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# Coverage Counsel and Personal Injury Lawyers: Perhaps Not Such Strange Bedfellows

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Comprehensive General Liability or Commercial General Liability (CGL) coverage provides broad insurance for claims against an insured alleging, among other things, bodily injury. A CGL insuring agreement will typically obligate the insurer to defend the insured in a lawsuit or to pay the costs of litigation, and to pay the judgement or settlement imposed on the policyholder.

Whether an alleged tortfeasor has this coverage often is one of the first and most fundamental inquiries made by plaintiff's counsel when assessing a new case. A severely injured prospective client and seemingly clear liability on the part of the prospective defendant may become far less appealing to plaintiff's counsel in the absence of this coverage. It may ultimately mean litigating a case for years through trial only to be left with an uncollectible judgment. This is one of the reasons why New York State's Preliminary Conference Order form requires defendants to disclose the existence and limits of potentially available insurance.

Even if an alleged tortfeasor has CGL coverage, injured plaintiffs generally do not have a direct cause of action against the tortfeasor's insurer. *Lang v. Hanover Ins. Co.*, 3 N.Y.3d 350, 357 (2004) (quoting *Jackson v. Citizens Cas. Co.*, 277 N.Y. 385 (1938)). This means that an injured plaintiff must rely on the alleged tortfeasor to comply with its policy obligations on which coverage is contingent and to reasonably dispute an insurer's denial of its defense and indemnity obligation. If it turns out that the tortfeasor does not do so, then a plaintiff can be left with an uncollectible judgment even when the tortfeasor had sufficient coverage limits to fund the settlement or judgment.

Almost one century ago, the New York legislature sought to remedy this perceived injustice with the enactment of N.Y. Insurance Law §3420. It provides that insurance policies issued in New York must include a provision "that the insolvency or

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bankruptcy of the person insured, or the insolvency of his estate, shall not release the insurer from the payment of damages for injury sustained or loss occasioned during the life of and within the coverage of such policy or contract." N.Y. Ins. Law §3420(a)(1). This statute grants an injured party a direct cause of action against the tortfeasor's insurer in a limited circumstance—"the injured party must first obtain a judgment against the tortfeasor, serve the insurance company with a copy of the judgment and await payment for 30 days." *Lang*, 3 N.Y.3d at 354. As described by Chief Judge Benjamin Cardozo:

> The effect of the statute is to give to the injured claimant a cause of action against an insurer for the same relief that would be due to a solvent principal seeking indemnity and reimbursement after the judgment had been satisfied. The cause of action is no less but also it is no greater. Assured and claimant must abide by the conditions of the contract.

*Coleman v. New Amsterdam Cas. Co.*, 247 N.Y. 271, 275 (1928).

However, New York practitioners should be aware that there is an exception to the requirement that an injured party must first obtain a judgment against the tortfeasor before a direct action can be brought against the insurer. This exception provides that there is no "judgment requirement" when the insurer brings a declaratory judgment action against its insured seeking a declaration of no coverage and names the injured plaintiff as a defendant/necessary party in that action. See, *e.g.*, *U.S. Underwriters Ins. Co. v. Zismopoulos*, No. 07-CV-4684 (CBA) (RLM), 2010 WL 1286221, at *2 (E.D.N.Y. March 31, 2010) ("However, the standing requirement is waived [when the injured parties are named] as defendants in the lawsuit; thus, 'as party defendants in the action, [the injured parties are] thereby allow[ed] … to contest the issue of coverage[.]'" (citing *Putnam Realty v. Ins. of N.Y.*, 828 N.Y.S.2d 394 (App. Div. 2007) (an injured party named in the declaratory judgment action has standing to contest coverage); *Maroney v. N.Y. Central Mut. Fire Ins. Co.*, 5 N.Y.3d 467 (2013) ("Because the insurer joined the insured in seeking a declaration of its rights … Insurance Law §3420 does not preclude consideration of the coverage issues in this case.")).

This exception was most recently reaffirmed by the Southern District of New York in *MIC General Insurance Co. v. Chambers*, Case No. 1:15-cv-03324 (S.D.N.Y. 2016). That declaratory judgment action stemmed from an underling lawsuit alleging personal injuries at a premises owned by the insured. MIC insured that premises, denied coverage, and then brought a declaratory judgment action against its insured and the underlying personal injury plaintiff seeking a declaration that it was not obligated to defend or indemnify the insured for the injuries sustained and allegedly caused by the insured's negligence.

Two of the three insureds did not appear in that action and the third appeared pro se. However, the injured plaintiffs retained coverage counsel to litigate the propriety of MIC's coverage denial as a result of being named defendants in MIC's case which, if successful, would benefit the injured plaintiff and the alleged tortfeasor. MIC and the injured plaintiff promptly moved for summary judgment respecting MIC's denial of any coverage obligation.

Citing *Lang v. Hanover Insurance Co.,* 3 N.Y.3d 350 (2011), MIC argued that the injured plaintiff lacked standing to bring a counterclaim because "under Section 3420 of New York Insurance Law, an injured person may not bring a declaratory judgment action against an insurer until he first obtains judgment against the tortfeasor." The court disagreed, holding that although an underlying injured party "ordinarily" lacks standing to bring a declaratory judgment against an insurer until there is a judgment against the tortfeasor, "[the] requirement is 'waived' when the injured party is named "as [a] defendant[] in the lawsuit.'" *Id.* (citations omitted). It ultimately denied MICs motion for summary judgment and granted the injured plaintiff's motion for summary judgment, declaring that MIC had both the duty to defend and indemnify its insured as a matter of law.

This often overlooked exception provides an injured party with an avenue to coverage or, at the very least, an avenue to contest the denial of coverage. Personal injury lawyers should be working closely with coverage counsel anytime their client is put in a defensive posture by a tortfeasor's insurer in a declaratory judgment action.

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