NOTICE REQUIREMENT IN INSURANCE POLICIES

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Insurance policies typically require that insureds give the insurance carrier notice as soon as practicable of any losses incurred and of any claims made against them. The purpose of such a clause is to allow the insurance company an opportunity to investigate a claim and determine as much information about the circumstances of a claim as early as possible. Moreover, many policies include a provision that the policy holder must give the insurer notice whenever he or she has information from which one could reasonably deduce that an occurrence or loss has taken place that might involve the insurance contract. These requirements are satisfied absent an acceptable excuse for late notice by giving the insurer such notice within a reasonable time (See, Utica Mut. Ins. Co. v. Fireman's Fund Ins. Co. , 748 F.2d 118, 121 (2d Circ. 1984).

In the event of litigation, the burden is on the insured to establish compliance with the notice requirement. If the insured cannot prove that either the insurer was given the notice required by the policy, or that the failure to give timely notice was excusable under the policy and the circumstances, the insured may be precluded from recovering for the particular loss or occurrence.

In other words, the policy of insurance contains a condition precedent before the insured is entitled to the benefits of a defense and indemnification in a claim made by a third-party. A failure to give timely notice of a loss or occurrence may be excused if there are extenuating circumstances that there has not been a lack of due diligence on the part of insured.

Extenuating circumstances have been held to excuse a delay in giving notice are:

1. Lack of knowledge by the insured, despite the exercise of due diligence of the potentially covered loss, act or omission;

2. A reasonable belief by the insured that the incident was so trivial that it would not evolve into a claim;
3. A reasonable belief by the insured that no claim could be asserted that might be covered by the policy;
4. A reasonable belief by the insured that the causal relationship between the occurrence and the insured's actions was such that the plaintiff would not attempt to hold the insured responsible for the damage or injury;
5. A reasonable belief by the insured that the injured party would obtain or had already obtained compensation from a third party who would not seek reimbursement from the insured;
6. A reasonable belief by the insured that he or she is not liable, although the better rule is to the contrary that the insured has reason to believe that he or she will nevertheless be sued;
7. The infancy of the claimant, although the better rule is that the infant's parents should be obligated to give timely notice on the infant's behalf;
8. Under compelling circumstances, the physical incapacity of the claimant;
9. A reasonable belief that notice had or would have been given on the insured's behalf; and
10. An inability, despite due diligence, to obtain a copy of the policy. (See, generally, White v. City of New York, 81 N.Y.2d 955; Smithtown v. National Union Fire Ins. Co., N.Y. Hud 94 N.Y.S.2d 318, 319; Mt. Vernon Fire Ins. Co. v. Creative Housing, Ltd., 797 F. Supp. 176, 185 (EDNY 1992); and Allstate Ins. Co. v. Grant, 587 N.Y.S.2d 382, 384.

A breach of the notice provision relieves the insurer not only of its duty to indemnify, but also of its duty to defend. (Commercial Union Ins. Co. v. International Flavors and Fragrances, Inc., 822 F.2d267 (2d Cir. 1987). New York also follows the line of authority that holds that failure to give timely notice is a condition precedent to coverage and that if such notice is not provided, it is not necessary for the carrier to demonstrate prejudice in order to avoid its obligation to defend and indemnify (See, 31 N.Y.Jur, Ins. Section 1262; Security Mutual Insurance Company v. Acker-Fitzsimmons Corp., 31 N.Y.2d 436, 440 (Ct. Of Appeals))

There are situations in which the insurer receives notice of the claim or potential claim from a party other than the insured. New York has a statute that expressly authorizes the injured party to give notice in lieu of the insured. If the notice is received from someone other than the injured party, there are cases in New York that hold that such notice does not satisfy the condition precedent of the notice provision of the insurance policy. These cases hold that such notice is without significance.

Many liability policies are claims-made policies. Under such policies, coverage is provided based on when a claim is made as opposed to when the circumstances given rise to the claim came into existence. Claims-made policies differ, however, in their definition of when a claim is made. Under the standard claims-made policy, a claim is deemed to have been made when a demand for compensation is made against the insured. Some policies, however, provide that a claim is not made until notice of the claim is given to the insurer.