling. Policy forms will have to be amended to contain the provisions that will be required by the new law on all policies issued or delivered on or after January 17, 2009. Liability insurers will no longer be free to deny claims based upon late notice unless they can prove material impairment of their ability to investigate or defend the claim.

Should you have any questions concerning the legislative changes or any of the matters discussed above, please do not hesitate to call us.