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New York's Highest Court Holds Untimely Disclosure Is Not an Untimely Disclaimer

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- Insurance Reinsurance & Surety
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- 2nd Circuit (incl. bankruptcy)

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The defendant, Preferred Contractors Insurance Company Risk Retention Group LLC (PCIC), is a risk retention group charted in Montana and doing business in New York. PCIC issued a CGL policy naming defendant Nadkos Inc. as an additional insured for liability related to the ongoing operations of the subcontractor and other members of the risk retention group. PCIC disclaimed coverage for Nadkos for an underlying personal injury action by an employee of Nadkos' subcontractor based on policy exclusions. Nadkos filed a declaratory judgment action.

Nadkos maintained that PCIC's disclaimer was untimely, and thus void pursuant to New York Insurance Law section 3420(d)(2)'s timely disclaimer requirements. In moving for summary judgment, PCIC argued that section 3420(d)(2) is inapplicable to a non-domiciliary risk retention group. Nadkos cross-moved, asserting that New York Insurance Law section 2601(a)(6) — which undisputedly applies to foreign risk retention groups — cross-references section 3420(d) and therefore subjects PCIC to section 3420(d)(2). The trial court granted PCIC summary judgment, dismissing the complaint, and made a declaration in favor of PCIC. The Appellate Division affirmed, holding that "an insurance coverage disclaimer is not a disclosure of coverage within the meaning of Insurance Law § 2601(a)(6), and therefore section 3420(d)(2) does not apply to [non-domiciliary] PCIC."

Insurance Law section 2601(a) lists various business practices that may constitute

unfair settlement practices — including "failing to promptly disclose coverage pursuant to Insurance Law §§ 3420(d)". Section 3420(d)(2) provides that if "an insurer shall disclaim liability or deny coverage ... it shall give written notice as soon as is reasonably possible". "[F]ailure to timely disclaim liability or deny coverage is considered an unduly delayed notice that results in per se prejudice to the insured and limits the defenses an insurer could raise against an insured's claim."

The question faced by the New York Court of Appeals was whether the reference to an insurer's failure "to promptly disclose coverage" in section 2601(a)(6) includes the timely disclaimer requirement of section 3420(d)(2). The court found that it did not: "[T]he prohibition on an unfair claim settlement practice based on a failure to promptly disclose coverage encompasses the mandates of section 3420(d)(1), not (d)(2)."

According to *Black's Law Dictionary*, the term "disclose" generally means "to make something known or public; to show something after a period of inaccessibility or of being unknown; to reveal." However, the term "disclaim" is "to state, usually formally, that one has no responsibility for, knowledge of, or involvement with something; to make a disclaimer about, to renounce or disavow a legal claim to." Relying on these definitions, the court reasoned:

> By requiring insurers to confirm the existence of an applicable liability policy and to specify the limits of its coverage, the requirement in section 3420(d)(1) falls within the general meaning of a disclosure. Conversely, an insurer does not disclose coverage by merely notifying the insured that it is not liable or will not provide coverage — a notification required by section 3420(d)(2).

A look into the legislative history of sections 3420 and 2601 further supported the court's conclusion. Notwithstanding a lengthy dissent, the decision was affirmed.

Nadkos, Inc. v. Preferred Contractors Ins. Co. Risk Retention Grp. LLC, No. 37, 2019 N.Y. Slip. Op. 04641 (June 11, 2019)