

NEW YORK: LIABILITY INSURANCE LATE NOTICE REFORM—PREJUDICE NOW REQUIRED

[July 2008] The New York State Insurance Law was amended this month by the New York State Legislature. The implications are significant. This amendment has radically changed insurance law in New York by eliminating a long-standing, and potent, insurer defense.

For liability policies issued after January 2009, insurers may no longer deny claims for personal injury or wrongful death on the basis of late notice without a demonstration of prejudice. New York courts have historically been in the minority in upholding coverage denials based on late notice by policyholders, regardless of whether or not the insurance company was prejudiced by the late notice. With this amendment, New York joins the majority of states requiring a demonstration of prejudice for late notice as an effective defense to coverage.

Specifically, the amended law states that the failure of a policyholder to provide timely notice as provided under the policy will not invalidate a policyholder's claim unless the failure to provide timely notice has "prejudiced the insurer." The New York State Legislature defines prejudice as "materially impair[ing] the ability of the insurer to investigate or defend the claim."

Many coverage disputes revolve around what constitutes "late" notice. The new statutory provision does not definitively answer this question, but it does impose upon the insurer the burden to establish prejudice when notice is provided by the policyholder two years or less from the time notice was required under the policy. For notice provided more than two years after notice was required, the burden shifts to the policyholder to establish that the insurance company was not prejudiced by late notice. Notice provided after liability has been determined, or a settlement has been reached, gives rise to an irrebuttable presumption of prejudice.

NOTE: The amendment does not apply to claims-made policies. Notice given beyond the policy period remains subject to a late-notice denial even in the absence of insurer prejudice.

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