

In This Issue

[Overview Of The New Law Amending The Civil Practice Law And Rules And The Insurance Law](#)

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OVERVIEW OF THE NEW LAW AMENDING THE CIVIL PRACTICE LAW AND RULES AND THE INSURANCE LAW

These provisions take effect 180 days from when the law was signed by the Governor. Thus, 180 days from July 21, 2008 is January 17, 2009.

Who May Bring A Declaratory Judgment Action, And When?

Right now, only the insurance company or the insured has “standing” to bring a declaratory judgment action to resolve coverage issues prior to the point that an injured party or other claimant has a judgment against the insured. As of January 17, 2009, there is a very narrow exception to this rule. Once an insurer disclaims because of “late notice” (the statute does not specify which of the notice requirements and also does not specify the source of the notice) the injured party or any other claimant may bring a declaratory judgment action before obtaining a judgment against the insured, but this new right is limited.

First, the “sole question” to be resolved is whether the late notice disclaimer is valid. Second, this action can only be brought after 60 days from the date of the disclaimer, during which time the insurer can prevent the injured party from suing if the insurer (1) brings such a declaratory judgment action; and (2) includes the injured party or claimant as a party to the action. Note that the right to bring an action only applies to claims for wrongful death or “personal injury,” not to economic loss and not to property damage claims. Does “personal injury” mean “bodily injury?” Probably, but if it does, why not say so since other portions of the new law use the “bodily injury” term, and “personal injury” in coverage law does have a distinct meaning (*see* Insurance Law § 3420[a][6]). Suppose the disclaimer letter is based on more than late notice? Why would the insurer want to bring the declaratory judgment action and not wait for the injured party to do so? Why would the injured party or other claimant want to wait to bring the declaratory judgment action?

Changes are found in CPLR 3001 and Insurance Law § 3420(a)(6). The already existing right of an injured party or other claimant to bring a declaratory judgment action is established by Insurance Law § 3420.

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Prejudice Requirement

New York has historically allowed insurers to disclaim on late notice without having to show prejudice. Various defenses have been allowed by the court to slowly whittle away at this rule. Now the legislature has attacked by imposing a prejudice requirement.

A new paragraph in Insurance Law § 3420(a), paragraph (5) establishes this prejudice requirement for a disclaimer based upon the failure to give any notice required by the policy. Note that even if the insurer can show prejudice, the insurer may still have to provide coverage if it can be shown that it was not possible to have given earlier notice. Separate provisions are set forth for claims made policies. The insurer's rights are prejudiced only if its ability to investigate or defend the claim have been impaired (*see* Insurance Law § 3420[c][2][c]).

The burden on the prejudice requirement changes with the length of delay from "the time required by the policy." Cases have negated such requirements, holding that no matter what the policy said, the notice just had to be given in a "reasonable time." So are we now going to have to litigate what time period was reasonable, so that we can then decide how much time has passed from when the notice should have been given, to decide who has the burden on prejudice?

The statute says this period of time is within two years. If it is more than two years then the insured, injured party or other claimant has the burden of proving that the insurer was not in fact prejudiced (*see* Insurance Law § 3420[c][2][a]). Hello litigation! Note that there is an irrebuttable presumption of prejudice if the case was resolved by settlement or through judgment **prior to** notice being given (*see* Insurance Law § 3420[c][2][b]).

Information From Insurer

The new law also addresses mandatory disclosure by an insurer once an injured party or other claimant has filed a claim (not defined) and sent a written request for coverage information. The insurer has 60 days within which to confirm the existence of a policy and the amount of coverage (*see* Insurance Law § 3420[d][1][b]). If the insurer was not given enough information to find the policy, it has 45 days to contact the injured party or other claimant and let them know what other information it needs to get that material. The insurer will have an additional 45 days to respond once it receives the information that it said it needed (*see* Insurance Law § 3420[d][1][c]). The failure of an insurer to make these disclosures constitutes an unfair claim practice under Insurance Law § 2601 (6).

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