Sills Cummis & Gross P.C.

Client Alert Product Liability Law

CPLR Amended To Require Defendants To Automatically Disclose Insurance Information

On December 31, 2021, Governor Kathy Hochul signed into law an amendment to Rule 3101(f) of the New York Civil Practice Law and Rules ("CPLR") that requires a defendant to automatically disclose all insurance policies under which an insurer may be liable to satisfy a judgment (the "New Rule"). The New Rule applies to all relevant insurance policies, including primary, excess and umbrella policies – without regard to the potential magnitude of a judgment in the particular case.

The new insurance disclosure requirements are designed to avoid delay in production of insurance information – with the apparent goal to promote early settlements. While the greatest impact of early disclosure is likely to be seen in personal injury actions, the new requirements apply to all cases, not just tort actions. The lone exception is for cases brought to recover motor vehicle personal injury protection ("PIP") benefits, to which the automatic disclosure rule does not apply. *See* CPLR 3101(f)(5).

Prior to the amendment, CPLR 3101(f) did not require automatic disclosure, but instead permitted a plaintiff to seek insurance coverage information as part of discovery (the "Original Rule"). The scope of disclosure under the Original Rule was similar to the initial disclosure requirements under Federal Rule of Civil Procedure Rule 26(a)(1)(A)(iv), permitting discovery of "any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a possible judgment which may be entered in the action or to indemnify or reimburse payments made to satisfy the judgment." Importantly, as phrased, the Original Rule could be interpreted as only requiring "relevant" disclosure – which typically may be satisfied by the production of a declaration page showing the policy limits. The New Rule goes beyond the Original Rule and that of the federal rule.

Indeed, certain requirements of the New Rule were deemed so extreme that Governor Hochul almost immediately requested that the Legislature amend it. In February 2022, the Legislature amended the New Rule (the "Amended New Rule").

May
2022

Client Alert Product Liability Law

The Required Disclosures Under The Amended New Rule

The highlights of the Amended New Rule, CPLR 3101(f), include the following:

- Within ninety (90) days of filing an answer, a defendant must produce a copy of all insurance policies in place at the time of the loss "under which any person or entity may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the entry of final judgment."
- The scope of insurance policies that must be disclosed includes *all* "primary, excess and umbrella" policies.
- A defendant must provide contact information for "an assigned individual responsible for adjusting the claim."
- The "total limits" of each policy that may be used to satisfy a judgment – which is the total of the policy less any "account erosion and any other offsets" – must be disclosed (thus, in addition to disclosing the total coverage on each policy, a defendant must also advise the plaintiff how much of that total remains available to satisfy a judgment.
- A defendant is required to make reasonable efforts to ensure the information remains accurate and must provide updated information at various points of the litigation – including upon filing of a Note of Issue, court ordered settlement negotiations, voluntary mediation, at the commencement of trial, and for 60 days after a settlement or entry of judgment.
- The disclosure of policy limits is *not* an admission that the claim is covered by any identified policy, nor is any information concerning the policies admissible at trial.
- A defendant must provide a certification from a person with knowledge *and* from counsel that the disclosed information is accurate and complete.

A few important notes on the new requirements under the Amended New Rule. First, CPLR 3101(f) does not limit the disclosure requirement only to those layers of insurance coverage sufficient to satisfy an anticipated judgment. Rather, it appears to require a defendant to produce every layer of insurance coverage it maintains, even when a plaintiff's stated claim or likely recovery would be satisfied by a first layer of insurance coverage. Second, the disclosure requirement applies to all cases in which a party has applicable coverage – not just tort claims. Thus, a defendant in a business dispute action must also produce any policy that might cover the claim at issue. Third, the disclosure requirement applies equally to defendants on counterclaims, cross-claims or third-party actions. As such, a plaintiff will fall within the requirement for disclosure if a defendant files a counterclaim. Fourth, there is no exception should an insurer disclaim coverage. CPLR 3101(f)'s disclosure requirement applies whenever an insurer "may be liable" and, as such, appears to require disclosure even if coverage is initially denied.

While the new disclosure requirements now in effect under CPLR 3101(f) are certainly more burdensome than under the Original Rule, the first version of the disclosure requirements enacted in the New Rule were far worse. The Amended New Rule removed many of the more onerous requirements of the New Rule, including the following.

First, the Amended New Rule allows the plaintiff and defendant to agree that defendant need only produce policy declaration pages, instead of the entire policy. If the parties do agree, plaintiff maintains the right to revoke the agreement at any time, for any reason, and to demand production of the entire policy.

Second, as originally enacted in the New Rule, the application for an insurance policy was deemed to be part of the policy and subject to production. Policy applications likely contain confidential business information, especially as to a defendant's finances, that is clearly not relevant to the purpose of the policy disclosure. The Amended New Rule expressly removed the requirement that policy applications be produced.

Third, the Amended New Rule clarifies that only those policies that are applicable to a particular claim must be produced. The New Rule did not require a nexus between the claim in the action and the policies that need to be produced, and thus arguably would have required production of *all* policies maintained by a defendant.

Fourth, the Amended New Rule limits the disclosure of persons responsible for adjusting the claim to a single "assigned individual" instead of "any person responsible for adjusting the claim," which could include multiple persons throughout an insurance company or third-party claims adjuster.

The New Rule, as amended by the Amended New Rule, took effect immediately, on a going forward basis. It thus applies to any case filed in 2022, but not before. For applicable cases, we advise that the first step should be to confer with Plaintiff's counsel and, wherever possible, secure the option of producing only declaration pages.

Conclusion

New York has amended its disclosure requirements for insurance policies in civil litigation. Under the amended CPLR 3101(f), a defendant in all non-motor vehicle PIP cases must disclose to plaintiff, within 90 days of filing an answer, all of its insurance policies from which a judgment or settlement may be satisfied. The Amended New Rule requires disclosure of all layers of policies, regardless of the amount of the claim in the action. The Amended New Rule does provide the option for the parties to agree to limit the disclosure to just declaration pages, but this is at the sole option of plaintiff. The Amended New Rule also requires the defendant to disclose the identity of a person responsible for adjusting the claim, and to periodically update its disclosure to ensure that it remains accurate.

Client Alert Product Liability Law

The changes to CPLR 3101(f) place a substantial new burden on defendants to produce insurance documents to plaintiff and are likely to be tested in the courts. We will provide updates as appropriate.

If you would like additional information, please contact:

Beth S. Rose, Esq.
Chair, Product Liability Practice Group
brose@sillscummis.com | (973) 643-5877

Andrew W. Schwartz, Esq.
Of Counsel, Product Liability Practice Group
aschwartz@sillscummis.com | (973) 643-5886