

New York Legislature Passes Statute Imposing Notice-Prejudice Rule and Creating Direct Action Right

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The New York legislature has passed Senate Bill S. 6306 and Assembly Bill A8363-A, which, if signed by Governor Eliot Spitzer, would establish a "material prejudice" rule with respect to notice under all liability insurance policies and also create a right for claimants to pursue a direct coverage action against an insurer so long as they have "interposed a claim" against the policyholder. In the past, New York's courts consistently have held that an insurer does not have to establish prejudice in order to deny coverage for late notice in most types of policies. If allowed to become law, this legislation would mark a distinct shift in New York law on this important issue. Furthermore, New York law until now has required a claimant to obtain a judgment and attempt to execute that judgment upon the policyholder before being permitted to pursue a coverage action against the policyholder's insurer.

The Senate passed this legislation on June 20, 2007, and the Assembly passed the same piece of legislation on June 21, 2007. Having been passed by both houses of the New York legislature, this legislation need only be signed into law by New York Governor Spitzer to become law. The governor has 30 days from the date the legislation was passed to sign the bills or the legislation effectively will be vetoed. He also has the option of vetoing the legislation outright. Governor Spitzer has taken no public position on the proposed statute.

The contemplated late notice provision provides that an insurer "shall not deny coverage for a claim based on the failure of an insured to give timely notice of claim unless the authorized insurer or other insurer subject to the provisions of this article is able to demonstrate that it has suffered material prejudice as a result of the delayed notice." In addition, the proposed statute creates a "rebuttable presumption" that the insurer has not suffered prejudice if there is evidence that the insurer "had knowledge" of the "accident, loss [or] injury . . . that is the subject of the claim." The statute further provides that it is to "be liberally construed in order to effectuate the purpose hereof which is to mitigate against the potential for procedural denial of insurance coverage resulting in unreasonable loss of insurance protection for claimants." This marks a distinct change from New York case law that has in the past stated that there is no prejudice requirement. See *Argo Corp. v. Greater N.Y. Mut. Ins. Co.*, 4 N.Y.3d 332, 827 N.E.2d 762 (2005). The proposed statute makes no provision for a separate rule for claims made or claims made and reported policies.

In addition to changing the law regarding law notice, the legislation would create a direct action right for claimants. The statute provides that "[a] party who has interposed a claim against another party may bring a declaratory judgment action for a determination of the existence or extent of coverage owed by an insurer . . . to the party against whom the original claim is interposed." This legislation, therefore, would permit a claimant to bring a direct declaratory judgment action against an insurer once it has interposed a "claim" against a policyholder.