Anderson Kill & Olick, P.C.
POLICYHOLDER ADVISOR
The Policyholder Law Firm
Volume 14 Number 3 www.andersonkill.com May/June 2005

New York Policyholders Look to Legislature for Relief in Late Notice Cases

By Ann V. Kramer and Dennis J. Artese

For decades, New York has stood nearly alone in allowing insurance companies to escape their obligations to policyholders simply by showing notice was "late" without any showing of prejudice to the insurance company. New York sanctions the severe consequence of forfeiture based upon immaterial "late" notice of occurrence, claim and/or lawsuit to liability insurance companies. In fact, courts have permitted forfeitures for delays as short as three weeks.

Then, because of a series of decisions handed down by various New York state and federal courts, policyholders shared a cautious optimism that New York's draconian "late notice" law was on the verge of a fundamental change. The recent New York high court decision in *Argo Corp. v. Greater N.Y. Mutual Ins. Co.*, __ N.Y.2d __, 2005 WL 756613, (April 5, 2005) ("*Argo*") has dampened policyholders' hopes for a judicial change in the law. Nevertheless, a legislative change remains possible.

New York's Draconian Late Notice Law

Virtually all liability insurance policies require the policyholder to give its insurance company notice of an "occurrence," "claim" and "suit" either "as soon as practicable" or "immediately." Where a policyholder has a reasonable excuse for delay, such as a reasonable belief in non-liability, delay often is excused. *See, e.g., Paramount Ins. Co. v. Rosedale Gardens, Inc.*, 37 A.D.2d 235 (1st Dept. 2002). Absent a valid excuse, however, the failure of a policyholder to comply with this technicality, by even short periods of time, operates 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).

New York courts generally do not require that an insurance company demonstrate that it was prejudiced by its policyholder's late notice before it can deny coverage based on late notice, and the policyholder cannot rebut that denial by proving that the insurance company was not prejudiced. *See Nationwide v. Brandon*, 97 N.Y.2d 491, 496 (2002) ("*Brandon*") (citing *Security Mut. Ins. Co. v. Acker-Fitzsimons Corp.*, 31 N.Y.2d 436, 440 (1972)).

This draconian rule of law, which often results in total forfeiture of coverage despite the absence of any prejudice to the insurance company, is known as the "no prejudice exception." It is referred to as an "exception" because it is a divergence from the well-established principle of contract law that "a non-breaching party must show that a breach was material, or that it was prejudiced by the breach, before being relieved of its obligations to perform under the contract." *Great Canal Realty Corp. v. Seneca Ins. Co.*, 13 A.D.3d 227, 230 (1st Dept. 2004) ("*Great Canal*").

The recent New York high court decision in Argo has dampened policyholders' hopes for judicial change, nevertheless legislative change remains possible.

Erosion of the Harsh "No Prejudice Exception"

The New York high court began chipping away at the "no prejudice exception" as early as 1992, when it held that a reinsurance company must demonstrate prejudice before it may successfully disclaim coverage based on its reinsured's late notice. *See Unigard Sec. Ins. Co., Inc. v. North River Ins. Co.*, 79 N.Y.2d 576, 581 (1992) ("*Unigard*"). The court reasoned that applying the "no prejudice exception" in the reinsurance context would not further the articulated rationales for its application in the context of primary insurance. *See id.* at 582.

The rationales for permitting the application of the "no prejudice exception" where a policyholder submits late notice to its primary insurance company are connected to the insurance company's obligation to defend the policyholder. It is argued that any delay may undermine the insurance company's ability to provide that defense. The reference to primary insurance policies in *Unigard* gave

"Relief in Late Notice Cases" continued p2

Recent Developments

Minnesota Appeals Court rules builder entitled to Declaratory Judgment fees. *Westfield Insurance Co. v. Stephen J. Kroiss, et al.* On April 5 the Minnesota Court of Appeals reversed a trial court's ruling, and held that the policyholders, Stephen J. Kroiss and Stephen R. Kroiss ("the Kroisses") are entitled to attorney fees incurred in the Declaratory Judgment to determine the insurance company's duty to defend. The trial court had ruled that the Kroisses were entitled to a defense but not to reimbursement for the attorney fees they incurred to vindicate that right. Westfield Insurance Co. ("Westfield") appealed the district court's finding that it had a duty to defend the Kroisses (homebuilders) against lawsuits for water damages caused by defective construction. Westfield stated that because the complaints do not specifically allege that damages occurred during the insurance company's policies, Wesfield did not have a duty to defend. The Kroisses argued that the trial court erred in not allowing them recover attorney fees in the Declaratory Judgment action to determine Westfield's duty to defend. The Minnesota Court of Appeals decided: "Because the district court properly determined that the claims asserted against the respondents were arguably covered by appellant's policy, we affirm the district court's holding that the appellant had a duty to defend the respondents. However, because the respondents attorney fees in the declaratory judgment were damages arising out of appellant's breach of its duty to defend, we reserve the district court's denial of attorney fees and costs, and remand to the district court to determine the proper amount of those fees as damages."

—Claudia Ilie

"Relief in Late Notice Cases" continued from p1

policyholders hope that the high court was opening a path to alleviate the harshness of the "no prejudice exception" for excess insurance policies and other policies without a defense obligation. That hope was dashed by the court's 1997 decision in *American Home Assurance Co. v. Int'l Ins. Co.*, 90 N.Y.2d 433 (1997), which extended the application of the "no prejudice exception" to excess insurance companies.

In 2002, the Court of Appeals departed from the "no prejudice exception," this time in the context of Supplemental Uninsured Motorists ("SUM") coverage. In *Brandon*, the court held that the "no prejudice exception" did not apply to delayed notice of "suit," where the policyholder previously had given timely notice of "claim." *See Brandon*, 97 N.Y.2d at 498. Chief Judge Kaye recognized that New York was in the distinct minority regarding notice, and indicated that the holding in *Brandon* was a first step in the process of bringing New York into line with its sister states. *See Brandon*, 97 N.Y.2d at 496 n.3.

Subsequent courts have applied *Brandon* broadly, requiring insurance companies to demonstrate prejudice where a policyholder allegedly submits late notice of occurrence or claim, as well as late notice of suit. For instance, in *St. Charles Hosp. & Rehab. Center v. Royal Globe Ins. Co., Decision of Interest, N.Y.L.J. Vol. 231, Col. 3, (May 25, 2004)*, the court required the insurance company to demonstrate that it was prejudiced by an alleged nine-month delay in providing notice of claim under a professional liability policy. Granting the hospital summary judgment, the court pointed to the "turning of the tide" in New York with respect to the application of the "no prejudice exception," particularly where the underlying rationales for applying the exception were not advanced under the circumstances of the case.

More recently, in *Great Canal*, an intermediate appellate court took on the validity of New York's draconian law in late notice of occurrence cases. After a lengthy analysis of the *Brandon* opinion, general principles of contract law, and a survey of the law in other jurisdictions, two judges concurred in an opinion affirming that a triable issue of fact existed as to whether the insurance company was prejudiced by the alleged four-month delay in providing notice of an occurrence under a general liability policy. *See Great Canal*, 13 A.D.3d at 23-29.

The Harsh "No Prejudice Exception" Returns

These decisions and others led many observers to believe that it would not be long before the New York high court brought the state into line with its sister states and began to require consideration of an insurance company's lack of prejudice in "late" notice cases. To the surprise of many, however, the court recently applied the "no preju-

"Relief in Late Notice Cases" continued p3

"In 1859, the Court observed that nothing is so easy as to be wise after the event."

Answer on page 3

"Relief in Late Notice Cases" continued from p2

dice exception" in a case where the policyholder received notice of claim and lawsuit at the same time, and delayed for over 14 months, without excuse, before notifying its insurance company of the lawsuit. *See Argo*, 2005 WL 756613 at *2-3. The court explicitly distinguished its holding in *Brandon* stating that, in *Brandon*, the insurance company previously was given timely notice of claim. *Id*. at *3.

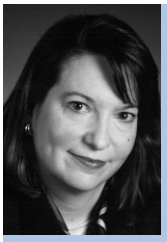
In a companion case decided by the Court of Appeals on the same day as *Argo*, the court required a SUM insurance company to demonstrate prejudice where the policyholder provided timely notice of the accident/occurrence, but delayed for six months in submitting notice of the SUM claim, without excuse. *See Rekemeyer v. State Farm Mut. Auto. Ins. Co.*, __ N.Y.2d __, 2005 WL 756620 (April 5, 2005). The court emphasized that the policyholder's notice of the accident "was sufficient to promote the valid policy objective of curbing fraud or collusion." *Id*. at *3.

Legislative Hope

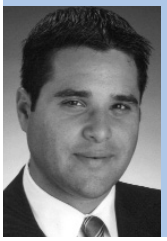
While *Argo* may present a considerable obstacle to policyholders seeking judicial relief from the "no prejudice exception," it is no obstacle to a legislatively imposed requirement that the insurance company prove prejudice before permitting forfeiture of coverage. Indeed, on February 2, 2005, such a bill was proposed in the New York State Senate. Bill No. S1770 (the "Bill"), proposed by Senator Bonacic, states that "[a]n insurer shall not deny coverage for a claim based on the failure of an insured to give timely notice of a claim unless the authorized insurer or other insurer can demonstrate that it has suffered substantial prejudice as a result of the delayed notice."

The prejudice requirement would apply to all types of insurance coverage in New York and to every contract of insurance "executed, issued, reissued or renewed on or after [its] effective date." Thus, if signed into law as written, the Bill's prejudice requirement would not apply retroactively. Under the Bill, evidence that the insurance company had knowledge of the loss that is the subject of the claim would create a rebut-

"Relief in Late Notice Cases" continued p4



Ann V. Kramer is a senior Shareholder in the New York office of Anderson Kill & Olick, P.C. Ms. Kramer heads the settlement and alternative dispute resolution adjunct to Anderson Kill's insurance coverage recovery practice. Ms. Kramer has been instrumental in negotiating settlements in many of Anderson Kill's multi-party insurance coverage litigations. Ms. Kramer has represented clients in negotiations, mediations, arbitrations and other forms of alternative dispute resolution. She also was one of the first developers of computerized insurance allocation models for long-tail claims. These models have been used in connection with product liability, environmental remediation and toxic tort claims. Ms. Kramer can be reached at (212) 278-1709 or akramer@andersonkill.com.



Dennis J. Artese is an associate in Anderson Kill's New York office who represented St. Charles Hospital in the case mentioned above. Mr. Artese can be reached at (212) 278-1246 or dartese@anderson-kill.com

Announcement

Anderson Kill & Olick, P.C. is pleased to announce that the following Anderson Kill attorneys have been promoted to Stockholder:

Jeremy J. Flanagan
Anderson Kill & Olick, P.C.
(212) 278-1259
Fax: (212) 278-1733
jflanagan@andersonkill.com

John G. Nevius
Anderson Kill & Olick, P.C.
(212) 278-1508
Fax: (212) 278-1733
jnevius@andersonkill.com

Steven J. Pudell
Anderson Kill & Olick, P.C.
(973) 642-5877
Fax: (973) 621-6361
spudell@andersonkill.com

Richard A. Schwartz
Anderson Kill & Olick, P.C.
(212) 278-1416
Fax: (212) 278-1733
rschwartz@andersonkill.com

a WHO SAID WHAT?

ITT Hartford Insurance Company, Appellee's Brief and Request for Oral Argument at 15, dated Sept. 29, 1999, *Gibson v. ITT Hartford Insurance Co.*, No. 99-0386 (Iowa).

"Relief in Late Notice Cases" continued from p3

table presumption that the insurance company has not been prejudiced by the delay in notice.

The Bill goes a long way to cure the severe consequences of a policyholder's technical breach of the notice requirement as it stands today, however, its provisions should be expanded to instances of late notice of "occurrence" and "suit," as well as late notice of "claim." Because New York courts distinguish between the three, such a revision would greatly clarify the intent of the Bill.

Conclusion

The Bill has a long way to go before becoming law. It has been introduced in the Senate, which has a reputation for responding to pressure from insurance industry lobbyists. The Assembly has in the past been more receptive to protections for policyholders but no companion version of the Bill appears to have been introduced in the Assembly. Governor Pataki would have to support the Bill as well.

Although it is too early to predict whether the legislature would pass and the governor would sign the Bill, it does appear to present an opportunity for New York policyholders potentially to benefit from a prejudice requirement when an insurance company asserts the defense of late notice. Of course, the insurance industry will continue to fight to protect its unique advantage over New York policyholders.

Anderson Kill & Olick, P.C. Is Pleased to Announce

Joseph Bulian has joined the Firm as a Shareholder in the New York Office and **Thomas Petty** has joined the Firm as a Partner in the DC Office. Mr. Bulian and Mr. Petty concentrate their practices in the area of commercial real estate, with a focus on real estate financings and acquisitions.

Joseph Bulian, Esq.
Anderson Kill & Olick, P.C.
1251 Avenue of the Americas
New York, NY 10020
Direct: (212) 278-1139, Fax: (212) 278-1733
jbulian@andersonkill.com

Thomas Petty, Esq.
Anderson Kill & Olick, L.L.P.
2100 M Street, N.W, Suite 650
Washington, DC 20037
Direct: (202) 218-0041, Fax: (202) 218-0055
tpetty@andersonkill.com

AKO Policyholder Advisor is published every two months by Anderson Kill & Olick, P.C. The Firm has offices in New York, Washington, Chicago, Philadelphia and Newark. The newsletter informs clients, friends, and fellow professionals of developments in insurance coverage law. The newsletter is available free of charge to interested parties. The articles appearing in **AKO Policyholder Advisor** do not constitute legal advice or opinion. Such advice and opinion are provided by the Firm only upon engagement with respect to specific factual situations. For more information, contact our Editorial Board:

Mark Garbowski (mgarbowski@andersonkill.com) Editor-in-Chief, Financial Services Group, (212) 278-1169;
Finley T. Harckham (fharckham@andersonkill.com) International Editor, (212) 278-1543;
Claudia Ilie (cilie@andersonkill.com) Managing Editor, Legal Researcher, (212) 278-1024;
Joshua Gold (jgold@andersonkill.com) Pharmaceuticals and Healthcare Industry Group, (212) 278-1886
Richard P. Lewis (rlewis@andersonkill.com) Pharmaceuticals and Healthcare Industry Group, (212) 278-1822;
John B. Berringer (jberringer@andersonkill.com) Real Estate and Construction Industry Group, (212) 278-1500;
John N. Ellison (jellison@andersonkill.com) Petroleum and Chemicals Industry Group, (215) 568-4710;
William G. Passannante (wpassannante@andersonkill.com) Petroleum and Chemicals Industry Group, (212) 278-1328.

Anderson Kill & Olick, P.C.
1251 Avenue of the Americas
New York, NY 10020