STATE OF NEW YORK
INSURANCE DEPARTMENT
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Circular Letter No. 26 (2008)
November 18, 2008

TO: All authorized Property/Casualty Insurers; Rate Service Organizations; New York Medical Malpractice Insurance Plan; New York Automobile Insurance Plan; and Excess Line Association of New York.

RE: Notice provisions in liability policies; Chapter 388 of the Laws of 2008

STATUTORY REFERENCE: Insurance Law Sections 3420(a) and 2601
Civil Procedure Law and Rules Section 3001

The purpose of this Circular Letter is to advise property/casualty insurers of the recent enactment of Chapter 388 of the Laws of 2008 ("Chapter 388"), which amends Insurance Law §§ 2601 and 3420 and Civil Procedure Law and Rules ("CPLR") § 3001. These amendments streamline litigation and prohibit the denial of liability coverage in certain circumstances. Chapter 388 culminates a nearly year-long endeavor involving the effort of this Department, working in conjunction with the Governor's office, the Legislature, industry and other interested parties, to put into place necessary and long overdue consumer protections in a manner that also is fair to both insureds and insurers. Chapter 388 accomplishes this delicate balancing act by bringing New York into the mainstream with respect to establishing a "prejudice" standard applicable to the late notice of claims.

The law takes effect on January 17, 2009 (180 days after it was signed by the Governor on July 21, 2008). The amendments apply to all liability policies (including renewals) issued or delivered in New York on or after the effective date of January 17, 2009, including policies issued in the excess line market. Liability insurers are reminded of the necessity of promptly revising their property/casualty insurance policy forms to comply with the bill's significant amendments. The key provisions of Chapter 388 are summarized below.

Insurance Law § 3420 establishes minimum policy provisions and other requirements with respect to liability policies issued or delivered in New York. One of those provisions, Insurance Law § 3420(a)(4), has long protected insureds, injured persons and other claimants by imposing a "reasonably possible" standard on insureds – i.e., every liability policy had to provide that failure to give any notice required by the policy within the time prescribed therein would not invalidate any claim if it could be shown not to have been reasonably possible to have given notice within the prescribed time, and that notice was given as soon as reasonably possible.

In adding new Insurance Law § 3420(a)(5), Chapter 388 establishes additional protections that complement the existing requirements. It requires every liability policy issued or delivered in New York to contain a provision stating that the failure to give notice as prescribed by the policy will not invalidate a claim made by the insured, an injured person, or any other claimant, unless the late notice has prejudiced the insurer, except as provided under Insurance Law § 3420(a)(4). In other words, the claim may not be denied if: 1) it had not been reasonably possible to give notice within the prescribed time, and notice is given as soon as reasonably possible, even if the insurer has been prejudiced; or 2) the insurer has not been prejudiced, even if the claim was not made as soon as reasonably possible.

With respect to a claims-made policy, pursuant to Insurance Law § 3420(a)(5), the policy may provide that the claim shall be made during the policy period, any renewal thereof, or any extended reporting period, subject to Insurance Law § 3420(a)(4). The reference to "any renewal" of a claims-made policy does not permit duplicate claims under multiple policy periods, or a late claim under a prior policy period, for example, where a subsequent policy's limits have been exhausted. Nor does the prejudice standard for late notice apply when notice is given under a claim-made policy after the expiration of: the policy period governing the time during which the event occurred; the renewal of such policy; and any extended reporting period under such policy. In reviewing policy forms, the Department will consider appropriate policy language reflecting this intent. Because Chapter 388 requires that the meaning of its provisions be construed by a Department regulation, New York Comp. Codes R. & Regs. ("NYCRR"), Tit. 11, Pt. 73 (Regulation 121) shall continue to govern the construction of any referenced definitions, as well as the establishment of minimum provisions, with respect to claims-made policies.

Chapter 388 adds Insurance Law § 3420(a)(6), which requires every liability policy to contain a provision that states, with respect to a personal injury or wrongful death claim, that if the insurer disclaims liability or denies coverage based on a failure to provide timely notice, then the injured person or other claimant may maintain an action directly against the insurer, on the sole question of late notice, unless the insured or the insurer, within 60 days of the disclaimer, initiates an action to declare the rights of the

parties under the policy, and names the injured person or other claimant as a party to the action.

Chapter 388 amends Insurance Law § 3420(c) to provide that, in any action in which an insurer alleges that it is prejudiced by the failure of an insured, injured person or other claimant to provide timely notice, the insurer shall have the burden to prove that it was prejudiced, if notice was provided to the insurer within two years of the time required under the policy. If notice is provided to the insurer more than two years after the time required by the policy, then the insured, injured person or other claimant has the burden of proving that the insurer was not prejudiced. Further, the insurer's rights are not deemed prejudiced unless the failure to provide timely notice materially impairs the ability of the insurer to investigate or defend the claim. If notice is provided to the insurer after a court of competent jurisdiction or binding arbitration determines the insured's liability, or after the insured has settled the case, then there is an irrebuttable presumption of prejudice.

Chapter 388 amends Insurance Law § 3420(d) to establish a process by which an injured person or other claimant may receive from an insurer confirmation that the insured had an insurance policy in effect on the alleged occurrence date, and the liability limits under the policy. This requirement applies only if the policy: 1) provides coverage with respect to a claim arising out of death or bodily injury of a person; and 2) the policy is either subject to Insurance Law § 3425 (other than an umbrella or excess liability policy) or is used to satisfy a financial responsibility requirement imposed by law or regulation, including (but not limited to) a motor vehicle liability policy in satisfaction of Article VI or VIII of the New York Vehicle and Traffic Law. Failure to disclose coverage pursuant to Insurance Law § 3420(d) constitutes an unfair claim settlement practice, in violation of Insurance Law § 2601.

Finally, Chapter 388 amends CPLR § 3001 to permit a claimant in a personal injury or wrongful death action to maintain a declaratory judgment action directly against the defendant's insurer, as provided pursuant to Insurance Law § 3420(a)(6).

The amendments apply only to liability policies, and do not apply to first-party benefits under the no-fault endorsement of a motor vehicle insurance policy issued pursuant to Article 51 of the Insurance Law. No-fault policies continue to be governed by Article 51 and 11 NYCRR § 65 (Regulation 68).

Chapter 388 does not require an insurer to send any conditional renewal notice pursuant to Insurance Law § 3426 (e)(1)(B), because the amendment does not effectuate a reduction in coverage under the policy.

As noted above, the amendments apply only to policies issued or delivered on or after January 17, 2009. It is expected that no insurer will prematurely issue or deliver policies with effective dates on or after Chapter 388's effective date. However, should insurers attempt to prematurely issue or deliver policies in an attempt to circumvent the

law, the Superintendent may find such conduct to constitute an unfair or deceptive act, that violates Article 24 of the Insurance Law.

Although the Department expects insurers to be in full compliance by the effective date of the law, any liability policy issued or delivered in this state on or after January 17, 2009 that does not contain the provisions required by Chapter 388 shall, pursuant to Insurance Law § 3103(a), nonetheless be enforceable as if the policy conforms with the requirements of Chapter 388, and thus shall be valid and binding upon the insurer.

Please note that the Department expects to receive a large volume of policy form filings to review and approve. In order to ensure timely compliance with the statute, all affected insurers and rate service organizations are advised to submit, as soon as possible, revised policy forms to the Insurance Department for the Superintendent's review and approval. In order to expedite disposition of the filings, submissions should be limited to changes mandated by Chapter 388. In addition, insurers are encouraged to utilize the Speed-To-Market filing procedures for the required policy form filings. Information about the speed-to-market process can be obtained from the Department's website at www.ins.state.ny.us.

Any questions and/or comments with respect to this circular letter should be directed to:

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Very truly yours,

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