OUTSIDE PERSPECTIVES

Late Notice Of Claim? Policyholders Are Getting Long Needed Relief From New York's Draconian Application Of The "No-Prejudice" Exception

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The law of late notice in New York is changing. Recently, in a major victory for New York insurance policyholders, a state trial court has required an insurance company to demonstrate that it was prejudiced by its policyholder's untimely notice of claim before it could deny coverage on that basis. *See St. Charles Hospital and Rehabilitation Center v. Royal Globe Insurance Company*, et al., No. 29155-98 (April 28, 2004) ("*St. Charles Hospital*").

Virtually all liability insurance policies require a policyholder to give its insurance company notice of a claim "as soon as practicable." In New York, the failure of a policyholder to comply with this technicality, by even short periods of time, has operated in the past as a complete bar to coverage. *See, e.g., Olin Corp. v. Ins. Co. of North Am.*, 743 F. Supp. 1044, 1053 (S.D.N.Y. 1990). Moreover, New York courts have long adhered to the "no-prejudice" exception, which allows an insurance company to deny coverage based on its policyholder's late notice of claim without having to demonstrate that it was somehow prejudiced by the late notice.

Despite this longstanding position, New York Supreme Court Justice James M. Catterson recently ruled that, in order to effectively deny coverage, Royal Globe Insurance Company and Royal Insurance Company of America (collectively, "Royal") "was required to show that it was prejudiced by receiving the notice of claim and legal action twenty-one years and nine months after the occurrence as opposed to having received it twenty-one years after the occurrence." Justice Catterson further held that, "as a matter of law, Royal was not prejudiced by the nine month delay in notification."

In *St. Charles Hospital*, the underlying claim involved allegations of medical malpractice on the part of St. Charles Hospital and Rehabilitation Center ("St. Charles"), which occurred 21 years before the underlying plaintiff brought suit. St. Charles' first notice of the underlying occurrence came when it was served with the summons and complaint in the underlying action. Seeking coverage under a hospital malpractice liability endorsement to a commercial general liability insurance policy, St. Charles notified Royal of the underlying suit nine months after it was served. Royal disclaimed coverage on the basis that St. Charles' notice of claim to Royal was nine months late.

A declaratory judgment action ensued and St. Charles eventually moved for summary judgment arguing that, under the circumstances of the case, Royal should have to demonstrate prejudice before it could evade its obligations to its policyholder. Royal cross-moved for summary judgment relying on the no-prejudice exception. Justice Catterson agreed with St. Charles.

This decision comes in the wake of the recent New York Court of Appeals decision in *In re Brandon* (*Nationwide Mut. Ins. Co.*), 97 N.Y.2d 491 (2002) ("Brandon"). In *Brandon*, New York's highest court declined to apply the no-prejudice exception in the uninsured motorist context where, although timely notice of claim was submitted, the policyholder's notice of suit was over a year late. The *Brandon* court explicitly declined to comment on the issue of whether New York

should continue to maintain the no-prejudice exception when insurers assert late notice of claim as a defense, because that issue was not before the court.

Taking his signal from Brandon, Justice Catterson pointed out the "turning of the tide" in New York with respect to the application of the no-prejudice exception and refused to apply it in a late notice of claim case where (i) the underlying rationales for the rule were not advanced; and (ii) policy considerations such as the compensation of tort victims and the inequities of the insurance company receiving a windfall, militated against application of the rule.

Justice Catterson stated that:

> Since the rationale for the 'no-prejudice' exception is based on the presumption that an insurer will be prejudiced if it cannot investigate a claim or negotiate a settlement on a timely basis, it necessarily follows that whatever need exists to conduct an investigation or enter into settlement negotiations exists within a timeframe that occurs 'soon after the underlying event.'

Because St. Charles did not receive notice of any kind until 21 years after the underlying events occurred, Justice Catterson declined to apply the no-prejudice exception and required that Royal show that it was somehow prejudiced by receiving St. Charles' notice of claim 21 years and nine months after the occurrence as opposed to receiving it 21 years after the occurrence. Justice Catterson further ruled that, as a matter of law, Royal was not prejudiced by St. Charles' nine month delay.

In addition to *Brandon*, the New York Court of Appeals has sent other signals suggesting New York's inevitable move to a "prejudice" state. Indeed, on December 12, 2002, the New York Court of Appeals accepted certification of the Second Circuit's certified question of whether a malpractice insurance company was required to demonstrate prejudice to disclaim coverage based on the insured's failure to give timely notice of suit. *See Mark A. Varrichio & Assoc. v. Chicago Ins. Co.*, 99 N.Y.2d 545 (2002).

Not surprisingly, after the Court of Appeals accepted the Second Circuit's certification, the plaintiff in *Varrichio* reached a settlement with its insurance company, the appeal was dismissed, and the certification to the New York Court of Appeals was withdrawn. *See Mark A. Varrichio & Assoc. v. Chicago Ins. Co.*, 328 F.3d 50 (2d Cir. 2003). In seeking a ruling from the Court of Appeals, however, the Second Circuit gave its opinion of the outcome:

> Were we to decide the case ourselves, we likely would conclude that the general principals that the New York Court of Appeals adopted in *Brandon* suggest that the court would not apply the no-prejudice rule in the case before us.
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> *Varrichio*, 312 F.3d at 549.

Conclusion

While the New York Court of Appeals has not yet addressed whether, and under what circumstances, an insurance company should be required to demonstrate that it was somehow prejudiced by its policyholder's late notice of claim before it can evade its contractual obligations on that basis, the current momentum on this issue is swinging strongly in favor of policyholders.

John B. Berringer and Dennis J. Artese, attorneys in the New York office of Anderson Kill & Olick, P.C., successfully represented the policyholder in St. Charles Hospital, discussed above. John and Dennis regularly represent policyholders in a wide range of insurance coverage disputes. John can be reached at (212) 278-1500 or jberringer@andersonkill.com and Dennis at (212) 278-1246 or dartese@andersonkill.com. For more information on Anderson Kill, please visit www.andersonkill.com.