

## *New York Adopts Modern Rule on Notice For Liability Insurance*

*by Lorelie S. Masters and Brian S. Scarbrough*

New York has at last corrected a longstanding perceived disadvantage for policyholders regarding notice under liability insurance policies by abolishing in part New York's antiquated "no-prejudice" rule. On July 21, 2008, New York Governor David A. Paterson signed into law a bill (S.8610/A.11541) that requires certain liability insurers to demonstrate prejudice from late notice of an insurance claim. Through this change, New York joins the vast majority of states in which a liability insurer must establish prejudice from the failure to give timely notice of an insurance claim. The new law becomes effective January 17, 2009 and applies to liability insurance policies issued or delivered in New York on or after such date.

Prior to this law, if a policyholder provided late notice of a claim to an insurer, the burden was on the policyholder to prove that notice was provided as soon as reasonably possible. Providing notice a few days after the time prescribed by the policy in some cases was considered "late" notice. The insurer did not have to demonstrate any prejudice from such late notice.

The Governor's memorandum supporting this bill stated that this prior New York law "leads to an inequitable outcome with insurers collecting billions of dollars in premiums annually, and disclaiming coverage over an inconsequential technicality. . . . 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 only to find at a time of need their policy is not available."

The new law provides that failure to give any required notice under an insurance policy shall not invalidate any claim unless such failure has prejudiced the insurer. Under the new law, "[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 burden of proof is also shifted as a result of the new law. If an insurer alleges prejudice as a result of late notice, the burden is on the insurer to prove such prejudice if notice was provided within two years of the time required under the policy. If notice was provided more than two years after the time required under the policy, the policyholder still has the ability to preserve coverage if it can prove that the insurer was not prejudiced by such late notice. It should be noted, however, that, if notice is provided after the policyholder's liability has been determined, or the policyholder has settled the underlying case, there would be an irrebuttable presumption of prejudice.

While the new law only applies prospectively to certain liability insurance policies, the new law may prove useful to policyholders who have pending coverage actions involving the timing of notice as the new law indicates a shift in New York public policy away from forfeiture of coverage on technical grounds and in support of refusing to allow insurers to invalidate coverage when there is no showing of prejudice.

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