New York State Finalizes Changes to Insurance Disclosure Law

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New York Civil Practice Law and Rules (NY CPLR) §3101(f) has long required, upon demand, disclosure of the "contents" of insurance agreements liable to the judgment of a civil litigation. What was meant by "contents," however, was often debated and argued over in terms of simply disclosing limits, versus entire policies, and other information clients may deem private or sensitive. This often allowed defense counsel to shield from disclosure information that clients preferred to keep in-house.

This landscape changed unexpectedly when, on Dec. 31, 2021, New York state Governor Kathy Hochul signed into law an amendment that fundamentally changed NY CPLR §3101(f) and dramatically increased the burden to defendants and third-party defendants in New York state litigation. The response from the defense community was swift and critical as the amendment not only required disclosure of information that should clearly remain confidential, but it created almost-impossible burdens as to the scope of the disclosure and continued updates.

The amendment was significantly scaled back by further changes that were signed into law on Feb. 24, 2022, (and deemed effective as of the original Dec. 31, 2021 amendment date), but the new language of NY CPLR §3101(f) will still have a profound impact on insurance defense practice in the state of New York moving forward.

The initial amendment to NY CPLR §3101(f) included numerous new disclosure requirements that were now compulsory upon answering a complaint, as opposed to upon demand. The new language strengthened the requirement to disclose the complete "policy, contract or agreement … including, but not limited to, declarations, insuring agreements, conditions, exclusions, endorsements, and similar provisions." Not only did the new provisions compel disclosure of insurance applications inclusive of detailed corporate and financial details but also necessitated production of information as to the erosion of policy limits by other claims and attorney fees, including providing the caption and attorney information for all claims and litigations that could erode limits. (This was originally written as a non-specific "ongoing" obligation and applied retroactively to all pending litigations.)

The response and uproar over the amendment came fast and swift, leading to substantial changes that were signed into law on Feb. 24, 2022. Among them was removal of the requirement to disclose insurance applications and lawsuit information and, perhaps most importantly, removing the retroactive language and only applying the new law prospectively to lawsuits filed on or after Dec. 31, 2021. NY CPLR §3101(f) as written now only requires disclosure of policy erosion with "reasonable efforts" to update at the time of the filing of the Note of Issue, court-supervised settlement negotiations, voluntary mediation, and/or trial. Additionally, the now-codified version limits the

disclosure of claims representatives' information to name and email address and increases the time to comply to 90 days from the service of the answer. However, it maintains a requirement in the initial amendment that both counsel and the responding defendant issue certifications attesting to undertaking reasonable efforts to disclose accurate insurance information.

The amended statute clearly places the onus on defendants to proactively address insurance coverage matters. Defense counsel can no longer wait for plaintiffs to pursue the issue and respond as necessary. The February amendments further include a provision that allows the parties to agree that production of a Declarations Page—the document that was often produced to satisfy the insurance disclosure requirement under the prior statute—will satisfy a defendant's obligation under the revised statute. Therefore, maintaining a cordial and positive dialogue with plaintiffs' attorneys and securing agreements to turn over only the Declarations Page will now be a high priority to mitigate cost and overhead, and to protect information clients wish to keep private.

Determining the amount of any policy erosion is another key task created by the new language, as this can impact not only the relevant primary policy, but any excess layers as applicable to cases moving forward. For example, if the value of a case is clearly within the primary level of insurance and there is no applicable erosion in any aggregate coverage for the policy period (either due to unrelated claims and losses or attorney fees), that should be immediately confirmed at the onset of any new claim or potential loss. If such erosion does exist, it should be accurately calculated to make a good faith effort in providing the most up-to-date information before mediations, at the close of discovery, during court-supervised settlement, and before trial.

The final version of the law did not alter the language of NY CPLR §3122-b requiring certification of the insurance disclosures, which will now function as a new obligation under the civil practice rules in New York. Providing context is that NY CPLR §3122-a addresses the Certification of Business Records that is often encountered when subpoenaing records for trial, signaling that a similarly-styled document will satisfy the new requirement as to insurance disclosures. Moreover, it was not uncommon to engage in motion practice to withhold full policy language that was often irrelevant to a plaintiff's mere need to know policy limits. Since the amended statute does still refer to policy documents that "relate" to the subject claim, it is anticipated that the defense will remain able to litigate this issue and work to protect from disclosure information that is of a private or proprietary nature.

The change in this law undoubtedly creates a new landscape when responding to lawsuits that are filed on or after Dec. 31, 2021. Though the February amendments are a welcome change from the original, the impact remains significant. We expect aspects of these amendments to NY CPLR §3101(f) will be addressed in motion practice as noted above, particularly as to the disclosure of policy information and how that information "relates" to the subject claim. While we continue to assess its evolution and practical implications, defense practitioners will want to focus on the applicable limits, potential erosion issues, and relevant policy documents to meet the reasonable efforts standard established in the new law.

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