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ALERT

Insurer May No Longer Delay Notifying Insured of Known Grounds for Denying Death or Bodily Injury Claim While Investigating Other Potential Grounds

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The New York State Supreme Court Appellate Division, First Department, has overruled its prior holding and concluded that an insurer with knowledge of a late notice defense to coverage for a death or bodily injury claim must advise the insured of such "as soon as reasonably possible" even though its investigation of other potential defenses to coverage may be ongoing. *Campbell v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2012 WL 118461 (N.Y. App. Div. Jan. 17, 2012).

An employee of the insured, a subcontractor, was injured while working at a job site. The employee brought suit against the general contractor and the site owner for the injuries he sustained. The general contractor and the owner of the site sought coverage as additional insureds under the subcontractor's insurance policy and tendered the matter to the subcontractor's primary insurer. The general contractor and the site owner did not provide notice to the subcontractor's excess insurer until more than a year after they received information indicating the potential for damages in excess of the primary limit of liability.

The excess insurer responded to the report of the claim with a reservation of rights, including the right to deny coverage based on the failure to provide timely notice. The excess insurer also sent multiple requests for a copy of the primary policy and other information so that it could ascertain whether the general contractor and the site owner were additional insureds under its policy. After

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confirming that they were in fact additional insureds based on the information provided, and four months after its receipt of the report of the claim, the excess insurer disclaimed coverage based on late notice. The general contractor and the site owner ultimately settled with the employee and brought suit against the excess insurer for contribution to the settlement, arguing that the excess insurer waived its late notice defense by failing to issue a timely disclaimer of coverage.

The appellate court recognized that it had previously ruled that an insurer need not advise an insured of a known ground for disclaiming coverage while it continued to investigate other grounds. The court determined, however, that the previous ruling "cannot be squared" with New York Insurance Law § 3420(d), which provides that "an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state" by giving "written notice [of the disclaimer or denial of coverage] as soon as is reasonably possible." According to the court, "[i]f the insurer knows of one ground for disclaiming liability, the issuance of a disclaimer on that ground without further delay is not placed beyond the scope of the 'reasonably possible' by the insurer's ongoing investigation of the possibility [of other grounds]." In this regard, the court held that the timeliness of the disclaimer is measured from the point in time that the insurer had sufficient knowledge to disclaim on a particular ground. Here, the court found that the excess insurer had such knowledge as to its late notice defense at the time it first learned of the claim because the excess insurer was given a copy of a report from a year earlier advising the insured of the potential for damages in excess of the primary policy's limit of liability. The court concluded that, by waiting four months from this point to advise the insured of its position, the disclaimer was untimely and therefore the insurer waived its late notice defense to coverage.