BY NORMAN H. DACHS AND JONATHAN A. DACHS

'Schlott,' Not

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The issuance by the Appellate Division of a decision that appears to contradict, and thus, call into question well-established and well-settled rules of law is a rare and unusual event. When that happens, as it appears to have in the recently decided case of *Schlott v. Transcontinental Ins. Co.*, 41 AD3d 339, 838 NYS2d 559 (1st Dept. 2007), lv. to appeal denied, 9 NY3d 817, NYS2d (2008) (a case in which the authors appeared as appellate counsel for the plaintiffs-appellants), the decision is worthy of note, analysis and discussion.

Schlott involved an action pursuant to Ins. L. §§3420(a)(2) and 3420(b) in which plaintiffs sought to recover from Transcontinental the payment of a judgment obtained by default against its insured, which had remained unsatisfied more than 30 days after its presentment to Transcontinental. It was undisputed that the insured, the defendant in the underlying action, did not give any notice of the accident or of plaintiffs' claim to Transcontinental at any time prior to plaintiffs' commencement of the underlying action against it, and, indeed that no notice of the accident, the claim, or even the lawsuit, was ever provided by the insured to Transcontinental.

Rather, the first, and only, notice given to Transcontinental occurred when plaintiffs' counsel served a copy of the default judgment obtained against the insured, with notice of its entry, nearly seven years after the date of the accident in which plaintiffs were injured on the insured's premises, and more than three years after the judgment was entered against the insured. Within two weeks of receiving this notice of the accident/claim/lawsuit, Transcontinental issued a denial/disclaimer of coverage, addressed to its insured, with copies to the insured's broker and to plaintiffs' counsel. The stated basis for this denial/disclaimer was the ground of late notice of the claim by the insured. At no time did the denial/disclaimer letter refer in any way to the fact that plaintiffs' notice was untimely; that plaintiffs failed to make diligent attempts expeditiously to identify and notify Transcontinental of their claim, lawsuit or judgment; or that plaintiffs somehow failed to comply with the provisions of the insurance agreement.

Issue Presented

The issue presented in *Schlott* was whether in a situation where notice of an accident, claim and/or lawsuit is provided to an insurer first (and only) by or on behalf of the injured party, as opposed to the insured, a disclaimer based solely upon the untimeliness of notice by the insured, and which makes no reference at all to the injured party's late notice, is valid and effective as against the injured party.

The Supreme Court, after accepting the fact that the first and only notice was that which was provided by plaintiffs ("the basis for the denial of coverage was the insured's failure to comply with the policy terms and conditions" pertaining to notice), and the fact that the disclaimer letter did not in any way refer to plaintiffs' late notice ("defendant [Transcontinental] omitted from that notice any specific reference to the injured party's own failure to afford the insurer timely notice"), as well as the notion that the timeliness of plaintiffs' notice must be judged by a different, more lenient standard than notice by or from the insured, nevertheless rejected plaintiffs' contention that Transcontinental was estopped from asserting its late notice defense against plaintiffs because it did not specifically assert it in its disclaimer letter. Instead, the court found that plaintiffs' notice to Transcontinental was inexcusably late, and, thus, it was "of no moment that the disclaimer was addressed to [the insured] and not the Plaintiffs." Accordingly, the court denied plaintiffs' motion for summary judgment and granted Transcontinental's cross-motion for summary judgment dismissing the complaint.

First Department Decision

On their appeal to the First Department, plaintiffs argued quite vehemently that the Supreme Court had erred as a matter of law in finding that Transcontinental's disclaimer was effective as against them because such ruling directly ignored and/or contradicted a venerable line of unchallenged and unrefuted precedents, emanating from the Court of Appeals, as well as from each of the appellate divisions (including the First Department itself), which established that where, as here, notice was provided first (and/or only) by or on behalf of the injured party, pursuant to such party's independent right to give notice and to satisfy the notice requirement of a policy (Ins. L. §3420(a)(3)), the notice of disclaimer must address with specificity the grounds for disclaiming coverage applicable to both the injured party and the insured, and that a disclaimer in such circumstances based solely upon the insured's late notice or failure to notify the insurer of the claim will not be effective against the injured party, such as the plaintiffs in this case. See, e.g., *State Farm Mut. Auto Ins. Co. v. Cooper*, 303 AD2d 414 (2d Dept. 2003); *Vacca v. State Farm Ins. Cos.*, 15 AD3d 473 (2d Dept. 2005); *Shell v. Fireman's Fund Ins. Co.*, 17 AD3d 444 (2d Dept. 2005); see also, New York Pattern Jury Instructions, 4:79 ("a disclaimer is ineffective as to the injured person where it relies solely on the insured's failure to give timely notice and does not refer to the injured party's allegedly untimely notice").

Court of Appeals Precedent

Most notable among the precedents cited to and relied upon by plaintiffs, of course, was the Court of Appeals' decision, from nearly three decades ago, in the well-known case *General Accident Ins. Co. v. Cirucci*, 46 NY2d 802 (1979). There, as in *Schlott*, the first and only notice of the accident was provided to the underlying defendant's insurer by the injured parties, which notice was undoubtedly untimely insofar as it was given 2½ years after the accident. There, as in *Schlott*, the insured never provided any notice to his insurer of the accident, the claim or even the lawsuit. There, as in *Schlott*, the insurer disclaimed coverage to its

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insured on the ground of the insured's failure to report the accident (and failure to cooperate), but did not mention the untimeliness of the injured parties' notice in its disclaimer. There, as in *Schlott,* the issue presented was whether the insurer's disclaimer was effective as against the injured parties, and the Court of Appeals held that "although under the facts of this case a disclaimer might have been premised on the late notice furnished by the third parties [i.e., the injured parties] themselves to the insurer, since that ground was not raised in the letter of disclaimer, it may not be asserted now."

The *Cirucci* court further explained why the insurer's defect in its disclaimer outweighs or trumps any defect in the giving of notice to the insurer, as follows: "Both statute and public policy require that motorists be insured against the risks of automobile travel (Vehicle and Traffic Law §310, subd. [2]; *Rosado v. Eveready Ins. Co.,* 34 NY2d 43). Although an insurer may disclaim coverage for a valid reason [citation omitted], the notice of disclaimer must promptly apprise the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated. Absent such specific notice, a claimant might have difficulty assessing whether the insurer will be able to disclaim successfully. This uncertainty could prejudice the claimant's ability to ultimately obtain recovery. In addition, the insurer's responsibility to furnish notice of the specific ground on which the disclaimer is based is not unduly burdensome, the insurer being highly experienced and sophisticated in such matters."

Notwithstanding that the rule set out by the Court of Appeals in *Cirucci* had been universally followed by the courts of this state, including the First Department, that court, without the citation of a single case, affirmed the order below. Apparently troubled by the length of the delay in plaintiffs' giving of notice to Transcontinental, i.e., "more than three years after entry of the Judgment, and nearly seven years after the occurrence," and the absence of any explanation by plaintiffs as to "why notice was not attempted until years later, or what diligent efforts they undertook to notify the insured's carrier expeditiously," the First Department, without even acknowledging, no less attempting to distinguish, the venerable precedents mentioned above, simply concluded, without explanation, that Transcontinental "complied with the mandate of §3420(d) when it gave notice of disclaimer to the insured and sent a copy to the injured party." Then, the court added that "the fact that Defendant omitted from that notice any specific reference to the injured's party's own failure to afford the insurer timely notice did not prejudice Plaintiffs."

It is unclear, however, why the court was of the impression that plaintiffs were required to demonstrate prejudice as a result of the insurer's improper disclaimer under the facts and circumstances of this case, insofar as no case had ever previously so held in the context of a case governed by Ins. L. §3420(d). Cf. *Topliffe v. U.S. Art Co.,* 40 AD3d 967 (2d Dept. 2007) (in an action concerning the loss of certain artworks, wherein Ins. L. §3420(f) was inapplicable because, unlike *Schlott,* the underlying action did not involve death or bodily injury, "common law principles govern, under which the insurer's delay in giving notice of disclaimer of coverage, even if unreasonable, will not estop the insurer from disclaiming unless the insured has suffered prejudice from the delay").

Reaction to Decision

It should be noted that immediately upon its issuance, the *Schlott* decision caught the attention of Insurance Law commentators (other than ourselves). As noted commentator, Dan Kohane of Hurwitz & Fine PC, an adjunct professor of insurance law at Buffalo Law School, wrote, the day after the decision was handed down, in his biweekly review of significant insurance law cases, entitled "Coverage Pointers," under the heading "Insurer Wins Late Notice Case (That It Should Have Lost)":

> Well, we understand (and appreciate) the result, but technically, as an insurance purist, note that the carrier got away with one.... The claimant has a right to give notice and when it gives notice late, the case law is legion that the insurer must indicate in its disclaimer letter that it is denying coverage based on the claimant's late notice. A failure to do so results in a waiver of that defense. It is a reason that courts have said, time and again, is different from the insured's late notice. The court, surely in a result-oriented holding, simply said, without citations, that the 'fact that defendant omitted from that notice any specific reference to the insured party's own failure to afford the insurer timely notice did not prejudice Plaintiffs.' Prejudice? Since when is that the standard? See www.hurwitzfine.com, Coverage Pointers, Vol. VIII, No. 26, Friday, June 29, 2007.

Analysis

It is, we believe, readily apparent that the decision in *Schlott* was motivated and can only be explained by the court's distaste for plaintiffs' unexplained extensive delay in providing notice to the underlying defendant's insurer until long after the judgment was entered against its insured. It appears that, in the court's view, plaintiffs' own delay crossed over some heretofore unestablished line whereby it became so unreasonably late as to justify discarding the previously certain and constant rule of law pursuant to which the degree of unreasonableness of the delay in providing the notice to the insurer was deemed irrelevant in the face of unreasonable or improper disclaimer for such late notice by the insurer.

However, it has been recognized that the area of insurance law is one in which, perhaps even more than most areas of the law, "the court has continually sought certainty." See *Fitzpatrick v. American Honda Motor Co.,* 78 NY2d 61 (1991). See also, *Allstate Ins. Co. v. Mugavero,* 79 NY2d 153, 165 (Titone, J., dissenting) ("Experience has taught that precision and predictability in this highly regulated field are essential juridical values. Once courts engage in selecting ad hoc exceptions, they step on a slippery slope leading to an indefinite destination").

Current Status

Notwithstanding all of the foregoing, both the First Department and the Court of Appeals denied leave to appeal to the Court of Appeals in *Schlott,* thus leaving the First Department's decision intact, and—in our opinion—standing alone. How effective and influential *Schlott,* will be as a precedent in future cases, especially in departments other than the First, and whether its holding will be applied in cases involving less significantly delayed notice by the injured parties, remains to be seen.