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CASE ALERT July 25, 2008

NEW YORK LEGISLATURE ALTERS STANDARDS GOVERNING LATE NOTICE DEFENSE, RIGHT TO FILE DECLARATORY JUDGMENT IN INJURY, DEATH CASES

New York has enacted long-anticipated changes to the Insurance Law to eliminate the absolute "no prejudice" rule for late notices of claim. Once the law takes effect, a carrier disclaiming on the basis of late notice will need to demonstrate prejudice. This has always been the approach in New Jersey.

The statute does create a presumption of prejudice in the instance of notice received more than two years after the loss. In case of such late notice the burden will shift to the claimant to show that the carrier has not been prejudiced. Additionally, if the claim is resolved by trial or settlement prior to notice then prejudice will be assumed as a matter of law; the claimant will not have a right to seek coverage on the basis that the carrier would have handled the claim in the same fashion.

The bill also slightly changes the Lang rule that a coverage decision may not be challenged until entry of an unsatisfied judgment against the insured. Now, in cases of wrongful death or personal injury (not property damage), an insured or claimant may file a declaratory judgment action to challenge a late notice denial. However, a declaratory judgment action may not be filed to dispute coverage denials for other reasons such as the application of policy exclusions, policy rescission or cancellation defenses.

The new law will take effect in 180 days.

Attached is a copy of the bill which shows the amendments to the CPLR and Insurance Law Sec. 3420. Should you have any questions concerning this important development do not hesitate to contact Ric Gallin, Managing Partner of our New York office.

A **11541** Rules (Weinstein) Same as [S 8610](#) DEFRANCISCO
Governor Program # 65
Civil Practice Law and Rules
TITLE....Provides for a declaratory judgment action against an insurer directly where a claim is brought for personal injury or wrongful death against another
Currently on Assembly Committee Agenda
Codes (LENTOL)
OFF THE FLOOR, Wednesday, June 18, 2008
Currently on Assembly Committee Agenda
Judiciary (WEINSTEIN)
OFF THE FLOOR, Monday, June 16, 2008
06/11/08referred to judiciary
06/16/08reported referred to codes

S8610 DEFRANCISCO Same as [A 11541](#) Rules (Weinstein)
Governor Program # 65
NOT ON FILE
TITLE....Provides for a declaratory judgment action against an insurer directly where a claim is brought for personal injury or wrongful death against another
06/18/08REFERRED TO RULES

RULES COM (Request of Weinstein, Morelle)
Amd S3001, CPLR; amd SS3420 & 2601, Ins L
Provides for a declaratory judgment action against an insurer directly where a claim is brought for personal injury or wrongful death against another.
Governor's Program

STATE OF NEW YORK

11541

IN ASSEMBLY

June 11, 2008

Introduced by COMMITTEE ON RULES -- (at request of M. of A. Weinstein, Morelle) -- (at request of the Governor) -- read once and referred to the Committee on Judiciary

AN ACT to amend the civil practice law and rules and the insurance law, in relation to liability insurance policies

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Section 3001 of the civil practice law and rules is amended
2 to read as follows:

3 § 3001. Declaratory judgment. The supreme court may render a declara-
4 tory judgment having the effect of a final judgment as to the rights and
5 other legal relations of the parties to a justiciable controversy wheth-
6 er or not further relief is or could be claimed. If the court declines
7 to render such a judgment it shall state its grounds. **A party who has**
8 **brought a claim for personal injury or wrongful death against another**
9 **party may maintain a declaratory judgment action directly against the**
10 **insurer of such other party, as provided in paragraph six of subsection**
11 **(a) of section three thousand four hundred twenty of the insurance law.**

12 § 2. Subsection (a) of section 3420 of the insurance law, the opening
13 paragraph as amended by chapter 584 of the laws of 2002, is amended to
14 read as follows:

15 (a) No policy or contract insuring against liability for injury to
16 person, except as provided in subsection (g) **[hereof] of this section,**
17 or against liability for injury to, or destruction of, property shall be
18 issued or delivered in this state, unless it contains in substance the
19 following provisions or provisions **[which] that** are equally or more
20 favorable to the insured and to judgment creditors so far as such
21 provisions relate to judgment creditors:

22 (1) A provision that the insolvency or bankruptcy of the person
23 insured, or the insolvency of **[his] the insured's** estate, shall not
24 release the insurer from the payment of damages for injury sustained or
25 loss occasioned during the life of and within the coverage of such poli-
26 cy or contract.

EXPLANATION--Matter in **italics** (underscored) is new; matter in brackets
[-] is old law to be omitted.

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1 (2) A provision that in case judgment against the insured or **[his] the**
2 **insured's** personal representative in an action brought to recover
3 damages for injury sustained or loss or damage occasioned during the
4 life of the policy or contract shall remain unsatisfied at the expira-
5 tion of thirty days from the serving of notice of entry of judgment upon
6 the attorney for the insured, or upon the insured, and upon the insurer,
7 then an action may, except during a stay or limited stay of execution
8 against the insured on such judgment, be maintained against the insurer
9 under the terms of the policy or contract for the amount of such judg-
10 ment not exceeding the amount of the applicable limit of coverage under

11 such policy or contract.

12 (3) A provision that notice given by or on behalf of the insured, or
13 written notice by or on behalf of the injured person or any other claim-
14 ant, to any licensed agent of the insurer in this state, with partic-
15 ulars sufficient to identify the insured, shall be deemed notice to the
16 insurer.

17 (4) A provision that failure to give any notice required to be given
18 by such policy within the time prescribed therein shall not invalidate
19 any claim made by the insured, an injured person or [~~by~~] any other
20 claimant if it shall be shown not to have been reasonably possible to
21 give such notice within the prescribed time and that notice was given as
22 soon as was reasonably possible thereafter.

23 (5) A provision that failure to give any notice required to be given
24 by such policy within the time prescribed therein shall not invalidate
25 any claim made by the insured, injured person or any other claimant,
26 unless the failure to provide timely notice has prejudiced the insurer,
27 except as provided in paragraph four of this subsection. With respect to
28 a claims-made policy, however, the policy may provide that the claim
29 shall be made during the policy period, any renewal thereof, or any
30 extended reporting period, except as provided in paragraph four of this
31 subsection. As used in this paragraph, the terms "claims-made policy"
32 and "extended reporting period" shall have their respective meanings as
33 provided in a regulation promulgated by the superintendent.

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

44 § 3. Subsection (b) of section 3420 of the insurance law is amended to
45 read as follows:

46 (b) Subject to the limitations and conditions of paragraph two of
47 subsection (a) [~~hereof~~] of this section, an action may be maintained by
48 the following persons against the insurer upon any policy or contract of
49 liability insurance [~~which~~] that is governed by such paragraph, to
50 recover the amount of a judgment against the insured or his personal
51 representative:

52 (1) any person who, or the personal representative of any person who,
53 has obtained a judgment against the insured or [~~his~~] the insured's
54 personal representative, for damages for injury sustained or loss or
55 damage occasioned during the life of the policy or contract;

1 (2) any person who, or the personal representative of any person who,
2 has obtained a judgment against the insured or ~~his~~ the insured's
3 personal representative to enforce a right of contribution or indemnity,
4 or any person subrogated to the judgment creditor's rights under such
5 judgment; and

6 (3) any assignee of a judgment obtained as specified in paragraph one
7 or paragraph two of this subsection, subject further to the limitation
8 contained in section 13-103 of the general obligations law.

9 § 4. Subsection (c) of section 3420 of the insurance law is amended to
10 read as follows:

11 (c) (1) If an action is maintained against an insurer under the
12 provisions of paragraph two of subsection (a) of this section and the
13 insurer alleges in defense that the insured failed or refused to cooper-
14 ate with the insurer in violation of any provision in the policy or
15 contract requiring such cooperation, then the burden shall be upon the
16 insurer to prove such alleged failure or refusal to cooperate.

17 (2)(A) In any action in which an insurer alleges that it was preju-
18 dated as a result of a failure to provide timely notice, the burden of
19 proof shall be on: (i) the insurer to prove that it has been prejudiced,
20 if the notice was provided within two years of the time required under
21 the policy; or (ii) the insured, injured person or other claimant to
22 prove that the insurer has not been prejudiced, if the notice was
23 provided more than two years after the time required under the policy.

24 (B) Notwithstanding subparagraph (A) of this paragraph, an irrebutta-
25 ble presumption of prejudice shall apply if, prior to notice, the
26 insured's liability has been determined by a court of competent juris-
27 isdiction or by binding arbitration; or if the insured has resolved the
28 claim or suit by settlement or other compromise.

29 (C) The insurer's rights shall not be deemed prejudiced unless the
30 failure to timely provide notice materially impairs the ability of the
31 insurer to investigate or defend the claim.

32 § 5. Subsection (d) of section 3420 of the insurance law is amended to
33 read as follows:

34 (d)(1)(A) This paragraph applies with respect to a liability policy
35 that provides coverage with respect to a claim arising out of the death
36 or bodily injury of any person, where the policy is: (i) subject to
37 section three thousand four hundred twenty-five of this article, other
38 than an excess liability or umbrella policy; or (ii) used to satisfy a
39 financial responsibility requirement imposed by law or regulation.

40 (B) Upon an insurer's receipt of a written request by an injured
41 person who has filed a claim or by another claimant, an insurer shall,
42 within sixty days of receipt of the written request: (i) confirm to the
43 injured person or other claimant in writing whether the insured had a
44 liability insurance policy of the type specified in subparagraph (A) of
45 this paragraph in effect with the insurer on the date of the alleged

46 occurrence; and (ii) specify the liability insurance limits of the
47 coverage provided under the policy.
48 (C) If the injured person or other claimant fails to provide suffi-
49 cient identifying information to allow the insurer, in the exercise of
50 reasonable diligence, to identify a liability insurance policy that may
51 be relevant to the claim, the insurer shall within forty-five days of
52 receipt of the written request, so advise the injured person or other
53 claimant in writing and identify for the injured person or other claim-
54 ant the additional information needed. Within forty-five days of receipt
55 of the additional information, the insurer shall provide the information
56 required under subparagraph (B) of this paragraph.

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1 (2) If under a liability policy issued or delivered [~~or issued for~~
2 ~~delivery~~] in this state, an insurer shall disclaim liability or deny
3 coverage for death or bodily injury arising out of a motor vehicle acci-
4 dent or any other type of accident occurring within this state, it shall
5 give written notice as soon as is reasonably possible of such disclaimer
6 of liability or denial of coverage to the insured and the injured person
7 or any other claimant.

8 § 6. Paragraph 1 of subsection (j) of section 3420 of the insurance
9 law, as added by chapter 540 of the laws of 1984, is amended to read as
10 follows:

11 (1) Notwithstanding any other provision of this chapter or any other
12 law to the contrary, every policy providing comprehensive personal
13 liability insurance on a one, two, three or four family owner-occupied
14 dwelling, issued or [~~renewed~~] delivered in this state on and after [~~the~~
15 ~~effective date of this subsection~~] the first of March, nineteen eighty-
16 four, shall provide for coverage against liability for the payment of
17 any obligation, which the policyholder may incur pursuant to the
18 provisions of the workers' compensation law, to an employee arising out
19 of and in the course of employment of less than forty hours per week, in
20 and about such residences of the policyholder in this state. Such cover-
21 age shall provide for the benefits in the standard workers' compensation
22 policy issued in this state. No one who purchases a policy providing
23 comprehensive personal liability insurance shall be deemed to have
24 elected to cover under the workers' compensation law any employee who is
25 not required, under the provisions of such law, to be covered.

26 § 7. Paragraph 6 of subsection (a) of section 2601 of the insurance
27 law, as added by chapter 547 of the laws of 1997, is amended to read as
28 follows:

29 (6) failing to promptly disclose coverage pursuant to subsection (d)
30 or subparagraph (A) of paragraph two of subsection (f) of section three
31 thousand four hundred twenty of this chapter.

32 § 8. This act shall take effect on the one hundred eightieth day after
33 it shall have become a law, and shall apply to policies issued or deliv-

34 ered in this state on or after such date and to any action maintained
35 under such a policy; provided, however, that effective immediately, the
36 addition, amendment and/or repeal of any rule or regulation necessary
37 for the implementation of this act on its effective date are authorized
38 and directed to be made and completed by the superintendent of insur-
39 ance on or before such effective date.

NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: A11541

SPONSOR: Rules (Weinstein)

TITLE OF BILL: An act to amend the civil practice law and rules and the insurance law, in relation to liability insurance policies

Purpose

This bill: (1) permits a party suing an insured in a personal injury or wrongful death case to commence a simultaneous declaratory judgment action against the defendant's insurer, in limited circumstances, to challenge the insurer's denial of coverage based on the failure to provide timely notice; and (2) prohibits certain liability insurers from denying coverage for a claim based on the failure to provide timely notice, unless the insurer suffers prejudice as a result of the delayed notice.

Summary of Provisions

Section 1 of the bill amends CPLR § 3001 to permit a claimant in a personal injury or wrongful death case to maintain a declaratory judgment action directly against the insurer of a defendant to the lawsuit, as provided under Insurance Law § 3420(a)(6).

Section 2 of the bill amends Insurance Law § 3420(a) to require liability policies for injury to person or destruction of property, issued or delivered in the state, to contain a provision that: (1) failure to give notice as prescribed by the policy will not invalidate a claim made by the insured, injured person or any other claimant unless the late notice has prejudiced the insurer; and (2) with respect to a personal injury or wrongful death claim, if the insurer disclaims liability or denies coverage based on a failure to provide timely notice, then the injured person or other claimant may maintain an action directly against an

insurer, on the question of late notice, unless the insured or the insurer, within 60 days of the disclaimer, initiates an action under the policy, naming the injured person or other claimant as a party to the action.

Section 2 of the bill also allows claims-made policies to contain a provision that the claim shall be made during the policy period, any renewal thereof, or any extended reporting period. This provision of the bill is not intended to permit duplicate claims under multiple policy periods or a late claim under a prior policy where a subsequent policy's limits have been exhausted.

Section 3 of the bill makes certain technical amendments to Insurance Law § 3420(b).

Section 4 of the bill amends Insurance Law § 3420(c) to establish that: (1) if notice is provided to the insurer within 2 years of the time required under the policy, then the burden to show prejudice would fall on the insurer; (2) if notice is provided to the insurer more than 2 years after the time required under the policy, then the burden to show that the insurer is not prejudiced would fall on the insured, injured person or other claimant; and (3) if notice is provided to the insurer after the insured's liability is determined, or after the insured has settled the case, then there would be an irrebuttable presumption of prejudice under the bill.

Section 4 of the bill also provides that the insurer's rights will not be deemed prejudiced unless the failure to timely provide notice materially impairs the ability of the insurer to investigate or defend the claim.

Section 5 of the bill amends Insurance Law § 3420(d) to establish a process for a claimant to receive confirmation from an insurer that the insured had an insurance policy in effect on the alleged occurrence date, and the limits of such policy. This section of the bill also establishes a process in case insufficient information is provided to the insurer and such confirmation is not possible.

Section 6 of the bill makes certain technical amendments to Insurance Law § 3420(j).

Section 7 of the bill provides that failure to promptly disclose coverage pursuant to Insurance Law § 3420(d) may constitute unfair claim settlement practices.

Section 8 of the bill provides for the bill's effective date.

Existing Law

A tort claimant may file a direct action against an insurer if a judgment against the insured remains unsatisfied for 30 days or more. However, neither common law nor Insurance Law § 3420 authorizes a claimant to file a direct action against the insurer, including a declaratory judgment action, before the claimant obtains such a judgment against the insured.

An insured who files a late notice of claim must demonstrate that it was not reasonably possible to have given such notice within the prescribed time, and that notice of the claim was provided as soon as was reasonably possible. The insurer need not show any prejudice as a result of the late notice in order to disclaim coverage, leaving the burden of proof squarely on the insured.

Statement in Support

This bill protects individuals who suffer personal injuries, and families whose loved ones die as a result of tortious conduct, in two important ways. First, the bill permits tort plaintiffs to bring declaratory judgment actions against insurers in certain circumstances to challenge the insurer's denial of coverage based on a late notice of claim. Second, the bill prohibits certain liability insurers from denying coverage for a claim for late notice unless the insurer suffers prejudice as a result of the delayed notice.

A. Declaratory Judgment

New York State law currently does not adequately protect the interests of tort victims because they may only file a direct action against an insurer if a judgment against the insured tortfeasor remains unsatisfied for 30 days or more. Neither common law, nor Insurance Law authorizes a tort victim to file a direct action against the insurer, including a declaratory judgment action, before the victim obtains such a judgment against the insured.

Therefore, an injured tort victim, or a family bringing a wrongful death action may struggle through expensive and protracted litigation against an insured, only to determine later that there is no insurance coverage for the loss. This is an especially difficult burden on injured plaintiffs in cases where the defendant is ultimately judgment proof and has no means or incentive to file a declaratory judgment action. In this respect, the party most interested in an early determination of the existence of coverage, may indeed be the injured party.

This bill permits certain tort victims, under specified circumstances, to bring a declaratory judgment action against the defendant's insurer to challenge the insurer's denial of coverage. In particular, the bill would allow tort plaintiffs to initiate a declaratory judgment action against the defendant's insurer, where: (1) the underlying action is for personal injury or wrongful death; (2) the denial of coverage is for failure to provide timely notice; and (3) where neither the insured nor the insurer has previously commenced a declaratory judgment action with-

in 60 days of the disclaimer. In this regard, the bill provides relief to tort victims for whom it is critical to determine whether it is indeed worthwhile to proceed with the lawsuit, while also providing limitations and safeguards in the law to ensure that the defendant's rights and interests under their policy are also protected.

B. Late Notice

An insured who files a late notice of claim must demonstrate that it was not reasonably possible to have given such notice within the prescribed time, and that notice of the claim was provided as soon as was reasonably possible. The insurer need not show any prejudice as a result of the late notice in order to disclaim coverage, leaving the burden of proof squarely on the insured. New York is in the minority of states in the country because most states require insurers to suffer some form of prejudice before coverage may properly be denied for late notice. Current law, therefore, leads to an inequitable outcome with insurers collecting billions of dollars in premiums annually, and disclaiming coverage over an inconsequential technicality.

This bill would prohibit insurers from denying coverage for claims based on the failure to provide timely notice unless the insurer has suffered "prejudice" as a result of the delay. Under the bill, the insurer's rights would not be deemed prejudiced unless the failure to timely provide notice materially impairs the ability of the insurer to investigate or defend a claim.

The insurer must show prejudice if notice is provided within 2 years after the time required under the policy. However, if notice were provided after the 2 years, then the burden to show that the insurer was not prejudiced as a result of the late notice shifts to the insured, injured person or other claimant. Lastly, if notice were provided after the insured's liability was determined, or after the insured settled the case, then there would exist an irrebuttable presumption of prejudice under the bill.

This bill therefore prevents insurers from denying coverage for claims based on a technicality. It also eliminates the extreme hardship placed on those who pay their premiums timely only to find at a time of need that their policy is not available.

Budget Implications

This bill will not have a material impact on state finances.

Effective Date

This bill would take effect on the 180th day after it becomes a law as provided in section 8 of the bill.
