Late Notice

Wednesday, September 30, 2009 at 3:49PM

LATE NOTICE IN NEW YORK

NEW YORK'S NO PREJUDICE RULE: THE RULE REMAINS AS TO POLICIES ISSUED BEFORE JANUARY 20, 2009. AFTER THAT DATE, PREJUDICE MUST BE SHOWN IN SOME CASES BUT THE NEW STATUTE HAS COMPLEX RULES

In cases involving late notice to an insurance company, New York has traditionally (but soon to be changed by statute) applied a strict rule. The rule is: "[a]bsent a valid excuse, a failure to satisfy the notice requirements vitiates the policy…and the insurer need not show prejudice before it can assert the defense of noncompliance." Security Mutual Ins. Co. of New York v. Acker-Fitzsimons Corp. 31 N.Y.2d 436, 340 N.Y.S.2d 902 (1972). See also Argo Corp. v. Greater New York Mutual Ins. Co., 4 N.Y.3d 332, 794 N.Y.S.2d 704 (2005). The New York Court of Appeals has had occasion to consider this rule in a number of contexts. The court held that the no prejudice rule does not apply to reinsurers, Unigard Sec. Ins. Co. v. North Riv. Ins. Co., 79 N.Y.2d 576, 584 N.Y.S.2d 290 (1992), but the rule does apply to excess insurers, American Home Assur. Co. v. International Ins. Co., 90 N.Y.2d 443, 661 N.Y.S.2d 584 (1997).

The Court of Appeals addressed this issue once again in Brandon v. Nationwide Mutual Ins. Co., 97 N.Y.2d 491, 743 N.Y.S.2d 53 (2002). In Brandon, the court held that where the insured under a supplementary uninsured motorists (SUM) policy provides timely notice of the claim, but gives late notice of legal action brought against the insured, an insurer "relying on late notice of legal action should be required to demonstrate prejudice." The court also held that the burden of proving prejudice is on the insurer because it has the relevant information about its own procedures and a alternative approach would "saddle the policyholder with the task of proving a negative." 97 N.Y.2d at 498, 743 N.Y.S.2d at 53.

An assertion by an insured that it had a "reasonable belief in non-liability" has been recognized as a valid excuse for delayed notice. However, in order to be accepted as an excuse for the late notice, the insured's belief that it is not liable must be objectively reasonable under the circumstances. See Kim v. Maher, 226 A.D.2d 350, 640 N.Y.S.2d 579 (2d Dep't 1996). The validity of the excuse will turn on whether the insured anticipated that a claim would be filed against it. See Avery & Avery, P.C. v. American Insurance Co., 51 A.D.3d 695, 858 N.Y.S.2d 319 (2d Dep't 2008).

If an insured is aware that it will bear responsibility for any injury sustained in an accident, it is under a duty to make inquiries into the circumstances of the incident and into the extent of any injuries sustained by the claimant. The insured cannot simply bury its head in the sand and claim to have been unaware that a claim might be filed against it. See Great Canal Realty Corp. v. Seneca Insurance Co., Inc., 5 N.Y.3d 742, 800 N.Y.S.2d 521 (2005) ("where a reasonable person could envision liability, that person has a duty to make some inquiry," citing White v. City of New York, 81 N.Y.2d 955, 598 N.Y.S.2d 759 (1993)). Also see York Specialty Food, Inc. v. Tower Ins. Co. of NY, 47 A.D.3d 589, 850 N.Y.S.2d 409 (1st Dep't 2008); Philadelphia Indemnity Ins. Co. v. Genesee Valley Improvement Corp., 41 A.D.3d 44, 834 N.Y.S.2d 802 (4th Dep't 2007).

Under these standards, the courts of New York have held that an insured has no obligation to report an accident where it appears that no one was injured or where any injury is trivial. Kelly v. Nationwide Mutual Ins. Co., 174 A.D.2d 481, 571 N.Y.S.2d 258 (1st Dep't 1991).

However, New York Senate Bill 8610 ("S.B. 8610") was signed into law on July 24, 2008. S.B. 8610 modifies N.Y. Ins. Law section 3420(c)(2)(A) such that it will provide:

(a) No policy . . . shall be issued or delivered in this state, unless it contains . . .

(5) a provision 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 person or any other claimant, unless the failure to provide timely notice has prejudiced the insurer. . . .

The revised statute provides that ""[i]n any action in which an insurer maintains that it was prejudiced as a result of failure to provide timely notice, the burden of proof shall be on . . . the insurer to prove that it has been prejudiced, if the notice was provided within two years of the time required under the policy . . ."

S.B. 8610 further provides that it will "take effect on the one hundred eightieth day after it shall have become a law" (i.e., January 2009) and will only "apply to policies issued or delivered in this state on or after such date. . . ." (S.B. 8610 § 8.) Accordingly, late notice disputes under future policies containing the provisions specified in the new law will be governed by a prejudice rule.

It should be noted that with respect to a claim for property damage and not bodily injury, the rules under New York's Insurance Law § 3420(d), which requires prompt disclaimers (generally within 30 days) do not apply.