



Salvatore J. Zambri

Statute of Limitations

- 6-year SOL for breach of contract claim
 - N.Y. C.P.L.R. § 213(2)
- Begins to run at time of breach, not when contract formed or any other date
 - *Ely-Cruikshank Co. v. Bank of Montreal*, 81 N.Y.2d 399, 402, 599 N.Y.S.2d 501, 615 N.E.2d 985 (1993)

Statute of Limitations (con't)

- Insurance policies can shorten the period of time in which a party can bring a breach of contract claim.
 - *Schunk v. N.Y. Cent. Mut. Fire Ins. Co.*, 237 A.D.2d 913, 914, 655 N.Y.S.2d 210 (App. Div. 4th Dept. 1997)
- A shorter statute of limitations promotes public policy because it “more effectually secures the end sought to be attained by the statute of limitations.”
 - *Ripley v. Aetna Ins. Co.*, 30 N.Y. 136, 163 (1864); see also *John J. Kassner & Co. v. New York*, 46 N.Y.2d 544, 550-51, 415 N.Y.S.2d 785, 389 N.E.2d 99 (1979) (holding that an agreement shortening the statute of limitation to a reasonable period is enforceable).

Notice

- How provided
 - Oral
 - Writing
 - Specific means per policy
- When provided: specific deadline?

Notice (con't)

- “Prompt” and “immediate” notice: provided within a reasonable time under the circumstances
 - *Metro. N.Y. Coordinating Council on Jewish Poverty v. Nat'l Union Ins. Co.*, 222 A.D.2d 420, 421, 634 N.Y.S.2d 730, 731 (App. Div. 2nd Dept. 1995) (holding that plaintiff's 3-year delay in notifying insurance company was unreasonable as a matter of law)
- Even shorter delays deemed unreasonable
 - *Deso v. London & Lancashire Indem. Co.*, 3 N.Y.2d 127, 164 N.Y.S.2d 689, 143 N.E.2d 889 (1957) (51-day delay unreasonable); *see also Zadrina v. PSM Ins. Cos.*, 208 A.D.2d 529, 616 N.Y.S.2d 817 (App. Div. 2nd Dept. 1994) (4-month delay unreasonable)

Notice (con't)

- Untimely notice vitiates the policy.
 - *Deso v. London & Lancashire Indem. Co.*, 3 N.Y.2d 127, 129, 164 N.Y.S.2d 689, 143 N.E.2d 889 (1957)
- If there are any mitigating circumstances, the reasonableness is decided by the jury; but if none exists, the court determines whether the delay was reasonable.
 - *Deso v. London & Lancashire Indem. Co.*, 3 N.Y.2d 127, 130, 164 N.Y.S.2d 689, 143 N.E.2d 889 (1957)

Notice (con't)

- “No-prejudice rule” no longer applies to policies issued after 1/17/09
- N.Y. Ins. Law § 3420:
 - *Insurer* must prove prejudice if notice provided within 2 years (2(A)(i))
 - *Insured* must prove absence of prejudice if notice provided after 2 years (2(A)(ii))

Notice (con't)

- N.Y. Ins. Law § 3420(2)(B):
 - Irrebuttable presumption of prejudice if, prior to notice:
 - Insured's liability determined by court or
 - Insured settled claim

Notice (con't)

- N.Y. Ins. Law § 3420(2)(C):
 - Prejudice exists only when failure to timely provide notice “materially impairs the ability of the insurer to investigate or defend the claim.”

Proof of Loss

- What is it?
 - Standard form sufficient?
- Deadline:
 - Automatic and specific, without request
 - Automatic and specific when triggered by request
 - Not mentioned in policy

“Loss,” Generally

- Typically, net income that would have been earned **plus** continuing normal operating expenses (including payroll) actually incurred.
 - See “Business Income” definition on Insurance Services Office Commercial Property Form CP 00 30 04 02
- Recovery under a business-interruption policy consists “of the profits that would have been earned if the business had not been interrupted and the expense of maintaining an organization during the interruption.”
 - *Books for Less, LLC v. United Nat'l Ins. Co.*, 2018 NY Slip Op 08187, 166 A.D.3d 567, 567, 86 N.Y.S.3d 875 (App. Div. 1st Dept.) (recognizing that business-interruption coverage covers “actual business-income loss suffered by plaintiff”)

“Loss” (con’t)

- Amount determined by evaluating the experience of the business before the interruption and “its probable experience thereafter”
 - *Howard Stores Corp. v. Foremost Ins. Co.*, 82 A.D.2d 398, 441 N.Y.S.2d 674 (App. Div. 1st Dept. 1981) (quoting 15 George J. Couch, Couch Cyclopedia of Insurance Law § 57:28 (2d ed. 1983))
- A business that is failing before it is interrupted is not entitled to coverage.
 - *Cosmetics Plus Grp., Ltd. v. Am. Int’l Grp., Inc. (In re Cosmetics Plus Grp., Ltd.)*, 379 B.R. 464 (Bankr. S.D.N.Y. 2007) (two stores were unable to recover business-interruption losses because their going-out-of-business sales started before 9/11/01 terrorist attacks destroyed their stores)

"Costs"

- Defined
- Undefined
- Meriam-Webster:
 - “amount or equivalent paid or charged”
 - “outlay or expenditure made to achieve an object”
(i.e., achieved fame, but at *cost* of losing friends)
 - “loss or penalty incurred, especially in gaining something”
(i.e., “the *cost* of lives during war”)
 - “to cause to pay, suffer, or lose something”
(i.e., “frequent absences *cost* him his job”)

Typical Requests

- Loss Location(s)
- Claiming physical loss or damage to property?
- Explain the physical loss of (or damage to) property
- Any confirmed case of Covid-19 on premises?
- Has property been tested for presence of virus?
- Business fully closed?
- Have operations been reduced?
- Has ingress/egress been prevented?

Typical Requests (Con't)

- Orders pertaining to business access and operations
- Customers prevented from receiving goods/services?
- What's required to perform partial/full operations?
- Any delayed payment of rent?
- Any suppliers prevented from providing goods/services?
- What is your total claimed loss?
- How do you calculate your losses?



Salvatore J. Zambri
Regan Zambri Long PLLC

szambri@reganfirm.com
202-822-1899