

Michael A. Miranda
Brian S. Sokoloff
Steven Verveniotis
Ondine C. Slone
Neil L. Sambursky

The Insurance Coverage Newsletter from

MIRANDA & SOKOLOFF LLP

240 Mineola Boulevard, Mineola NY 11501 (516) 741-7676
450 Seventh Avenue, New York, NY 10123 (212) 584-0001
313 South Avenue, Fanwood, New Jersey 07023 (908) 889-0808

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COVERAGE UPDATE

Bruce R. Calderon
Meredith L. Bernstein
Jason B. Gurdus
Joseph T. Roccanova
Benjamin P. Malerba III
Frank A. Valverde
Matthew J. Minero
Steven Seltzer
Alan E. Kleinberger

Mark R. Osherow
Of Counsel

NEW YORK RECALCULATING WAIVER PERIOD

First Financial Insurance Company v. Jetco

New York's Court of Appeals, having heard oral argument in mid October in the case of First Financial Insurance Company v. Jetco Contracting Corp., 99 N.Y.2d 649, 760 N.Y.S.2d 98 (2003), is now "crunching the numbers" as to what period of time constitutes waiver on the part of an insurer in issuing a coverage position to an insured or claimant. The certified questions accepted by New York's Court of Appeals from the federal Second Circuit Court of Appeals are as follows:

- (1) Under N.Y. Ins. Law § 3420(d), may an insurer who has discovered grounds for denying coverage wait to notify the insured of denial of coverage until after the insurer has conducted an investigation into alternate, third-party sources of insurance benefiting the insured, although the existence or non-existence of alternate insurance sources is not a factor in the insurer's decision to deny coverage?
- (2) If an investigation into alternate sources of insurance is not a proper basis for delayed notification under N.Y. Ins. Law § 3420(d), is an unexcused delay in notification of 48 days unreasonable as a matter of law under § 3420(d)?

The decision is expected to be a milestone and a guide for insurers in following the standards set by the Court in Hartford Ins. Co. v. County of Nassau, 46 N.Y.2d 1028, 416 N.Y.S.2d 539 (1979), in which the Court held that an insurer's unexplained delay of sixty days in issuing a disclaimer of coverage constituted a waiver of policy defenses.

THE PARTIES' CONTENTIONS IN FIRST FINANCIAL v. JETCO

In First Financial v. Jetco, the coverage issues concern a claim arising from building facade restoration work performed by Jetco on a building owned by New York University near Washington Square Park in Manhattan. Gavin Hanna, an employee of Jetco's scaffolding contractor, Rockledge Scaffolding Corp., was allegedly injured when he fell from a scaffold during the course of his work on July 9, 1998. The president and general manager of Jetco learned of the incident immediately and actually visited the site of the accident that very same day. Jetco, however, did not notify First Financial of the accident until February 23, 1999 - over seven months after the accident. The president and general manager of Jetco nonetheless informed the insurer's investigator on March 30, 1999, when he was interviewed under a reservation of rights as to late notice, that he and the insured knew of the accident since the day that it occurred. First Financial then, rather than disclaiming, pursued further investigation on the issue of other possible insurance to cover Jetco and did not issue a disclaimer for late notice until May 17, 1999, which was a period of 48 days after the investigator was told of the insured's awareness of the accident since the date of the occurrence.

At the trial of the coverage case before the United States District Court for the Southern District of New York, First Financial argued that the investigation as to other possible insurance coverage for Jetco was for the benefit of the insured and, therefore, should not be held against the insurance company. The District Court agreed and held that, as a matter of public policy, N.Y. Ins. Law § 3420(d) should not be interpreted to force an insurer to disclaim coverage before investigating alternate sources of insurance for its insured in that an insurer who disclaims coverage would then have no financial interest in identifying additional sources of insurance cover benefiting an insured. Since the District Court found reasonable the explanation (need for investigation, including investigation as to other insurance) for the 48 day delay between the date of awareness of facts to support the late notice defense and the disclaimer, the District Court concluded that First Financial had timely disclaimed coverage to Jetco for late notice.

On appeal, Jetco argues that the investigation as to other possible insurance coverage for Jetco had no relation to the disclaimer for Jetco's late notice of the accident and, therefore, should not be deemed justification for First Financial's delay in disclaiming based upon late notice. Jetco points to trial testimony indicating that First Financial would have issued a disclaimer based upon late notice regardless of the outcome of the investigation as to other possible insurance coverage. Jetco argues that First Financial violated N.Y. Ins. Law § 3420(d) by failing to give notice of its disclaimer "as soon as [was] reasonably possible."

THE CASE LAW SINCE HARTFORD v. COUNTY OF NASSAU

The Second Circuit, in certifying the two questions to the New York state Court of Appeals, noted that the Appellate Divisions of New York, since Hartford v. County of Nassau, have recognized a carrier's right to investigate but, at the same time, have deemed carriers, on a case by case basis, to have waived coverage defenses when the investigation has been deemed unjustified, even when the delay has been less than two months. The Court wrote:

New York courts seem to be in general agreement that a delay in notification by an insurer is unreasonable as a matter of law when the delay is both two months or longer *and* unexplained. See, e.g., Buttenschon v State Farm Mut. Auto. Ins. Co., 291 A.D.2d 864, 737 N.Y.S.2d 190, 190-191 (4th Dep't 2002); Agoado Realty Corp. v. United Int'l Ins. Co., 260 A.D.2d 112, 699 N.Y.S.2d 335, 340 (1st Dep't 1999); Ward v. Corbally, Gartland & Rappleyey, 207 A.D.2d 342, 615 N.Y.S.2d 430, 432 (2d Dep't 1994); U.S. Liability Ins. Co. v Staten Island Hosp., 162 A.D.2d 445, 556 N.Y.S.2d 153, 155 (2d Dep't 1990).

Yet some courts have interpreted Hartford as indicating that even a delay of *less than* two months, if unexplained or unpersuasively explained, can be unreasonable as a matter of law. See In re Colonial Penn Ins. Co. v. Pevzner, 266 A.D.2d 391, 698 N.Y.S.2d 310 (2d Dep't 1999)(unjustified 41-day delay unreasonable as a matter of law); Nationwide Mut. Ins. Co. v. Steiner, 199 A.D.2d 507, 605 N.Y.S.2d 391, 392-93 (2d Dep't 1993)(unpersuasive 41-day delay unreasonable as a matter of law.) At the same time, at least one court has found that under Hartford an insurer's unexplained delay of less than two months can be reasonable as a matter of law. See Travelers Ins. Co. v. Volmar Constr. Co., 300 A.D.2d 40, 752 N.Y.S.2d 286, 289 (1st Dep't 2002) (finding, without explanation, an insurer's disclaimer offered 14 days after notice of accident from insured to be "timely as a matter of law").

New York University v. First Financial Ins. Co., 322 F.3d 750, 756-7 (2d Cir. 2003). The Second Circuit thus found that the public policy considerations impacting a carrier's right to conduct an investigation and the insured's right to notification of a disclaimer warranted determination by New York's Court of Appeals.

CONCLUSION

The decision in First Financial v Jetco, whichever way it is decided, should be informative for insurance carriers in deciding what is or is not proper investigation to perform before issuing a disclaimer and when, in relation to investigation, a carrier must issue a disclaimer or be deemed to have waived a coverage defense.

The Issues:

What constitutes proper investigation for an insurer to delay issuance of a disclaimer?

Does an unexcused delay of 48 days in disclaiming coverage constitute a waiver as a matter of law?

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