



## New York Becomes A 'Prejudice' State

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This past July, New York State Governor David Patterson signed legislation that revises New York State's position with respect to what constitutes timely notice of a potential claim to an insurance carrier. The changes to New York Insurance Law and the Civil Procedure Law and Rules prohibit insurers from denying claims based on late notice unless the insurer can prove prejudice. Additionally, the new laws permit claimants in a personal injury or wrongful death claim to maintain declaratory judgment actions directly against insurers on the sole question of late notice. These amendments, effective January 17, 2009, erase New York's status as a "notice" state and move it towards the more popular "prejudice" view.

For policies issued prior to January 17, 2009, New York law permits insurers to deny claims if the claimant fails to notify the insurer of a claim in a timely manner, regardless of whether the timing of the notice caused any prejudice to the insurer. The timeliness of the notice was determined by the courts and New York provided limited leniency only in situations where the claimant could prove that it was not reasonably possible to give notice within the prescribed time and that notice was given as soon as reasonably possible.

The new law applicable to insurance policies issued in New York on or after January 17, 2009 will require new policies to contain a provision stating that failure to give timely notice will not invalidate a claim made by a claimant unless the late notice has prejudiced the insurer. The New York Insurance

Law has also been revised to provide that in an action where the insurer alleges prejudice and notice was provided within two years of the time required by the policy, the insurer shall have the burden to prove it was prejudiced. If, however, notice is provided to the insurer more than two years after the prescribed time period, the burden of proving that the insurer was not prejudiced shifts to the claimant.

According to the new statutes, prejudice to an insurer occurs when failure to provide timely notice materially impairs the ability of the insurer to investigate or defend the claim. While the meaning of "materially impairs" will undoubtedly become the subject of litigation, the statutes clarify that an irrebuttable presumption of prejudice is established if notice is provided to the insurer (1) after a court of competent jurisdiction or binding arbitration has determined the insured's liability or (2) after the case has been settled.

In addition to establishing the prejudice standard, the amendments establish a process through which a claimant may in certain circumstances obtain from an insurer confirmation that the insurance policy is applicable to the claim.

While New York's new 'prejudice' standard will minimize the ability of insurance carriers to deny claims due to the timing of when notice is given, prudent business practice continues to dictate providing carriers with notice of claims as soon as possible. Of course, the added insurance that one's insurance policy will indeed cover a claim is comforting for insureds.

The above article is an overview only and should not be considered legal advice. Application of relevant laws will be dependent upon specific facts and circumstances. For more information, please contact Michael J. Vardaro, Esq. at 212-682-6800, or [mvardaro@zdlaw.com](mailto:mvardaro@zdlaw.com).

Many thanks to Calvin Lee, who is currently a law student at Brooklyn Law School and working as a legal intern at Zetlin & De Chiara LLP.

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