The Applicability (Inapplicability) of New York's Disclaimer Statute, Continued

By Jonathan A. Dachs

In my last article in this space, I discussed the recent history of New York's disclaimer statute, Ins. L. §3420(d)(2), and one of its explicit statutory limitations—the requirement set forth in the statute that the policy being denied or disclaimed be one that was "issued or delivered" in New York. This article continues the discussion of the applicability or inapplicability of the statute by focusing on another explicit statutory limitation—the requirement that the claim at issue be one involving "death or bodily injury"—as well as certain judicially created or recognized limitations or exclusions from the applicability of the disclaimer statute, and, indeed, Ins. L. §3420 as a whole.

'Death or Bodily Injury'

Notwithstanding the existence—since the 1959 statutory amendment, discussed in part one of this article (see "The Applicability (Inapplicability) of New York's Disclaimer Statute," NYLJ, Jan. 31, 2017)—of language specifically limiting application of Ins. L. §3420, to, inter alia, claims involving "death or bodily injury," several decisions by the Appellate Division, First Department, *appeared to and/or were interpreted* to ignore that limiting language and apply the provisions of the disclaimer statute to non-bodily injury or death cases. See, e.g., *Malca Amit New York v. Excess Ins. Co.*, 258 A.D.2d 282 (1st Dept. 1999) (involving theft of a gem shipment); *Hotel des Artistes v. General Accident Ins. Co. of America*, 9 A.D.3d 181 (1st Dept. 2004) (involving a claim of fire damage and loss of business interruption insurance to a restaurant); and *Estee Lauder v. OneBeacon Insurance Group*, 62 A.D.3d 33 (1st Dept. 2009) (involving a breach of contract and declaratory judgment action arising from a refusal to defend and indemnify certain environmental claims).

In *KeySpan Gas East v. Munich Reinsurance America*, 23 N.Y.3d 583 (2014), an insurance coverage dispute in which KeySpan sought a declaration that several insurers had a duty to defend it for liabilities associated with the investigation and remediation of environmental damage at manufactured gas plant sites formerly owned by Long Island Lighting Company (LILCO), the appellate division held that although

> Several decisions by the First Department appeared to and/or were interpreted to ignore limiting language and apply the provisions of the disclaimer statute to non-bodily injury or death cases.

LILCO failed, as a matter of law, to provide timely notice under the subject policies of environmental contamination, the defendant insurers were not entitled to summary judgment in their favor "because issues of fact remain as to whether defendants waived their right to disclaim coverage based on late notice" by "fail[ing] to timely issue a disclaimer." See *Long Island Lighting Company and KeySpan v. Allianz Ins.*, 104 A.D.3d 581 (1st Dept. 2013).

On their appeal to the Court of Appeals (upon leave granted by the Appellate Division), the defendant insurers argued that the court wrongly applied the strict timeliness standard from Insurance Law §3420(d)(2) in considering whether they waived their right to disclaim coverage of LILCO's environmental damage claims. Notably, the court pointed out: "Although the Appellate Division did not cite section 3420(d)(2) in its decision, the court essentially recited the statutes' disclaimer requirement when it stated that defendants had an 'obligation' to disclaim coverage based on late notice 'as soon as reasonably possible' after first learning of the ... grounds for disclaimer." The court agreed that this was error, and reversed. 23 N.Y.3d at 589.

In explaining its decision, the Court of Appeals observed:

> By its plain terms, section 3420(d)(2) applies only in a particular context: insurance cases involving death and bodily injury claims arising out of a New York accident and brought under a New York liability policy (citations omitted). 'Where, as here, the underlying claim does not arise out of an accident involving bodily injury or death, the notice of disclaimer provisions set forth in Insurance Law §3420(d) are inapplicable (citations omitted).' In such cases, the insurer will not be barred from disclaiming coverage 'simply as a result of the passage of time,' and its delay in giving notice of disclaimer should be considered under common-law waiver and/or estoppel principles (citations omitted).

23 N.Y.3d at 590.

Accordingly, the Court of Appeals specifically held that to the extent that *Estee Lauder v. OneBeacon Ins. Group*, supra; *Hotel des Artistes v. General Acc. Ins. Co. of Am.*, supra and *Malca Amit N.Y. v. Excess Ins. Co.*, supra, held that Insurance Law §3420(d)(2) applies to claims not based on death and bodily injury, "those cases were wrongly decided and should not be followed." 23 N.Y.3d at 590, fn. 2.

Three months later, in *Key Fat v. Rutgers Casualty Ins. Co.*, 120 A.D.3d 1195 (2d Dept. 2014), the court noted: "Although Insurance Law §3420(d)(2) does not apply if the underlying claim does not involve death or bodily injury," the statute was applicable in that case in which the coverage » 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).*

Disclaimer

« Continued from page 3

sought by the defendant insurer to disclaim was for defense costs incurred in connection with an underlying personal injury action. Thus, based upon unrefuted evidence that the insurer failed to provide timely written notice of its disclaimer to the plaintiff, a claimant in the litigation, the court concluded that the insurer was estopped from disclaiming coverage under its policy.

In *B&R Consolidated v. Zurich American Ins.*, 120 A.D.3d 1366 (2d Dept. 2014), an action pursuant to Ins. L. §3420(b), the direct action statute, to recover the amount of an unsatisfied judgment in favor of the plaintiff and against the defendant's purported insured in an action involving nonpayment of a loan, the court observed that "Where, as here, the matter does not involve death or bodily injury, the untimely disclaimer by an insurer does not automatically estop the insurer from disclaiming on the basis of late notice unless there has been a showing of prejudice to the insured due to the delay (citations omitted)." Because the record established that the plaintiff was prejudiced by the insurer's five-month delay disclaiming coverage, the court ruled that the insurer was estopped from disclaiming.

Similarly, in *Miller v. Allstate Indemnity*, 132 A.D.3d 1306 (4th Dept. 2015), which involved a claim for property damage, the court noted: "Where, as here, the underlying claim does not arise out of an accident involving bodily injury or death, the notice of disclaimer provisions set forth in Insurance Law §3420(d) are inapplicable," and that "[u]nder the common-law rule, delay in giving notice of disclaimer of coverage, even if unreasonable, will not estop the insurer to disclaim unless the insured has suffered prejudice from the delay" (citations omitted). Applying the common law standard, the court found the plaintiffs' contention that they were "damaged and prejudiced" by the untimely disclaimer was "conclusory" and insufficient to create an estoppel against the disclaimer. See also, to same effect, *The Provencal v. Tower Ins. Co. of New York*, 138 A.D.3d 732 (2d Dept. 2016). See also *Scappaticci v. Allstate Ins. Co.*, 6 A.D.3d 692 (2d Dept. 2004) ("The plaintiff's property damage claim does not fall within the ambit of Insurance law §3420[d]").

'Estee Lauder II'

Following the 2009 decision by the First Department in *Estee Lauder v. OneBeacon Ins. Group*, mentioned above, in which the court, inter alia, denied the insurer's motion to dismiss the complaint, the litigation of that case proceeded until several years later, when, following the Court of Appeals' above-described decision in *KeySpan Gas East*, in which the court determined that the earlier *Estee Lauder* decision was "wrongly decided and should not be followed," the insurer moved to amend its answer to assert several affirmative defenses and for summary dismissal of the complaint based thereon.

On Estee Lauder's appeal to the First Department from the Supreme Court's grant of leave to amend the answer, the court this time reversed, and denied the motion to amend, based upon its determination, as a matter of law (which it had made in its previous decision), that OneBeacon waived its right to assert a later notice defense when it failed to raise that ground in its disclaimer letter. Notably, the First Department went on to explain that *KeySpan* did not alter that result because, while the Court of Appeals there stated that the prior *Estee Lauder* decision was "wrongly decided and should not be followed" to the extent that it held that Ins. L. §3420(d)(2) applies to claims not based on death and bodily injury, "*Our case did not so hold.*" (emphasis added). 130 A.D.3d 497 (1st Dept. 2015).

As the First Department explained:

> The opinion states at the outset that '[t]he resolution of this appeal turns on whether OneBeacon waived its right to disclaim coverage on the ground that plaintiff failed to give it timely notice of certain claims against plaintiff' (id. at 34, 873 N.Y.S.2d 592). It then finds that '[n]either in the July 24 nor the November 1 letter [rejecting plaintiff's claims] did OneBeacon ever assert that Lauder had failed to give timely notice of a claim or occurrence, let alone disclaim coverage on the ground of such a failure by Lauder' (id.). It notes that under New York law, 'an insurer is deemed, as a matter of law, to have intended to waive a defense to coverage where other defenses are asserted' and the insurer knows of 'the circumstances relating to its defense of untimely notice' (id. at 36, 873 N.Y.S.2d 592), and states that OneBeacon did not dispute that it had such knowledge long before it sent the 2002 letters (id. at 36, 873 N.Y.S.2d 592). Thus, in a matter involving property damage claims, we relied on the common law for the proposition that [a] ground not raised in the letter of disclaimer may not later be asserted as an affirmative defense' (*Benjamin Shapiro Realty Co. v. Agricultural Ins. Co.*, 287 A.D.2d 389, 389 [1st Dept. 2001])."
>
> 130 A.D.3d at 498.

The Court of Appeals, in its most recent decision on this topic, by decision dated Sept. 15, 2016, reversed the appellate division and reinstated the lower court's order. In so doing, the court made clear that the analysis of the validity and effectiveness of OneBeacon's disclaimer was to be and was made "under the common-law waiver standard, which requires an examination of all factors"—and *not* pursuant to Ins. L. §3420(d)(2). Insofar as under such common-law principles, triable issues of fact existed as to whether OneBeacon "clearly manifested an intent to abandon their late notice defense," the grant of OneBeacon's motion to amend its Answer to assert the late notice defense was upheld. 28 N.Y.3d 960, 961 (2016).

Claims Between Co-insurers

In *Tops Markets v. Maryland Casualty*, 267 A.D.2d 999, 1000 (4th Dept. 1999), a request was made by one insurer to another insurer for an equal contribution towards a settlement on behalf of their mutual insured. The Supreme Court held that the request for contribution was the equivalent of a disclaimer or denial under Ins. L. §3420(d), and that because it was made more than 2½ years after the commencement of the underlying personal injury action, it was untimely as a matter of law. The Fourth Department, however ruled that was error, and stated: "An insurer has a right to seek contribution from an obligated coinsurer (citation omitted). The purpose of Insurance Law §3420(d) is to protect the insured, the injured party 'and any other interested party who has a real stake in the outcome' from prejudice resulting from a belated denial of coverage (citation omitted). That section is inapplicable to a request for contribution between coinsurers."

> In 'Wadsworth,' in the absence of permitted reliance upon the disclaimer statute, the plaintiff's efforts to establish a waiver and/or estoppel under common-law rules failed because the defendant had repeatedly reserved its rights to deny coverage based upon several policy provisions.

Similarly, six years later, in *Al[illegible] Ins. v. Investors Ins. Co.*, 17 A.D.3d 259 (1st Dept. 2005), the court held that "While an insurer must give timely notice of disclaimer to its insured even where, as here, the insurer has not in the first instance received timely notice of the accident (citation omitted), the duty to disclaim as soon as is reasonably possible (Insurance Law §3420[d]) is not triggered where, as here, the request is for contribution by a coinsurer (citing *Tops Markets*, supra).

In *Bovis Lend Lease LMB v. Royal Surplus Lines Ins. Co.*, 27 A.D.3d 84 (1st Dept. 2005), the First Department addressed the question, inter alia, of "whether section 3420(d) applies vis-à-vis an insurer intending to disclaim liability against another insurer who covers the same insured." Examining the clear language of the statute, and its underlying purposes, the court noted that the statute required the giving of prompt written notice of denial or disclaimer to the insured, the injured party, or "any other claimant," which the court interpreted to mean any other party with a claim against the insured arising under the policy at issue. and

concluded that "another insurer does not fall within the specified categories." 27 A.D.3d at 91. Insofar as the purpose of the notice requirements of Ins. L. §3420(d), i.e., the protection of the insured and the injured person or other claimant against the risks posed by a delay in learning the insurer's position regarding coverage, "are not risks to which another insurer seeking contribution is subject," the court held, consistent with the prior precedents set forth above, that §3420(d) is not applicable to a request for contribution between coinsurers. See also *Public Service Mutual Ins. Co. v. Tower Ins. Co. of New York*, 111 A.D.3d 476 (1st Dept. 2013).

Foreign Risk Retention Groups

Finally, a recent decision of the Supreme Court, New York County, in *Southwest Marine & General Ins. Co. v. Preferred Contractors Ins. Co.*, 2016 N.Y. Slip Op. 51849(U) (Sup. Ct. N.Y. Co. 2016), brings up yet another, lesser known, exception to the applicability of Ins. L. §3420(d)(2)—foreign (nondomiciliary) risk retention groups within the meaning of the federal Liability Risk Retention Act of 1986 (LRRA) (15 U.S.C. §3901, et seq.).

In *Wadsworth v. Allied Professionals Ins. Co.*, 748 F.3d 100 (2d Cir. 2014), the U.S. Court of Appeals for the Second Circuit examined the provisions of the LRRA, which "contains sweeping preemption language that sharply limits the authority of states to regulate, directly or indirectly, the operation of risk retention groups chartered in another state," in the context of an action by a tort victim against a nondomiciliary risk retention group, under New York's direct action statute, Ins. L. §3420(a)(2). A "risk retention group" is "a liability insurance company owned and operated by its members, and those members are its insureds. Risk retention groups offer commercial liability insurance for the mutual benefit of those owner-insureds, who must be exposed to similar risks and be members of the same industry." See 15 U.S.C. §3901(a)(4).

The question before the *Wadsworth* court was whether the LRRA preempts application of Ins. L. §3420(a)(2) to a risk retention group that was domiciled in Arizona, but issued insurance policies in New York. After noting that New York Insurance Law, as it pertains to risk retention groups, "largely mirrors the structure of federal law," and that "Article 59 of the New York Insurance Law expressly recognizes the limits imposed by the LRRA," and that "New York clearly distinguishes between the broad regulatory authority it exercises over those risk retention groups that seek to be chartered in New York, and the more limited regulations it is permitted to adopt with respect to nondomiciliary risk retention groups" (compare Ins. L. §5903 with Ins. L. §5904), the court observed that the statutes require nondomiciliary risk retention groups to comply with the laws of New York specifically set out in 10 subsequent subsections, which do not include the provisions of Ins. L. §3420(a)(2) and (b)(1), or, indeed, any part of §3420, including §3420(d)(2). Accordingly, the Second Circuit stated that "there is a strong argument that as a matter of New York law, §3420 simply does not apply to foreign risk retention groups. ... Because the declared intention of New York is to regulate risk retention groups to the extent permitted by federal law, NY Ins. L. §5901, we are inclined to believe that New York did not intend §3420 to apply to risk retention groups chartered in another state."

Then, turning specifically to the limited question before it, the court held that "any construction of New York law that would impose §3420's direct action requirements on foreign risk retention group is preempted by §3902(a)(1) of the LRRA."

In *Southwest Marine and General Ins. Co. v. Preferred Contractors Ins. Co.*, supra, the court, following *Wadsworth*, supra, held, inter alia, that New York's direct action statute, Ins. L. §3420(a)(2), did not apply to the defendant insurer because it was a foreign risk retention group within the meaning of the LRRA, and that Ins. L. §3420(d)(2), the disclaimer statute, was also preempted by the LRRA. In the absence of permitted reliance upon the disclaimer statute, the plaintiff's efforts to establish a waiver and/or estoppel under common-law rules failed because the defendant had repeatedly reserved its rights to deny coverage based upon several policy provisions.