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INSURANCE LAW

NEWSLETTER OF THE INSURANCE LAW PRACTICE GROUP OF MANATT, PHELPS & PHILLIPS, LLP

Active Year For Insurance Legislation In New York

Passage of Bills Related to No Prejudice Standard, Identity Theft Insurance, and Automobile Insurance Flex Rating Among Important Changes to Law

[James S. Walsh](#)

The New York State Legislature adjourned on June 24. In addition to the dramatic changes among the leadership of state government – with the departure of Governor Eliot Spitzer and the announced departure of Senate Majority Leader Joseph Bruno and the arrivals of Governor David Paterson and Senate Majority Leader Dean Skelos – there were several significant bills passed by the Legislature and enacted into law or awaiting review by the Governor that affect the insurance industry. The following is a brief overview of many of those bills, including their status in the legislative process.

Bills Passed by the Legislature

Group Blanket and Health Insurance Coverage (A.7120 (Gianaris)/S.3964-C (Seward)): This bill would clarify the employees that may be covered by group blanket and/or health insurance, including retired employees and corporate directors. The eligible employees would be similar to those eligible under group accident and health and group life insurance policies. This bill would take effect immediately upon becoming a law.

Status: Passed the Legislature, but not yet delivered to the

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Governor.

Wellness Program Incentive (A.10884-A (Morelle)/S.4675-A (Hannon)): This bill would authorize accident and health insurers, among other entities, to establish wellness programs, including, but not limited to, programs for smoke cessation, weight management, stress management, worker injury prevention, nutrition education, and health and fitness incentives. The bill would authorize insurers to use rewards and incentives (e.g., reimbursement for program participation, waiver or reduction of copayments, coinsurance and deductibles for preventative services, and monetary rewards such as gift cards for products or services that encourage good health) to encourage participation in wellness programs. This bill would take effect immediately.

Status: Passed the Legislature, but not yet delivered to the Governor.

Risk-Based Capital Exemption for Medical Malpractice Insurers (S.6535-A (Seward)/A.9521-A (Morelle)): This bill would authorize the Superintendent of Insurance to exempt from the statutory risk-based capital requirements those stock and non-stock insurance companies which have total direct premiums including at least ninety percent medical malpractice liability insurance. Under current law, the exemption applies only to non-stock domestic property/casualty insurance companies with direct premiums of at least ninety percent medical malpractice liability insurance. This bill would take effect immediately and would be deemed repealed on December 31, 2011.

Status: Passed the Legislature, but not yet delivered to the Governor.

No Fault Coverage Regarding Drunk or Impaired Drivers (S.8294-A (Bonacic)/A.10000 (Dinowitz)): The bill would provide that No Fault insurers may not exclude from coverage the basic economic loss, including costs related to the hospital care and treatment, of an insured who is guilty of driving while under the influence of drugs or alcohol. This bill would allow insurers to seek to recover from an insured guilty of driving while under the influence of drugs or alcohol the cost of first party benefits paid or payable. This bill is intended to ensure that health care facilities and professionals are compensated for the treatment of injuries to drunk or impaired drivers, the costs for which may be denied by insurers. In order to ensure that insurers are held harmless, the bill would authorize a cause of action against the insured to recover medically related costs resulting from injuries due

to the insured's operation of a vehicle while drunk or impaired. This bill would take effect 180 days after becoming a law.

Status: Passed the Legislature, but not yet delivered to the Governor.

Annual Financial Statement Requirement for Certain Domestic Insurers (S.6535-A (Seward)/A.9521-A (Morelle)): This bill would require each domestic insurance corporation subject to rehabilitation or liquidation to submit to the Department of Insurance and the Legislature an annual financial statement showing the corporation's financial condition in the prior calendar year together with an opinion or report by an independent certified public accountant regarding such financial statement. The Superintendent would be required to submit to the Department and the Legislature an annual financial statement of the Liquidation Bureau showing its cash receipts and disbursement for the prior calendar year along with an opinion or report by an independent certified public accountant regarding such financial statement. This bill would take effect on December 31, 2009.

Status: Passed the Legislature, but not yet delivered to the Governor.

Clarify Assets as Admitted or Non-Admitted (S.6749-B (Seward)/A.869-B (Destito)): This bill would clarify the treatment of certain assets (e.g., "goodwill," pre-paid real estate taxes, interest, electronic data processing equipment) as admitted or non-admitted for purposes of the presentation of insurance company financial results in its annual and quarterly statements. For instance, the bill would change the depreciable life of real estate property owned by a life insurer from the lesser of its useful life or 40 years to the lesser of its useful life or 50 years. This change would provide for consistent treatment by life and non-life companies. These amendments are consistent with changes recommended by the National Association of Insurance Commissioners ("NAIC") to develop uniform, comprehensive regulatory accounting rules for insurance companies nationwide. This bill would take effect immediately.

Status: Passed the Legislature, but not yet delivered to the Governor.

Bills Signed Into Law

Flood Insurance Notice (Chapter 21 of the Laws of 2008; A.6344-B (Gunther)/S.4097-A (Libous)): This law requires that insurers provide with each new homeowners' and dwelling fire personal line policies, or renewal thereof, a notice that such policies do not provide coverage for loss caused by mudslide or flood and that separate insurance is available in accordance with the National Flood Insurance Program. Current law provides that insurers must provide a one-time notice at policy issuance. This law shall take effect on August 31, 2008.

Increase the Aggregate Amount of Foreign Investments by New York Life Insurers (Chapter 60 of the Laws of 2008; S.805-B (Seward)/A.8818-A (Gianaris)): This law permits: (a) a 16% of admitted assets aggregate foreign investment limit for investments in jurisdictions rated in one of the four highest rating categories which are denominated in United States dollars or are effectively hedged, substantially in their entirety, against the United States dollar; and (b) insurers who have an approved derivatives use plan under Insurance Law § 1410 to use counterparties permitted under their plans to effect the required foreign currency hedges, in addition to the other counterparties specified under §1405(a)(7)(C). This law took effect on April 23, 2008.

Make Permanent the Authority for Derivative and Replication Transactions (Chapter 71 of the Laws of 2008; A.9882 (Morelle)/S.6656 (Seward)): This law makes permanent the authority for domestic insurers to enter into derivative and replication transactions, in accordance with written derivative use plans approved by the Insurance Department. Without this law, this authority would otherwise have expired and been deemed repealed on June 30, 2008. This law took effect on May 7, 2008.

Make Permanent the Surplus Formula for the Retained Surplus by Domestic Life Insurance Companies (Chapter 72 of the Laws of 2008; A.9883 (Morelle)/S.6655 (Seward)): This law makes permanent the formula used to determine the amount of surplus that must be maintained by certain domestic life insurers. Without this law, the authority to use the formula would have expired on December 31, 2008 and such insurers would have been subject to a formula that is both obsolete and different from that used by domestic mutual life insurers. This law took effect on May 7, 2008.

Insurance Agent Licensing Exam Study (Chapter 77 of the Laws of 2008; S.4074-A (Seward)/A.7249-A (Espaillat)): This law directs the Superintendent of

Insurance to collect certain information from individuals who apply to take the life insurance agent licensure exam. This information includes the applicant's gender, native language, the race or ethnicity with which the applicant identifies, and the highest level of education the individual achieved. This law also provides that the Superintendent must inform applicants that they are not required to provide this information and that no penalty will be assessed to those applicants who choose not to disclose their race, ethnicity, gender, native language, or level of education. The law also directs the Superintendent to annually perform a study of the demographics of life insurance agent licensure examination applicants, as well as the results of those tests. This law shall take effect on September 19, 2008.

Flex Rating, Homeowners' Insurance, and Miscellaneous (Chapter 136 of the Laws of 2008; S.8624 (Seward)/A.11693 (Rules - Morelle)): This law:

(i) extends the expiration date for certain powers of the New York Property Insurance Underwriting Association ("NYPIUA") from June 30, 2008, to June 30, 2011, requires NYPIUA to develop incentives for insurers to write homeowners' insurance policies in coastal areas and to offer extended coverage for additional natural and man-made events and other broad forms of coverage at fixed locations in the state for a period of 5 years, with more expansive coverage in those areas; (ii) extends the expiration date from June 30, 2008, to June 30, 2011, of various provisions of law, including the authority of the Superintendent of Insurance to pre-approve insurance rates for motor vehicles used principally for transport of people for hire (e.g., buses and school buses), the requirement for insurers to submit a plan to refund or credit excess profits to insurers, and the requirement that the Superintendent compile reports related to the number of new insureds, non-renewed insureds and other vital information; (iii) permits an insurer with no more than 750 automobile insurance policies in force to non-renew such policies without regard to the 2% statutory limitation on nonrenewals pursuant to a plan approved by the Superintendent for the orderly non-renewal of the policies; (iv) authorizes flexible rating for non-business automobile insurance policies whereby insurers may institute rate increases or decreases of five percent without prior approval by the Superintendent; and (v) requires the Superintendent to implement a program to attract more competition for homeowners' insurance coverage to the state and to reinvigorate the Special Advisory Panel on Homeowners' Insurance Coverage. This law took effect on June 30, 2008, with certain provisions of the law to take effect on January 1, 2009.

Increase Maximum Life Insurance for Minors (Chapter 178 of the Laws of 2008; A.9181-A (Morelle)/S.5800-A (Seward)): This law increases the maximum amount of life insurance that insurers are authorized to issue upon the life of a minor – persons under the age of 14 years, 6 months - to \$50,000 or 50% of the life insurance in force on the person seeking the insurance for the minor, whichever is greater. Prior law limited the maximum insurance for all life insurance policies to \$25,000 or 50% of the life insurance in force on the person seeking the insurance for the minor, whichever was greater. This law took effect on July 7, 2008.

Compensation Disclosure (Chapter 263 of the Laws of 2008; S.7764 (Seward)/A.11194 (Morelle)): This law requires life insurance companies to include with their annual statements the compensation and names of the Chief Executive Officer, the next four highest executive officers, the five most highly compensated employees whose compensation exceeds \$100,000, all directors, and any other employee whose total compensation exceeds \$750,000. This law took effect on July 7, 2008.

Extend the Grace Period for Certain Life Insurance Products (Chapter 264 of the Laws of 2008; S.7765 (Seward)/A.11195 (Morelle)): This law provides for a 61-day grace period for life insurance policies, in which the amount and frequency of premiums may vary (flexible premium products), during which the policyholder may pay a premium sufficient to keep the policy from lapsing. The law further requires that a premium due notice must be mailed to the policyholder within 30 days after the day when the insurer determines that the net cash surrender value under the policy is insufficient to pay the total charges that are necessary to keep the policy in force. The law also requires that premium due notices be mailed to the policy owner, who will be responsible for paying the premium to keep the policy in place. This law shall take effect on October 5, 2008.

Declaratory Judgment/No Prejudice (Chapter __ of 2008 [to be announced]; S.8610 (DeFrancisco)/A.11541 (Rules-Weinstein)): This law authorizes a claimant for personal injury or wrongful death against another party to maintain a declaratory judgment action directly against the insurer of the other party where such insurer “disclaims liability or denies coverage based upon the failure to provide timely notice.” The law also establishes that in an action in which an insurer alleges that it was prejudiced by a claimant’s failure to provide timely notice, the insurer will have the burden to prove that such failure to provide notice within two years of the time required under the

policy materially impaired the insurer's ability to investigate or defend the claim. The burden of proof will be upon the 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 law requires policies to include information related to these new provisions. Finally, the law requires insurers to notify a claimant in writing as to whether the insured had liability insurance coverage in effect on the date of the occurrence as well as to state the liability insurance limits of such coverage. Under prior law a personal injury claimant could not file a direct action against an insurer, including for a declaratory judgment, but could file a direct action against an insurer if a judgment against the insured remained unsatisfied for 30 days or more. In addition, according to the law's legislative sponsors, an insurer had only to demonstrate that notice of a claim was untimely in order to disclaim or deny coverage. This law shall take effect on January 19, 2009.

Identity Theft Insurance and Credit Card Issuer Expanded Authority (Chapter __ of 2008 [to be announced]; S.7561-A (Seward)/A.10403-A (Morelle)):

This law clarifies that stolen identity can be a covered event under the burglary and theft insurance line, which can be further expanded to include event ticket protection. The law also authorizes insurers that issue credit insurance to indemnify a person for educational expenses related to a student's dismissal or withdrawal, including room and board, that are not permitted to be covered under prior law. The law allows credit card/debit card issuers and banks to provide group coverage to holders of their credit/debit cards and checking accounts for event ticket protection, catered affair expense protection, trip interruption or cancellation protection, and personal effect protection related to a trip. The Superintendent of Insurance is authorized to: adjust by regulation the monetary limitations for group property/casualty insurance by card issuers and banks in accordance with inflation; and allow card issuers and banks to offer additional coverage that is limited in scope or duplicative with other more comprehensive coverage. The law permits insurers to sell group identity theft and property travel insurance policies. Finally, the law makes permanent Insurance Law §3442, which includes the regulatory provisions for credit card, debit card, or checking account group policies. This law shall take effect on October 21, 2008.

Expands the Authority of Certain Insurance Adjusters (Chapter __ of 2008 [to be announced]; S.2645-B (Seward)/A.7245-A (Canestrari)): This law allows an insurance company employee to adjust a claim for another

insurance company within the same holding company system, without the need to obtain an independent adjuster license. The law also allows life insurers to adjust claims under an insurance contract issued by another insurer where the claim is within the scope of the reinsurance contract between the two insurers. This law took effect on July 23, 2008.

Group Life Insurance Employee Notification (Chapter __ of 2008 [to be announced]; S.5138-A (Seward)/A.7896-A (Destito)): This law requires that, prior to commencement of a group life insurance policy, an employer must notify its employees in writing of the face amount of the insurance coverage, that the employer will be the beneficiary or policyholder of the policy and that the employee must consent to such coverage in writing. This law took effect on July 23, 2008.

New Filing Requirements and Penalties for Workers' Compensation Insurers (Chapter __ of 2008 [to be announced]; S.8400 (Robach)/A.11700 (Rules - Benedetto)): This law requires insurers and the State Insurance Fund ("SIF") to file notification of the issuance, reinstatement, amendment or endorsement of employers' workers' compensation insurance coverage and disability coverage with the Chair of the Workers' Compensation Board within thirty days of execution. Failure to provide timely notification related to insurance coverage will be subject to a penalty of up to \$500 for each 10-day period of lateness, while the failure to notify the Chair of policy issuance and changes related to disability coverage will be subject to a fine of up to \$100 for each such 10-day period. The law also provides that an insurer or the SIF shall be subject to the same \$500 per 10-day period penalty for failure to timely file notification of the cancellation or termination of coverage. This law shall take effect on October 21, 2008.

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