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Article 11

Ins. Law § 3407: Failure of Insured to File Proof of Loss Within the Required 60-Day Period Constitutes an Absolute Defense Against Lawsuit

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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.

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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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tation clause as matter of law). Moreover, an insurance agent, by representations to the insured, may subject the company to a waiver of line 161. *See* Aarons Fifth Ave., Inc. v. Insurance Co. of Am., 52 App. Div. 2d 855, 855, 383 N.Y.S.2d 45, 45 (2d Dep't 1976). A common thread that runs through many of the cases is the effect of negotiations between the agent and the insured on a later assertion of waiver. *See, e.g.*, Sciarrillo v. North River Ins. Co., 61 App. Div. 2d 1112, 1112, 403 N.Y.S.2d 582, 582-83 (3d Dep't 1978) (estoppel not applicable when insurer, after negotiations with insured, denied claim sufficiently in advance); Dresserville Farms v. Firemen's Ins. Co., 54 App. Div. 2d 1118, 1119, 388 N.Y.S.2d 788, 788 (4th Dep't 1976) (question of fact whether insurance agents misled plaintiff into believing case would be settled, resulting in plaintiff's forbearance to sue); Pasmear 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) (settlement offer by insurance company eight months before statute of limitations expired not cause of plaintiff's forbearance to sue, thus suit time-barred).

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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 3267 (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).

loss.[2] Section 3407 was designed primarily to protect the "insured from the consequences of his oversight or neglect in complying with one of the conditions precedent to a recovery under the policy. . . ."[3] Recognizing this remedial purpose, courts historically have construed this section broadly.[4] Recently, however, in *Igbara v. New York Property Insurance Underwriting Association*,[5] the New York Court of Appeals narrowed the protection afforded by section 3407 by holding that the failure of the insured to file proof of loss within 60 days of receipt of the insurer's demand is an abso-

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[2] *See* N.Y. INS. LAW § 3407(a) (McKinney 1985). The statute provides in pertinent part:

> The failure of any person insured against loss or damage to property under any contract of insurance . . . to furnish proofs of loss to the insurer or insurers as specified in such contract shall not invalidate or diminish any claim of such person under such contract, unless such insurer or insurers shall, after such loss or damage, give to such insured a written notice that it or they desire proofs of loss to be furnished by such insured to such insurer or insurers on a suitable blank form or forms. If the insured shall furnish proofs of loss within sixty days after the receipt of such notice and such form or forms, or within any longer period of time specified in such notice, such insured shall be deemed to have complied with the provisions of such contract of insurance relating to the time within which proofs of loss are required.

Id.

Section 172 was added to the Insurance Law when it was recodified in 1939. *See Igbara*, 63 N.Y.2d at 215, 470 N.E.2d at 863, 481 N.Y.S.2d at 65.

[3] *See* La Canin v. Automobile Ins. Co., 41 F. Supp. 1021, 1023 (E.D.N.Y. 1941); Marguilies v. Quaker City Fire & Ins. Co., 276 App. Div. 695, 698, 97 N.Y.S.2d 100, 103 (1st Dep't 1950); Bank of Utica v. Canners Exch. Subscribers, 119 Misc. 2d 939, 940, 464 N.Y.S.2d 625, 626 (Sup. Ct. Oneida County 1983).

An insurance policy is "a contract by the insurer to indemnify the insured against property loss." Dyno-Bite Inc. v. Traveler Co., 80 App. Div. 2d 471, 473, 439 N.Y.S.2d 558, 560 (4th Dep't 1981); *See* Michael Delivery v. Firemen's Fund Ins. Co., 115 Misc. 2d 834, 835, 454 N.Y.S.2d 790, 791 (1982). The filing of proof of loss is a condition precedent to the insurer's promised indemnification. *See* Do-Re-Knit Inc. v. National Union Fire Ins. Co., 491 F. Supp. 1334, 1336-37 (E.D.N.Y. 1980); Lentini Bros. v. New York Property Ins. Underwriting Ass'n, 53 N.Y.2d 835, 836, 422 N.E.2d 819, 820, 440 N.Y.S.2d 174, 175 (1981) (mem.). A loss is normally payable by the insurer 60 days after the receipt of the insured's proof of loss. *See* N.Y. INS. LAW § 3404(e) (McKinney 1985) (second page of standard fire policy). Absent such a proof of loss, the insurer is under no contractual obligation to indemnify the insured. *See id.* § 3407 (McKinney 1985). However, the insured's failure to file proof of loss will not invalidate his claim unless the insurer, after the occurrence of the loss, provided the insured a written request for such proof of loss. *See* Miller v. Nationwide Mut. Fire Ins. Co., 92 App. Div. 2d 723, 724, 461 N.Y.S.2d 128, 129 (4th Dep't 1983).

[4] *See, e.g.*, La Canin v. Automobile Ins. Co., 41 F. Supp. 1021, 1023 (E.D.N.Y. 1941) (as remedial statute, § 172 should be broadly construed); Marguiles v. Quaker City Fire & Marine Ins. Co., 270 App. Div. 695, 698, 97 N.Y.S.2d 100, 103 (1st Dep't 1950) (purpose of § 172 is to protect insured); Bank of Utica v. Canners Exch. Subscribers, 119 Misc. 2d 939, 940, 464 N.Y.S.2d 625, 626 (Sup. Ct. Oneida County 1983) (because § 172 is remedial statute, it should be given broadest possible interpretation).

[5] 63 N.Y.2d 201, 470 N.E.2d 858, 481 N.Y.S.2d 60 (1984).

lute defense against lawsuit on a policy, even when the insurer, in its demand, has not informed the insured of the 60-day time limit.[6]

In *Igbara*, the Court of Appeals consolidated four cases.[7] Although the factual circumstances in each case were distinguishable, all four nevertheless involved an instance in which an insurance company sought to dismiss lawsuits brought by policy holders who failed to file proof of loss within the required 60-day period.[8] In each case the Court held in favor of the insurer.[9]

The majority focused on the relationship between the legislative purpose of section 3407 and the pre-enactment[10] judicial construction of the proof of loss provision in standard insurance poli-

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[6] *See id.* at 209-10, 470 N.E.2d at 860, 481 N.Y.S.2d at 61. Section 3407 only requires the "insurer [to] bring to the attention of the insured, by making a written demand for proofs [of loss] and [by] providing blank forms, the necessity for filing such proofs." *Id.* at 216, 470 N.E.2d at 863, 481 N.Y.S.2d at 65; *see* N.Y. INS. LAW. § 3407 (McKinney 1985). The insurer is not required to notify the insured that the proofs must be returned within a specified time. *See* N.Y. INS. LAW § 3407 (McKinney 1985). Furthermore, while the standard insurance contract does state that proof of loss must be submitted within sixty days, and that failure to comply with this requirement will prevent any action on the contract from being sustained, *id.* at § 3404(e) (McKinney 1985) (second page of standard fire policy), such lanquage consists of only three lines of a policy that may run a total of 165 lines, *see id.*

[7] *See* 63 N.Y.2d at 209, 470 N.E.2d at 859, 481 N.Y.S.2d at 61. The Court consolidated Syd's Decorators Inc. v. New York Property Ins. Underwriting Ass'n, 97 App. Div. 2d 722, 468 N.Y.S.2d 631 (1st Dep't 1983) (mem.); Trexler v. American Home Assurance Co., 96 App. Div. 2d 686, 466 N.Y.S.2d 528 (3d Dep't 1983) (mem.); Igbara Realty Corp. v. New York Property Ins. Underwriting Ass'n, 94 App. Div. 2d 79, 463 N.Y.S.2d 211 (1st Dep't 1983); Bonus Warehouse, Inc. v. Great Atl. Ins. Co., 93 App. Div. 2d 615, 462 N.Y.S.2d 672 (2d Dep't 1983).

[8] *See Igbara*, 63 N.Y.2d at 210-14, 470 N.E.2d at 860-62, 481 N.Y.S.2d at 62-64.

[9] *See id.* at 219-20, 470 N.E.2d at 865-66, 481 N.Y.S.2d at 66-67. The Court held that the actions should be dismissed in the *Syd's Decorators*, *Trexler*, and *Bonus Warehouse* cases because the policy holders did not comply with the time periods in their respective insurance policies. *Id.* at 216-17, 470 N.E.2d at 863-64, 481 N.Y.S.2d at 66.

In addition, the Court considered two related issues: whether the insurer's absolute defense of failure to file timely proof of loss is waived by the filing of an answer repudiating liability when such answer is filed prior to the expiration of the time for filing proof of loss, *see id.* at 217-18, 470 N.E.2d at 864-65, 481 N.Y.S.2d at 66, and whether the insured lacked standing due to lack of capacity, *id* at 214, 470 N.E.2d at 802, 481 N.Y.S.2d at 64. The Court held that the insured did have standing, *id.* at 218, 470 N.E.2d at 865, 481 N.Y.S.2d at 66-67, but that the insurer does not waive its proof of loss defense when it files an answer that does not include a defense of failure to file proof of loss before the statutory sixty day period has lapsed, *id.* at 217-18, 470 N.E.2d at 864-65, 481 N.Y.S.2d at 66.

[10] Throughout this Survey, "pre-enactment" is used to define those cases decided before the 1939 enactment of § 172 but after the adoption of the standard policy in 1886. "Post-enactment", will be used to define those cases that have been decided since the enactment of § 172. *See infra* notes 12, 16 & 17.

cies.[11] Writing for the Court, Judge Meyer construed section 3407 to be merely an extension of the narrow construction given to the proof of loss provision by pre-enactment courts.[12] Although the majority acknowledged that section 3407 was enacted to protect the insured,[13] the Court nevertheless emphasized that the mechanism by which such protection was afforded existed in the plain language of the statute, which required the insurer to make written demand for proof of loss upon the insured.[14] Accordingly, the Court concluded that the purpose of section 3407 was to establish the proof of loss provision in insurance policies as a condition precedent, compliance with which had to be alleged and proved by the insured and the failure to comply with which constituted an absolute defense to an action on the policy.[15]

Although Judge Meyer's narrow construction of section 3407 may be in accord with pre-enactment case law,[16] it is suggested

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[11] *See Igbara*, 63 N.Y.2d at 214-15, 470 N.E.2d at 862-63, 481 N.Y.S.2d at 64-65.

[12] *See id.* at 216, 470 N.E.2d at 862-63, 481 N.Y.S.2d at 64-65. While the Court noted that § 3407 was "enacted to protect the insured from the consequences of his oversight or neglect in complying with one of the conditions precedent to a recovery under the policy," *id.* (quoting Marguilies v. Quaker City Fire & Marine Ins. Co., 276 App. Div. 695, 696, 97 N.Y.S.2d 100, 103 (1st Dep't 1950)), the majority nevertheless chose to emphasize the fact that many pre-enactment courts required strict compliance with the provisions of the insurance policy and denied recovery on the policy if such compliance had not occurred, *see id.*; Peabody v. Satterlee, 166 N.Y. 174, 179, 59 N.E. 818, 820 (1901) (plaintiff must comply with all requirements of policy within given time); Quinlan v. Providence Wash. Ins. Co., 133 N.Y. 356, 364-65, 31 N.E. 31, 33-34 (1892) (insured bound by conditions and limitations of insurance contract whether or not he had actual knowledge); Gallin v. Allemania Fire Ins. Co., 184 App. Div. 876, 879-80, 172 N.Y.S. 662, 664-65 (1st Dep't 1918) (to recover, plaintiff must show filing of proof of loss as condition precedent), *aff'd*, 230 N.Y. 547, 130 N.E. 888 (1920). The *Igbara* Court construed the legislative purpose of § 172 as an extension of this pre-enactment construction of the proof of loss provision in the standard insurance policy. *See* 63 N.Y.2d at 216, 470 N.E.2d at 862-63, 481 N.Y.S.2d at 65.

[13] *See* 63 N.Y.2d at 216, 470 N.E.2d at 863, 481 N.Y.S.2d at 65.

[14] *See id.* By reasoning that the plain language of § 3407 should override its legislative purpose, it is submitted that the Court applied the plain meaning rule rather than the method of statutory interpretation required by the United States Supreme Court. *See e.g.*, Train v. Colorado Pub. Int. Research Group, Inc. 426 U.S. 1, 9-10 (1976) (court errs when it fails to consider legislative history in discerning meaning of statute); Cass v. United States, 417 U.S. 72, 78-79 (1974) (courts should resort to statutory history regardless of clarity of statute) (citing United States v. American Trucking Ass'ns, 310 U.S. 534, 543-544 (1940)). *See generally*, Murphy, *Old Maxims Never Die: The "Plain Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1303-05 (1975).

[15] *See Igbara*, 63 N.Y.2d at 216, 470 N.E.2d at 863, 481 N.Y.S.2d at 65.

[16] *See supra* note 12. *But see* Porter v. Trader's Ins. Co., 164 N.Y. 504, 509, 58 N.E. 641, 642-43 (1900) (technical breach should not defeat recovery when substantial performance is established); Matthews v. American Cent. Ins. Co., 154 N.Y. 449, 463, 48 N.E. 751, 755 (1897) (non-performance excused if, after due diligence, no reasonable means of per-

that the Court, by ignoring the post-enactment construction of section 3407,[17] has misconstrued section 3407 and undermined its intended remedial nature. The Court's insistence on strict compliance with the filing requirements needlessly penalizes the insured for minor oversights.[18] A broad construction of section 3407 is sug-

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formance is available); Paltrovitch v. Phoenix Ins. Co., 143 N.Y. 73, 76, 37 N.E. 639, 639-40 (1894) (conditions in fire insurance policy should be "reasonably, not rigidly construed") (citing McNally v. Phoenix Ins. Co., 137 N.Y. 389, 398, 33 N.E. 475, 478-79 (1893)).

[17] *See Igbara*, 63 N.Y.2d at 216, 470 N.E.2d at 863, 481 N.Y.S.2d at 65. Although the Court mentioned the legislative history and post-enactment construction of § 3407, the Court focused on the plain language of the statute. *Id.* The Court determined that the statute requires insurers to do no more than make the insured aware of the need for proof of loss by making written demand and providing a form. *See id.*

The *Igbara* Court failed to overrule on a policy level or even distinguish on a factual level Lentini Bros. v. New York Property Ins. Underwriting Ass'n, 53 N.Y.2d 835, 422 N.E.2d 819, 440 N.Y.S.2d 174 (1981), and its progeny, *see infra*. In *Lentini*, a unanimous Court of Appeals affirmed the dismissal of the complaint in an action on a fire insurance policy in which the plaintiff failed to file a proof of loss with the insurer. *See* 53 N.Y.2d at 836, 422 N.E.2d at 820, 440 N.Y.S.2d at 174. Affirming the dismissal, the Court of Appeals noted that the case was *not* one in which the plaintiff could either have been found to have *substantially performed* his obligation to the insurer or offered an excuse for non-compliance. *See id.* at 836, 422 N.E.2d at 820, 440 N.Y.S.2d at 175. In *Bonus Warehouse*, 93 App. Div. 2d 615, 462 N.Y.S.2d 672 (2d Dep't 1983), *Lentini* was interpreted to imply that failure to file timely proof of loss will not invariably cause dismissal of the insured's action on the policy. *Id.* at 621, 462 N.Y.S.2d at 676.

The *Bonus Warehouse* court's interpretation of *Lentini* and of § 3407 has been adopted by virtually every court that has considered the matter. *See, e.g.*, Ninth Fed. Savings & Loan Ass'n v. New York Property Ins. Underwriting Ass'n, 99 App. Div. 2d 456, 456-57, 471 N.Y.S.2d 284, 285-86 (1st Dep't 1984) (mem.) (when plaintiff substantially performed, court was reluctant to dismiss action without affording plaintiff opportunity to comply with policy's provisions) (citing Pogo Holding Corp. v. New York Property Ins. Underwritting Ass'n, 73 App. Div. 2d 605, 606, 422 N.Y.S.2d 123, 124 (2d Dep't 1979)); *see also* Raymond v. Allstate Ins. Co., 94 App. Div. 2d 301, 305, 464 N.Y.S.2d 155, 157 (1st Dep't 1983) ("[s]ubstantial compliance by . . . insured . . . is all that is required"); Bank of Utica v. Canners Exch. Subscribers, 119 Misc. 2d 939, 940-41, 464 N.Y.S.2d 625, 626 (Sup. Ct. Oneida County 1983) (because insured substantially performed and there was no indication that insured willfully refused to comply, court refused to grant summary judgment).

[18] *See Igbara*, 63 N.Y.2d at 216, 470 N.E.2d at 863, 481 N.Y.S.2d at 65; *infra* note 21. It is submitted that the strict compliance requirement imposed by *Igbara* results in a needless penalty in cases such as *Bonus Warehouse*. In *Bonus Warehouse*, there was no contention by the insurer that the insured had not completely cooperated. 93 App. Div. at 620, 462 N.Y.S.2d at 675. The insured merely filed the proof of loss forms two and one half months late. *Id.* In addition, there was no contention that such late filing caused any inconvenience to the insurer. *Id.* at 623, 462 N.Y.S.2d at 676. Indeed, the record seems to show that the insured willingly tried to assist the insurer to bring about recovery on the policy. *Id.* at 622, 462 N.Y.S.2d at 676. However, imposition of the strict compliance requirement by the court denied the insured as much as $150,000. *Id.* at 616, 462 N.Y.S.2d at 673.

At least one lower court in New York has not extended the strict compliance requirement of *Igbara* beyond the fact situation in which the proof of loss statement itself was too late. *See* DBF Enter. v. New York Property Ins. Underwriting Ass'n, No. 2346/83, slip op. at

gested by principles of equity.[19] While a narrow construction of the statute, limiting the discretion of the trial courts, is "likely on a repetitive basis to yield unjust results,"[20] a broad construction would properly protect an insured who "substantially performed [his] obligation to cooperate."[21]

It is suggested that a narrow construction of section 3407 violates public policy to the extent that it may encourage insurers to

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4 (Sup. Ct. New York County 1984). In *DBF Enterprises*, the court refused to grant summary judgment to an insurer who raised the insured's failure to file timely proof of loss as an absolute defense to the insured's action on the policy. *Id.* The court distinguished *Igbara* on the ground that in *DBF Enterprises* the insured had timely filed proof of loss even though it was twice rejected by the insurer before the time limit expired. *Id.*

[19] *See Syd's Decorators*, 97 App. Div. 2d at 723-24, 468 N.Y.S.2d at 633-34. (Sandler, J., concurring). Concurring, Justice Sandler noted that to adopt the pre-enactment, strict construction of insurance contracts is particularly unfair when: (1) the insured is merely "requested" to file a proof of loss; (2) neither the 60-day time limit nor the legal consequences of non-compliance are included in the insurer's written notice to the insured after the occurrence of the loss; and (3) the insurer's notice serves a primary purpose other than a demand that the insured file proof of loss. *Id.* (Sandler, J., concurring).

[20] *Syd's Decorators*, 97 App. Div. 2d at 723, 468 N.Y.S.2d at 633. (Sandler, J., concurring); *see supra* note 19. It is suggested that when litigation involves § 3407, it is particularly desirable that trial courts be given a high level of discretion. Litigation arising out of insurance claims is often both highly costly and complex. As a result, the Court of Appeals has indicated that § 3407 should be approached with some flexibility; *see also Lentini*, 53 N.Y.2d 835, 836, 422 N.E.2d 819, 820, 440 N.Y.S.2d 174, 175 (1981) (mem.) (technical noncompliance will not defeat claim when insured substantially performed); *supra* note 16 (examples of flexible approach). It is submitted that flexibility can be obtained only when there is an inquiry into the relationship between the insurer and the insured and when the trial court is given the power to fashion various remedies.

[21] Ninth Fed. Sav. & Loan ass'n v. New York Prop. Ins. Underwriting Ass'n, 99 App. Div. 2d 456, 456, 471 N.Y.S.2d 284, 285 (1st Dep't 1984)(mem.); *see* Pogo Holding Corp. v. New York Property Ins. Underwriting Ass'n, 73 App. Div. 2d 605, 605-06, 422 N.Y.S.2d 123, 124 (2d Dep't 1972) (mem.); Bank of Utica v. Canners Exch. Subscribers, 119 Misc. 2d 939, 940-41, 464 N.Y.S.2d 625, 626 (Sup. Ct. Oneida County 1983).

Courts have considered several factors when an insured has failed to comply with the 60-day provision, including: (1) the insured's lack of knowledge that an accident has occurred, *see* Holyoke Mut. Ins. Co. v. B.T.B. Realty, 83 App. Div. 2d 603, 604, 441 N.Y.S.2d 301, 303 (2d Dep't 1981) (citing Security Mut. Ins. v. Acker-Fitzsimons Corp., 31 N.Y.2d 436, 440-41, 293 N.E.2d 76, 78-79, 340 N.Y.S.2d 902, 905-06 (1972)); (2) a good-faith and reasonable belief in the insurer's non-liability that might provide justification for failure to provide timely notice, *see* 875 Forest Ave. Corp. v. Aetna Casualty & Sur. Co., 37 App. Div. 2d 11, 12, 322 N.Y.S.2d 53, 55 (1st Dep't 1971) (per curiam), *aff'd*, 30 N.Y.2d 726, 283 N.E.2d 768, 332 N.Y.S.2d 896 (1972); Woolverton v. Fidelity & Casualty Co., 190 N.Y. 41, 47-48, 82 N.E. 745, 747 (1907); (3) the purpose underlying the proof of loss provision—*i.e.*, the extent to which it was intended to be remedial, *see Bonus Warehouse*, 93 App. Div. 2d at 623, 462 N.Y.S.2d at 677; (4) the nature and extent of the insured's cooperation, *id.*; (5) the length of the delay, *id.*; (6) the conduct of the insurer and the insured, *id.*; and (7) the extent to which the insured's actions are consistent with policies underlying the proof of loss provision of § 3404(e), *see DBF Enterprises*, No. 2346/83, slip op. at 5.

immunize themselves from valid claims through the use of dilatory tactics that operate to preclude the insured from filing proof of loss in a timely manner. A narrow construction of the statute may, for instance, encourage insurers not to inform the insured of the 60-day limit with the goal that the insured will fail to comply with the time period and thus be barred from pursuing his claim.[22] Moreover, it is suggested that a narrow construction of section 3407 creates the opportunity for insurers to reject systematically an insured's proof of loss on technical grounds until the 60-day limit has expired.[23]

In conclusion, though recognizing some of the injustices that almost certainly will flow from its strict and narrow construction of section 3407,[24] the Court of Appeals has rejected a post-enactment construction of the statute that has historically served to protect the insured from the consequences of minor oversights and technical errors.[25] It is submitted that there is little justification for such a reaction either as a matter of law,[26] or as a matter of equity.[27] Courts should not wait for legislative approval of a broad construc-

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[22] *Cf. Syd's Decorators*, 97 App. Div. 2d at 722-23, 468 N.Y.S.2d at 633 (claim dismissed for failure to timely file proof of loss). The Court noted that there is no persuasive reason why insurers should not be required to inform the insureds explicitly that their claims will be barred if the requested proof of loss is not timely filed. *Id.* It is suggested that such notice would not be an undue burden on the insurer. Equally important, it is submitted that neither the notice requirement nor the doctrine of substantial compliance undercut the policies supporting the proof of loss provision in § 3407. *See supra* notes 16 & 17. Indeed, the extent to which a court should allow the substantial compliance of the insured to trigger the insurer's duty of indemnity must be a function of the extent to which the insured's actions are consistent with the protective purpose of § 3404 as well as the remedial purposes of § 3407. *See DBF Enterprises*, No. 2346/83, slip op. at 5; *supra* notes 2, 16, 17 & 18.

[23] *See, e.g., DBF Enterprises*, No. 2346/83, slip op. at 1 (insurer twice rejected insured's proof of loss forms until 60-day period expired); Ninth Fed. Sav. and Loan Ass'n v. New York Property Ins. Underwriting Ass'n, 99 App. Div. 2d 456, 456-57, 471 N.Y.S.2d 284, 285 (1st Dep't 1984) (mem.) (readily correctible error in proof of loss used by insurer to justify assertion of non-compliance with 60-day limitation).

[24] *See Igbara*, 63 N.Y.2d at 216, 470 N.E.2d at 863-64, 481 N.Y.S.2d at 65. In *Igbara* the majority noted that:

> It may well be, as Justice Leonard H. Sandler suggested in his concurring opinion in *Syd's Decorators*, that there is need for an amendment of subdivision [a] of section [3407] to achieve more fully its remedial purpose, but that is a function of the Legislature rather than the courts, the rule under discussion having resulted from its enactment of sections [3404(e)] and [3407] of the Insurance Law.

Id.

[25] *See supra* note 17.

[26] *See id.* ; *supra* notes 15-16.

[27] *See supra* notes 19-23.

tion of section 3407.[28] Rather, in light of their duty to construe statutes according to legislative intent,[29] courts should seek to re-implement the post-enactment construction of the proof of loss provision.

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[28] *See supra* note 24.
[29] *See supra* note 13.