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There is No Need To Be Alarmed By Alarmist Readings of New York's Most Recent Ruling On Waiver of Notice Defenses

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The New York Court of Appeals recently reversed and remanded a lower court's ruling that insurers had waived their late notice defense by not raising the defense until years after they first received notice of a pollution remediation claim. Although some have interpreted this decision as a near-death knell to coverage for pollution remediation claims with potential notice issues in New York, the situation is not nearly that dire.

In *KeySpan Gas East Corp. v. Munich Reinsurance America, Inc.*, 2014 WL 2573382, 2015 N.Y. Slip Op. 04113 (N.Y. June 10, 2014), an assignee of the policyholder was seeking a declaration that several insurers were obligated to cover the remediation of environmental damage at sites formerly owned and operated by the policyholder. When the policyholder initially notified its insurers that there potentially would be regulatory investigations of the sites, the insurers issued standard reservations of rights letters, but did not deny coverage based on allegedly late notice. In fact, the insurers did not affirmatively assert that notice had been untimely until the policyholder brought its declaratory judgment action nearly three years later.

In the trial court, the insurers brought a motion for summary judgment on their notice defense. In opposing the motion, the policyholder's assignee argued (among other things) that the insurers had waived their rights to disclaim coverage based on allegedly late notice by waiting until the declaratory judgment action was filed to assert that defense. The trial court found that the insurers had not waived their notice defenses. The appellate division disagreed, finding that there were genuine issues of material fact regarding "whether defendants waived their right to disclaim coverage based on late notice" by "fail[ing] to timely issue a disclaimer." In reaching this conclusion, the appellate division "essentially recited" (although it did not cite to) N.Y. Ins. Law § 3420(d)(2), which provides that:

> If under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant.

The New York Court of Appeals reversed, finding that N.Y. Ins. Law § 3420(d)(2), by its terms, does not apply because pollution remediation claims are not claims for "death or bodily injury arising out of a motor vehicle accident or any other type of accident."

If one were to focus only on this aspect of the ruling – in which the Court of Appeals admittedly rejected a more heightened standard than the one insurers otherwise need to meet to maintain a notice defense – one might think that notice waiver law in New York is worse for policyholders after *KeySpan*. But that is not the case. Although the Court of Appeals did foreclose applying N.Y. Ins. Law § 3420(d)(2) to pollution claims, the Court also expressly held that common law waiver and estoppel to continue to apply. Indeed, the Court noted that the policyholder's assignee itself had relied only on common law waiver, not the referenced statutory provision; the Court thus remanded for an examination of whether the insurers had waived their late notice defense based on the common law standards for waiver.

Accordingly, if there is evidence that either (1) an insurer intentionally released its right to disclaim coverage based on late notice by reserving its right to question notice without affirmatively asserting that notice was improper or (2) a policyholder was prejudiced by its insurer's failure to affirmatively assert that notice was improper, the insurer will not be able to escape coverage based on a notice defense. Policyholders have always had these counterarguments to allegations of late notice, so the inapplicability of N.Y. Ins. Law § 3420(d)(2) is far from coverage-defeating.