

## The Claim Professional's Tip Sheet

### How to Determine if the Right to Disclaim or Deny Coverage is Lost in New York

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#### **WAIVER:**

**Law:** Waiver is a voluntary, intentional and irrevocable relinquishment of a known right (see *Albert J. Schiff Assoc. v Flack*, 51 NY2d 692, 698 [1980]). This doctrine applies only where coverage exists and may not operate to create such protection (see *Ward v County of Allegany*, 34 AD3d 1288 [4th Dept 2006]). To prove waiver, the insured must demonstrate a "clear manifestation of intent by [the insurer]" to abandon its right to assert what it knows or should know to be a defense to coverage (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 968 [1988]).

**Effect:** If an insurer has knowledge that its insured failed to comply with a policy condition precedent to coverage, that insurer must disclaim coverage on that basis in accordance with the requirements of section 3420 (d). An insurer may waive the right to assert a coverage defense when it, among other things, manifests an intent to relinquish the benefit of a policy defense (cf. *Compis Servs., Inc. v Hartford Steam Boiler Inspection & Ins. Co.*, 272 AD2d 886, 888 [4th Dept 2000]), or when it fails to assert a policy defense pertaining to:

- **timely notice of loss** (see *General Acc. Ins. Group v Cirucci*, 46 NY2d 862, 864 [1979]);
- **the prompt disclosure of suit papers** (see *Matter of Allstate Ins. Co. [Zenaty]*, 174 AD2d 832, 834 [1991]);
- **the consent of the carrier prior to the settlement of the claim** (see *Firemen's Fund Ins. Co. v Freda*, 156 AD2d 364, 365-366 [2d Dept 1989]); and
- **timely filing of proof of loss** (see *Schunk v New York Cent. Mut. Fire Ins. Co.*, 237 AD2d 913, 914 [4th Dept 1997]).

#### **PRECLUSION:**

**Law:** The doctrine of preclusion arises from the terms of section 3420 (d). That statute requires that an insurer issuing a policy delivered in New York State

"disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state[] [by] giv[ing] written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant."

The failure of an insurer to give notice "as soon as is reasonably possible" after it first learns of the grounds for disclaimer precludes effective disclaimer or denial of coverage (*New York Cent. Mut. Fire Ins. Co. v Aguirre*, 7 NY3d 772, 774 [2006]). However, conformity with section 3420 (d) is necessary only where the policy would provide coverage but for a policy defense or exclusion (see *Markevics v Liberty Mut. Ins. Co.*, 97 NY2d 646, 648 [2001]). Therefore, section 3420 (d) is inapplicable when a claim falls outside the scope of coverage afforded by the policy (see *Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 188 [2000]).

**Effect:** The timeliness of an insurer's disclaimer is measured from the point at which the insurer first learns of the grounds for disclaimer of liability or denial of coverage and is generally a question of fact (*Aguirre*, 7 NY3d at 772). However, each of the following appellate courts has found the below-described unexcused delay in disclaiming to be unreasonable as a matter of law:

**Court of Appeals:** 48 days (*First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 68-70)

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[2003]);

**Fourth Department:** 60 days (*Nuzzo v Griffin Tech.*, 222 AD2d 184, 188 [4th Dept 1996], *lv denied* 91 NY2d 802);

**Third Department:** 42 days (*Squires v Robert Marini Bldrs.*, 293 AD2d 808, 810 [3d Dept 2002], *lv denied* 99 NY2d 502);

**Second Department:** 41 days (*Nationwide Mut. Ins. Co. v Steiner*, 199 AD2d 507, 508 [2d Dept 1993]); and

**First Department:** 30 days (*West 16th St. Tenants Corp. v Public Serv. Mut. Ins. Co.*, 290 AD2d 278, 279 [1st Dept 2002], *lv denied* 98 NY2d 605).

**Careful!** There is no bright line rule that an unexplained delay of less than 30 days is reasonable (*Hess v Nationwide Mut. Ins. Co.*, 273 AD2d 689, 690 [3d Dept 2000]).

**ESTOPPEL:**

**Law:** Estoppel arises where an insurer acts in a manner inconsistent with a lack of coverage, and the insured relies upon those representations to its prejudice. When an insurer defends an action on behalf of an insured despite knowledge that a policy defense or a policy exclusion may defeat coverage, it is thereafter estopped from asserting that the policy does not cover the claim (*O'Dowd v American Sur. Co. of N.Y.*, 3 NY2d 347, 355 [1957]; *see Schiff Assoc.*, 51 NY2d at 699). The burden of proving estoppel rests with the proponent of that doctrine (*see Merchants Mut. Ins. Group v Travelers Ins. Co.*, 24 AD3d 1179, 1182 [4th Dept 2005]).

**Effect:** If an insurer has knowledge that a claim comes within the ambit of a policy exclusion and is therefore removed from coverage, or that coverage in a particular matter is defeated by application of a policy defense, that insurer must either disclaim coverage on that ground or reserve its right to do so to avoid becoming estopped from denying that protection at a later time. To illustrate, an insurer that mistakenly provides coverage may be estopped from disclaiming on the basis of an applicable policy defense or exclusion where the insured is prejudiced by the insurer's retraction of coverage.

- **represented the insured for two years before disclaiming coverage** on the ground that coverage did not begin until after the subject accident (*American Tr. Co. v Wilfred*, 296 AD2d 360, 361 [1st Dept 2002]);
- **represented the insured for 11 years before disclaiming coverage** on grounds that were known to the insurer throughout the course of the litigation (*Brooklyn Hosp. Ctr. v Centennial Ins. Co.*, 258 AD2d 491, 492 [2d Dept 1999]);
- **defended and settled a claim on behalf of its insured** before attempting to escape its coverage obligations by way of an exclusion (*National Cas. Co. v State Ins. Fund*, 227 AD2d 115, 118 [1st Dept 1996]); and
- **controlled the early stages of the defense of its insured for seven months** before attempting to disclaim coverage on the basis of an exclusion (*Dryden Mut. Ins. Co. v Michaud*, 115 AD2d 150, 152 [3d Dept 1985]).

The doctrine of estoppel generally does not create coverage where none existed under the policy's terms (*see Jefferson Ins. Co. of New York v Travelers Indem. Co.*, 92 NY2d 363, 370 [1998]). However, where an insurer issues a certificate of insurance purporting to provide coverage to a party that is not an insured or an additional insured under the policy, that insurer may be estopped from later arguing that there is no protection for what would otherwise have been an uncovered entity (*see Bucon, Inc. v Pennsylvania Mfg. Assoc. Ins. Co.*, 151 AD2d 207 [3d Dept 1989]).

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