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NY Appeals Court Wrongly Denied Late-Notice Defense

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For the second time in the same case, the New York Supreme Court, Appellate Division, First Department, has held erroneously that an insurer waived a late-notice defense by failing to raise the defense in its initial disclaimer letter to the insured. *Estee Lauder Inc. v. OneBeacon Insurance Group*, __ N.Y.S.3d __, (N.Y. App. Div. July 9, 2015). The court first addressed this issue in 2009, when it held that OneBeacon had waived the late-notice defense by not raising it in the initial disclaimer letter to Estee Lauder. *Estee Lauder Inc. v. OneBeacon Insurance Group*, 873 N.Y.S.2d 592 (N.Y. App. Div. 2009). In that first holding, the Appellate Division opined that an insurer waives a timely-notice defense if it does not raise the defense "as soon as is reasonably possible" after it learns the grounds for the defense.

The Court of Appeals effectively overruled the 2009 *Estee Lauder* ruling in its opinion in *KeySpan Gas East Corp. v. Munich Reinsurance America Inc.*, 23 N.Y.3d 583, 591 (2014), in which it reversed an Appellate Division opinion that applied the same waiver standard as the first *Estee Lauder* opinion. The court held that the Appellate Division had wrongly applied the strict timeliness standard from Insurance Law § 3420(d)(2), which by its terms applies only in cases involving death or bodily injury, in an entirely different context. The court distinguished the statute's strict timeliness standard from traditional common law waiver standards, which require a finding that the insurer clearly manifested an intent to waive the timely notice defense. The court noted that the legislature had limited the statutory timeliness standard to death and bodily injury cases and that "it is not for the courts to extend the statute's prompt disclaimer

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requirement beyond its intended bounds." The court further held that "to the extent *Estee Lauder* ... and other Appellate Division cases hold that Insurance Law § 3420(d)(2) applies to claims not based on death and bodily injury, those cases were wrongly decided and should not be followed."

The trial court in *Estee Lauder* recognized the impact of the *KeySpan* ruling in an opinion dated Feb. 10, 2015, in which it permitted OneBeacon to amend its answer to reassert its late-notice defense. In a thoughtful and thorough opinion, the trial court rejected Estee Lauder's argument that the Appellate Division in *Estee Lauder* had relied not on the statutory standard, but on a common law principle that existed independent of the statute. The trial court acknowledged that the Appellate Division's opinion in *Estee Lauder* had not expressly cited § 3420(d)(2), but opined that the Appellate Division had, as it did in the *KeySpan* case, incorporated the statutory timeliness standard from cases that applied the statute in personal injury cases. The trial court correctly concluded that *KeySpan* had precluded the Appellate Division from expanding the statutory timeliness standard beyond the context of personal injury or death cases, and concluded that the *KeySpan* opinion had "effectively abrogated" the Appellate Division's opinion in *Estee Lauder*.

Estee Lauder appealed the February 2015 trial court ruling to the Appellate Division, which inexplicably resurrected the waiver holding the Court of Appeals had rejected in *KeySpan*. In a one-page opinion citing one case in support of its holding, the Appellate Division rejected the notion that the Court of Appeals in in *KeySpan* had abrogated its prior holding in *Estee Lauder*. Noting that *KeySpan* abrogated *Estee Lauder* "to the extent" that it applied § 3420(d)(2) to a property claim, the Appellate Division opined that "[o]ur case did not so hold." According to the Appellate Division, its 2009 opinion had relied upon waiver case law outside the context of personal injury or wrongful death and therefore independent of § 3420(d)(2).

The Appellate Division's 2009 opinion, as well as its July 2015 decision, are simply wrong. Its 2009 waiver ruling was, in fact, based upon an erroneous application of § 3420(d)(2) because, on close examination, all of the case law upon which the Appellate Division relied turned directly or indirectly upon application of the statute. The 2009 opinion relied upon three cases for its waiver standard: *General Accident Insurance Group v. Cirucci*, *Firemen's Fund Insurance Co. of Newark v. Hopkins*, and *Hotel des Artistes Inc. v. General Accident Insurance Co. of America*. The July 2015 opinion adds a fourth opinion, *Benjamin Shapiro Realty Co. v. Agricultural Insurance Co.*, for the same proposition. Each of these cases, however, either directly applied § 3420(d)(2) (*Cirucci*) or relied upon other cases that applied the statute (*Hopkins*, *Hotel des Artistes* and *Shapiro*).

The Appellate Division's confusion may stem from the fact that the *Hopkins*, *Hotel des Artistes* and *Shapiro* opinions cited rulings that turned on § 3420(d)(2), but did so without referring to the statute, giving the false appearance that a common law waiver rule existed independent of the statute. But no confusion should exist on this point, since the Court of Appeals in *KeySpan* flatly held that these cases had not created a common law requirement that mirrored the statutory standard of strict timeliness and that it was not the province of the courts to do so. Rather, the only common law waiver principle that applies in this context is whether the insurer clearly manifested an intent to waive the late-notice defense. Thus, the 2009 opinion in *Estee Lauder*, which the Appellate Division reaffirmed in its July 2015 opinion, in fact was based on § 3420(d)(2) and not upon a nonexistent common law waiver rule.

The Appellate Division made a mistake in finding waiver in its 2009 opinion. That mistake was based in part on case law in which New York courts inappropriately applied the principles of § 3420(d)(2) in situations that did not involve bodily injury or death. The Court of Appeals recognized the Appellate Division's error in its *KeySpan* opinion and reversed the ruling in that case as well as expressly abrogating the *Estee Lauder* opinion and others that incorrectly tried to create a common law rule out of the statutory standard. Notwithstanding this clear rejection of multiple Appellate Division opinions, the Appellate Division's July 2015 opinion suggests that there continues to be confusion over the state of New York waiver law. The Court of Appeals needs to speak more clearly on this waiver issue if and when it is raised again in the high court.