NY Ruling Highlights Need For Specific Insurance Disclaimers

By **Dan Kohane** (April 28, 2023)


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In New York, there are insurers that prefer not to send actual copies of detailed disclaimer letters to anyone other than their insureds, instead opting to send separate abbreviated versions to the injured party and other potential claimants.

While there is no statutory requirement to send actual copies of disclaimer letters to the injured party, a failure to do so is now riskier than ever before.

In a March 23 decision in Bahnuk v. Countryway Insurance Co., [1] the New York Appellate Division, Third Department criticized an insurer who sent a separate letter without "a high degree of specificity." It struck down the disclaimer.

In addition, the court questioned whether a confessed consent judgment may be offensive to a "sense of justice and propriety" and thus subject to collateral attachment as unenforceable.

The New York disclaimer statute is well known to coverage practitioners. Section 3420(d)(2) of the Insurance Law provides:

If under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant.[2]

It is well established that a failure to comply with the statute's dictates, when an insurer is denying coverage in whole or in part based on a liability policy exclusion or breach of policy condition, in a matter involving a New York accident which caused bodily injury or wrongful death, renders the disclaimer invalid. Accordingly, an insurer that could have justifiably relied upon a policy exclusion or breach of condition, faces a challenge to the effectiveness of its disclaimer. Noncompliance is often fatal to the effective denial of coverage in that situation.

Correspondingly, the use of reservation of rights letters, in lieu of full or partial disclaimer letters, so often used throughout the nation, may not protect the insurer from a failure to comply.

How detailed is detailed enough? The court is suggesting that the injured party has the same right to understand the reason for a disclaimer as does the insured. And that makes sense.

Let us review the facts. Paul Bahnuk, the injured plaintiff, was an EMT. He was injured when responding to a call at a residence and then sued Pauline Williams, the property owner. Williams had a homeowners policy with Countryway Insurance Co. and the carrier was asked to defend and indemnify Williams under that policy.

The insurer refused to defend, and the insured was left to defend for herself. Fearful of

personal liability, she entered into a consent judgment with the plaintiff under which the plaintiff promised to seek only the $100,000 policy limit from the insurer and guarantee the defendant freedom from personal liability.

In a lengthy and detailed letter to its policyholder, Williams, Countrywide disclaimed, relying on, among other grounds, a policy argument that the property did not meet the definition of "residence premises" or "insured location." It also advised the insured that it was denying coverage based on a business pursuits exclusion.

Countrywide did not send a copy of that disclaimer letter to Bahnuk. In most cases, when an insurer is relying upon policy exclusions or breaches to deny coverage in whole or in part, it simply sends a carbon copy of the disclaimer letter to the plaintiff or the plaintiff's attorney — and to others who may have cross-claims against its insured — to satisfy the statutory requirement to notify the injured party of the reason for the disclaimer.

The statute does not specifically require that the same letter be sent to the injured party, only that the insurer give written notice, as soon as is reasonably possible, of such disclaimer of liability or denial of coverage to the insured, the injured person and any other claimant. But detail is required and that makes sense.

Countrywide chose to write a bare-bones, three-paragraph letter to the injured party's attorney, stating:

This will acknowledge receipt of your letter to Pauline Williams, dated December 7, 2012, which was received by our office on March 20, 2013. We are also in receipt of a copy of the suit that was filed against Pauline Williams in the Supreme Court of New York, County of Broome. As you may already be aware, we provided Pauline Williams with a Homeowner's policy . . . with effective dates of June 12, 2011, to June 12, 2012.

Please be advised that there is no coverage available for the above referenced date of loss under Pauline William's Homeowners policy with Countryway Insurance Company. The premises . . . does not meet the definition of an "insured location" within the meaning of the policy. As such, we are denying your claim in its entirety.

If you have any questions, please feel free to contact me.

First, the insurer did not discuss the "business pursuits" or "residence premises" exclusion in its letter to the injured party's lawyer and waived those grounds for denial.

The case law in New York is quite clear: A failure to articulate the basis for a disclaimer based on an exclusion in a case governed my Insurance Law 3420(d)(2) statutorily waives the carrier's right to rely upon that coverage defense.

As the insurer made no mention at all in its letters to plaintiff of any policy exclusions concerning injuries arising out of a business conducted on the property or of the property's failure to meet the definition of "residence premises," thereby it waived its right to rely on such exclusions.

The court's lesson was clear and the message, I believe, is consistent with the statutory intent. Put meat on the bones — give the claimant and others enough information about the reasons for the coverage denial so that those parties understand the reason and decide whether they want to challenge the coverage denial.

Here, while the court noted that the insurer did mention the insured location exclusion in its letter, it provided no specificity as to why the exclusion was applicable. There were eight different definitions of "insured location" and the claimant was left to guess as to the insurer's message.

As for the exclusion based on the property not qualifying as an "insured location," while defendant did reference this exclusion in its letter to Williams, it failed to provide any additional information as to why the property did not satisfy that definition. In that regard, we note that, pursuant to the policy, the term "insured location" carries eight distinct definitions. In the absence of a more detailed explanation, plaintiff could not have been expected to know from the language in the letter why coverage was being disclaimed under this broad term.[2]

The simple solution would have been to send the parties the same letter as was sent to the insured. It is unclear why the insured chose this alternative method, and I have learned that the letter's signatory is no longer employed with Countryway, so we may never know.

There is no requirement that the same letter be sent but insurers need to understand how important specificity of disclaimer grounds is to preserve the coverage defense. Any other message to the insured that the carrier does not want to share with the injured party can be set out in a separate letter.

Now how about that consent judgment? Unusual? No. When a plaintiff's attorney believes that an insured's only viable assets are proceeds from a liability policy, it is relatively common for counsel to "set up" the carrier by agreeing to a judgment, not coincidentally matching the liability limits of $100,000. Why a judgment and not just an agreement? With a judgment, the plaintiff-turned-judgment-creditor can pursue a direct action against the defendant's insurer, without the necessity of an assignment of rights under the policy.[3]

There are certainly some judgments that may be exaggerated, unjustified and subject to collateral attack. In this case, the court affirmed a finding from the lower court that there was a "triable issue of fact with respect to whether the confessed judgment was the product of collusion between plaintiff and Williams."

Whether this judgment was collusive enough to be unenforceable was not clear but the advice that we can learn from the decision is surely clear. If a judgment is going to be entered, it must be supported and supportable by the underlying facts. Is it necessary for a court to render a verdict that justifies the amount of the judgment? Had that happened in this case, it is less likely that the matter would have been remanded for a fresh look at the $100,000 judgment.

The parties need to do what they can to establish that the judgment did not amount to "fraud, misrepresentation, or other misconduct practiced on the court" to render the judgment a nullity.

Surely, a judicial determination of a reasonable judgment, after at least bare-bones discovery, would carry greater weight than an agreement between the parties. A default judgment with an assessment by the court followed by an agreement not to enforce it against the defendant is a safer option than a confessed judgment.

The court recognized that the confession does not necessarily mean that something untoward took place in the negotiations, where the plaintiff, because of his injuries, underwent a surgery and multiple hospitalizations and missed approximately 30 weeks of

work, incurring a workers' compensation lien of more than $60,000.

This does not signal the end of confessed judgments, but this case gives insurers an avenue of challenge. Surely, some confessed judgments of policy limits are excessive, not reflective of true values. This case gives the insurer an opportunity to challenge those that may be, or at least appear to be, nothing more than set-ups designed to squeeze more money out of an insurer's pocket than that which is fair.

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[1] Bahnuk v. Countryway Ins. Co., 2023 NY Slip Op 01554 (App. Div.).

[2] Id.

[3] Insurance Law § 3420(a)(2).