STATE OF NEW YORK
INSURANCE DEPARTMENT
25 BEAVER STREET
NEW YORK, NEW YORK 10004

David A. Paterson
Governor

Eric R. Dinallo
Superintendent

OGC Op. No. 09-01-05

The Office of General Counsel issued the following opinion on January 13, 2009, representing the position of the New York State Insurance Department.

Re: Circular Letter 26 (2008)

Questions Presented:

1. Do the notice provision amendments of Chapter 388 of the Laws of 2008 ("Chapter 388") apply to claims-made policies?

2. Do the Chapter 388 notice provision amendments, which become effective on January 17, 2009, apply to policies already in effect on that date that contain a liberalization clause?

3. Do the Chapter 388 notice provision amendments to N.Y. Ins. Law § 3420(c) (McKinney Supp. 2009) set forth a specific date for receipt of notice of claim by an insurer that triggers the beginning of the two-year period that determines which party has the burden of establishing insurer prejudice due to failure to provide timely notice to the insurer?

Answer:

1. Yes. The Chapter 388 notice provision amendments apply to claims-made policies, but allow for a claims-made policy to provide that the claim must be made during the policy period, any renewal thereof, or any extended reporting period, subject to Insurance Law § 3420(a)(4).

2. As a general matter, liberalization clauses typically apply to coverage and not policy conditions, but may be subject to the Chapter 388 notice provision amendments depending on the specific language in the policy endorsement.

3. No. The date of receipt of notice of claim that triggers the beginning of the two-year period that determines which party has the burden of establishing insurer prejudice due to failure to provide timely notice to the insurer is set forth in the specific language of each policy endorsement.

Facts:

The questions are of a general nature, without reference to particular facts.

Analysis:

Enacted in 2008, Chapter 388 amended Insurance Law §§ 2601 and 3420 and Civil Procedure Law and Rules § 3001 to require, among other things, that liability policies include provisions and other requirements establishing that late notice of a claim by the insured, an injured person, or any other claimant will not invalidate a claim unless the late notice has prejudiced the insurer. The amendments apply to all liability policies, including renewals, issued or delivered in New York on or after January 17, 2009.

In response to the first query, the Chapter 388 notice provision amendments apply to all liability policies, including claims-made policies. However, the notice provision changes are not intended to vitiate the purpose of claims-made policies by creating overlapping coverage periods that would not exist but for the amendments. Therefore, the examples delineated in Circular Letter 26 set forth circumstances when the new prejudice standard contained in Chapter 388 is limited to prevent such unintended outcomes. The new Insurance Law § 3420(a)(5) reads as follows:

> A provision that failure to give any notice required to be given by such policy within the time prescribed therein shall not invalidate any claim made by the insured, injured person or any other claimant, unless the failure to provide timely notice has prejudiced the insurer, except as provided in paragraph four of this subsection. With respect to a claims-made policy, however, the policy may provide that the claim shall be made during the policy period, any renewal thereof, or any extended reporting period, except as provided in paragraph four of this section. As used in this paragraph, the terms "claims-made policy" and "extended reporting period" shall have their respective meanings as provided in a regulation promulgated by the superintendent.

In response to the second query, a liberalization clause typically provides that changes to the policy form made by an insurer for new or renewed policies, which broaden coverage under the policy, without additional premium charge, will automatically apply to the policy if issued within a specified period of time before the changes to the policy form go into effect. The inquirer provides liberalization clause language from an undisclosed "Homeowners Policy" that reads as follows:

> If we adopt any revision which would broaden coverage under this policy without additional premium within 60 days prior to or during the policy period, the broadened coverage will immediately apply to this policy.

This language clearly implicates coverage, rather than policy conditions, such as those addressed by the Chapter 388 amendments. However, because liberalization clause language varies by policy, there is no definitive answer to the second question posed.

In response to the third query, Chapter 388 amended Insurance Law § 3420(c) to set forth whether the insurer or the insured has the burden of establishing prejudice due to failure to provide timely notice. That amendment reads as follows:

> (2)(A) In any action in which an insurer alleges that it was prejudiced as a result of failure to provide timely notice, the burden of proof shall be on: (i) the insurer to provide that it has been prejudiced, if the notice was provided within two years of the time required under the policy; or (ii) the insured, injured person or other claimant to prove that the insurer has not been prejudiced, if the

> notice was provided more than two years after the time required under the policy.

The policy language in an individual policy endorsement dictates when the notice of claim must be made to the insurer and, therefore, when the two-year period begins to run that determines which party has the burden of establishing prejudice for failure to provide timely notice to the insurer.

For further information you may contact Associate Counsel Alexander Tisch at the New York City Office.