

## Second Circuit Certifies Notice Prejudice Rule to New York Court of Appeals

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January 2003

The Second Circuit Court of Appeals has certified to the New York Court of Appeals the question whether an insurer is required to demonstrate prejudice in order to disclaim coverage based on an insured's failure to comply with a notice of suit requirement where the insured has already complied with the policy's notice of claim requirement. *Varrichio and Assoc. v. Chicago Ins. Co.*, 312 F.3d 544 (2d Cir. Nov. 14, 2002).

The insurer issued a legal malpractice policy to an attorney. That policy provided that "[i]f Claim is made or suit is brought against the Insured, the Insured or its representative shall immediately forward to the Company every demand, notice, summons or other process received by the Insured or the Insured's representative." In early 1999, the attorney notified the insurer that he was likely to be sued for malpractice. The insurer began investigating the case and maintained regular contact with the attorney after that time. When the insured was actually served with a summons and complaint in the matter in July 2000, however, he failed to forward those papers to his insurer for approximately two months. Although the attorney and insurer had been in communication concerning the claim, the insurer disclaimed coverage based on the late notice, and coverage litigation ensued.

The court initially rejected three of the attorney's arguments with little discussion. First, the court refused to consider arguments that communications with the attorney constituted an implied waiver of the notice provision or estopped the insurer from relying on the notice provision because those arguments had not been raised at the trial level and were therefore forfeited. Second, the court rejected the attorney's argument that his delay in forwarding the papers was reasonable, noting that "where a policy has an *immediate* notice of suit requirement, even a relatively short delay in providing notice violates that requirement." Third, the court found that it was unreasonable for the attorney to infer, based on the fact that the insurer was investigating and defending the case, that the insurer had therefore received copies of the suit papers.

The Second Circuit then addressed the question whether, under New York law, the insurer was required to demonstrate prejudice in order to disclaim coverage. The court stated that the holding in *In re Brandon*, 769 N.E.2d 810 (N.Y. 2002), that insurers relying on the late notice of legal action defense should be required to demonstrate prejudice, "casts doubt on the traditional New York rule that when the insured has failed to comply with an immediate notice of suit provision in the insurance contract, an insurer need not show prejudice in order to refuse coverage." Even though *In re Brandon* involved coverage for uninsured motorists

and suits brought by an insured, rather than a professional liability policy where the implicated suit was brought against an insured, the court noted that the holding in *In re Brandon* might signal a "shift" to a prejudice requirement under New York law. The court stated that if it were to decide the case itself, it would likely conclude that New York law would require the insurer to make a showing of prejudice because the traditional reasons for the no-prejudice rule, such as "the insurer's need to protect itself from fraud by investigating claims soon after the underlying events; to set reserves; and to take an active, early role in settlement discussions," were met by the insured's timely notice of the claim. Nevertheless, the Second Circuit found the issue sufficiently uncertain to warrant certification. It therefore certified to the New York Court of Appeals the following question: "Where an insured has already complied with a policy's notice of claim requirement, does New York require the insurer to demonstrate prejudice in order to disclaim coverage based on the insured's failure to comply with the policy's notice of suit requirement?"

For more information, please contact one of WRF's Professional Liability Attorneys at 202.719.7130.