Two Recent Cases Highlight the Importance of Complying With New York's Coverage Disclaimer Rules

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As two recent cases demonstrate, a coverage disclaimer in New York is only as good as its compliance with that state's various rules for perfecting a disclaimer in connection with a bodily injury claim. Under New York Insurance Law § 3420(d)(2):

> [i]f 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.

Common mistakes in failing to comply with Section 3420 include failing to issue the disclaimer within a reasonable time, failing to send a copy of the disclaimer to both the insured and the injured person (or other claimant) and failing to state all defenses to coverage that are available to the insurer at the time it issues the disclaimer. But, as two recent New York cases illustrate, there are also other pitfalls to keep in mind when contemplating a disclaimer.

In *Dynatec Contracting, Inc. v. Burlington Insurance Company*, 2019 N.Y. Misc. LEXIS 187 (N.Y. Sup. Ct. Jan. 7, 2019), for example, an insurer was estopped under Section 3420 from disclaiming coverage based on a policy exclusion because the disclaimer was not issued soon enough after receipt of the claim. There, a contractor sued a subcontractor and the subcontractor's insurer for coverage as an additional insured under the subcontractor's general liability policy in connection with an underlying action seeking damages for bodily injuries sustained in a scaffolding accident.

In April 2017—the dates are relevant—the contractor tendered its defense to the subcontractor's insurer. Thirty days later, in May 2017, the contractor's insurer disclaimed coverage on several grounds, including that the subcontract requiring that the contractor be named an additional insured on the subcontractor's policy was not fully executed. However, ***three months later***, in August 2017, the subcontractor's insurer sent a supplemental letter disclaiming coverage on the additional basis that an exclusion in the subcontractor's policy excluded coverage. The contractor argued that the subcontractor's insurer was estopped, under Section 3420(d)(2), from disclaiming coverage based on that exclusion because notice was not given "as soon as is reasonably possible." The trial court agreed, concluding that "the basis alleged for the disclaimer was available on the face of the underlying amended complaint." The court rejected the insurer's argument that its delay in disclaiming coverage under the exclusion was "due to its desire to conduct further investigations," since no further investigation was necessary. As a result of the insurer's failure to comply with Section 3420, the *Dynatec* court held that the insurer was obligated to defend the contractor as an additional insured in the underlying action.

In *County of Niagara v. Liberty Mutual Insurance Company*, 2019 U.S. Dist. LEXIS 1898 (W.D.N.Y. Jan. 3, 2019), a coverage disclaimer was upheld because the insurer complied with Section 3420's disclaimer rules. There, the owner of a window-installation project tendered its defense and indemnity to the general and excess liability insurer of the window-installation contractor, in connection with an underlying action by one of the contractor's employees seeking damages for bodily injuries he sustained while working on the project. Within one week of receiving the project owner's tender, the contractor's insurer disclaimed coverage for the project owner on several grounds, including that certain exclusions in the contractor's policy applied to the allegations in the worker's complaint. Having agreed that coverage for the accident was subject to the policy exclusions, the New York federal court moved to "consider[ ] whether

the Disclaimer Letter timely and sufficiently disclaimed coverage for the accident" under Section 3420(d).

The project owner in *Niagara* argued that the contractor's insurer was estopped from disclaiming coverage because the insurer did not address a copy of the disclaimer to the project owner; it was addressed only to the named insured contractor with a "cc" to the project owner. But, "under relevant New York case law," the court observed, "a disclaimer letter is effective as against an additional insured so long as the additional insured received a copy of it," including where it receives "only a carbon copy" of the letter. The project owner also argued for estoppel because the insurer did not reference the project owner's claim for additional insured coverage; it only referenced "generic" claims made in connection with the underlying action (including the named insured's claim). The court disagreed, concluding that "the Disclaimer Letter consistently and repeatedly states coverage is being denied for the 'above captioned matter' and the 'incident,'" which satisfies Section 3420's notice requirement. The project owner further argued for estoppel because the insurer did not include with the project owner's copy of the disclaimer a hard copy of the relevant policy exclusions. But the court also rejected that argument, finding the insurer's full quotation of the exclusion's language in the disclaimer satisfied Section 3420's notice requirement.

These two recent cases highlight the importance of complying with N.Y. Ins. Law § 3420's coverage disclaimer rules—and the danger insurers face in failing to do so. An insurer can, and will, be estopped from disclaiming coverage under even the most cast-iron defense if the disclaimer is not both timely and sufficient under Section 3420.

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