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RAWLE'S REPORTS

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NEW YORK

INSURANCE LAW

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Insurers are no doubt aware of the broad protections afforded them in New York, which permit insurers to disclaim coverage on the grounds that the insured failed to give timely notice of the claim. On January 17, 2009, significant changes went into effect in New York's Insurance Law that will effectively remove some of these protections and will have a major impact on insurers' ability to disclaim untimely claims.

By way of background, under the common law in New York, failure of an insured to place its insurance carrier on notice of a potential claim in a timely manner, as defined by their insurance policy, entitles the insurer to disclaim coverage, irrespective of whether the insurer suffers prejudice by the insured's delay in giving notice. *See* Briggs Avenue LLC v. Insurance Corp. of Hanover, 11 N.Y.3d 377, 870 N.Y.S.2d 841 (2008), 1700 Broadway Co. v. Greater New York Mutual Ins. Co., 54 A.D.3d 593, 863 N.Y.S.2d 434 (1st Dep't 2008). This rule was based on the recognition that an insurer, "which has a duty to indemnify and defend, requires timely notice of lawsuit in order to be able to take an active, early role in the litigation process and in any settlement discussions and to set adequate reserves." Argo Corp. v. Greater New York Mut. Ins. Co., 4 N.Y.3d 332, 794 N.Y.S.2d 704 (2005). *See also* Security Mut. Ins. Co. of New York v. Acker-Fitzsimons Corp., 31 N.Y.2d 436, 340 N.Y.S.2d 902 (1972).

This is no longer the case for insurance policies issued on or after January 17, 2009, because of Chapter 388 of New York Law 2008, which amends section 3420 of New York's Insurance Law. Under the amended terms of the statute, insurers can no longer issue liability policies permitting them to disclaim coverage based on untimely notice unless the delay in providing notice causes prejudice to the insurer. In fact, as long as the insured puts the carrier on notice of the claim within two years of the time required by the policy, the insurer must prove that the delay caused prejudice if it wishes to disclaim coverage for failure to provide timely notice. Only if the insured waits more than two years from the time the policy requires notice, does the burden of proof shift to the insured or the injured person. But even with over a two year delay, the insured can still defeat a carrier's attempt to disclaim coverage by demonstrating lack of prejudice. As such, Chapter 388 will have significant consequences for insurance coverage litigation.

Issue #1: Defining Prejudice

Much of current coverage litigation revolves around whether the insured has sufficient notice of a claim in order to trigger its duty to place the carrier on notice. Thanks to Chapter 388, the determination of when notice should have been given will become less important because the insured now has two years in which to give notice. Instead, coverage disputes will revolve around what constitutes "prejudice." The amended statute only provides a partial answer to this question. The amended section 3420(c)(2)(A) of the New York Insurance Law, sets forth that prejudice only occurs when the failure to provide timely notice "materially impairs the ability of the insurer to investigate or defend the claim." This is troublesome because it does not explain if "material impairment" includes assigning new counsel, performing investigation, determining whether to provide coverage, etc.

The statute gives only one other clue as to what constitutes "prejudice": "[a]n irrebuttable presumption of prejudice shall apply if, prior to notice, the insured's liability has been determined by a court of competent jurisdiction or by binding arbitration; or if the insured has resolved the claim or suit by settlement or other compromise." This would appear to mean that a question of fact arises whenever an insurer claims prejudice short of a final determination. Thus, it is unclear when insurers can validly claim prejudice where no decision or finding on the merits of the action has been made as of the time they were given notice of the claim. This will no doubt lead to extensive litigation in the future.

Issue #2: Covered Policies

It is important to note that Chapter 388 only applies to liability policies issued on or after January 17, 2009. Chapter 388 did not amend policies already in effect as of January 17, 2009. As such, Chapter 388 will not be triggered in many litigations in the coming months and years. This is not to say that plaintiffs and insureds will not try to extend the language of Chapter 388 to policies that went into effect prior to January 17, 2009. We anticipate this issue will also be the subject of significant coverage litigation.

Accordingly, adjusters should not assume that they cannot disclaim for failure to give timely notice without first checking the date the policy at issue went into effect.

Some Additional Issues

The amended law also requires that insurance carriers provide policy information to potential claimants upon request in some cases. Specifically, persons claiming against Personal Lines Auto, Homeowners and Commercial Auto policies can request the Bodily Injury policy limits, and the carrier must confirm or deny the existence of a policy within 60 days of receipt of the inquiry or send a request for additional information within 45 days of receipt of inquiry.

Moreover, in matters involving death or personal injury, a claimant may bring an action directly against a carrier who disclaims on the basis for failure to provide timely notice. Alternatively, the insured or the insurance carrier may initiate a declaratory judgment action to declare the rights of the parties under the policy and name the claimant as a party to the action. If filed within sixty days of the disclaimer, the claimant can no longer bring suit directly against the insurer for disclaimer on the basis of late notice.

While Chapter 388 seeks to resolve the late notice problem, it raises issues as to what constitutes prejudice to an insurer which disclaims on the grounds of late notice. As always, we recommend openly engaging counsel on any questions you may have regarding the details of the new Insurance Law in New York.

Robert A. Fitch, resident partner in our New York office, concentrates his practice in the areas of general casualty, product liability, professional and medical malpractice, and commercial motor vehicle litigation

He is admitted to practice in the state and federal courts of New York as well as the U.S. Court of Appeals for the Second Circuit. Bob has tried over 70 cases to verdict in the state and federal courts of New York. He has been rated AV by Martindale–Hubbell.

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David P. Turchi, an associate in our New York office, received his law degree, *cum laude*, from the Washington College of Law at American University in 2000. He earned a B.S. degree in International Affairs from the George Washington University in 1996.

He is admitted to practice in the state of New York and the U.S. District Courts for the Eastern and Southern Districts of New York.

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OF COUNSEL

Derek E. Barrett has joined Rawle & Henderson as Of Counsel to the firm in our New York office. He obtained his J.D. degree from New York School of Law in 1991 and his B.A. degree from Queens College of the City University of New York.

Derek has extensive trial experience handling casualty and commercial motor vehicle matters. He is admitted to practice in New York and New Jersey.

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ASSOCIATE

Steven R. Montgomery has joined Rawle & Henderson as an associate in our New York office. He received his law degree from New York School of Law in 2003 and his B.A. degree from the University of Massachusetts in 2000.

Steven focuses his practice on the defense of commercial litigation, professional and medical malpractice, including representation of architectural and engineering clients. He is admitted to practice in New York and the U.S. District Court for the Eastern, Northern, and Southern Districts of New York.

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TIDA INDUSTRY SEMINAR

James A. Wescoe will be a guest speaker at the Trucking Industry Defense Association's (TIDA) 17th Annual TIDA Industry Seminar on October 28-30, 2009 in San Antonio, Texas.

Jim will be part of a panel discussion on **Cargo Theft and Security Issues**. The panel will share their experiences, successes and failures in preventing and mitigating cargo theft losses in this challenging economic environment. *For more information regarding cargo issues contact, Jim Wescoe at jwescoe@rawle.com*