INSURANCE LAW

Multiple Meanings Of 'Direct Action' Against Insurer

By **Norman H. Dachs** And **Jonathan A. Dachs**

When is a 'direct action' not a 'direct action'? The short answer, as set forth in *Curet v. United National Insurance Company*[1]—in which the authors represent the plaintiff—is that a "direct action" is not a "direct action" when the term is construed within the context of 28 U.S.C. §1332(c)(1) ("Diversity of citizenship; amount in controversy; costs")—the federal statute that, inter alia, defines the citizenship of a corporation for the purposes of determining the diversity of citizenship sufficient to impose original jurisdiction in the federal district courts. Clearly, this answer requires explanation.

'Direct Action' Statute

New York Insurance Law §3420(a)(2) requires every liability insurance policy or contract to contain a provision that "in case judgment against the insured or the insured's personal representative in an action brought to recover damages for injury sustained or loss or damage occasioned during the life of the policy or contract shall remain unsatisfied at the expiration of thirty days from the serving of notice of entry of judgment upon the attorney for the insured, or upon the insured, and upon the insurer, then an action may, except during a stay or limited stay of execution against the insured on such judgment, be maintained against the insurer under the terms of the policy or contract for the amount of such judgment not exceeding the amount of the applicable limit of coverage under such policy or contract."

Insurance Law §3420(b)(1) then goes on to provide that, subject to the conditions of §3420(a)(2), above, an action may be maintained by any person who has "obtained a judgment against the insured or the insured's legal representative, for damages for injury sustained or loss or damage occasioned during the life of the policy or contract."

This statute has long been known and referred to as the "direct action" statute. Indeed, that is precisely how the New York Court of Appeals referred to the statute in its landmark decision in *Lang v. Hanover Ins. Co.*, 3 NY3d 350, 353 (2004), wherein it affirmed the order of the Appellate Division dismissing a declaratory judgment action brought by an injured person before he obtained a judgment against the insured "on the ground that Insurance Law 3420 precludes a *direct action* by an injured party against a tortfeasor's insurance company until a judgment has been secured against the tortfeasor and that judgment has been served on the insurance company but has remained unpaid for 30 days [emphasis added]."

> Insurance Law 3420 grants an injured party a right to sue the tortfeasor's insurer, but only under limited circumstances.

As the court further explained, "Insurance Law 3420 therefore grants an injured party a right to sue the tortfeasor's insurer, but only under limited circumstances—the injured party must first obtain a judgment against the tortfeasor, serve the insurance company with a copy of the judgment and await payment for 30 days. Compliance with these requirements is a condition precedent to a *direct action* against the insurance company [emphasis added]."

Cases that refer to N.Y. Insurance Law §3420(a)(2) as a "direct action" statute are legion—in both the state and federal courts. See, e.g., *Hartford Fire Ins. Co. v. Mitlof*, 123 F.Supp.2d 762, 763 (SDNY, Conner, Senior Dist. Judge [2000]) ("Hartford claims that they are precluded from intervention in this action by New York's *direct action* statute, N.Y. Ins. Law §3420.") *Richards v. Select Ins. Co.*, 40 F.Supp.2d 163 (SDNY 1999 [Mukasey, J.]) (citing numerous cases using the term "*direct action statute*" to describe N.Y. Ins. Law §3420[a][2]).

See also, *Sincerbeaux v. Nationwide*, 206 AD2d 907 (4th Dept. 1994) ("Plaintiff's remedy is a *direct action* against the insurer in the event that a judgment is rendered against the Snows and the judgment remains unsatisfied 30 days after entry [see Insurance Law §3420(a)(2)]"); *Herschberger by Herschberger v. Schwartz*, 198 AD2d 859, 860 (4th Dept. 1993) ("Plaintiffs may commence a *direct action* against defendants' insurer only when a judgment has been rendered against the insureds and the judgment remains unsatisfied 30 days after entry [see, Insurance Law §3420[a][2]"); *Nap v. Shuttletex Inc.*, 112 F.Supp.2d 369, 371 (SDNY 2000) ("Section 3420[a][2] of the statute requires that insurance policies issued or delivered in the state contain provisions specifically authorizing *direct actions* brought under the terms of the policy against an insurer by an allegedly injured party to be instituted only when a judgment against the insured person has remained unsatisfied for 30 days from the date of service of notice of entry of judgment") [emphasis added throughout]. Accord, *Searles v. Cincinnati Insurance Company*, 998 F.2d 728, 729 (9th Cir. 1993) (referring to Louisiana's "direct action statute") ("...the statute allowed an injured party to sue a tortfeasor's insurer directly without joining the tortfeasor as a defendant.... [A] direct action is one in which a plaintiff is entitled to bring suit against the tortfeasor's liability insurer without joining the insured.").

The Federal Statute

The same term, "direct action," also appears in the fed- » Page 9

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Direct Action

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eral diversity of citizenship statute, 28 U.S.C. §1332. As pertinent hereto, that statute provides, as follows: "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—(1) citizens of different States";

The statute continues that "(c) For the purposes of this section and section 1441 of this title—

> (1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any *direct action* against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business (emphasis added)."

The 'Curet' Case

With that as background, we can discuss the *Curet* case, and the decision of Senior District Judge Jed S. Rakoff, of the U.S. District Court for the Southern District.

Originally commenced in the state court (Supreme Court, Bronx County), *Curet* was an action brought by the plaintiff in an underlying personal injury action—a New York resident and citizen—pursuant to N.Y. Ins. L. §3420(a)(2) and (b)(1), against the insurer for the underlying defendant/tortfeasor/insured—the New York corporation that owned the premises where the plaintiff's injury was sustained—to recover upon a judgment entered against the insured upon its default. At issue in that action was the validity of the insurer's disclaimer of coverage on the ground of late notice of claim.

In its "notice of removal" to federal court, the insurer, United National, noted that it was "organized and domiciled in the state of Pennsylvania, with its principal office and principal place of business" in Pennsylvania and, thus, was "a citizen of the State of Pennsylvania." Accordingly, the insurer contended that the U.S. District Court for the Southern District of New York had jurisdiction over the action "by reason of the diversity of citizenship of the parties and because the amount in controversy is in excess of $75,000." See 28 U.S.C. §1332(a)(1).

Upon receipt of that notice of removal, plaintiff moved before the District Court, to remand the action back to the Supreme Court, Bronx County, upon the ground that diversity of citizenship did not, in fact, exist and, therefore, the District Court lacked subject matter jurisdiction over the action. This motion was based upon the contention that "perforce the provisions of 28 U.S.C. §1332(c)(1)," this being a "direct action" against an insurer that issued a policy of liability insurance to the tortfeasor, and the insured was not joined as a party defendant, nor, indeed, was the insured required to be so joined for the requested relief to be granted to plaintiff, "such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as any State by which the insurer has been incorporated and of the State where it has its principal place of business." Insofar as the underlying defendant was a citizen of New York, plaintiff argued, the insurer should be deemed to be a citizen of New York, thus destroying diversity of citizenship between the parties.

In opposition to the plaintiff's motion, United National argued that this action was not a "direct action" as contemplated by 28 U.S.C. §1332(c). As it explained, "the federal statute allows an injured party to bring suit directly against a tortfeasor's insurer for the tortfeasor's negligence without first obtaining a judgment against the tortfeasor. At bar, [Sylvia] Curet's claims against United National are based on United National's disclaimer of coverage and refusal to satisfy a judgment already obtained by Curet against United National's insured...rather than upon its liability for the negligence of [the insured]. Thus, this is not a direct action as that term is used in 28 U.S.C. §1332 and United National cannot be deemed a citizen of New York for purposes of this lawsuit.... The present suit is clearly not a direct action since Curet is not seeking to impose liability on United National for the negligence of [the insured]. Rather, she is seeking to impose liability on United National for its own tortious conduct, i.e., United National's refusal to satisfy the judgment Curet already obtained against [the insured]. Such liability could not be imposed against [the insured], nor could [the insured] even be joined as a Defendant in this suit. Thus, §1332(c) does not apply to destroy diversity jurisdiction in this case.... Of course, 28 U.S.C. §1332(c) is a federal statute which applies nationwide in limited states which allow an injured party to bring suit against the tortfeasor or the tortfeasor's insurer (or both) for the tortfeasor's negligence without first obtaining a judgment

Insofar as the court held that the 'Curet' action was not a 'direct action' in terms of §1332(c), it concluded that diversity of citizenship continued to exist and, thus, the court retained jurisdiction over the action and denied plaintiff's motion to remand the action to state court.

against the tortfeasor. New York is not such a jurisdiction."

The Court's Decision

In his interesting recent decision, Judge Rakoff first observed that none of the references to "direct action" in the cases cited by plaintiff were "in the context of interpreting what 'direct action' means in terms of Section 1332(c)—a matter of federal law—as opposed to how these actions are viewed under Section 3420(a)(2)." As explained by the court, "in the latter case—a matter of State law—such an action is referred to as a 'direct action' simply to indicate that the statute allows an injured party to directly sue the injured party's insurer where certain contingencies are met. But 'direct action' under §1332(c) is more nuanced. Specifically, it uses that term to refer only to cases where the insurer's responsibility to the injuring party is already established, that the injured party, in suing the insurer directly, is simply 'cutting out the middle man.'"

Citing and quoting from a previous decision by the U.S. Court of Appeals for the Second Circuit in *Rosa v. Allstate Ins. Co.*, 981 F.2d 669, 675 (1992), Judge Rakoff noted that "the general rule is that the provision does not affect suits against the insurer based on its independent wrongs: such as actions brought against the insurer either by the insured for failure to pay policy benefits or by an injured third party for the insurer's failure to settle within the policy limits as in good faith."

He thus concluded that the *Curet* action "is another example of the latter category of lawsuits, where it is the insurer's allegedly wrongful disclaimer that is in issue. Specifically, the gravamen of the instant complaint is that defendants failed to pay the insured sums it was legally obligated to pay under the terms of the policy.... Accordingly, it is an 'action[ ] brought against the insurer...for failure to pay policy benefits,' precisely the kind of action the Second Circuit held is not a 'direct action'" under section 1332(c)'s proviso.[2]

Insofar as the court held that the *Curet* action was not a "direct action" in terms of §1332(c), it concluded that diversity of citizenship continued to exist and, thus, the court retained jurisdiction over the action and denied plaintiff's motion to remand the action to state court.

The *Curet* case provides another graphic example of the importance of context in interpreting the meaning of words and/or phrases in statutes and insurance policies.[3]

1. __F.Supp.2d__, 2011 WL 1985671 (May 23, 2011).

2. See also, *Webb v. Lumberman's Mut. Cas. Co.*, No. 01-cv-00770A (Sr), 2004 U.S. Dist Lexis 12942, at *6, 2004 WL 1529239 (W.D.N.Y. July 2, 2004); *Rogers v. General Accident Ins. Co.*, No. 91 Civ. 6533 (EES), 1992 U.S. Dist. Lexis 8297, at *4 (SDNY June 4, 1992); *Peck v. Public Service Mutual Ins. Co.*, 2004 WL 1055680, at *1 (D. Conn. May 6, 2004) ("[Section 1332 (c)] has been held inapplicable in diversity actions where the Plaintiff first successfully sued the tortfeasor and then instituted a subsequent action against the tortfeasor's insurer").

3. See Dachs, N. and Dachs, J., "Coverage in Context: Defining 'Use' of a Motor Vehicle," NYLJ, Sept. 14, 2010, p. 3, col. 1.