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Amendments to CPLR Impose New Insurance Disclosure Requirements on Defendants

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On Feb. 24, 2022, Gov. Kathy Hochul signed into law an amended version of the Comprehensive Insurance Disclosure Act (the Act), expanding the insurance disclosure obligations imposed on defendants in civil cases filed in New York state courts. The obligations imposed by the amended version of the Act are not as extensive as those in the version originally signed by the Governor on Dec. 31, 2021, but the Act nevertheless includes significant new insurance disclosure requirements. The new requirements have been codified at §§3101(f) and 3122-b of the CPLR and became effective immediately.

Prior to the new law, the CPLR merely permitted a party to take discovery in a pending action regarding the existence and contents of any insurance policy the proceeds of which might be available to satisfy part or all of a judgment (or to indemnify or reimburse payments made to satisfy a judgment) that might be entered in the action. This column will discuss the new disclosure obligations imposed by the Act, the modifications to the original version of the Act, which scaled back some requirements, as well as some issues and concerns posed by the new disclosure obligations.

New Insurance Disclosure Obligations

The expanded requirements impose an affirmative obligation on defendants, third-party defendants and defendants on a counterclaim or cross-claim to produce "proof of the existence and contents of any insurance agreement … under which any person or entity may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the entry of final judgment." CPLR §3101(f)(1). A defendants' obligation may be satisfied by production of a copy of the relevant insurance policy or, if plaintiff agrees in writing, the declarations page of the policy.

The new requirements apply to all new actions and all pending actions filed after Dec. 31, 2021 (except for actions brought to recover motor vehicle insurance personal injury protections or no-fault benefits) and disclosure is required within 90 days of the filing of an answer to a complaint, counterclaim or cross-claim. The amendments to the Act increased the time to disclose from 60 days to 90 days from the filing of an answer.

Policy Limits and Adjustor Contact Information

The new requirements specifically include disclosure of all

primary, excess and umbrella insurance policies regardless of whether the policies were issued by syndicates like Lloyd's of London, private or public companies, captives, mutuals, risk retention groups or reciprocal insurance exchanges.

Defendants must also disclose the total policy limits available to satisfy a judgment in the pending litigation taking into account erosion of limits due to prior payments as well as any other relevant offsets. In addition, defendants must also disclose the name and contact information of the insurance adjustor for the claim including their email address.

Notably, the Act specifically provides that disclosure of policy limits does not constitute an admission that the policy provides coverage for alleged injury or damage. Further, disclosure of insurance information "is not by reason of disclosure admissible evidence at trial." CLPR §3101(f)(3) & (4).

Ongoing Obligations and Certification Requirement

Under the new rules, the defendant, third-party defendant or other disclosing party has an obligation "to make reasonable efforts to ensure that the information remains accurate and complete" and to provide updated information to any party to whom the insurance information has been disclosed at (1) the filing of a note of issue; (2) when entering into any formal settlement negotiations supervised by the court; (3) at a voluntary mediation; and (4) when the case is called for trial. The disclosure requirement and the obligation to update continue until 60 days after settlement or entry of a final judgment inclusive of all appeals. CPLR §3101(f)(2).

Further, the defendant, third-party defendant or other disclosing party must certify and the disclosing party's counsel must execute an affirmation or affidavit representing that the disclosed insurance information is accurate and complete and that reasonable efforts have and will be made to ensure that the disclosed information remains accurate and complete. CPLR §3122-b.

Changes From Original Version of the Act

While the Act materially expands the insurance disclosure requirements imposed on defendants, it notably scales back some of the burdens that would have been imposed under the version of the Act announced in January.

For example, the original version of the Act expressly provided that an insurance application is considered part of the policy and required disclosure of the application. Since insurance applications often contain confidential business information, it is fortunate that this requirement was removed.

In addition, the original version of the Act required disclosure of any pending lawsuits that have or may reduce the available limits of the disclosed insurance policy due to payment of loss or attorney fees as well as the identification and contact information for counsel who represent the parties in such a lawsuit or who have received payment of attorney fees that reduced the available policy limit. Such a provision would have created significant additional burdens on defendant insureds without providing any real benefits.

Potential Issues and Concerns

Although the amended version of the Act eliminated some of the more burdensome requirements, the new disclosure obligations do create potential concerns for policyholder defendants and their counsel and will likely require defendants to devote additional time and resources in further of compliance. Businesses should consider revising their internal procedures following receipt of a new lawsuit in order to efficiently address these issues.

The Act imposes an automatic burden on defendants that runs

from the date of the answer regardless of whether the plaintiff requests such insurance information in discovery requests. Counsel will need to timely advise policyholder defendants of these obligations so that they can gather the requisite information. In many cases, defendants will not have previously gathered this information and they may require help from counsel, their insurance broker or the insurer to achieve compliance.

It may be difficult enough for an insured defendant to identify and obtain copies of the relevant insurance policies within the 90-day period, but the Act also requires that they determine whether potentially applicable policy limits have been eroded by payments related to other matters.

This could be particularly difficult for clients that do not have an in-house risk manager responsible for these types of issues and many defendants may need to rely on their insurance broker to assemble this information. The process may be even more complicated where multiple insurance policies may respond or where there are multiple pending claims that implicate the same insurance policies.

Disclosure of policy limit and erosion information could impact the pending cases in a variety of ways. For example, the revelation that defense costs are materially decreasing available policy limits might encourage settlement negotiations. On the other hand, the availability of significant limits may encourage plaintiffs to seek bigger payouts or discourage settlement talks altogether.

The new requirements could also foster discovery disputes. For example, disclosure of the erosion of policy limits due to payments in other matters might cause plaintiffs to seek discovery in an effort to obtain information concerning these other cases.

Likewise, disclosure of the claims adjustor's contact information seems likely to cause plaintiffs to focus on whether the adjustor has relevant information that is within the scope of discovery. Since defendants may very well balk at these types of additional discovery requests, disputes may ensue.

Finally, the ongoing nature of the disclosure obligations, including the requirement for updates, and the certification obligation imposed on the defendant and counsel requires that a conscious effort be made to stay on top of any payments made by insurers under the relevant insurance policies. Defendants should consider designating an appropriate manager to ensure that any updates are communicated to counsel in a timely manner.

Looking Forward

While the amended Act is no doubt less burdensome than the original version, the Act still imposes material new insurance disclosure obligations on insured defendants. In order to assist clients in complying with these obligations, counsel should encourage policyholder defendants to begin gathering the relevant insurance information as soon as they are served with a new lawsuit, at the same time that they provide notice of claim to the insurer. This process should involve reaching out to their insurance broker for assistance assembling the necessary information and, where necessary, direct contact with the insurer.

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