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cause of the increased possibility of federal and state constitutional attack on CPLR 6501, it is submitted that the Court's narrow interpretation of the statute should be maintained in future cases.

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INSURANCE LAW

Ins. Law § 3404: Failure to provide for shortened limitation period in fire insurance policy results in application of the general six-year period

Section 3404 of the Insurance Law requires that all fire insurance policies issued in New York conform to a statutorily mandated form.¹ Subsection (e) of section 3404 enables an insurer to


New York's pendency statute may be more susceptible to procedural due process scrutiny under the New York Constitution, which does not require state action for a procedural due process violation to exist. See N.Y. Const. art. 1, § 6; Hercules Chem., 118 Misc. 2d at 821, 462 N.Y.S.2d at 134. “[T]he absence of any express State action language simply provides a basis to apply a more flexible State involvement requirements than is currently being imposed by the Supreme Court with respect to the Federal provision.” Sharrock v. Dell-Buick, 45 N.Y.2d 152, 160, 379 N.E.2d 1169, 1174, 408 N.Y.S.2d 39, 44 (1978). Therefore, even if New York's pendency statute does not entail sufficient state action to trigger federal due process protection, “it certainly is sufficient to invoke protection of due process rights under the more flexible standard of the State constitution.” Hercules Chem., 118 Misc. 2d at 821, 462 N.Y.S.2d at 134.

¹ N.Y. Ins. Law § 3404 (McKinney 1984). Section 3404 provides, in pertinent part:

(a) The printed form of a policy of fire insurance, as set forth in subsection (e) hereof, shall be known and designated as the “standard fire insurance policy of the state of New York.”

(b)(1) No policy or contract of fire insurance shall be made, issued or delivered by any insurer or by any agent or representative thereof, on any property in this state, unless it shall conform as to all provisions, stipulations, agreements and
shorten the period for commencement of an action on the policy to two years rather than the otherwise applicable six year period provided by CPLR section 213.\(^2\) Notwithstanding the prevalent use of section 3404(e) suit limitations,\(^3\) New York courts have been willing to mitigate the consequences of a policy holder's failure to bring suit within the shortened limitation period through the doctrines of waiver and estoppel.\(^4\) Recently, in 1303 Webster Avenue

conditions with such form of policy . . .

Id. § 3404 (a)-(b)(1).

Organized fire insurance originated in England after the London fire of 1666, but it was not until the mid-nineteenth century that American state and local governments drafted legislation concerning fire insurance policies. See 1 RICHARDS ON INSURANCE § 13, at 45-47 (5th ed. 1952); S. HUBNER, K. BLACK, R. CLINE, PROPERTY AND LIABILITY INSURANCE 23 (2d ed. 1976) [hereinafter cited as HUBNER, BLACK & CLINE].

\(^2\) See N.Y. INS. LAW § 3404(e) (McKinney 1985); see also CPLR 213 (statute of limitations on contract action is six years). Section 3404(e), "the standard 156 lines," see Reader & Polk, The One-Year Suit Limitation in Fire Insurance Policies: Challenges and Counterpunches, 19 FORUM 24, 24 n.1 (1983), provides in pertinent part:

No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twenty-four months next after inception of the loss.


The United States Supreme Court has upheld the use of a limitation period in a fire insurance policy when such period differs from the period prescribed by the state statute of limitations. See Riddlesbarger v. Hartford Ins. Co., 74 U.S. (7 Wall.) 386, 391-92 (1868). The constitutionality of the two-year time limit of the New York statute was recently challenged and upheld. See Van Hoesen v. Pennsylvania Millers Mut. Ins. Co., 86 App. Div. 2d 733, 734, 447 N.Y.S.2d 47, 48 (3d Dep't 1982).


\(^4\) See, e.g., Becker-Fineman Camps, Inc. v. Public Serv. Mut. Ins. Co., 52 App. Div. 2d 656, 656, 382 N.Y.S.2d 122, 123 (3d Dep't 1976) (failure to issue policy with expressly shortened limitations period estops insurance company from relying on shortened period); Pas-
Realty Corp. v. Great American Surplus Lines Insurance Co., the Court of Appeals restricted the availability of shortened limitation periods under section 3404(e), holding that a failure to provide for the shortened period in a fire insurance policy results in the application of the general six-year limitation period.  

mear Inn, Inc. v. General Accident Fire & Life Assurance Corp., 44 App. Div. 2d 647, 647, 353 N.Y.S.2d 278, 279 (4th Dep't 1974) (insurance company that fraudulently causes plaintiff to sue stopped from asserting statute of limitations); Conte v. Yorkshire Ins. Co., 5 Misc. 2d 670, 675, 163 N.Y.S.2d 28, 33 (Sup. Ct. N.Y. County 1957) (insurance company estopped from relying on shortened limitations period when such period omitted from policy). One commentator has noted that because the time limitation of the standard form policy derogates CPLR 213, courts actively seek to avoid the results of the shortened statute of limitation. See 3 Richards on Insurance § 557, at 1875 (5th ed. 1952).

Waiver has been defined as an “intentional relinquishment of a known right, with full knowledge of the facts upon which the existence of the right depends.” Gilbert Frank Corp. v. Federal Ins. Co., 91 App. Div. 2d 31, 33, 457 N.Y.S.2d 494, 496 (1st Dep't 1983); see also S & E Motor Hire Corp. v. New York Indem. Co., 255 N.Y. 69, 72, 174 N.E. 65, 66 (1930) (waiver requires actual knowledge of facts upon which right depends); 6 Couch on Insurance 2d § 32:274 (rev. ed. 1982) (waiver requires manifested intention to relinquish right). Waiver, however, differs from estoppel because, as an equitable principle, it involves only the legal consequences that stem from an insurer's conduct, and does not require reliance. See Rothschild v. Title Guar. & Trust Co., 204 N.Y. 468, 464, 97 N.E. 879, 880 (1912); Conte v. Yorkshire Ins. Co., 5 Misc. 2d 670, 672, 163 N.Y.S.2d 28, 30 (Sup. Ct. N.Y. County 1957). Since an insurer may waive the statutory suit preclusion clause, the Conte court reasoned that “[i]t is but a short and logical step to further declare that... [an insurer] may also be estopped from relying on it when it fails to include in the policy a specific provision limiting the time of the insured for the commencement of an action...” 5 Misc. 2d at 672, 163 N.Y.S.2d at 30; see also Reader & Polk, supra note 2, at 37-40 (although waiver and estoppel are different concepts, in practice they are often interchanged). But cf. Siegel § 56 (while doctrines of waiver and estoppel are firmly entrenched in law, courts resort to them sparingly).


6 In Webster, the Court refers to § 168 of the insurance law. Id. at 231, 471 N.E.2d at 136, 481 N.Y.S.2d at 323. The insurance law was amended and reenacted in its entirety effective September 1, 1984, as a new Chapter 28 of the Consolidated Laws of New York by ch. 367, § 1, [1984] N.Y. LAWS 2040. The purpose of the new chapter is “to recodify, without substantive change, the insurance law in effect immediately prior to the effective date of this chapter.” N.Y. INS. LAW § 102 (McKinney 1985). Section 3404 replaces the former § 168 without any substantive change.

7 63 N.Y.2d at 231, 471 N.E.2d at 136, 481 N.Y.S.2d at 323.
The plaintiff in *Webster* insured his buildings, located in Bronx County, against fire loss with Great American Surplus Lines Insurance Company and the Illinois Employer's Insurance Company. The buildings were damaged by fire in 1979 but the plaintiff waited more than two years to commence an action against both carriers to enforce the policies. The defendants moved to dismiss the action on the ground that it was time barred. The Supreme Court, Bronx County, denied the defendants’ motions, but the Appellate Division reversed and granted dismissal. The Appellate Division held that despite the fact that the policies violated section 3404(e) by containing a shorter one-year statute of limitations, the policies were enforceable as if they had conformed with the two year period of section 3404(e). As a result, the court determined that the failure to bring suit within two years from accrual barred the action.

On appeal, the Court of Appeals modified the order of the Appellate Division, holding that there was a triable question of fact on the issue of whether the policy issued by the defendant Great American contained a limitation clause at all. The Court noted that a failure to include a limitation period, even one that contravened section 3404(e), operated as a waiver of all limitation periods but the six year CPLR provision. The Court reasoned that when a policy does not refer to any time limitation within which suit must be brought, the insurer is not entitled to the benefits of the

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8 Id.
9 Id. at 230, 471 N.E.2d at 136, 481 N.Y.S.2d at 323.
10 See id.
11 See id.
12 See id. The Appellate Division relied on what is now § 3103(a) of the Insurance Law, a general construction statute, which provides, in pertinent part:

Except as otherwise specifically provided in this chapter, any policy of insurance . . . issued for delivery in this state in violation of any of the provisions of this chapter shall be valid and binding upon the insurer issuing the same, but in all respects in which its provisions are in violation of the requirements or prohibitions of this chapter it shall be enforceable as if it conformed with such requirements or prohibitions.

N.Y. INS. LAW § 3103(a) (McKinney 1985) (formerly N.Y. INS. LAW § 143(a)).
13 63 N.Y.2d at 231, 471 N.E.2d at 136, 481 N.Y.S.2d at 323.
14 See id.; see also CPLR 213 (1972) (six-year statute of limitations for actions on a contract, unless otherwise provided for in the contract).
statutory short period. The Court therefore concluded that the policyholder may rely on the six year statute of limitations generally applicable to contract actions. In addition, the Court upheld the Appellate Division's determination that the policy issued by the Illinois Employer's Insurance Company, although it contained a period shorter than that authorized by section 3404(e), was enforceable as if it had contained the two year limitations period.

The Insurance Law was enacted primarily to protect the insured from inequitable and one-sided insurance contracts issued by companies with superior bargaining power. To achieve this end, the Legislature requires the use of a standard form policy to ensure uniformity in fire insurance policies. The courts have enforced the mandate of uniformity by relying on section 3103(a), which dictates that an insurance policy containing terms that are not in strict compliance with the provisions of the Insurance Law is enforceable as if it had contained the statutory terms. It can be

16 See 63 N.Y.2d at 231, 471 N.E.2d at 136, 481 N.Y.S.2d at 323. The Court noted that an insured has no notice of a shortened limitation on the time within which suits on the policy must be commenced if the contract is silent on this subject. See id.
17 See id.
18 Id. The Court observed that the inclusion of a shortened limitation clause in a fire insurance policy precluded a finding of waiver of the two-year provision of § 3404(e). Id.; see also Medical Facilities, Inc. v. Pryke, 62 N.Y.2d 716, 717, 465 N.E.2d 39, 40, 476 N.Y.S.2d 532, 534 (1984) (fire insurance contract making no reference to shortened limitations period governed by general six-year period applicable to contract actions).
20 See supra notes 1 & 2 and accompanying text.
21 See N.Y. Ins. Law § 3103(a) (McKinney 1985); supra note 13; see also Bersani v. General Accident Fire & Life Assurance Corp., 36 N.Y.2d 457, 460, 330 N.E.2d 68, 70, 369 N.Y.S.2d 108, 111 (1975). In Bersani, an insurance policy was issued to facilitate the acquisition of a mortgage, but with an oral agreement between the parties' agents that there would be no claims submitted on the policy. See 36 N.Y.2d at 459, 330 N.E.2d at 69, 369 N.Y.S.2d at 110. After the building was damaged by fire, the plaintiffs sued to enforce the policy notwithstanding the oral agreement to the contrary. See id. The court determined that § 143(a), the predecessor of § 3103(a), controlled the transaction, reasoning that "[i]n all respects in which the provisions of an insurance policy violate the requirements or prohibitions of the Insurance Law, the policy is enforceable as if it had been made with such requirements or prohibitions . . . ." Id. at 460, 330 N.E.2d at 70, 369 N.Y.S.2d at 111; cf. Rosado v. Eveready Ins. Co., 34 N.Y.2d 43, 49, 312 N.E.2d 153, 155, 356 N.Y.S.2d 8, 12 (1974) (automobile policy that fails to adopt statutory minimums enforceable as if it had).
argued that a fire policy that is silent on the issue of suit limitations is in violation of section 3404(e) and that section 3103(a) would cause the two-year statutory period to apply.\textsuperscript{22} It is suggested, however, that this result, while certainly uniform, would thwart the public interest in the meritorious disposition of insurance claims.\textsuperscript{23}

Although an element of uncertainty exists in this area, courts have identified instances when an insurer's conduct will be interpreted as a waiver of the shortened suit limitation period.\textsuperscript{24} It is

\textsuperscript{22} See N.Y. INS. LAW § 3404 (McKinney 1985). Section 3404(b)(1) mandates that all fire policies "conform as to all provisions, stipulations, agreements and conditions" contained in the standard form, 3404(e). \textit{Id.} § 3404(b)(1) (emphasis added); see supra note 1. New York fire policies must therefore contain each of the 165 lines, and it is suggested that a failure to include a two-year limitation clause may violate line 161. As a result, two conflicting public interests collide: the legislative mandate of uniformity, see supra notes 13 & 18 and accompanying text, and the general remedial nature of the insurance law, see supra note 19. Instead of opting for a more restrictive construction of §§ 3103(a) and 3404(b)(1), the Court in \textit{Webster} chose a more expansive interpretation that focused on the relationship between § 3404(e), and CPLR 213, and retained the remedial purposes of the Insurance Law. See 63 N.Y.2d at 231, 471 N.E.2d at 136, 481 N.Y.S.2d at 323.

\textsuperscript{23} See supra note 21; see also Conte v. Yorkshire Ins. Co., 5 Misc. 2d 670, 671, 163 N.Y.S.2d 28, 29 (Sup. Ct. N.Y. County 1957). The \textit{Conte} court observed:

[\textit{I}f the short statute were to apply to every policy, even when as here it was not included in the policy, some companies might lapse into lax habits and omit the provision in the vague expectation that insured persons who had suffered losses would not consult counsel in time to initiate an action.

5 Misc. 2d at 672, 163 N.Y.S.2d at 30; see also Medical Facilities, Inc. v. Pryke, 62 N.Y.2d 716, 717, 465 N.E.2d 39, 40, 476 N.Y.S.2d 532, 533 (1984). In \textit{Pryke}, an action to recover on a fire insurance policy was commenced six years and three days after the building covered by the policy was damaged by fire. \textit{See} Medical Facilities, Inc. v. Pryke, 95 App. Div. 2d 692, 694, 463 N.Y.S.2d 804, 806 (1st Dep't 1983) (Kassal, J., dissenting), aff'd, 62 N.Y.2d 716, 465 N.E.2d 39, 476 N.Y.S.2d 532, 533 (1984). The policy did not contain the two-year limitation clause pursuant to line 161 of the standard form. \textit{Id.} at 694, 463 N.Y.S.2d at 806-07. The Court of Appeals declared that, "[a]n insurer who issues a policy omitting reference to the shortened limitations period, in violation of statutory mandate, cannot claim the benefit of its own omission. . . ." 62 N.Y.2d at 717, 465 N.E.2d at 40, 476 N.Y.S.2d at 533. Underlying the \textit{Pryke} Court's analysis was the notice function that line 161 provides. \textit{Id.} The Court noted that once an insurance company issues a policy lacking a limitation clause, actual notice of the shortened time period by the insurer to the policyholder will not cure the defect. \textit{See id.}

suggested that the Court in *Webster* reaffirmed this commitment to protecting the rights of the insured. Moreover, it is submitted that the holding in *Webster* counterbalances a potentially restrictive operation of the standard fire insurance policy by militating against the preclusion of suits on statute of limitations grounds when the policyholder has no notice of any limitation period other than the six year statute generally applicable to all contract actions.

Roger G. Coffin

*Ins. Law § 3407: Failure of insured to file proof of loss within the required 60-day period constitutes an absolute defense against lawsuit*

Section 3407\(^1\) of the New York Insurance Law provides that an insured’s failure to file the proof of loss required by an insurance contract shall not invalidate or diminish the insured’s claim under the policy unless the insurer, after the occurrence of the loss, gives written notice to the insured that it desires such proof of

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\(^1\) Section 3407 is the successor statute to § 172 of the Insurance Law, which was renumbered as a result of the recodification of the Insurance Law in 1984. See Ch. 805, § 170, [1984] N.Y. Laws 3287 (McKinney). The statute was recodified without substantial change. See Igbara Realty Corp. v. New York Property Ins. Underwriting Ass’n, 63 N.Y.2d 201, 206 n.5, 470 N.E.2d 858, 864 n.5, 481 N.Y.S.2d 60, 65 n.5 (1984).