The Applicability (Inapplicability) Of New York's Disclaimer Statute

By Jonathan A. Dachs

One of the most relied upon categories of an "uninsured motor vehicle" is "an insured vehicle where the insurer disclaims liability or denies coverage." See N.Y. Ins. L. §3420(f)(1); see also Regulation 35-D's Supplementary Uninsured/Underinsured Motorist Endorsement—New York, 11 NYCRR §60-2.3 (f)(c)(3)(iii) ("The term 'uninsured motor vehicle' means a motor vehicle that, through its ownership, maintenance or use, results in bodily injury to an insured, and for which: ... there is a bodily injury liability insurance coverage or bond applicable to such motor vehicle at the time of the accident, but: ... the insurer writing such insurance coverage or bond denies coverage ... ."); *Vanguard Ins. v. Polchlopek*, 18 N.Y.2d 376 (1966) ("an insurance policy which is disclaimed subsequent to an accident is not a policy applicable at the time of the accident").

In order to protect an injured party who may be vitally affected by a denial or disclaimer by the tortfeasor's insurer, the legislature encouraged the expeditious resolution of liability claims by providing, in Ins. L. §3420(d)(2), that all liability insurers must "give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant." As explained by the court in *Bovis Lend Lease LMB v. Royal Surpluys Lines Insurance*, 27 A.D.3d 84, 92 (1st Dept. 2005): "It is clear that the notice requirement of section 3420(d) is designed to protect the insured and the injured person or other claimant against the risk, posed by a delay in learning the insurer's position, of expending energy and resources in an ultimately futile attempt to recover damages from an insurer until it is too late to pursue them successfully."

Unlike traditional common-law waiver and estoppel defenses, "section 3420(d)(2) creates a heightened standard for disclaimer that 'depends merely on the passage of time, rather than on the insurer's manifested intention to reverse a right as in waiver or on prejudice to the insured as in estoppel' [citation omitted]." *KeySpan Gas East v. Munich Reinsurance America*, 23 N.Y.3d 583 (2014). Failure of the insurer to give such reasonably timely and specific notice may result in its being precluded, based upon a theory of waiver and estoppel, from relying upon a breach of a policy condition (such as late notice or lack of cooperation), or an exclusionary provision in the policy. See *Roman Catholic Diocese of Brooklyn v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 21 N.Y.3d 139 (2013); *Allcity Ins. v. Jimenez*, 78 N.Y.2d 1054 (1991).

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As important as the disclaimer statute is, however, it is not applicable in every case or scenario. Indeed, the statute specifically provides that it applies only where an insurance policy is "issued or delivered" in the state of New York, and only to claims that are based on "death or bodily injury" arising out of accidents that take place within the state. Stated another way, as it was by the Court of Appeals in *KeySpan*: "By its terms, the statute applies only in cases involving death or bodily injury claims arising out of a New York accident and brought under a New York liability policy."

This Part I of a two-part article on the applicability or inapplicability of the disclaimer statute—Ins. L. §3420(d)(2)—provides a brief historical background of the statute and its present provisions, and discusses one of the express limitations on the applicability of the statute—the requirement that the insurance policy at issue be one that is issued or delivered" in New York. Part II of this article will continue the discussion by focusing on another explicit limitation in the statute—the requirement that the claim at issue involve "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.

History

The 1958 version of New York's disclaimer statute, an amendment to former Ins. L. §167(1), set forth mandatory provisions for policies "issued or delivered in this state" insuring liability for *personal injuries or property damages* (see L. 1958, ch. 759, §3). By its terms, it applied not only to liability for *accidents* occurring in this state but to any liability under a policy "*issued or delivered* in this state."

That statutory provision was repealed in 1959 (L. 1959, ch. 64 §2), and replaced with the following provision: "If under a liability policy *delivered or issued for delivery in this state*, an insurer shall disclaim liability or deny coverage for *death or [bodily] injury arising out of a motor vehicle accident occurring within this state*, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant" (emphasis added).

In 1975, that provision was amended again to cover claims arising from "death or bodily injury arising out of a motor

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vehicle accident *or any other type of accident* occurring within this [s]tate" (L. 1975, ch. 775, §1). In a memorandum in support of the 1975 amendment, the superintendent of insurance noted that it would, in essence, restore the statutory requirements of the 1958 enactment, which had been repealed because automobile insurers claimed it unfairly imposed a "nationwide burden" (Mem. of Supt. of Ins., Bill Jacket, L. 1975, ch. 775). The superintendent further noted that, unlike the 1958 provision, the 1975 provision was only applicable to accidents occurring in New York. See *American Ref-Fuel Co. of Hempstead v. Employers Ins. Co. of Wausau*, 285 A.D.2d 49 (2d Dept. 2000).

In 2008, the statute was amended yet again to add several new provisions, including amendments to the former "no prejudice" rule. Most notable for present purposes was the change back from the phrase "*delivered or issued for delivery*" to "*issued or delivered*" in §3420(d)(2). L. 2008, ch. 388, §5, eff. Jan. 17, 2009.

'Issued or Delivered' in New York

In *First City Acceptance v. Gulf Ins.*, 245 A.D.2d 649 (3d Dept. 1997), a pre-2008 amendment case involving a motor vehicle accident that took place in Albany County, New York, and resulted in serious bodily injuries to the parties involved in the accident, the court, inter alia, rejected the contention by the lessor of the alleged offending vehicle, which was leased from First City Acceptance, a Massachusetts company, that since its excess insurer did not notify the injured claimant of its disclaimer of coverage (on the ground of late notice of claim), as required by the New York disclaimer statute, its disclaimer was improper and invalid. As noted by the court in support of its determination: "This provision of law applies by its terms only where an insurance liability policy is delivered or issued for delivery in New York and, admittedly, the policy in question was issued and delivered in Massachusetts."

In *American Ref-Fuel Company of Hempstead v. Employers Ins. Co. of Wausau*, 265 A.D.2d 49 (2d Dept. 2000), the plaintiff operated the municipal incinerator of the Town of Hempstead. The defendant, Employers Ins. Co. of Wausau (Wausau), which maintained its home office in Wausau, Wisconsin, delivered two insurance policies to the plaintiff's parent corporation in Houston, Texas. Both policies named as insureds American Ref-Fuel Company of Hempstead, which was located in Westbury, New York.

Following the commencement of a lawsuit by an individual allegedly injured as a result of American Ref-Fuel's negligent processing of ash produced by its incinerator, Wausau declined coverage based upon "pollution exclusions" in both its policies. American Ref-Fuel, on the other hand, argued that Wausau failed timely to disclaim coverage pursuant to Ins. L. §3420(d), and was, therefore, estopped and/or precluded for denying coverage.

Relying upon and interpreting the then-applicable provision that referred to policies "*delivered or issued for delivery* in this state," the court first noted that Wausau acknowledged that "issued for delivery" did not mean the same as "actual delivery," and that the policies in question "included as additional named insureds nine separate divisions of [the parent corporation], operating in several different states, including New York." The court also noted that Wausau contended that the subject policies were not "delivered or issued for delivery" in New York because the policies were actually delivered to the insured's parent corporation in Texas, all premium invoices were sent to the parent corporation, and the policies were countersigned by Wausau's authorized agent in Texas.

The court went on, however, to distinguish this case from *First*

City Acceptance because in *American Ref-Fuel*, "the policies listed, as a named insured, the plaintiff, which is a New York corporation located in and performing work in New York." The court, therefore, concluded that "the location of the insured and the risk to be insured are determinative." The court further noted that "the claim was for bodily injury resulting from an accident occurring within this State," and held that "Insurance Law §3420(d) applies because the disclaimer was for liability for a claim, under policies issued for delivery in this State, for bodily injury arising out of an accident occurring in this State," and, therefore, Wausau was obligated to "give written notice as soon as is reasonably possible" of its disclaimer based upon exclusions in its policies.

See also *Columbia Casualty Co. v. National Emergency Services*, 282 A.D.2d 346 (1st Dept. 2001) ("We reject plaintiff's claim that the timely disclaimer provision is inapplicable in this case merely because the policy in question was issued out of State and listed the address of the insured's corporate headquarters out of State. The policy expressly covers insureds and risks located in New York and must therefore be deemed issued for delivery in New York [see, *American Ref-Fuel Co. v. Employers Ins. Co.*, 265 A.D.2d 49, 53]").

In *Preserver Ins. v. Ryba*, 10 N.Y.3d 635 (2008), decided before the effective date of the 2008 amendment, the plaintiff, a New Jersey construction worker employed by a New Jersey subcontractor, performing work in the state of New York, was injured when he fell off a scaffold. The subcontractor/employer maintained a worker's compensation and employers' liability policy issued by Preserver Insurance, of New Jersey, which were both underwritten and delivered in New Jersey. Reversing the contrary determinations of the Supreme Court and the Appellate Division, the Court of Appeals noted that "a policy is 'issued for delivery' in New York if it covers both insureds and risks located in this State" (citing *Columbia Cas.* and *American Ref-Fuel*). The court went on to find that although by including New York as an "Item 3.c." state, the policy covered risks located in New York, the insured was, however, a New Jersey company, with its only offices in New Jersey, "so that it cannot be said that the insured is located in New York." Accordingly, the court held that the policy was neither actually "delivered" nor "issued for delivery" in New York, and, therefore, Preserver was not required by Ins. L. §3420(d) to make a timely disclaimer of coverage. See also *Admiral Ins. Co. v. Joy Contractors*, 81 A.D.3d 521 (1st Dept. 2011), affd. as modified, 19 N.Y.3d 448 (2012).

Recent Case

Most recently, in *Carlson v. American International Group*, 130 A.D.3d 1477 (4th Dept. 2015), lv. to appeal granted, 26 N.Y.3d 918 (2016), an action pursuant to a different section of Ins. L. §3420, i.e., §3420(a)(2), which governs actions against insurers to collect upon judgments against their insureds, the court ruled that section inapplicable because the policy was not "issued or delivered in this state." As the court explained, in reversing the Supreme Court's order that denied the insurer's cross-motion to dismiss the enforcement action, the phrase "issued or delivered," which currently appears in the statute, is not to be conflated with the phrase "issued for delivery," which formerly appeared in the statute. Thus, where the policy involved was issued in New Jersey and delivered in Seattle, Washington, and then in Florida, it was not issued or delivered in New York, and, accordingly, the direct action statute was inapplicable.

It remains to be seen what, if any, changes the Court of Appeals makes to this decision when it hears *Carlson* some time in the year ahead.

were forwarded for a defense, disclaimed coverage. That disclaimer was based upon an "insured versus insured" provision in the policy, which excluded "'[a]ny 'claim' made by or for the benefit of, or in the name or right of, one current or former insured against another current or former insured."

Because it was not clear from the language of the exclusion whether the insured claimant, as an employee, was an "insured" as defined in the policy, the court held that the provisions were ambiguous and subject to more than one interpretation, and, thus, held that the insurer failed to establish its prima facie entitlement to judgment as a matter of law, and, indeed, granted summary judgment in favor of the insured declaring that the insurer was obligated to defend it in the underlying personal injury action.

'Fitzgerald'

Finally, although this point was previously mentioned in a recent article in this space,[3] it is worth repeating that in *State Farm Mut. Auto. Ins. v. Fitzgerald*, 25 NY2d 799 (2015), the Court of Appeals observed that in interpreting the provisions of the prescribed uninsured motorist (UM) and supplemental uninsured motorist (SUM) endorsements, the general rule of construction of ambiguities against the drafter (insurer) will not apply because the insurers did not choose the terms of these endorsements of their own accord, but, rather, were required to include them in compliance with the governing statutes (Ins. L. Sections 3420[f][1] and [f][2]) and Regulations (11 NYCRR 60-2.3[f]). As the court stated the exception to the general rule of policy interpretation discussed above, policy provisions mandated by statute "must be interpreted in a neutral manner consistent with the intent of the legislative and administrative sources of the legislation."

1. See also *Lend Lease (U.S.) Construction LMB v. Zurich American Ins. Co.*, 136 AD3d 52 (1st Dept. 2015).

2. For a detailed discussion and analysis of *Matter of Viking Pump v. TIG Ins.*, 27 NY3d 244 (2016), see Dachs, J., "'Viking Pump': Allocation, Exhaustion, Policy Interpretation," NYLJ, May 17, 2016, p. 3, col. 1; and Epstein, Howard B. and Keyes, Theodore A., "'Viking Pump': Changing the Allocation Landscape," NYLJ, Aug. 31, 2016, p. 3, col. 1.

3. See Dachs, J., "Insurance Law Lessons My Father Taught Me," NYLJ, Feb. 22, 2016.