RECENT DEVELOPMENTS IN NEW JERSEY'S INSURANCE NOTICE LAW
How to Avoid and Effectively Challenge a Late Notice Defense by an Insurance Company
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Policyholders in New Jersey should be vigilant in timely notifying their insurance company in the event they become aware of a claim or facts and circumstances that may give rise to a claim in the future. In light of the recent decision by the New Jersey Supreme Court in Templo Fuente De Vida Corp. v. Nat. Union Fire Ins. Co., 224 N.J. 189 (2016), insurers are increasingly attempting to defeat an insured's right to coverage by raising the timing of notice as a defense. This article addresses how an insured can effectively challenge a late notice defense by an insurance company.

The Terms and Conditions of an insurance policy generally dictate the timing and manner in which a claim should be presented to the insurance carrier. The notice provisions of a policy are a material term of the policy; lack of adherence to these terms may result in the forfeiture of coverage. Time limitations for notice may differ from policy to policy. The policy itself may have differing time limitations for notice depending on whether (1) there is an incident, event, occurrence, loss or accident that may give rise to a claim in the future, or (2) a notice of an actual claim is received by the insured. In the event of these circumstances, the Conditions section of the policy must be reviewed immediately and the time limitations should be strictly adhered to. The Declarations page of the policy should also be reviewed as it often identifies to whom the notice is to be given and the method of delivery of the notice. More recently, some policies provide for electronic notice of claim to an insurance company or its agents. Whether the policy speaks to the precise method of providing notice, best practices would be to send the notice by certified mail, Federal Express or other method that could provide proof of delivery. Policyholders should not necessarily rely on their insurance agent or broker to ensure timely notice. It is ultimately the insured's obligation to provide proper notice to the insurer in accordance with the Terms and Conditions of the policy. Maintain proof of delivery in your claim file to avoid the specter of a late notice defense.

Recent Case Law

The New Jersey Supreme Court recently affirmed that notice requirements in claims made policies may be enforced against the insured even in the absence of prejudice to the insurer. Templo Fuente, 224 N.J. 189 (2016). A copy of a summons and complaint was received by the insured in that case on February 21, 2006, but the insured failed to notify its insurer of the claim until August 28, 2006, more than six months later. Id. at 195-96. National Union disclaimed coverage based on the policy's notice provision, which required the insured to provide notice of a claim "as soon as practicable." Id. at 194. The trial court entered judgment for National Union, and the Appellate Division affirmed. The New Jersey Supreme Court also affirmed, noting that the notice provision contained "a clear and unambiguous requirement that the insured report a claim to the insurer 'as soon as practicable[.]'" Id. at 209. By way of explanation as to the reason for strict compliance with claims made policy notice provisions, the Court observed:

> The prompt notice requirement . . . "maximiz[e][s] the insurer's opportunity to investigate, set reserves, and control or participate in negotiations with the third party asserting the claim against the insured" and "mark the point at which liability for the claim passes to an ensuing policy, frequently issued by a different insurer, which may have very different limits and terms of coverage." [Id. at 203].

The New Jersey Supreme Court reaffirmed its earlier decision in Zuckerman v. Nat. Union Fire Ins. Co., 100 N.J. 304 (1985), which held that an insurer does not need to show appreciable prejudice in order to avoid coverage based on the insured's failure to meet the notice requirement of a claims made policy.

There is a discussion in Templo Fuente of the differences between "claims made" and "occurrence-based" policies. Id. at 200-202. The Templo Fuente decision also addressed the differing standards applied by the courts in making decisions on the viability of late notice defenses depending on the nature of the policy. Typically, whether a policy is a "claims made" or "occurrence-based" policy is identified in the "Declarations" page of the policy.

Significantly, the New Jersey Supreme Court in Templo Fuente also concluded that it need not make a sweeping statement or draw a "bright line" on the facts about enforcing the "as soon as practicable" notice requirement in the policy generally. The New Jersey Supreme Court did not foreclose the presentation of evidence by the insured to justify the reporting delay. Id. at 206-207. Therefore, the record before the New Jersey Supreme Court was devoid of justification for the unexplained six-month delay. Every case is not the same factually. A late notice defense should be vigorously opposed by a policyholder's counsel by marshalling material evidence justifying an alleged delay in notice to avoid the potential forfeiture of coverage.

Challenging a Late Notice Defense

Under New Jersey law, an insurer may waive its rights under a policy or be equitably estopped from denying coverage. New Jersey law makes it clear that an insurer may waive any provision for its benefit and may waive any representation, warranty, condition or limitation in the policy upon which it would otherwise be entitled to reply. AMB Property, LP v. Penn America Ins. Co., 418 N.J. Super. 442, 455 (App. Div. 2011). An insurance company may waive policy condition defenses, such as those related to a policyholder's alleged late notice. Waiver and estoppel may be used to prevent an insurer from insisting on policy conditions, such as a notice provision, which results in forfeiture. "An insurer must act timely and forthrightly on a forfeiture defense to avoid the risk of waiver or estoppel, inasmuch as the insured is seeking to invoke coverage it has paid for while the insurer is seeking to deny that coverage." Maxwell v. Hartford Union High Sch. Dist., 814 N.W. 2d 484, 491-493 (Wis. 2012) and the authorities cited therein. Waiver may be express or implied from an insurer's acts, words, conduct or knowledge. See generally, Knorr v. Smeal, 178 N.J. 169, 177 (2003). See also, Merchs. Indem. Corp. of N.Y. v. Eggleston, 68 N.J. Super. 235, 254, aff'd 37 N.J. 114 (1962).

A late notice defense seeking to forfeit coverage is akin to a statute of limitations defense barring a cause of action. A statute of limitations defense is required to be pleaded as an affirmative defense or deemed waived. Notte v. Merchants Mut. Ins. Co., 185 N.J. 490, 500 (2006); Fees v. Trow, 105 N.J. 330, 335 (1987). Courts have also rejected a belated attempt by an insurer in the late stages of a proceeding to disclaim coverage for the first time only in response to the insured's affirmative motion for coverage. See The Continental Insurance Co. v. Beecham, Inc., 836 F. Supp. 1027, 1045 (D. N.J. 1993) ("An insurer that does not disclaim on a certain ground has no right to raise that ground in a declaratory action initiated to determine if there is coverage.") See also, N.J. Back Inst. v. Horizon Blue Cross Blue Shield Ins. Co., 2014 U.S. Dist. LEXIS 25639 (D. N.J. 2014).

Estoppel is an equitable doctrine founded on the fundamental duty of fair dealing imposed by law. The doctrine is designed to prevent injustice by not permitting a party to repudiate a course of action on which another party has relied to its detriment. In Griggs v. Bertram, 88 N.J. 347, 360-364 (1982), the insurer waited 18 months between notice of the incident and potential claim before it attempted disclaimer of coverage. The New Jersey Supreme Court found that the circumstances justified the imputation of prejudice sufficient to raise an estoppel against the insured. Given the equitable nature of estoppel, the trial court in Griggs found that

actual prejudice is presumed and need not be proven by the insured. The New Jersey Supreme Court emphasized the importance of the insurer's fiduciary obligation to deal in good faith with its insured and to deal with the insured candidly and forthrightly. The insurer there allowed 18 months to elapse before it notified the insured of its intent to disclaim. See also, Evcco Leasing Corp. v. Ace Trucking Co., 828 F.2d 188, 195 (3d Cir. 1987). (" . . . waiver may be inferred from silence or acquiescence as from other conduct or inaction.") The Third Circuit Court of Appeals found that based on the plaintiff's forbearance to object for 20 months, it did indeed waive its defense of non-compliance.

The insurer is required by law to promptly respond in writing to a notice of claim. This response is commonly known as a Reservation of Rights Letter. In New Jersey, an insurer's Reservation of Rights must fairly inform the insured of the insurer's position. At the time it issues the Reservation of Rights letter, an insurer should set out all the reasons of which it is aware, or should be aware as to why the insured may not be entitled to coverage. Battista v. W. World Ins. Co., Inc., 227 N.J. Super. 135. A Reservation of Rights letter must also specifically inform the insured that the offer to defend subject to the insurer's right to later disclaim indemnity may be accepted or rejected by the insured. Sneed v. Concord Ins. Co., 98 N.J. Super. 306 (1967). In the event that additional investigation is required to ascertain whether coverage is available, the letter should also state that the insurer reserves its right to disclaim based on further factual development.

A disclaimer must be issued by an insurer in a timely manner. Shotmeyer v. New Jersey Realty Title Ins. Co., 195 N.J. 72. "[O]nce an insurer has had a reasonable opportunity to investigate, or has learned of grounds for questioning coverage, it then is under a duty promptly to inform its insured of its intention to disclaim coverage or of the possibility that coverage will be denied or questioned." Griggs v. Bertram. The letter should identify the relevant defense or policy provisions on which that the insurer will rely. See. e.g., Gen. Acc. Ins. Co. v. New York Marine and Gen'l Ins. Co., 320 N.J. Super. 546.[1]

When a policyholder is faced with the assertion of late notice, the record of the claims process must be examined to determine whether the insurance company or its agents timely notified the insured of its position on late notice. In the absence of such notification, depending on the time that has elapsed, a persuasive argument can be made that the insurer either voluntarily waived its late notice defense or should be estopped from advancing that position.

Conclusion

Policyholders must be vigilant in complying with the precise terms of their insurance policy to avoid forfeiture of coverage. Depending on the proofs that can be presented by the insured, however, a late notice defense can be successfully challenged.

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[1] Excerpted from *Reservation of Rights, Disclaimer Letters, Non-waiver Agreements – 50 State Survey, 2011, published by Munich Re.*

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