LITIGATING IN NEW YORK IS A WHOLE NEW BALLGAME: ONEROUS INSURANCE DISCLOSURE OBLIGATIONS HAVE BUSINESSES AND INDIVIDUALS SUBJECT TO NEW YORK JURISDICTION ON HIGH

Date: 8 February 2022

U.S. Litigation and Dispute Resolution Alert

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Maintaining thorough and complete insurance records is now more important than ever for businesses and individuals subject to New York jurisdiction. Following passage of amendments to New York's court rules (or C.P.L.R.), defendants now must produce, without first being asked and at the beginning of a lawsuit, material including complete copies of insurance policies and broad information regarding the reduction or potential reduction of coverage limits by other lawsuits. Complying with these requirements will impose significant new burdens on defendants, who will have to rely on cooperation from their liability insurance companies to fulfill such obligations completely. This represents a sea change from prior New York practice, which compelled plaintiffs to demand insurance information in discovery and entitled them only to information about the existence and contents of any insurance agreements that might provide coverage for a judgment in the action.

On 31 December 2021,[1] the State of New York enacted the Comprehensive Insurance Disclosure Act (the Act), which imposes significant new insurance-related disclosure obligations on New York defendants. Purportedly based upon a desire to eliminate alleged tactical delays[2] by defendants in disclosing their potentially applicable insurance (although no doubt seen by many defendants as a wholly-unnecessary and burdensome additional obligation placed upon them), the Act requires defendants in New York civil suits to provide, *without being asked*, “complete information” for any insurance agreement that could satisfy a judgment. The Act amended New York's C.P.L.R. § 3101(f) to now require the automatic disclosure of extensive insurance information by defendants within 60 days of filing an answer. The Act also requires defendants to identify in a timely manner excess policies, eroding policies, and any information or contracts affecting available coverage.[3] Absent reconsideration by the legislature (a new bill relaxing certain of the Act's requirements already is progressing), litigation in New York will take on a new complexion for defendants.

NEW DISCLOSURES

Beyond the “existence and contents” of applicable insurance previously required by C.P.L.R. § 3101(f), the newly amended C.P.L.R. § 3101(f) also requires a defendant to disclose “information and documentation” including:

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1. All primary, excess, and umbrella policies, and a complete copy of those policies, including declarations, insuring agreements, conditions, exclusions,[4] endorsements, and similar provisions, such as an application for insurance;
2. A complete copy of any insurance policy, contract, or agreement which could satisfy a judgment;[5]
3. The amounts available under any applicable insurance;[6]
4. Any lawsuits that have reduced or eroded, or may reduce or erode, such amounts available under any policy;[7]
5. The amount of attorneys' fees that have eroded or reduced the face value of the policy, along with the name and address of any attorney who received such payments;[8] and
6. Contact information - including the telephone number and e-mail address - of any person(s) responsible for adjusting the claim.[9]

DEFENSE COUNSEL OBLIGATIONS

The Act also imposes several obligations on defense counsel. Under the current version of the Act, by 1 March 2022, any "defendant, third-party defendant, or defendant on cross-claim or counter-claim" must determine whether they have met the requirements of C.P.L.R. § 3101(f)[10] in all pending cases. If not in compliance, defense counsel must make reasonable efforts in pending cases to determine what insurance information its client previously disclosed and to gather missing information from the carrier (full copies of policies, adjuster contact information, etc.) to provide to plaintiff(s).[11]

In both pending and future cases, defense counsel must provide two certifications, one from the insured defendant and one by an attorney appearing on behalf of the defendant, which state that the disclosures are both accurate and complete.[12] In addition to the certifications at the time of disclosure, there is an ongoing obligation to ensure that the information disclosed remains accurate and complete throughout litigation. Defense counsel must provide updated information within 30 days of receiving information that renders the prior disclosure inaccurate or incomplete.[13] This obligation not only exists during the pendency of the litigation, but it remains for 60 days after any settlement or final judgment reached in the case.[14]

Failure to comply with the Comprehensive Insurance Disclosure Act will subject a defendant to the penalties set forth in C.P.L.R. § 3126.

POTENTIAL AMENDMENTS

With defendants quite reasonably observing that the new disclosure requirements are too burdensome, a bill to amend them is advancing in the New York legislature. The newest bill passed the Senate on 26 January 2022 and is awaiting approval from the Assembly.[15] New York Governor Kathy Hochul has indicated she supports the proposed changes.[16] The most notable proposed amendments include:

7. Making the Act applicable only to actions filed on or after 31 December 2021, not to cases already in litigation;
8. Extending the time limit to comply with the C.P.L.R. to 90 days after filing an answer, instead of 60 days;

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9. Eliminating the requirement that defendants disclose applications for insurance;
10. Requiring disclosure only of insurance policies that "relate to the claim being litigated;"
11. Requiring only disclosure of the total limits available under the policy, defined as the "actual funds, after taking into account erosion and any other offsets, that can be used to satisfy a judgment"; and
12. Requiring only the disclosure of the name and email address of the person adjusting the claim.

BEST PRACTICES TO STREAMLINE COMPLIANCE

The enacted amendments to C.P.L.R. § 3101(f), notwithstanding the likely additional forthcoming amendments, mark a significant change in discovery requirements imposed on defendants and their insurance companies. Insurers and brokers should expect and be prepared for an influx of inquiries from policyholders involved in New York pending litigation. Defendants will need to communicate with their insurers and brokers, as well as with their counsel, to comply with the new changes. To best effectuate compliance, policyholders should consider taking steps to manage current and future disclosures under the Act, including:

13. Confirming the policyholder is in possession of all of its insurance policies going back as far as possible;
14. Working with the policyholder's broker to obtain copies of any missing insurance policies;
15. Storing all insurance policies and related documents and information electronically and backed up on an external hard drive; and
16. Requiring, where the policyholder is an additional insured under the insurance of another entity with which it has contracted, a copy of the actual insurance policy rather than just a certificate of insurance.

FOOTNOTES

[1] *See* C.P.L.R § 3101(f) Actions (Signed by Governor Hochul 31 December 2021)

[2] *See* C.P.L.R. § 3101(f) Justification ("This amendment will reduce the use of delaying tactics by explicitly compelling disclosure...") https://www.nysenate.gov/legislation/bills/2021/s7052.

[3] Notably, the information disclosed pursuant to the Act "is not by reason of disclosure admissible in evidence at trial." C.P.L.R. § 3101(f)(4)

[4] C.P.L.R. § 3101(f)(1)(i)–(ii)

[5] *Id.*

[6] C.P.L.R. § 3101(f)(1)(iv)

[7] C.P.L.R. § 3101(f)(1)(v)

8 C.P.L.R. § 3101(f)(1)(vi)

[9] C.P.L.R. § 3101(f)(1)(iii)

[10] C.P.L.R. § 3122-b

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[11] C.P.L.R. § 3122-b

[12] *Id.*

[13] C.P.L.R. § 3101(f)(2)

[14] *Id.*

[15] *See* S. Comm. S78882 (N.Y. 2021–22); https://www.nysenate.gov/legislation/bills/2021/s7882

[16] Katherine J. Henry, *Beware of New Insurance Disclosure Requirements for Defendants in New York Litigation*, *THE NATIONAL LAW REVIEW* (January 26, 2022) https://www.natlawreview.com/article/beware-new-insurance-disclosure-requirements-defendants-new-york-litigation

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