

Insurer Fails to Provide Notice of ROR to Claimant and Waives Strong Defense: No, This Was Not a New York Case

By: Randy J. Maniloff and Margo E. Meta
Insurance Coverage and Bad Faith Alert
11.30.20

It is well known that, under New York statutory law, an insurer that fails, in a timely manner, to advise a claimant of a disclaimer to its insured for a bodily injury claim can waive certain coverage defenses. This is a general statement of one aspect of New York Insurance Law § 3420.

In our experience, it is less-known that Virginia has a similar statutory provision – and not limited to bodily injury claims. And, as last week's decision in *National Casualty Insurance Company v. Solomon*^[1] teaches, an insurer's failure to comply can lead to a harsh result. Here, on account of not providing notice to a claimant of a reservation of rights, National Casualty lost the ability to disclaim coverage, under a claim-made policy, where notice was late by **12 years**. Not 12 months. Years. Insurers do not lose too many "claims made" cases with facts like this. But enter Va. Code § 38.2-2226.

In *Solomon*, the court addressed coverage under the following circumstances.

In December 1999, Atlanta Channel Company, Inc.'s former attorney, Henry Solomon, allegedly committed legal malpractice following the submission of a defective application for a special broadcasting license with the Federal Communications Commission. Solomon did not report the allegedly defective application to National Casualty until November 2012. National Casualty sent Solomon a series of reservation of rights letters, in 2015, 2016 and 2019, stating that it would defend him in the malpractice action filed by Atlanta Channel, but it would not indemnify him for any judgment or settlement. This was on account of his failure to provide timely notice of circumstances which could give rise to a claim. Significantly, National Casualty failed to copy Atlanta Channel on the letters.

Atlanta Channel did not receive copies of any of the letters until late 2019. The company argued that National Casualty's failure to copy it on the letters violated Virginia Code § 38.2-2226, and that as a result, National Casualty had waived its right to disclaim coverage to Solomon for his failure to comply with the policy's notice provisions.

As cited by the court, Virginia Code § 38.2-2226 provides:

Whenever any insurer on a policy of liability insurance discovers a breach of the terms or conditions of the insurance contract by the insured, the insurer shall notify the claimant or the claimant's counsel of the breach. Notification shall be given within forty-five days after discovery by the insurer of the breach or of the claim, whichever is later. Whenever, on account of such breach, a nonwaiver of rights agreement is executed by the insurer and the insured, or a reservation of rights letter is sent by the insurer to the insured, notice of such action shall be given to the claimant or the claimant's counsel within forty-five days after that agreement is executed or the letter is sent, or after notice of the claim is received, whichever is later. Failure to give the notice within forty-five days will result in a waiver of the defense based on such breach to the extent of the claim by operation of law.

While not cited by the court, § 38.2-2226 also provides:

Notwithstanding the provisions of this section, in any claim in which a civil action has been filed by the claimant, the insurer shall give notice of reservation of rights in writing to the claimant, or if the claimant is represented by counsel, to claimant's

counsel not less than thirty days prior to the date set for trial of the matter. The court, upon motion of the insurer and for good cause shown, may allow such notice to be given fewer than thirty days prior to the trial date. Failure to give the notice within thirty days of the trial date, or such shorter period as the court may have allowed, shall result in a waiver of the defense based on such breach to the extent of the claim by operation of law.

The bulk of the court's opinion addressed whether Virginia Code § 38.2-2226 is procedural or substantive in nature and its applicability to the claim.

After determining that the provision was substantive, and applicable, the court had no trouble quickly reaching a conclusion: National Casualty's failure to provide timely notice of Solomon's breach to Atlanta Channel was a violation of § 38.2-2226 and mandated a determination that National Casualty could not disclaim coverage for any judgment entered in favor of Atlanta Channel, against Solomon, in the malpractice lawsuit.

Of note, Va. Code § 38.2-2226 does not apply when an insurer is advising its insured of a defense, based on a claim not satisfying the requisite terms for coverage under a policy. This point was made not long ago by the Fourth Circuit in *Gateway Residences at Exchange, LLC v. Illinois Union Insurance Company*[2]: "The statute's text makes two things clear: it covers denials based on the insured's 'breach' of the terms and conditions of the policy and applies to arguments properly characterized as waivable 'defenses.' Courts have therefore rightly held that the statute (or its precursor) doesn't apply when an insurer denies coverage because the claim falls outside the scope of policy coverage. (citations omitted) The argument that a claim is outside the scope of coverage is not about an insured's 'breach' of contract. A 'breach' assumes a legal duty on the insured's part, but the insured obviously has no legal duty to incur covered claims. Likewise, a denial based on scope of coverage is not a 'defense,' as a 'defense' presupposes the insurer's existing obligation to provide coverage."

If you're going to Virginia, don't miss Monticello, Mt. Vernon or Va. Code § 38.2-2226.

If you have any questions or need more information, contact Randy J. Maniloff (maniloffr@whiteandwilliams.com; 215.864.6311) or Margo E. Meta (metam@whiteandwilliams.com; 215.864.6219).

[1] *National Casualty Insurance Company v. Solomon*, No. 20-699 (D.D.C. Nov. 24, 2020)

[2] *Gateway Residences at Exchange, LLC v. Illinois Union Insurance Company*, 917 F.3d 269, 274 (4th Cir. 2019)

This correspondence should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only and you are urged to consult a lawyer concerning your own situation and legal questions.

