# Appellate Division: Violation of New York Insurance Law § 3420(d)(2) Does Not Constitute an Unfair Claims Handling Practice

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Casualty insurers doing business in the state of New York that wish to deny coverage on a claim for death or bodily injury are subject to the timing requirements set forth in New York Insurance Law (NYIL) § 3420(d)(2), which provides:

> If under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of 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].

Failure to comply with NYIL § 3420(d)(2) can have significant implications for insurers, including a waiver of any available coverage defenses.

Recently, however, in *Nadkos, Inc. v. Preferred Contractors Insurance Company Risk Retention Group LLC*, __A.D.3d__, 2018 NY Slip Op 03242 (N.Y. App. Div. 1st Dep't. May 3, 2018), the New York State Supreme Court, Appellate Division, First Department, held that NYIL § 3420(d)(2) is inapplicable to risk retention groups (RRG)[1] organized under the laws of another state. In so holding, the court found that failure to comply with NYIL § 3420(d)(2) does not constitute an unfair claim settlement practice within the meaning of NYIL § 2601(a)(6).

In *Nadkos*, the parties disputed whether a denial of coverage for a personal injury accident in New York by Preferred Contractors Insurance Company Risk Retention Group LLC (PCIC) (an RRG organized under the laws of Montana) more than two years after tender was untimely pursuant to NYIL § 3420(d)(2) such that PCIC had waived its coverage defenses. The plaintiffs argued that PCIC failed to deny coverage "as soon as reasonably possible" in compliance with NYIL § 3420(d)(2). Moreover, the plaintiffs contended that New York state had the authority to regulate the timing of PCIC's denial because NYIL § 2601(a)(6) provides that it shall constitute an unfair claim settlement practice if an insurer "fail[s] to promptly disclose coverage pursuant to [Insurance Law § 3420(d)]." [Emphasis added].

The court disagreed, holding instead that a foreign RRG need not comply with NYIL § 3420(d)(2) because the statute does not concern an unfair claim settlement practice. *See Nadkos*, 2018 NY Slip Op 03242 at ¶ 2.[2] The court noted that the prompt disclosure requirement of NYIL §2601(a)(6) only applies to confirmation of coverage, and is not applicable to a disclaimer of coverage. *Nadkos*, 2018 NY Slip Op 03242 at ¶¶ 3-4.

While this is an important decision concerning the rights of RRGs, this decision has a much broader implication: failure of a casualty insurer doing business in New York to comply with the strict timing requirements in NYIL § 3420(d)(2) shall not constitute an unfair claim settlement practice. Accordingly, although an insurer may be precluded from asserting coverage defenses for violating NYIL § 3420(d)(2), an insurer will not be liable for extra-contractual damages for unfair claims handling and/or bad faith practices, and its damages will be limited to policy limits.

If you have questions or would like additional information, please contact Erica Kerstein (kersteine@whiteandwilliams.com; 212.868.4837) or Elyor Pogorelskiy (pogorelskiye@whiteandwilliams.com; 212.714.3074).

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[1] RRGs are liability insurance companies created by organizations or persons engaged in similar businesses or activities and thereby exposed to the same types of liability. The insureds are the owners of the RRG.

[2] Although foreign RRGs are not required to comply with section 3420(d)(2), they are still subject to common law estoppel and waiver. However, unlike under NYIL § 3420(d)(2), the policyholder bears the burden of demonstrating prejudice (estoppel), or the intentional relinquishment of a known right (waiver).