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Internet Resources

- ◆ Great Canal Realty Corp. v. Seneca Ins. Co., New York Appellate Division Opinion http://courts.state.ny.us/reporter/3dseries/2004/2004_09419.htm
- ◆ Argo Corp. v. Greater N.Y. Mut. Ins. Co., a notice related case currently on appeal to the New York Court of Appeals www.courts.state.ny.us/reporter/3dseries/2003/2003_18542.htm
- ◆ Rekemeyer v. State Farm Mut. Auto. Ins. Co., an underinsurance coverage action involving notice issues, currently on appeal to the NY Court of appeals www.decisions.courts.state.ny.us/ad3/decisions/2004/94987.pdf

Recent Calls For Abandonment of New York's "No Prejudice" Standard for Late Notice

By John W. Fried

For years, New York courts have applied a strict "no prejudice" standard in cases involving late notice of insurance claims or occurrences. Under that draconian standard, insurers are able to disclaim liability when they receive late notice, even if they have suffered no prejudice from the delay.

The days of the continued application of this "no-prejudice" standard may, however, be numbered. In Great Canal Realty Corp. v. Seneca Insurance Co., 2004 N.Y. Slip Op. 09419, 2004 WL 2952794 (N.Y. App. Div., First Dep't Dec. 21, 2004), a New York State appellate court recently upheld, by a 3-2 vote, a trial judge's denial of an insurer's summary judgment motion premised on late notice. However, two of the three appellate justices voting to uphold the trial court's denial of summary judgment took the unusual step of expressly calling for the abandonment of the "no-prejudice" standard. Their opinion, along with other recent harbingers, signals that a change in the notice law of New York may be on the way, even if such a change has not yet been effectuated.

These recent harbingers indicate that New York's insurance law may soon enter the Twenty-First Century. In at least 34 states across the country, an insurer may not disclaim coverage on the basis of a policyholder's delay in providing notice unless the insurer can prove it suffered prejudice as a result of the delay. In six additional states, prejudice to the insurer sufficient to disclaim

coverage is presumed when late notice occurs, but the policyholder may rebut that presumption and avoid forfeiture of coverage by offering evidence that the insurer suffered no prejudice from any delay in notice. These states all recognize that the purpose of timely notice requirements (to avoid prejudicing the insurance company's investigation) is not met when the insurer suffers no prejudice but the policyholder is punished by forfeiting the coverage for which it paid premiums.

Under New York law, a policyholder may escape the effect of the "no-prejudice" rule if it reasonably believed that the occurrence at issue would not result in any claim of liability, and Great Canal relied on this argument in opposing its insurer's motion for summary judgment. The trial court judge denied the insurer's motion for summary judgment after concluding that there were disputed issues of fact concerning whether Great Canal had a valid excuse for its delay in giving notice. The New York Appellate Division, First Department, affirmed the denial of summary judgment in a close, 3-2 ruling.

In voting to affirm, however, two of the Appellate Justices, Catterson and Ellerin, joined in an opinion in which they noted that, in the absence of any prejudice to the insurer, there is no justification to excuse that insurer from its coverage obligations. In their opinion, the two justices argued that New York's "no prejudice" rule is outdated, that it

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ignores the underlying purpose of notice requirements, that it results in inequities and inconsistent decisions, and that it fails to recognize that insurance contracts are contracts of adhesion, with no opportunity for policyholders to negotiate provisions like notice requirements.

Two other cases involving challenges to New York's "no-prejudice" rule were argued before the state's highest court on February 9, 2005. Those two cases, Argo Corp. v. Greater New York Mutual Insurance Co. and Rekemeyer v. State Farm Mutual Automobile Insurance Co., involve personal injury claims, by the policyholder's tenant in Argo, and the policyholder herself (underinsurance) in Rekemeyer. In both cases, the insurer disclaimed coverage on the basis of late notice. In Argo, the trial court dismissed the policyholder's coverage action on the basis of untimely notice and was affirmed by the Appellate Division, First Department. In Rekemeyer, the trial court refused to dismiss the policyholder's coverage action, but was reversed by the Appellate Division, Third Department. In both cases, the policyholders have argued to the state's Court of Appeals that the "no prejudice" rule should be abandoned.

Sound public policy requires the abandonment of the antiquated "no prejudice" standard utilized in New York and several other jurisdictions. Under the modern approach now followed in the majority of states across the country, the interests of insurers and policyholders are both protected. Insurers that are truly prejudiced by late notice remain able to disclaim coverage on that ground, but policyholders providing delayed notice that causes no prejudice to their insurers are not forced needlessly to forfeit the insurance coverage for which they have paid premiums. The time has come for the New York Court of Appeals and the high courts of other jurisdictions that rely upon the "no prejudice" standard to join their sister states in adopting the modern approach to notice.

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John W. Fried is a member of the firm's New York office. Mr. Fried began his legal career in 1972 as an assistant district attorney for Frank S. Hogan, the Manhattan District Attorney. In 1975, District Attorney Robert M. Morgenthau reappointed Mr. Fried to his position. Thereafter, he prosecuted and tried numerous homicide and other felony cases. In 1985, Mr. Fried became Chief of Trials and supervised 250 assistant district attorneys who prosecuted and tried criminal cases, ranging in seriousness from disorderly conduct to murder.

In 1990, Mr. Fried joined a large New York law firm and began his civil practice as a partner in its insurance coverage group.

In 1999, Mr. Fried left that firm and formed the law firm that today is Fried & Epstein LLP.

Mr. Fried's civil practice is devoted primarily to representing policyholders whose insurance claims have been denied. He currently represents many nationally known corporations seeking insurance coverage for pollution, asbestos, toxic tort, products, property, medical stop-loss, and business interruption claims. Mr. Fried also represents individuals seeking insurance coverage for claims covered by directors and officers insurance, errors and omissions insurance, and disability income insurance.



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