'Issued or Delivered' Redefined

By **Jonathan A. Dachs**

As an excellent article by Dan D. Kohane, Esq. (see Kohane, D., "Out-of-State Insurers Take Heed As Danger Lurks," N.Y.L.J., Dec. 22, 2017) recently noted, on Nov. 20, 2017, the New York Court of Appeals issued an extremely significant decision on what may, to some, have seemed a mere semantic argument concerning a relatively innocuous statutory phrase. In *Carlson v. American International Group*, 2017 N.Y. Slip Op. 08163 (2017), the court, by a 4-3 vote, gave a broad interpretation to the phrase "issued or delivered" in New York, which appears, inter alia, in several places in Insurance Law §3420 ("Liability insurance; standard provisions; right of injured persons"), thereby expanding the scope and applicability of such provisions contained with that statute that provide a right of direct action against an insurer to an injured party seeking to enforce a judgment in his or her favor (Ins. L. §3420[a][2]. and [b][1]) and pertain to disclaimers or denials of coverage (Ins. L. §3420[d][2]). In so doing, and holding that the subject policy, which was issued in New Jersey and delivered in Washington and then in Florida, but covered an insured and risks located in New York, was governed by Ins. L. §3420 because the phrase "issued or delivered" in New York "encompasses situations where both insureds and risks are located in this state even though the policy was issued and delivered outside the state, the majority (Judges Wilson, Rivera, Feinman and Eng [sitting for Judge Fahey]), relied upon both legislative history and intent and the court's own previous precedent, as set forth below.

Prior Precedent

In *Preserver Ins. Co. v. Ryba*, 10 NY3d 635 (2008), the question before the Court of Appeals was whether the provisions of New York's "disclaimer statute," Ins. L. §3420(d), applied to a policy actually delivered in New Jersey by a New Jersey insurer to a New Jersey insured. Notably, the statute, as written and in effect at that time, provided that it was applicable when a liability policy was *"delivered or issued for delivery"* in this state—language different from the subsequently amended *"issued or delivered"* language at issue in *Carlson*, supra.

The *Preserver* court held, in pertinent part, that "A policy is 'issued for delivery' in New York if it covers both insureds and risks located in this state [citations omitted]."

> The court, by a 4-3 vote, gave a broad interpretation to the phrase "issued or delivered" in New York.

There, by its express terms, the policy covered risks located in New York. However, because the insured was a New Jersey company, with its only offices located in New Jersey, and, therefore, it could not be said that the insured was located in New York, the court concluded that the policy "was neither actually 'delivered' nor 'issued for delivery' in New York." Thus, the court held that Preserver was not required by Ins. L. §3420[d] to make a timely disclaimer of coverage.

'Carlson'

The Appellate Division, Fourth Department, in its decision in *Carlson v. American International Group*, 130 A.D.3d 1477 (4th Dept. 2015), noted that "'[T]he right to sue a tortfeasor's insurance company to satisfy a judgment obtained against the tortfeasor' exists only pursuant to Insurance Law §3420 (*Lang v. Hanover Ins. Co.*, 3 N.Y.3d 350, 352 (2004)," and held that "Plaintiff may not recover against [the insurer] pursuant to section 3420(a)(2) because the policy was not 'issued or delivered in this state' (id.)." The court went on to explain that "The parties and the [Supreme] court have improperly conflated the phrase 'issued or delivered' with 'issued for delivery,' which was used in the former version of Insurance Law §3420(d), and therefore the definition of 'issued for delivery' is not relevant here (see *Preserver Ins. Co. v. Ryba*, 10 N.Y.3d 635, 642 [2008])." Because, as previously noted, the subject policy was issued in New Jersey and delivered in Seattle, Washington, and then Florida, and was not issued or delivered in New York, the court dismissed the plaintiff's cause of action.

Upon the grant of leave to appeal by the Court of Appeals, the state's highest court reversed the Fourth Department on this issue, and reiterated its statement in *Preserver*, supra, that "section 3420 applies to policies that cover insureds and risks located in the state."

As noted by the majority of the Court of Appeals in its recent decision, "under *Preserver*, 'issued for delivery' was interpreted to mean where the risk to be insured was located—not where the policy document itself was actually handed over or mailed to the insured." Further, the majority explained, "We interpreted section 3420 to provide a benefit—deliberately in derogation of the common law—to New Yorkers whenever a policy covers 'insureds and risks located in this state.' Applying the *Preserver* standard to the facts of this case, it is clear that DHL [the insured/underlying defendant] is 'located in' New York because it has a substantial business presence and creates risks in New York. It is even clearer that DHL purchased liability insurance covering vehicle-related risks from vehicles delivering its packages in New York because its insurance agreement says so."

Legislative History

Then, supporting its conclusion, the majority turned to the legislative history of Ins. L. §3420, noting that its interpretation of "issued or delivered" *was* consistent with the reasoning behind » Page 8

JONATHAN A. DACHS *is a partner at Shayne, Dachs, Sauer & Dachs, in Mineola. He is the author of New York Uninsured and Underinsured Motorist Law & Practice (LexisNexis/Matthew Bender 2016).*

Insured

« Continued from page 3

the legislature's original enactment of that statute. As explained by the majority, "In 1917, the legislature created this statutory cause of action to remedy the inequality of the common law rule that an injured person had no cause of action against the insurer of a tortfeasor and to protect the tort victims of New York (see *Lang v. Hanover Ins. Co.*, 3 N.Y.3d 350, 353-54 [2004]) 'Generally, statutes designed to promote the public good will receive a liberal construction and be expounded in such a manner that they may, as far as possible, attain the end in view' (McKinney's Statutes, §341). The overall legislative intent of Insurance Law §3420 is to protect the tort victims of New York state, and the subsequent amendments to section 3420 were designed to expand the remedy, not to contract it."

Turning specifically to the amendment from "delivered or issued for delivery" to "issued or delivered," the majority noted that "In 2008, the legislature amended Insurance Law §3420 to expand its reach in several respects. The 2008 amendments were made to 'restore fairness to the process and protect individuals who suffer personal injuries and families whose loved ones have died as a result of the tortious conduct of another'" (DeFrancisco Letter, Bill Jacket, L. 2008, ch. 388 at 5; see Introducer's Mem. in Supp., id., at 6 ["[T]his progressive, forward thinking legislation will benefit insureds, injured parties, and the administration of justice"]; New York State Academy of Trial Lawyers Letter, id., at 18 ["This legislation advances the cause of justice and will improve New Yorkers' access to the courts and their ability to seek relief for injuries and wrongful death"]).

According to the majority, "The 2008 amendments also changed the 'issued for delivery' language in subsection (d) to match the 'issued or delivered' language elsewhere in the statute. Nothing in the bill jacket or other legislative history mentions that change, so that it appears to have been a stylistic change with no intended import. If anything, 'issued or delivered' is facially broader than 'issued for delivery.' Moreover, there is certainly no indication that the legislature's minor amendment to subsection (d) was intended to overturn this court's holding in *Preserver*."

> Reaction to this important decision has been mixed, breaking down largely along policyholder/claimant and insurer lines.

The majority next observed that "Interpreting 'issued or delivered in this state' to apply exclusively to policies issued by an insurer who mails a policy to a New York address would undermine the legislative intent of Insurance Law §3420. It would require an assumption that the legislature intended to remove coverage benefitting injured New York residents if the policy was mailed from another state, but to increase coverage for foreign victims injured elsewhere so long as the policy was mailed to New York or underwritten by a New York-based insurer—hardly plausible in light of the express purpose of section 3420 and the 2008 Amendments."

Finally, in directly addressing an argument made by the three dissenters (Judges Garcia, DiFiore and Stein), who opined that the majority "misinterprets section 3420(a) in a manner that enacts sweeping change across the Insurance Law, generating substantial implications, both known and unknown," the majority noted that the dissent's position that would restrict section 3420(d) to policies that were actually either issued in New York or delivered to New York "would exclude, for example,

an insurance policy issued by a national insurer located in Connecticut to a retailer operating in all fifty states, if the policy was delivered to the retailer's headquarters in Arkansas—even if the policy was specifically written to cover risks in New York created by the insured's extensive operations in this state." Refuting that argument, the majority stated, as follows: "The same concerns that animate our consideration of section 3420 are also relevant to and consistent with the purpose of other provisions of the Insurance Law, which has as its overriding purpose the protection of New Yorkers and the coverage of injuries occurring in New York [citations omitted]. The dissent's interpretation of 'issued or delivered' would allow an insurer to avoid compliance with many of the provisions of the Insurance Law simply by mailing the policy to the insured's secondary location, even though the risks contemplated by the policy existed entirely within New York. It is simply not plausible that the legislature intended the provisions of the Insurance Law to be so easily evaded by companies doing business in New York and purporting to cover risks in New York."

Accordingly, the majority concluded that the term "issued or delivered" "does not alter our conclusion in *Preserver*, and that section 3420(a) encompasses situations where both insureds and risks are located in this state." Thus, the court held that the policies at issue in *Carlson* fell within the purview of Insurance Law §3420, and, therefore, that Mr. Carlson could maintain his action against the insurer[s], subject, of course, to his ability to prove the existence of coverage at the time of the accident.

Reaction to this important decision has been mixed, breaking down largely along policyholder/claimant and insurer lines. It remains to be seen how this decision plays out in the future, and whether the legislature will be motivated again to make any changes to the language of Ins. L. §3420.