CARLTON FIELDS

NY Insurance Law 3420(d)(2) Is Strictly Enforced

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It is of paramount importance that liability insurers doing business in New York be aware of the heightened disclaimer obligations applicable to claims implicating Insurance Law § 3420(d)(2). The statute, which applies to bodily injury or death claims arising out of an accident occurring within the state, and policies issued or delivered in New York, requires an insurer to provide written notice of the bases upon which it is denying coverage "as soon as is reasonably possible." The disclaimer must also be sent to the "insured and the injured person or any other claimant." Failure to adhere to the strict mandates imposed by Section 3420(d)(2) can have significant ramifications, including the forfeiture of certain coverage defenses. A recent decision by a New York appellate court, *Endurance American Specialty Insurance Company v. Utica First Insurance Company*,[1] further illuminates the stringent notification requirements of this statute and consequences of an insurer's failure to adhere to them. Endurance provided liability insurance coverage to a contractor, Adelphia Restoration Corporation. Utica insured CFC Contractor Group Inc., a subcontractor employed on an Adelphia project. The Utica policy contained an additional insured endorsement that provided coverage for entities that CFC was required by written agreement to procure insurance for, which included Adelphia. The Utica policy also contained an exclusion for bodily injuries sustained by employees of any insured, or by contractors or employees of contractors "hired or retained by or for any insured." On Oct. 16, 2011, an employee of CFC allegedly was injured on the Adelphia job. On Nov. 16, 2011, Endurance's third-party administrator, Rockville Risk Management, provided Utica notice of the accident on behalf of Adelphia. On Nov. 21, 2011, relying upon the employee exclusion in its policy, Utica informed CFC that it was denying coverage for the subject claim, as to it "or any other party seeking coverage under this policy of insurance for damages arising out of this incident." Utica sent a copy of the letter to Rockville, but not Adelphia. Rockville ultimately tendered Adelphia's defense and indemnity to Utica, noting that Adelphia was covered as an additional insured under Utica's policy pursuant to the contract between Adelphia and CFC. Rockville's tender did not include a copy of said contract. Several months later, a follow up tender letter was sent to Utica. Shortly thereafter, Utica received a copy of the contract between Adelphia and CFC, which reflected the former's status as an additional insured under Utica's policy. The following day, Utica denied coverage to Adelphia for the subject claim based on the employee exclusion. In responding to the denial, Adelphia conceded that the employee exclusion, on its face, precluded coverage. Nonetheless, it contended that Utica's

disclaimer, while sent to both CFC and Rockville, was ineffectual under Insurance Law § 3420(d)(2). After the trial court ruled in Utica's favor, the Appellate Division, First Department, reversed, finding that the Nov. 21, 2011, disclaimer sent by Utica to CFC did not constitute notice to Adelphia as an additional insured seeking coverage under the policy, which was required by the statute. Relying upon its holding in a prior decision[2] and other precedent, the court rejected Utica's argument that it was permitted to delay disclaiming coverage to Adelphia based on the policy's employee exclusion while investigating whether it was an additional insured under the policy, stating If Adelphia was not entitled to coverage because of the employee exclusion, it did not matter one way or the other whether it was an additional insured under the CFC/Utica policy, and Utica therefore did not need to investigate Adelphi's status in order to disclaim coverage under the exclusion. ... Utica should have immediately disclaimed to Adelphi on that basis. Thus, Utica's investigation as to whether Adelphi was an additional insured was insufficient as a matter of law as the basis for a disclaimer. *Endurance v. Utica* is significant for several reasons. First, by interpreting the statute as requiring that notice of Utica's disclaimer be sent to Adelphia, in addition to CFC (the policy's named insured) and Rockville (the TPA that tendered on Adelphia's behalf), the First Department reinforced the notion that an insurer must heed strictly to the specific requirements set forth in Insurance Law § 3420(d)(2), or risk severe consequences. Indeed, in another recent decision involving the statute, New York's highest court, the Court of Appeals, found that an insurer's disclaimer due to late notice was invalid as to an additional insured's claim because the disclaimer was sent only to the additional insured's carrier, which was the entity that had provided notice of claim.[3] The rationale that underlies these decisions is the view that § 3420(d)(2) was intended to expedite the disclaimer process for the particular types of claims covered by the statute (death/personal injury), thus enabling a policyholder or claimant to pursue other potential avenues of recovery if a particular insurance policy may not respond to a claim. Strictly enforcing the provisions of the statute that pertain to timing or notification of disclaimers was, in the eyes of these courts, consistent with that goal. Moreover, the First Department's ruling expands upon the holding in George Campbell Painting, which overruled prior case law and held that Section 3420(d)(2) precludes an insurer from delaying issuance of a disclaimer on a ground that the insurer knows to be valid while investigating other potential bases upon which the claim may not be covered. Accordingly, when notified of a claim that implicates § 3420(d)(2), an insurer should promptly assert all known bases for disclaiming coverage, even if it still requires additional information to determine the viability of other potential defenses and/or has yet to complete its investigation of the claim. Otherwise, an insurer may be barred from asserting a viable grounds for disclaimer and be compelled to provide coverage for a claim where none should exist. _____ [1] *Endurance Am. Specialty Ins. Co. v. Utica First Ins. Co.*, 132 A.D.3d 434 (1st Dep't 2015).

[2] *George Campbell Painting v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 92 A.D.3d 104, 111 (1st Dep't 2012).

[3] *Sierra v. 4401 Sunset Park, LLC*, 24 N.Y.3d 514, 518 (N.Y. 2014).

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