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KD Insurance Law Alert: New York's Appellate Division Reaffirms Insurer Timing Requirements Under Insurance Law 3420

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A recent decision in the New York State Appellate Division, First Department, further underscores the strict timing requirements that an insurer must follow when seeking to disclaim coverage for a bodily injury action under New York State Insurance Law § 3420(d). In Endurance American Specialty Insurance Company v. Utica First Insurance Company, No. 650703/13 (N.Y. App. Div. 1st Dep't 2015), the Court reaffirmed the rule that where an insurer has a ground for disclaiming coverage that it knows to be valid, it cannot delay in issuing a disclaimer of coverage on that basis while investigating other potential disclaimer grounds. Interestingly, the Court held that these timing requirements applied even where the tendering party had not yet established its status as an insured on the subject policy of insurance.

New York State Insurance Law § 3420(d) requires an insurer to provide written notice to its insured "as soon as is reasonably possible" when denying coverage for a claim that involves "death or bodily injury." Indeed, failure to timely notify the insured may result in the insurer's waiver of its ability to disclaim coverage, depending on the basis of the disclaimer. Courts have previously held that while § 3420(d) requires timely notice of disclaimer based on an exclusion in a policy, it does not apply where the claim falls outside the scope of coverage under the policy, such as where the party seeking coverage is not actually an insured. Courts have also held that the timeliness of a disclaimer is measured from the time when the insurer first learns of the grounds for disclaimer.

In the Endurance case above, an employee of CFC Contractor Group ("CFC"), was injured during the course of his employment, resulting in a lawsuit brought against Adelphi Restoration Corp. ("Adelphi"), who in turn commenced a third-party action against CFC. On November 16, 2011, CFC's insurer, Utica First Insurance Company ("Utica"), received notice of the accident and five days later, issued a disclaimer letter to CFC, denying coverage pursuant to the policy's "employee exclusion," which excluded coverage for bodily injuries sustained by employees of any insured. Utica specifically stated in its disclaimer that the "employee exclusion" barred coverage for "all parties" to the underlying lawsuit. Although Utica copied Adelphi's insurer, Endurance American Specialty Insurance Company ("Endurance"), on the disclaimer, it did not directly notify Adelphi.

On May 10, 2012, Endurance tendered Adelphi's defense and indemnity to Utica, on the ground that Adelphi was an additional insured under Utica's policy. The Utica policy contained an additional insured endorsement providing coverage for entities for which CFC was required to procure additional insured coverage under a written agreement. However, Endurance did not provide a copy of the written contract that purportedly triggered additional insured coverage for Adelphi, and Utica did not respond to Endurance's tender. On January 25, 2013, Endurance again wrote to Utica, this time providing a copy of the written contract. One day after receiving a copy of the contract, Utica disclaimed coverage to Adelphi based on the foregoing "employee exclusion."

In holding that Utica's disclaimer was untimely under New York Insurance Law § 3420(d), the Court noted that Utica knew, at the time it disclaimed coverage to CFC in 2011, that the "employee exclusion" barred coverage for all parties, yet it waited until 2013 to inform Adelphi. The fact that Utica attributed the delay to its investigation of whether Adelphi was an additional insured on its policy did not alter the Court's conclusion. In this regard, the Court reasoned that Utica could not delay disclaiming coverage to Adelphi on the applicability of the "employee exclusion" while it was investigating another possible basis for disclaiming coverage. In addition, the Court noted that Utica's notice to Endurance in 2011 did not constitute notice to Adelphi, as the statute requires that an insurer provide

notice "to the insured."

The Court's decision here reemphasizes the importance for insurers to promptly respond to tenders of defense and indemnity in bodily injury actions if they believe that an exclusion may apply as a bar to coverage. Further, even if the insurer believes a non-waivable defense may apply as a bar to coverage, based on the holding in Endurance, it would be best practices for that insurer to also include a reservation of rights section in the disclaimer letter on that potential other coverage defense rather than wait until its investigation is concluded and risk waiving such defense based on a timing issue.

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