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New York's Appellate Division Holds that Insurers Cannot Delay Issuing a Disclaimer of Coverage on a Known Coverage Defense While It Investigates Other Potential Grounds for Disclaiming

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In *George Campbell Painting v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2012 N.Y. Slip Op. 254 (1st Dept. 2012), New York's Appellate Division, First Department, expressly overruled its prior holding in *DiGuglielmo v. Travelers Prop. Cas.*, 6 A.D.3d 544, 766 N.Y.S.2d 542 (1st Dept. 2004), which held that "[a]n insurer is not required to disclaim on timeliness grounds before conducting a prompt, reasonable investigation into other possible grounds for disclaimer."

In *Campbell*, the owner of a project, Triborough Bridge and Tunnel Authority (TBTA), and its general contractor, George Campbell Painting (Campbell), sought coverage for an underlying personal injury action from National Union, the excess carrier for Safespan Platform Systems (Safespan), the subcontractor that employed the underlying personal injury plaintiff. Campbell and TBTA sought coverage on the grounds that they were additional insureds under the policies issued to Safespan. Campbell and TBTA gave notice of the claim to National Union in November, 2005. On January 17, 2006, Campbell and TBTA provided National Union with an August, 2004 status report from defense counsel advising that the value of the underlying personal injury claim would exceed Safespan's primary limits. National Union continued to investigate the matter for an additional four months before issuing a disclaimer, dated May 17, 2006, that was based on late notice.

Campbell and TBTA brought a declaratory judgment action against National Union. They moved for summary judgment on the grounds that National Union's disclaimer was untimely under Insurance Law § 3420(d)(2), which obligates insurers to disclaim "as soon as is reasonably possible." The lower court granted summary judgment for Campbell and TBTA. National Union appealed. The First Department affirmed the lower court's grant of summary judgment.

On appeal, National Union argued that under *DiGuglielmo*, it was permitted to delay its disclaimer while it investigated other possible grounds for disclaiming, specifically that Campbell and TBTA were not in fact additional insureds under the excess policy. The First Department disagreed, and stated that it was declining to follow *DiGuglielmo* pursuant to the express language of Insurance Law § 3420(d)(2), prior holdings of the Court of Appeals, and public policy grounds.

The *Campbell* court held that the plain language of Insurance Law § 3420(d)(2) "cannot be reconciled with allowing the insurer to delay disclaiming on a ground fully known to it until it has completed its investigation (however diligently conducted) into different, independent grounds for rejecting the claim." The court further reasoned, "[i]f the insurer knows of one ground for disclaiming liability, the issuance of a disclaimer on that ground without further delay is not placed beyond the scope of 'reasonably possible' by the insurer's ongoing investigation of the possibility that the insured may have breached other policy provisions, that the claim may fall within a policy exclusion, or (as here) that the person making the claim is not covered at all."

The First Department also cited two prior Court of Appeals cases, which it found to be inconsistent with *DiGuglielmo*. In *Allstate Ins. Co. v. Gross*, 27 N.Y.2d 263, 317 N.Y.S.2d 309 (1970), the Court of Appeals held "[t]he literal language of the statutory provision requires prompt notice of disclaimer after decision to do so, and by logical and practical exclusion, there is imported the obligation to reach the decision to disclaim liability or deny coverage promptly too, that is, within a reasonable time." In *First Fin. Ins. Co. v. Jetco Contr. Corp.*, 1 N.Y.3d 64, 769 N.Y.S.2d 459 (2003), the Court of Appeals held "[t]he timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage." The First Department concluded "[i]n view of the foregoing, adhering to the *DiGuglielmo* rule would be tantamount to deliberately setting aside the rule promulgated

by the Court of Appeals (and flowing naturally from the language of the statute) that once the insurer has sufficient knowledge of facts entitling it to disclaim … it must notify the policy holder in writing as soon as is reasonably possible."

Finally, the *Campbell* court also held that *DiGuglielmo* must be abrogated on public policy grounds. It noted that the legislative intent that motivated the enactment of Insurance Law § 3420(d)(2) was "to expedite the disclaimer process, thus enabling a policyholder to pursue other avenues expeditiously."

In light of the ruling in *Campbell*, it is imperative that insurers handling claims in New York issue disclaimer letters as soon as reasonably possible once a viable basis to disclaim has been identified, even if alternate grounds for disclaimer are still under investigation.

To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact Vincent P. Pozzuto at vpozzuto@cozen.com or 212.908.1284.