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Insurance Coverage Decisions: Issued Today - Impact Tomorrow
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Statute of Liberty: New York Appeals Court Frees Huddled Masses of Insurers from the Bonds of Section 3420(d)

Whenever I am involved in a case involving New York Insurance Law § 3420(d) I always make the same two observations: (1) Wow, there sure are a lot of cases on this issue; and (2) Wow, insurers lose pretty much every time.

Section 3420(d) is that pesky New York statute that so frequently trips up insurers, by invalidating their disclaimer/reservation of rights, for bodily injury claims, because their letter was not issued "as soon as is reasonably possible" – which is usually determined by courts to be a very short period of time.

Yesterday's decision from the Second Circuit Court of Appeals does nothing to minimize the number of cases addressing § 3420(d). However, where this decision differs from most is that it is a 3420(d) case where the insurer actually won. But even more than that – the court's decision demonstrates that, in a certain class of § 3420(d) cases, the insurer should win every time.

At issue in *NGM Insurance Company v. Blakely Pumping, Inc.* was the availability of coverage under a Businessowners Liability Policy issued to Blakely Pumping. Brian Blakely, an officer and employee of Blakely Pumping, was involved in an automobile accident. NGM Insurance Company, Blakely Pumping's insurer, denied coverage for the claim brought against Mr. Blakely on the basis of the policy's auto exclusion.

It was subsequently brought to NGM's attention that the policy issued to Blakely Pumping contained a Hired or Non-Owned Auto endorsement. Nonetheless, NGM again disclaimed coverage -- on the ground that, because Brian Blakely was an executive officer of Blakely Pumping, his truck was neither a Hired or Non-Owned Auto as defined in the endorsement. [The ins and outs of the Hired or Non-Owned Auto endorsement are not the take-away here – so don't waste any time thinking about that.]

Lo and behold coverage litigation ensued. The District Court held that, because Blakely Pumping had borrowed the auto of one of its officers, the accident was therefore not covered under the terms of the Hired or Non-Owned Auto endorsement. However, the District Court also concluded that, because the Hired or Non-Owned Auto endorsement "generally covered auto accidents," the basis for disclaiming coverage were exclusions to that general coverage.

Therefore, the District Court held that, pursuant to New York Insurance Law § 3420(d), NGM had been required to provide written notice that it was disclaiming coverage on the ground that Blakely's pickup truck was neither a "Hired Auto" nor "Non-Owned Auto." However, because NGM originally disclaimed coverage pursuant to the policy's exclusion for autos, it had waived its right to disclaim coverage on other grounds. Thus, NGM's subsequent notice of disclaimer, for the Hired or Non-Owned Auto coverage, was ineffective.

The Second Circuit reversed. And, in doing so, it provided an important reminder – not all disclaimer/reservation of rights are created equal when it comes to Section 3420(d)'s requirements and its unforgiving consequences for failure to comply.

The Second Circuit addressed *Zappone v. Home Insurance Co.*, 55 N.Y.2d 131 (1982), the New York Court of Appeals decision that interpreted § 3420(d) as requiring notice only for a "denial of liability predicated upon an exclusion set forth in a policy which, without the exclusion, would provide coverage for the liability in question." *Blakely Pumping* at 6 (quoting *Zappone* at 134). In other words, compliance with § 3420(d) is not required where no coverage ever existed in the first place.

The Second Circuit, following an interpretation of the Hired or Non-Owned Auto Endorsement, held that Blakely's pickup truck could have never been covered. Therefore, because there was no coverage "by reason of lack of inclusion," this was not an initially coverage claim that was now the subject of an exclusion, so compliance with § 3420(d) was not required. *Blakely Pumping* at 7 (quoting *Zappone* at 137). The Second Circuit reversed the District Court's decision that NGM's disclaimer was ineffective on account of violating § 3420(d).

Needless to say, insurers should take great care to comply with § 3420(d) in all New York bodily injury cases and not rely on the fact that, because the basis for the disclaimer is a "lack of inclusion," the claim can be safely dealt with next week. However, *Blakely Pumping* provides a useful lesson that not all late disclaimers/reservations of rights are fatal under § 3420(d).

A copy of the Second Circuit's February 1st decision in *NGM Insurance Company v. Blakely Pumping, Inc.* can be accessed here:

http://www.ca2.uscourts.gov/decisions/isysquery/3b112e3b-dd9b-489a-a5a7-d17ffd567756/1/doc/09-1655%20-cv_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/3b112e3b-dd9b-489a-a5a7-d17ffd567756/1/hilite/

Please let me know if you have any questions.

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