

## *KD Alert: Insurer Disclaimer Upheld Under New York's New Notice-Prejudice Law*

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*In what appears to be the first reported decision applying New York's new "Notice-Prejudice" rule, in Atl. Cas. Ins. Co. v. Value Waterproofing, Inc., 2013 U.S. Dist. LEXIS 6044 (S.D.N.Y. Jan. 15, 2013), the Southern District of New York held that the insurer's lost ability to investigate was sufficiently prejudicial so as to support the insurer's late notice coverage defense with respect to the underlying accident. Moreover, the Court held that subsequent opportunities to procure investigative materials through discovery did not relieve the prejudice.*

*By way of background, an insurance policy's requirement that an insured give notice "as soon as practicable" has required insureds to provide notice to insurers of accidents within a reasonable time. Prior to the enactment of N.Y. Insur. Law § 3420(a)(5), an insurer was not required to show any prejudice to disclaim coverage for an insured's failure to provide timely notice. However, after the enactment of N.Y. Insur. Law § 3420(a)(5), for any policies issued after January 17, 2009, an insurer could only disclaim coverage on the basis of untimely notice if the insurer suffered prejudice. N.Y. Insur. Law § 3420(a)(5). Until now, New York Courts had not published any decisions establishing the standard for prejudice under N.Y. Insur. Law § 3420(a)(5).*

*The facts underlying the Atl. Cas. lawsuit are straightforward – the insurer first received notice of a partial collapse at the subject property over six (6) months after the collapse, despite the fact that the insured knew of the collapse within a few hours of its occurrence. In fact, the subject property was demolished prior to notifying the insurer. The Southern District, having found that a six (6) month delay was unreasonable, coupled with the fact that the insured did not have a reasonable excuse for the delay, then turned its attention to the issue of the prejudice allegedly suffered by the insurer as a result of the delay.*

*The Court relied on the language of the statute, which recognizes that prejudice occurs if the failure to timely provide notice "materially impairs the ability of the insurer to investigate or defend the claim." N.Y. Insur. Law § 3420(c)(2)(C). As the Court explained, "the late notice prevented the [insurer] from being able independently to ascertain potential causes of the collapse, information which would be highly relevant to an investigation and defense of a claim." Moreover, the Court expanded its holding by stating that even discovery made available through the litigation, which included investigative reports, did not resolve the prejudice issue in favor of the insured because it forced the insurer to rely on "its adversary's investigation to defend its insured in the underlying action." The Court further held that the insurer was not required to show how its adversary's investigation was "biased or incomplete" to support its claim of prejudice. Finally, the Court did not require the insurer to wait for a verdict in the underlying lawsuit to determine whether its ability to defend the claim had been prejudiced, finding that the lost investigation was sufficiently prejudicial.*

*This decision should provide insurers, on a going-forward basis, with more clarity as to how a New York Court will address the issue of an insurer's ability to satisfy New York's prejudice standard in the context of late notice. Specifically, an insurer faced with a potential late notice coverage defense needs to evaluate: 1) whether any evidence has been destroyed prior to the notice; 2) what investigative steps, if any, remain available to the insurer; and 3) what, if any, investigation has already taken place. Although, under the current state of the law, insurers are not able to disclaim coverage for late notice with pre-N.Y. Insur. Law § 3420(a)(5) ease, this decision, at the very least, reserves the insurer's ability to perform its own investigations, while further preventing its insured(s) from destroying evidence before the insurer has notice.*

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