Late Notice Defense On Notice Of Occurrence Policies

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The New York State Court of Claims recently ruled on the meaning of late notice as it applies to comprehensive general liability policies prior to the enactment of the 2008 change to Section 3420 of the Insurance Law of New York State, which now requires a showing of prejudice to the insurer. In *Kaess v. State of New York*,[1] the court favorably ruled for Arch Insurance Company, as to its late notice defense, when its insured, New York State, failed to provide notice of an "occurrence" to Arch "as soon as practicable" as required by the policy.

Here the State provided notice to Arch ninety-one days after it first received a Notice of Intention to file Claim ("Notice") from Nicholas Kaess, the claimant. The Notice was submitted as a result of an incident in which he suffered serious personal injuries while driving a motorcycle which collided with a truck owned by Kamac Trucking Company, which was exiting a construction yard owned by the State. The court's decision in *Kaess* is significant in that it re-affirms that: (1) even relatively short periods of time, such as a 91-day delay in giving notice of an "occurrence," where such notice is required "as soon as practicable" under the policy, is deemed to be a material breach of the policy's condition precedent to coverage and vitiates coverage; and (2) the failure on the part of an insured to put forth a "reasonable excuse" for the delay (*i.e.*, facts which would establish a reasonable good faith belief of non-liability on its part), are fatal to claim for coverage.[2]

On one level, this decision will have limited precedential value going forward, because the court's decision did not need to consider whether Arch suffered prejudice as a result of the late notice. Under Section 3420 of the New York State Insurance Law, which was amended in 2008, when an insurance policy is issued with an effective date of on or after January 19, 2009, the burden is on the insurance carrier to prove that it has been prejudiced by the delay in notice, as long as notice was given less than two years after the time prescribed by the policy.[3] Under the amended rule, if notice is provided by the insured more than two years after the time to give notice set forth in the policy, then the burden switches to the insured to prove the absence of prejudice.[4] Because the Arch policy in *Kaess* was issued on April 11, 2008, the change to Section 3420 requiring a showing of prejudice by the insurer, had no application.[5]

While there are a rapidly dwindling number of pre-January 19, 2009 "no-prejudice" late notice cases still pending, the above decision is still highly relevant to post January 19, 2009 late notice cases as well, because the court's recognition of a relatively short time period (91 days) for the application of a late notice defense and the basis for its determination that the claimant failed to present a reasonable excuse for delay, will continue to be utilized going forward on both pre and post January 19, 2009 insurance policies (i.e. whether or not prejudice need be shown, the first criteria is if notice is late). Consequently, an analysis of the court's determination is constructive, both in terms of determining what amount of delay constitutes late notice and what constitutes a reasonable excuse for delay.

As an initial matter, the court adhered to the well-established principle under New York law that when an insurance policy requires that "notice of an occurrence" be given to the insurer "as soon as practicable," that such notice must be given to the carrier within a reasonable period of time.[6] The court also adhered to the well-established principle that "[an] insured's failure to satisfy the notice requirement constitutes a failure to comply with a condition precedent which, as a matter of law, vitiates the contract."[7] The court also recognized that there very well may be circumstances under which an insured's delay in providing notice may be excusable, such as a reasonable belief in non-liability, but that it is the insured's burden to establish the reasonableness of such an excuse.[8]

The court recognized that while the Notice of Intention served on the State did not fall within the policy's definition of a "suit" or claim, it did qualify as an "occurrence" (as defined in the policy), because under Section 10 of the Court of Claims Act "[i]t is a mechanism designed to primarily put the State on notice of a possible lawsuit and to extend the time within which a claimant may file a claim without seeking permission of the Court."[9]

The court also recognized that "Arch ha[d] established, *prima facie*, its entitlement to judgment as a matter of law by demonstrating that the State failed to provide Arch with notice, as soon as practicable, of an occurrence or claim being made against it, as required by the Policy, until 91 days after being served with claimant's notice of intention."[10] On this front, the court relied on *McGovern-Barbash Assoc., LLC v. Everest Natl. Ins. Co.* and *Evangelos Car Wash, Inc. v. Utica First Ins. Co.*[11] Indeed, New York courts have long recognized comparable and even lesser periods of time, such as delays of twenty-two and fifty-one days, as being too late.[12]

Next, relying on the New York Court of Appeals decision in *Great Canal Realty Corp. v. Seneca Ins. Co.*,[13] the court in *Kaess* found that the State simply failed to establish a reasonable excuse for its late notice to Arch of the subject occurrence. Specifically, the court held that "[t]he State's papers are bereft of any attempt to put forth facts that would establish a reasonable good faith belief on its part of non-liability prior to notifying Arch of the occurrence."[14] The court's finding on this issue is particularly interesting because the State, relying primarily on the affidavit of its investigator in support of its "excusable delay" position, essentially opposed Arch's motion on the basis that it first had to gather information concerning the accident, investigate the legitimacy of the Notice and that a number of typical mandatory internal protocols had to be followed. The State's opposition also argued that its investigator was tasked with finding and investigating the incident sites, tracking down the police report, determining what construction company was responsible for doing the work, finding out the insurance company that wrote the policy, determining if the policy covered the accident, and, thereafter, notifying the insurance company and that all this information needed to be obtained through the Department of Transportation of the State of New York. In addition, the State argued that the delay was reasonable due to budget constraints which limited its staff and that it was also necessary for it to first determine if it had insurance, what company the insurance was with, and if the insurance policy covered this particular claim. The State also argued that as soon as this information was determined, it notified Arch of the occurrence involving the claimant.

The court summarily rejected the "excuse" offered by State, finding that it was not a valid one under the circumstances. Applying the narrowly drawn standard for what constitutes a valid excuse for not timely reporting an occurrence or accident to an insurer in New York, the court observed that the State was no doubt aware of the "occurrence" as of August 11, 2009, and based on the allegations and attachments to the Notice, it did not present a good faith belief as to its non-liability accounting for the 91-day delay.

The court rejected the State's excuse that it first had to investigate and/or determine if the occurrence was going to be covered by insurance and that this failed to meet the New York standard of what constitutes a reasonable excuse for the delay. The court refused to permit the State to be held to a more lenient standard in terms of fulfilling either the Policy's notice requirement or the reasonable excuse standard. The court's decision also made clear that the Policy's requirement that notice of an occurrence be given as soon as practicable does not provide an allowance for an insured to first make a determination as to coverage. While the court's decision did not specifically discuss in detail the State's proffered excuse that because the State was the insured under the Policy, as opposed to an individual or company, that the State should be provided some latitude with respect to the reporting requirements, New York courts have repeatedly rejected earlier attempts along these lines. In *Power Authority of the State of New York v. Westinghouse Electric Corp.*, the appellate division held "[t]here are no mitigating or extenuating factors here. Plaintiff is not a severely injured individual unsophisticated in insurance matters being kept from his or her only source of recovery by a draconian application of law. Plaintiff is a large power authority with its own insurance manager. Its damage is purely economic and it in no way interfered with its

capacity to learn of the loss or of the fact of coverage, as might a personal injury."[15] Moreover, as the Court of Claims itself recognized previously in *Turner v. State*,[16] the State is well versed in insurance contracts and "routinely" and "continuously" enter into contracts with outside contractors for which it requires insurance and apparently makes claims under those insurance policies.

In sum, the New York State Court of Claims has affirmed that the language in an insurance policy is to be construed as written, and an insured has an obligation to report claims as they become aware of them. Moreover, the State of New York is held to the same standard as any other insured.

[1] *Kaess v. State of New York*, 2011 N.Y. Misc. LEXIS 6601 (N.Y. Ct. Cl. Dec. 28, 2011).
[2] *Id.* at *9-10
[3] N.Y. Insurance Law, §3420(c)(2)(C) (2008).
[4] N.Y. Insurance Law, §3420(c)(2)(A) (2008).
[5] *Kaess*, 2011 N.Y. Misc. LEXIS 6601, at *8.
[6] *Id.*
[7] *Id.* at *8-9 (citing *Great Canal Realty Corp. v. Seneca Ins. Co.*, 5 N.Y.3d 742, 743 (2005)).
[8] *Id.* at *10.
[9] *Id.* at *9 (citation omitted).
[10] *Id.* at *9-10 (citations omitted).
[11] *McGovern-Barbash Assoc., LLC v. Everest National Ins. Co.*, 79 A.D.3d 981, 983 (N.Y. App. Div. 2010) ("Plaintiffs had knowledge of the accident within days, but failed to notify it of the occurrence until almost four months thereafter (citations omitted))"; *Evangelos Car Wash, Inc. v. Utica First Ins. Co.*, 45 A.D.3d 727 (N.Y. App. Div. 2007) (104-day notice delay unreasonable as a matter of law).
[12] *Deso v. Landon & Lancashire Indemnity*, 3 N.Y.2d 127, 130 (1957) (51-day delay too long); *Rushing v. Commercial Casualty Ins. Co.*, 251 N.Y. 302, 304 (1929) ("[I]n the absence of explanation or excuse, a notice of an accident withheld for twenty-two days is not the immediate notice called for by the policy.").
[13] *Great Canal Realty Corp. v. Seneca Ins. Co.*, 5 N.Y.3d 742 (2005).
[14] *Kaess*, 2011 N.Y. Misc. LEXIS 6601 at *10.
[15] *Power Authority of New York v. Westinghouse Electric Corp.*, 117 A.D.2d 336, 342-43 (N.Y. App. Div. 1986) (citation omitted).
[16] *Turner v. State,*13 Misc.3d 252, 259 (N. Y. Ct. Cl. 2006).