

PROTECTING YOUR INSURANCE PROTECTION !.

ACT PROMPTLY TO AVOID COVERAGE DISCLAIMERS

By

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The disclaimer of coverage due to an alleged late notice of an “occurrence” is a far too frequent response by insurance companies today. In the continuing “hard” insurance market of the post-9/11 era, obtaining adequate coverage is a daunting task. Carriers, however, are also seeking to limit exposure even where insurance has been underwritten. The way to do this is simple. Simply find any excuse not to extend coverage to the insured when called upon to do so. Construction companies are often too slow to react to an “occurrence” and notices to carriers are often inadequate both in response time and content. This only plays into the hands of the carriers.

As will be discussed, construction companies should never “take no for an answer” regarding insurance coverage. There are avenues of relief against insurance companies that disclaim coverage, but they must be navigated with precision and determination. You can’t allow them to wear you down.

First the bad news. New York State, unique among all of the fifty states, maintains the pro-insurance industry rule of law known as the “no prejudice” rule. This

artificially protects insurance companies in coverage disputes. The timeliness of the insured's notice, therefore, is a significant battlefield in New York.

Outside the field of insurance, a party is not relieved of its contractual obligations by the default of the other party to the contract unless the other party's default is "material". That is unless the default affects an essential element of the contract so that the non-defaulting party is actually harmed or prejudiced in some way. In the insurance field in New York State, however, the courts continue to hold that in order to disclaim coverage an insurance company need not show that it was actually prejudiced in any material way by the insured's failure to send timely notice of an occurrence. In other words, under New York law an insurance company need not show that the late notice made a difference. If it was late, the insurance company can disclaim, even if the "tardiness" was harmless.

Emboldened by the Court of Appeals' recent pronouncement that the "no prejudice" rule is still the law in New York, insurance companies have taken every opportunity to disclaim coverage wherever there is any apparent issue to be made that they did not receive timely notice of the occurrence that underlies the claim. When this happens, the insured is left with not one, but two problems. First, it may face a lawsuit seeking potentially millions of dollars in damages from an injured party against which there is, allegedly, no insurance coverage. The insured will have to hire its own lawyers and pay attorneys' fees directly in order to defend itself in the liability action. The insured is left with no protection, although it paid insurance premiums in order to have

the insurance company pay for its defense, and to pay any damages for liability (up to the limits of the policy). Secondly, the insured will have to commence a second independent lawsuit to challenge the insurance company's disclaimer.

Belief of "Non-Liability"

However, there remains an important exception to the "no prejudice" rule under New York law. Where an insured has a reasonable belief of "non-liability" for the occurrence at issue, its failure to send immediate notice of the occurrence is not grounds for disclaimer of coverage by the carrier. Whether the insured's belief of non-liability is reasonable is an issue of fact that can be decided at trial.

The question of whether the belief was reasonable is not decided in a vacuum. It will depend upon all the information and circumstances available at and after the time of the occurrence. Absent any excuse, a delay of only days has been found enough to justify the disclaimer. Having established an excuse based upon a reasonable belief of non-liability, disclaimers of coverage have been reversed where the delay in sending notice was twenty years.

Whether the belief of non-liability is reasonable is greatly dependent upon whether you conducted an investigation into the occurrence. You simply cannot say that you did not believe you were liable. You have to have looked into what happened, gathered relevant information and then concluded, reasonably, based upon the relevant

information, that you were not liable or that the injured party did not evidence an intention to make a liability claim against you.

An example of a reasonable “belief in non-liability” would be the following circumstances from an actual case:

The police report of a car accident indicated that no one had been hurt, that the drivers were in substantial agreement as to how the accident had occurred and that only the rear bumper of the first car and the front plaintiff’s car had sustained damage. The cost of property damage was minimal; plaintiff did not report the accident to his insurance company. A full year later the plaintiff reported the accident after the other party to the accident had made a claim for personal injuries. In light of the police report and the fact no one involved in the accident ever previously complained of anything other than minor property damage, the Court held that the insurance company could not disclaim coverage for late notice, because the plaintiff had no previous reason to believe he faced any liability for the accident.

Because arguments like these are so fact specific, insurance companies typically refuse to change their positions when their disclaimers for alleged late notice are challenged. In order to force the carrier to withdraw its disclaimer, you either need an extremely knowledgeable insurance professional to assist you and/or you must

commence a lawsuit against the carrier seeking a declaration that the disclaimer be withdrawn and that coverage, or at least the duty to defend, be immediately enforced. Until a court orders the insurance company to extend coverage, the carriers really have nothing to lose by sticking with its original disclaimer.

G&C Commentary:

When faced with a disclaimer of insurance coverage for late notice of the “occurrence”, contact your insurance broker and your attorney immediately. Since you most likely will have to become involved in two lawsuits, one to defend the liability action and one against the insurance company to compel coverage, you will need counsel who can handle both the defense of the liability lawsuit and the insurance coverage dispute. Since this is a fact intensive issue, as indicated, the relevant facts need to be investigated and compiled quickly. It is not easy to fight with your carrier, but it is possible to prevail. It’s all about knowing your rights.

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