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COVERAGE UPDATE

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48 DAYS FOR INSURER TO ISSUE DISCLAIMER IS HELD TO BE UNREASONABLE AS A MATTER OF LAW

On two certified questions from the Second Circuit Court of Appeals, the New York Court of Appeals held that once an insurer knows of a basis to deny coverage, a 48 day delay in issuing a disclaimer, even if based upon an investigation, constitutes a waiver of the defense under N.Y. Ins. Law § 3420(d). First Financial Insurance Company v. Jetco Contracting Corp., USCOA, 2 No. 130, ___ N.Y.2d ___, ___N.Y.S.2d___(2003).

THE FACTS

An employee of Jetco's scaffolding contractor was allegedly injured when he fell from a scaffold during the course of his work on July 9, 1998. Jetco's president learned of the incident immediately and visited the site the same day. Jetco did not, however, notify its carrier, First Financial, of the accident until February 23, 1999 - over seven (7) months after the accident. On March 30, 1999, Jetco's president informed the insurer's investigator that he knew of the accident the day that it occurred. Rather than immediately disclaiming coverage for late notice, First Financial further investigated whether there was other possible insurance to cover Jetco. It was not until May 17, 1999, 48 days after the insured told the insurer's investigator that the insured knew of the accident on the on the date of loss, that First Financial denied coverage.

THE DECISION

INVESTIGATION MUST RELATE TO GROUNDS FOR DISCLAIMER

First Financial argued that its delay in denying coverage was because it was investigating other potential insurance coverage for the insured and thus was "for the benefit of the insured." Rejecting the argument that, as a matter of public policy the denial was justified, the court held that "[w]hen the insurer promptly disclaims coverage, the policyholder – perhaps with the aid of its own broker or insurance agent – is best motivated by its own interest to explore alternative avenues of protection." More importantly, since the investigation had no relation to the grounds for the disclaimer, "investigation into possible other sources of insurance is not an acceptable reason for delayed disclaimer...."

INFORMATION IS TRIGGER FOR TIME PERIOD FOR INSURER TO DISCLAIM

The Court of Appeals re-affirmed the principle that while an insurer is entitled to conduct an investigation to determine coverage, an explanation for a delay in denying coverage is "insufficient as a matter of law where the basis for denying coverage was or should have been readily apparent before the onset of the delay." The Court repeated the standard that "timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage."

The Court rejected the idea of establishing a "fixed time period" in which an insurer must disclaim coverage. The Court commented that "the Legislature had scrupulously avoided" such "fixed time period" and therefore "the question whether a notice of disclaimer has been sent 'as soon as is reasonably possible' will be a question of fact, dependent on all of the circumstances that make it reasonable, or unreasonable, for an insurer to investigate coverage."

COMMENTARY

Jetco makes it clear that an insurer will be held to a stringent standard of "reasonableness" for the time period in disclaiming coverage. An insurer must consider, from first notice, whether the information available at each point in time is sufficient to disclaim or risk being deemed to have waived the grounds for disclaimer. Further, an insurer must evaluate the necessity of an investigation in order to deny coverage, because an unnecessary investigation may be deemed insufficient to excuse a delay in disclaiming coverage.

Jetco does not address the common scenario where an insurer has conflicting information about a claim. In that situation, it would seem that conducting an investigation to resolve the conflict should be deemed a reasonable explanation for an investigation and delay in disclaiming. Nevertheless, given the holding in Jetco it may be prudent to deny coverage if there is any information supporting that position and if the insured provides information to refute the denial, the coverage position can be reconsidered and the insurer will not have waived the defense during the investigatory period.

Another common situation not addressed by Jetco is when there are several grounds for disclaiming coverage and some of the grounds are readily apparent (and no further investigation required) while others require investigation. After Jetco it would be prudent to issue a disclaimer as soon as possible on those grounds that do not require investigation and issue a supplemental disclaimer after the investigation on the other grounds is completed. While this makes for piece-meal disclaimers and likelihood of non-cooperation from the insured (and others) when pursuing investigation, it is a better alternative than risking waiver under Jetco.

The Holding:

1. Investigation as to other possible insurance is not sufficient as an excuse for an insurer to delay issuance of a disclaimer.

2. An unexcused delay of 48 days in disclaiming coverage constitutes a waiver of the coverage defense as a matter of law.

"It is the responsibility of the insurer to explain its delay"

"an insurer's explanation [for the delay and investigation] is insufficient as a matter of law where the basis for denying coverage was or should have been readily apparent before the onset of the delay."

"timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage."