

NY's First Department Holds for the First Time that Policy Classifications are not Exclusions and Cannot be Waived Under New York Insurance Law

By **Michael L. Zigelman** and **Eric B. Stern**

In a recent decision obtained by Kaufman Dolowich & Voluck, LLP's global insurance litigation group – *Black Bull Contracting, LLC v. Indian Harbor Ins. Co.*, 23 N.Y.S.3d 59 (1st Dept., 2016) – New York's First Department held that the carrier in question – Indian Harbor Insurance Company – had no duty to defend or indemnify its Named Insured – Black Bull Contracting LLC – in an underlying bodily injury lawsuit, despite the fact that Indian Harbor issued its disclaimer in an arguably "untimely" manner pursuant to the strict disclaimer-timing rules of New York's Insurance Law 3420(d). In reaching their decision, the First Department found that the subject Policy's "Classification Limitation" Endorsement was a condition precedent to coverage, and as such, did not operate as a waivable exclusion, therefore falling outside the scope of New York Insurance Law 3420(d)'s timing requirements.

By way of background, Indian Harbor denied coverage to Black Bull based on the fact that the underlying claimant, an employee of Black Bull, alleged that he was performing demolition work at the time of his accident. However, because the classifications listed on the subject Policy did not include demolition work, coupled with the Policy containing the aforementioned "Classification Limitation" Endorsement, Indian Harbor determined that there was no coverage available to Black Bull for the injury which arose out of Black Bull's demolition work.

In challenging Indian Harbor's coverage determination, Black Bull essentially argued that the Endorsement operated as an exclusion and not as a grant of/condition precedent to coverage, and because Indian Harbor's denial was untimely, Indian Harbor thus waived its right to rely on the Endorsement as a defense to coverage. KD attorneys argued that the Endorsement was not an exclusion to coverage, but rather part of the grant of coverage, and as such, because New York law clearly provides that an insurer cannot waive into coverage, the timing of Indian Harbor's denial was inconsequential.

After Black Bull commenced a declaratory judgment lawsuit against Indian Harbor, KD's attorneys moved to dismiss based on the documentary evidence (i.e. – the Policy and Endorsement, and the underlying bodily injury lawsuit) and Black Bull's failure to state a cause of action upon which relief could be granted, as a result of this documentary evidence. After full briefing and oral arguments concluded, the Court granted the motion to dismiss. Black Bull then appealed to the First Department.

The First Department, agreeing with Indian Harbor and KD's attorneys, determined that the Policy's "Classification Limitation" Endorsement merely defined the activities that were included within the scope of coverage and did not constitute an exclusion from coverage. In other words, the relevant language of the Endorsement and Policy's Declarations Page stated the activities that were covered. Therefore, the untimeliness of Indian Harbor's disclaimers did not preclude it from denying coverage.

This is an excellent result for insurers, as it clarifies, for the first time in New York, that the Classification Limitation Endorsement operates as a condition precedent to coverage, rather than an exclusion, and is not subject to the statutory scheme of Insurance Law 3420(d).