



June 16, 2008

A.11541 (Weinstein)/S.8610 (DeFrancisco)

AN ACT to amend the civil practice law and rules, in relation to liability insurance policies

The New York State Trial Lawyers Association (NYSTLA) strongly supports this bill, which would allow an injured party, in limited cases, to bring a declaratory judgment action to determine the existence, nature and applicability of potential insurance coverage of certain types of insurance before he or she is required to secure a judgment in court for the injury. In addition, this bill would eliminate New York's archaic and unfair "forfeiture rule" which holds that, in most cases, an untimely notice of claim must necessarily result in a policyholder's complete forfeiture of all insurance benefits, even if the insurer has not been materially prejudiced by any delay in notice.

In the summer of 2007, the Legislature passed a much stronger version of this bill, which would have permitted an injured party to commence a declaratory judgment action in all cases to determine the nature and existence of potential insurance coverage and prevented insurers from disclaiming insurance coverage unless they could show they were materially prejudiced by the plaintiff's failure to provide timely notice. Unfortunately, however, due to objections raised by the insurance industry, the prior version of this bill was vetoed by Governor Spitzer. In order to address insurance industry concerns, the bill has been substantially amended to its current form.

Specifically, to remedy an existing inefficiency in the law, this bill would promote judicial economy and save the time and costs involved in pursuing a judgment that may not be recoverable. The bill would allow a plaintiff in a personal injury or wrongful death action where late notice is at issue to know whether and to what extent a defendant's insurance coverage would be available to compensate the plaintiff for his or her damages before necessitating the expense and efforts of prolonged litigation. All too often in these types of disputes, our already overburdened courts must engage in full trials only to determine that there was never any relief to be obtained in the first instance. This is a woeful waste of judicial resources already stretched too thin.

In addition, this bill would eliminate New York's forfeiture rule and replace it with a fairer rule for determining when an insurer can justifiably claim they were prejudiced by an injured person's failure to provide timely notice. The forfeiture rule has given insurers an unearned windfall of millions of dollars and deprived New York policyholders, many of whom are small businesses, of insurance coverage for which they have fully paid, penalizing them doubly for innocent and trivial failures to comply with boilerplate policy notice requirements.

Historically, New York's courts have strictly construed and applied insurance policy provisions requiring prompt notice of occurrences, claims or suits. Compliance with these provisions is treated as a condition precedent to coverage. New York is one of the few remaining states that

persists in this harsh treatment of policyholders; conscientious citizens who have done their best to protect themselves and their families from unforeseen calamity by investing a percentage of the family budget in insurance premiums – with the full and reasonable expectation that this investment would provide help in times of serious need.

Only Georgia, Arkansas, Colorado, Idaho, Illinois, Mississippi, and Nevada share the dubious distinction of clinging to the anti-consumer forfeiture rule, under which a policyholder loses his or her significant financial investment in insurance premiums, and, more devastatingly, the protection that the investment was supposed to represent, by failing to carefully read the notice and comply with draconian and byzantine provisions in an insurance policy. In addition to further victimizing the already damaged victims of injury or loss, this is the kind of legal “technicality” that makes ordinary citizens distrustful of the legal system, and, more certainly, the insurance industry.

This bill would mitigate the extreme results of the forfeiture rule by providing that an insurer may not deny coverage for a claim based on an insured’s failure to give timely notice unless the insurer can demonstrate that it has suffered material prejudice as a result of the delay and the injured person could not provide notice in a timely manner and such person did not give notice as soon as was reasonably possible after that period.

Because this bill would protect injured parties in wrongful death and personal injury cases from the frustration and cost of unnecessary litigation, promote the efficient use of the courts, and would end the injustice of New York’s inflexible insurance forfeiture rule, NYSTLA strongly supports this legislation and urges the Legislature to pass this bill.

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