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RESEARCH MEMORANDUM

To: [redacted]

From: LegalEase Solutions, LLC

Date: [redacted]

Re: Insured's duty to timely notify Insurer

Introduction

The insured had two insurance policies, one was a general liability policy, and one was an auto policy for a vehicle. After an auto accident, the insured notified only its auto insurance company of the claim because it thought that coverage would be sufficient to cover the loss. A judgment was thereafter entered on the auto claim against the insured for an amount more than the maximum limit of the auto policy.

Question Presented

- When did the insured have to notify their general liability insurance company of the occurrence or the loss? Is the failure to notify the general liability insurance company within a reasonable time or when the insured learned about the auto claim a complete bar to coverage?

Short Answer

There will be no coverage for the loss. The insured was required to notify its insurance company of an occurrence or loss within a reasonable time and failure to do so will bars coverage for the loss.

Discussion

THE INSURED HAD TO NOTIFY THE INSURANCE COMPANY OF THE OCCURRENCE OR LOSS WITHIN A REASONABLE TIME

The rule in New York provides that a contract of primary insurance requires as a condition precedent, a notice of an occurrence be given "as soon as practicable" after the occurrence. *Great Canal Realty Corp. v. Seneca Ins. Co.*, 5 N.Y.3d 742, 743 (N.Y. 2005) (policy of liability insurance requires that a notice of the occurrence of loss should be given "as soon as practicable"). If there is no valid excuse for the delay in giving the notice "as soon as practicable," then the policy will be vitiated. *Argo Corp. v. Greater N.Y. Mut. Ins. Co.*, 4 N.Y.3d 332, 339 (N.Y. 2005) ("For years the rule in New York has been that where a contract of primary insurance requires notice "as soon as practicable" after an occurrence, the absence of timely notice of an occurrence is a failure to comply with a condition precedent which, as a matter of law, vitiates the contract."). See also *Travelers Ins. Co. v. Volmar Constr. Co.*, 300 A.D.2d 40, 42 (N.Y. App. Div. 1st Dep't 2002). *Morris Park Contr. Corp. v. National Union Fire Ins. Co.*, 33 A.D.3d 763 (N.Y. App. Div. 2nd Dep't 2006) ("Contractual obligations of an insured to provide notice of a claim to its liability insurer as soon as practicable and to promptly forward legal papers to the carrier serve as conditions precedent to coverage.").

"As soon as practicable" means within a reasonable time and is measured by the reasonableness standard. *Travelers Ins. Co.*, 300 A.D.2d at 42 ("The obligation to give notice "as soon as practicable" of an occurrence that may result in a claim is measured by the yardstick of reasonableness."). See also *Great Canal Realty Corp*, 5 N.Y.3d at 743; *875 Forest Ave. Corp. v. Aetna Cas. & Sur. Co.*, 37 A.D.2d 11, 13 (N.Y. App. Div. 1st Dep't 1971). Although the notice requirement is to avoid causing prejudice to the insurer, the insurer does not have to suffer prejudice by late notice in order to deny coverage. *Argo Corp.*, 4 N.Y.3d at 339. See also *Tower Ins. Co. of NY v. Saleh*, 2008 NY Slip Op 50134U, 4 (N.Y. Sup. Ct. 2008) ("There is no need to show that the insurer suffered any prejudice as a result of tardy notice.").

However, failure to give timely notice may be excused in reasonable circumstances. *Great Canal Realty Corp*, 5 N.Y.3d at 743, 744. See also, *875 Forest Ave. Corp.*, 37 A.D.2d at 13. The insured has the burden to prove the reasonableness of his delay in giving the notice. *Argentina v. Otsego Mut. Fire Ins. Co.*, 86 N.Y.2d 748, 749-750 (N.Y. 1995). See also *Tower Ins. Co. of NY*, 2008 NY Slip Op 50134U at 4 (the insured bears the burden of proving, under all the circumstances, the reasonableness of any delay in the giving of notice).

Further, the failure to give notice may be excused when an insured, acting as a reasonable and prudent person, has a good faith belief of non-liability, provided that the belief is reasonable. *Great Canal Realty Corp*, 5 N.Y.3d at 743, 744. See also *875 Forest Ave. Corp.*, 37 A.D.2d at 12-13; *SSBSS Realty Corp. v. Public Serv. Mut. Ins. Co.*, 253 A.D.2d 583, 584 (N.Y. App. Div. 1st Dep't 1998). The issue is not whether the insured believes he will ultimately be found liable for the injury, but whether he has a reasonable basis for a belief that no claim will be asserted against him. *Id.* See also *AMRO Carting Corp. v. Allcity Ins. Co.*, 566 N.Y.S.2d 282

(N.Y. App. Div. 1st Dep't 1991); *White v. New York*, 81 N.Y.2d 955, 957 (N.Y. 1993). Moreover, where an excuse or explanation is offered for delay in furnishing notice, the reasonableness of the delay and the sufficiency of the excuse are matters to be determined at trial. *Morris Park Contr. Corp. v. National Union Fire Ins. Co.*, 33 A.D.3d 763 (2nd Dept. 2006).

In *SSBSS Realty Corp.*, SSBSS Realty Corp., Pelham Bay Diner Inc. and Gerassimos Stefanitsis, owners and operators of the Pelham Bay Diner (collectively, the Insured) were the plaintiffs. *SSBSS Realty Corp.*, 253 A.D.2d at 583. Rose Befi, a 70-year-old woman, was injured when she tripped and fell on a raised slab of flagstone on the sidewalk upon exiting the diner. *Id.* After two days Elias Koulouris reported to Stefanitsis that a woman had fallen on the sidewalk and was taken to hospital. *Id.* But Koulouris could not identify the name of the woman or the hospital to which she was taken. *Id.* at 583-584. Koulouris also told Stefanitsis that the woman had not been bleeding or crying, and did not appear to be injured. *Id.* at 584. Later, the owners of the diner received a letter from Befi that she intended to assert a claim. *Id.* The plaintiffs forwarded the letter to their insurance broker who sent a fax report to the insurer. *Id.* This took place three months after the accident. *Id.* The insurer then disclaimed coverage, on the ground that the insured had failed to provide timely written notice of the accident as required by the conditions of the policy. *SSBSS Realty Corp.*, 253 A.D.2d at 584. The trial court granted summary judgment to the plaintiffs. *Id.* The insurer appealed. *Id.*

Reversing the decision of the trail court and granting the summary judgment to the insurer, the Appellate Division, First Department held that the Insured had failed to reasonably prove that Befi would not assert a claim against them. *SSBSS Realty Corp.*, 253 A.D.2d at 584. The court further held that the failure to give notice within the reasonable time will be excused if

the insured proves that he had reasonable belief of his non-liability or that no claim will be asserted against him. *Id.* See also *Holmes v. Morgan Guar. & Trust Co.*, 223 A.D.2d 441(2nd Dept. 1996) (10 month delay in providing notice of claim to insurance carrier unreasonable).

Here, the loss occurred in [redacted], and the insured notified the insurer in [redacted]. Based upon the facts as presented, the insured was aware of the claim in [redacted] and in fact notified its auto insurer. Therefore, the insured cannot claim that it was unaware of the claim or that they had a reasonable belief of nonliability. *C.C.R. Realty of Dutchess, Inc. v. N.Y. Cent. Mut. Fire Ins. Co.*, 1 A.D.3d 304 (2nd Dept. 2003) ("A failure to give notice may be excused when an insured has a reasonable belief of nonliability."). Moreover, there is no indication from the facts that the general liability insurer was an "excess" insurer, which might give rise to an argument that the insured did not reasonably believe that the claim would exhaust its primary insurance coverage and trigger excess coverage. *Morris Park Contr. Corp. v. National Union Fire Ins. Co.*, 33 A.D.3d 763 (2nd Dept. 2006) ("Where, as in this case, notice to an excess liability carrier is in issue, the focus is on when the insured reasonably should have known that the claim against it would likely exhaust its primary insurance coverage and trigger its excess coverage, and whether any delay between acquiring that knowledge and giving notice to the excess carrier was reasonable under the circumstances."). Rather, the facts as presented reflect that the insured had both an auto and general liability policy which afforded coverage for the loss in question. Therefore, the insured will not be required to cover the insured for the loss that occurred in [redacted].