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New York Expands Mandatory Disclosures of Insurance Coverage Information

Newly Enacted Law Requires New York State Court Defendants to Produce More Detailed Insurance Information

SUMMARY

On December 31, New York Governor Kathy Hochul signed into law the Comprehensive Insurance Disclosure Act (the "Act"), which substantially increases the insurance-related information and documents that defendants must produce to all other parties in civil lawsuits in New York state court. The law went into effect immediately and provides that pending cases must come into compliance by March 1, 2022.[1]

In addition to requiring production of substantial documents and information related to insurance coverage, the new law contains a provision requiring prompt updates of disclosures throughout the litigation and until sixty days after the litigation terminates. The law also requires signed certifications by defendants and their counsel.

Media and other reports indicate that, in signing the bill, Governor Hochul expressed that the New York Legislature should seek to amend the law to reduce some of the more onerous requirements, but it is presently uncertain as to whether any amendments will be enacted and, if they are, whether this will happen before parties are required to comply with these new obligations.

THE COMPREHENSIVE INSURANCE DISCLOSURE ACT

The Act provides that any defendant or third-party defendant in a New York State civil lawsuit must make disclosures of insurance coverage-related information and documents within sixty days after serving an answer or, for pending cases where an answer has already been filed, by March 1, 2022. The required disclosures include:

- A complete copy of all primary, excess, and umbrella insurance policies, including policies issued by captive insurers;
- Contact information for insurance adjusters;
- The amounts available under the policies to satisfy a judgment in the action;
- The identity of any other lawsuits that have depleted or may deplete the amount of coverage available under the policies, including the caption of any such lawsuit, the date the lawsuit was filed, and the identity and contact information of all counsel for all represented parties in the lawsuit;
- The amount of any attorneys' fees that have reduced the face value of the policy and the names and addresses of all attorneys who received such payments; and
- Insurance applications.

The Act imposes a continuing obligation on defendants to provide updated disclosures within thirty days of receiving information that renders prior disclosures inaccurate or incomplete. This obligation extends throughout the pendency of the litigation and for sixty days after a settlement or final judgment.

The Act also specifies that defendants and their counsel must provide affidavits or affirmations that the insurance disclosures are accurate and complete and that reasonable efforts have been and will be taken to keep the disclosures accurate and complete.

The new law's required disclosures, including production of insurance applications, contact information for insurance adjusters, and information regarding the amount of limits remaining on the policies and other litigation, go well beyond the information that defendants in federal and most, if not all, state courts are automatically required to disclose. For example, under federal and California civil rules, the required initial disclosures include only potentially applicable insurance agreements.[2]

IMPLICATIONS

The Act's heightened disclosure requirements impose a significant burden on defendants and their attorneys to make extensive disclosures, monitor for any changes impacting the disclosures, and certify their accuracy. Particularly for companies with multiple potentially applicable large and complex insurance programs who may be facing parallel litigation and investigations in multiple jurisdictions, the task of tracking and affirmatively disclosing the erosion of each such program in real time may place a high administrative burden on companies and their counsel.

The implementation of the Act is likely to raise multiple questions, some of which may be resolved by the courts:

- The Act does not address the extent to which the highly confidential or sensitive financial information often included in insurance applications must be disclosed, whether and how the insurers' reservation of rights and coverage positions affect the extent of required disclosure, whether information concerning confidential settlement agreements with insurers must be produced, or the consequences for non-compliance, whether inadvertent or intentional.

- Although the text of the law requires the disclosure of "lawsuits" that have eroded or may erode available limits, this term arguably fails to encompass governmental regulatory investigations, even though they may also be depleting policy limits. Moreover, parties may face confidentiality restrictions on their ability to disclose governmental investigations.
- The Act requires disclosure of depletion of insurance coverage limits, which may require production of confidential settlement information. If courts were to construe the Act in that manner, it would impede settlement of litigation by removing the ability of policyholders and insurers to settle coverage disputes on a confidential basis.
- The Act requires the disclosure of the names and address of any attorney who has received payment under the policy. But the fact of retention of a lawyer with particular subject matter expertise or geographic location may itself reveal confidential information, and the Act does not address how the insured may protect its confidential strategy and work product.
- Although the Act requires continuing production of insurance information sixty days after the conclusion of the case, this is likely inconsistent with New York courts' model protective orders and parties' typical protective orders. For example, the New York Commercial Division form of protective order requires that parties return or destroy all confidential material within that same sixty-day period.
- The continuing obligation requirement also effectively requires parties to continue to work with their counsel for sixty days after their case concludes to provide the required updates and certifications. To avoid this potentially unnecessary and wasteful activity, parties might seek to stipulate in their settlement agreements not to require this ongoing disclosure, but the Act does not address whether parties will be permitted to stipulate to modify or not to follow any of the requirements set forth in the law.

In light of the potential ambiguities in, and uncertainties with respect to the ultimate reach of, the new legislation, it is likely advisable for parties providing information pursuant to this new law to ensure their disclosure contains sufficient precautionary language to address the risks of disclosures turning out, in hindsight, to have been incomplete or inaccurate.

Media and other reports indicate that amendments to the Act may be forthcoming.[3] Potential amendments are reported to include removing the requirements to produce insurance applications and identification of other lawsuits and counsel, narrowing the policy production obligation to policies insofar as they relate to the claim being litigated, eliminating the Act's application to cases filed before its enactment, extending the time period for disclosures from sixty to ninety days after answering, and limiting the obligation to provide updates to certain key points in the case. It is not clear when or whether any amendments will be made or, if they are made, whether this will happen before the sixty-day deadline for defendants to comply with the Act in its current form.

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ENDNOTES

[1] New York State Senate, "Senate Bill S7052" (December 31, 2021), a*vailable at*: https://www.nysenate.gov/legislation/bills/2021/S7052.

[2] Fed. R. Civ. P. 26(a)(1)(A)(iv) and Cal. Civ. Proc. Code § 2016.090 both require disclosure of any insurance agreement under which an insurance business "may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment."

[3] *E.g.*, "Hochul Wants Revisions on Insurance Disclosure Law" (January 5, 2022), *available at*: https://www.insurancejournal.com/news/east/2022/01/05/648065.htm.

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