



# COUGHLIN DUFFY LLP

CASE ALERT, NO. 41

FEBRUARY 24, 2009

## *Blanket Reservation of Rights Does Not Avoid Waiver of Coverage Defenses*



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On February 19, 2009, the New York Appellate Division, First Department, held that an insurer waived its right to disclaim coverage based on late notice because it failed to timely assert the defense, notwithstanding that its disclaimer letters contained a "sweeping" reservation of all of its rights and the insurer disputed whether a policy had ever been issued to its insured during the relevant time period. The decision, Estee Lauder, Inc. v. OneBeacon Insurance Group, LLC, 2009 N.Y. Slip. Op. 01313 (N.Y. App. Div. 1st Dep't Feb. 19, 2009), underscores the importance of asserting coverage defenses with particularity and in a timely manner, even when the existence of coverage is in doubt, such as in missing policy situations.

The Estee Lauder lawsuit arose out of OneBeacon's denial of its duty to defend or indemnify Estee Lauder in connection with certain environmental claims relating to two New York landfills. OneBeacon denied coverage stating that it could not "locate any . . . evidence" of the policy under which Estee Lauder sought coverage and advised that it was "terminating its investigation of this matter and closing its file." OneBeacon later rejected Estee Lauder's tender of another claim relating to one of the landfills, again based on missing policy grounds. Neither of OneBeacon's denial letters asserted that Estee

Lauder had failed to give timely notice of the claims relating to either landfill, although the letters did include blanket reservations of rights.

The Appellate Division held that OneBeacon had sufficient knowledge of circumstances supporting a late notice defense when it initially disclaimed coverage for the first tendered claim. In light of this knowledge, and notwithstanding its broad reservation of all of its rights in its disclaimer letters, the Court found that OneBeacon had waived its right to assert a late notice defense.

The Court rejected OneBeacon's argument that the doctrine of waiver is inapplicable in missing policy cases. Although it acknowledged that an insurer's failure to timely disclaim coverage cannot operate to create coverage that does not otherwise exist, the Court reasoned that even where an insurer disputes whether a policy was issued, thereby creating an issue about the existence of coverage, it is still duty-bound by law to timely and specifically assert all defenses to coverage, including late notice. Accordingly, the Court held that actual knowledge of a policy's terms is unnecessary for the assertion of coverage defenses such as an insured's failure to provide timely notice.

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The Estee Lauder decision highlights the risk inherent in asserting, and relying upon, a blanket reservation of rights in a disclaimer letter. In New York, a unilateral reservation of the right to disclaim coverage on all other, unstated grounds does not absolve an insurer of the duty to timely and with specificity assert all known defenses to coverage, even in cases where, as in Estee Lauder, the existence of coverage is in dispute. Ultimately, asserting a broad reservation of rights may not protect against the risk of waiver of coverage defenses that were reasonably known to the insurer at the time of drafting. In light of the Estee Lauder ruling, insurers must be extra vigilant in the drafting of appropriate disclaimer and reservation of rights letters.

Should you have any questions about this decision, please do not hesitate to contact us.