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Declaratory Judgment Actions: A Question of Standing

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Although declaratory judgment actions (DJs) are recognized as an effective mechanism to determine whether an insurer is obligated to defend or indemnify an insured for liability arising from a particular incident,[1] there is a conflict among the courts as to who has standing to prosecute such an action. Is the declaratory judgment action remedy available only to the insured, who is in direct privity with the insurer, or may a third-party/stranger to the insurance contract, such as, most particularly, an injured claimant, seek to enforce his or her rights against an applicable insurance policy in such an action?

As will be demonstrated below, the answer to this question may depend upon where the DJ action is brought because there is a difference of opinion among the Appellate Division, Second Department and the other departments in the state. Although the federal district courts have recently attempted to predict how the New York Court of Appeals would decide this issue, that question has not been certified and the Court of Appeals has not yet directly spoken on this subject. As will be seen, however, the Court of Appeals may, indeed, have already provided some clues to divining its intentions in this regard.

The Statutes

CPLR 3001, entitled "Declaratory Judgment," provides that "The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed."

Insurance Law §3420(a)(2) requires every insurance policy or contract to contain a provision that in case judgment against the insured shall remain unsatisfied for 30 days after serving the notice of entry, "an action may ... be maintained against the insurer under the terms of the policy or contract for the amount of such judgment." Insurance Law §3420(b)(1) then goes on to provide that, subject to the conditions of §3420(a)(2), an action may be maintained by any person who has "obtained a judgment against the insured ... for damages for injury sustained or loss or damage occasioned during the life of the policy or contract."

First Department

In *Clarendon Place Corp. v. Landmark Ins. Co.*,[2] the Appellate Division, First Department held that a third party, in the absence of a judgment against an insured, may not bring a declaratory judgment action against the insurer. The court noted that Ins. L. §3420 created a statutory cause of action on behalf of an injured third party against the insurer, which is in derogation of the common law and, thus, to be strictly construed, and, therefore, compliance with the statutory prerequisites of entry of a judgment and a 30-day waiting period are conditions precedent to such an action. Indeed, the court held that in the absence of a judgment against the insured, third parties to the contract have no rights against the insurer and that "[a]bsent any legally cognizable interest in the insurance contracts at issue, there is no justiciable controversy between [the third parties] and the insurers to give [them] standing to bring [the] action." Finally, the court noted that "[a]ny request for declaratory relief is premature if the standing for such an action is contingent on the happening of a future event which is beyond the control of the parties and may never occur."

The First Department has consistently followed the rationale expressed in *Clarendon* in more recent cases.[3]

Fourth Department

The Fourth Department was quick to pick up on and adopt the First Department's view of the issue, as expressed in *Clarendon,* supra. In *Hershberger v. Schwartz*,[4] the court affirmed the dismissal of a direct action against the insurer by injured persons on the stated ground that "Plaintiffs are strangers to the homeowner's insurance policy and may not seek enforcement of the insurer's obligation under the policy [citing *Clarendon,* supra]. Plaintiffs may commence a direct action against defendant's insurer only when a judgment has been rendered against the insureds and the judgment remains unsatisfied 30 days after entry (see Ins. L. §3420[a][2])." The Fourth Department, too, has consistently maintained this position over the years.[5]

Third Department

Although the position of the Third Department is somewhat less clear, it appears from the most recent case law that that court has aligned itself with the First and Fourth departments on this issue.

In *State of New York v. Federal Ins. Co.*,[6] a direct action against an insurer by an injured party, the Third Department, in dicta (and, in a footnote) cited, with approval, the First Department's decision in *Clarendon,* supra.

In *White v. Nationwide Mutual Ins. Co.*,[7] by contrast, the court stated that insofar as the injured person is the party most interested in the dispute as to whether the insurer owes a duty to defend and indemnify the underlying defendant, a DJ action "may be brought by the injured person against both [the insured and the insurer]." This statement did not contemplate the situation in which a judgment against the insured had already been obtained. Moreover, although the action was ultimately dismissed, the basis for the dismissal was the failure by the injured party to include the insured, a necessary party, in the action, and not any claim of a lack of standing by the injured party to bring the action in the first place.

Most recently, however, in *Lang v. Hanover Ins. Co.*,[8] the Third Department dismissed a declaratory action brought by an injured party on the ground of a lack of

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standing. As stated by the court, "Plaintiff is a stranger to the subject insurance policy. This being the case, Insurance Law §3420(a)(2) authorizes an action by plaintiff against Hanover only after he obtains a judgment against [the insured] that has gone unpaid for 30 days [citing inter alia, *Clarendon*, supra, and the dicta in *State of New York v. Federal Ins. Co.*, discussed above.

Second Department

In a significant break from the other departments, the Second Department has permitted third parties to bring DJ actions against insurers to determine whether the insurer owes a duty to defend and/or indemnify even in the absence of a judgment against the insured.

In *Costa v. Colonial Penn Ins. Co.*,[9] the Second Department held that "a party who is not privy to an insurance contract but would nevertheless stand to benefit from the insurance policy may bring a declaratory judgment action to determine whether the insurer owed a defense and/or coverage under the policy." Accordingly, the court held that the injured party/stranger to the insurance contract had standing to maintain the action, citing with a "cf." the decisions of the First Department in *Clarendon*, supra, and *Mount Vernon Fire Ins. Co.*, supra.

In *Tepedino v. Zurich-American Ins. Group*,[10] the court repeated its holding in *Costa*, supra, and added that "a declaratory judgment action against insurers with respect to jural relations, either as to present or prospective obligations, is permitted prior to entry of judgment in the underlying action."[11]

In *Watson v. Aetna Cas. & Sur. Co.*,[12] the Second Department specifically rejected the First Department's decision in *Clarendon*, supra (as well as the decisions in the First and Fourth departments that followed it), which it criticized as "not supported by the language of the statute" and "overly rigid." Explaining why, in its view, a third party, even absent a judgment against an insured, may bring a DJ action against an insurer, the court stated that "we read Insurance Law §3420 as prohibiting, by its plain terms, only a direct cause of action to recover money damages, and not prohibiting a declaratory judgment action by the plaintiff in the underlying tort action seeking a declaration that a disclaiming insurance company owes a duty to defend or indemnify the tortfeasor." Since that case, in which the injured party sought a determination of whether the insurer must defend and indemnify its insured, presented "a genuine dispute that is justiciable, ... insofar as the plaintiff would stand to benefit from the policy," the court held that it was "surely presented with a real controversy involving substantial legal interests,' " and, thus, a proper issue for a DJ.[13]

Federal Court Decisions

Noting the existence of varying opinions among the several state appellate courts and the at-least perceived failure by the Court of Appeals to address this schism, the federal district courts have attempted to predict how the Court of Appeals would rule on this issue.

In *deBryne v. Clay*,[14] the U.S. District Court for the Southern District of New York concluded that the injured plaintiff could maintain an action against the insurer despite the absence of a judgment in the underlying action. However, the court qualified the scope of the issues it considered and decided more narrowly to encompass the particular fact that the insurer had itself brought a DJ action in the state court denying coverage. The court stated that "the policy considerations that support the provision of state law that an injured party may not sue a tortfeasor's insurance carrier for a declaration that the carrier had a duty to indemnify do not necessarily apply where the carrier itself instituted a declaratory judgment action to resolve that issue."

In *Richards v. Select Ins. Co., Inc.*,[15] the court declined to follow *deBryne*, supra, and rejected the plaintiff's contention, based upon the Second Department case law, that his action for declaratory action should be allowed. After noting the split among the departments, the court held that the analysis of the First Department in *Clarendon*, supra, was the "more persuasive" insofar as, in the court's view, it was "consistent with both the statute's history ... and with declaratory judgment jurisprudence in general."[16]

It appears that the Court of Appeals has allowed DJ actions brought by injured parties who had not yet obtained judgments against the defendants/insureds.

In *Bluestein & Sander v. Chicago Ins. Co.*,[17] the court stated that "it is well-settled that the declaratory judgment mechanism may be used to address coverage issues even though the underlying tort claimant has not yet reduced his claim against the insured to judgment." The significance of this broad general statement may be tempered somewhat by the fact that the case before the court involved a DJ action by the insured, and not by the injured party.

In *Travelers Property Casualty Corp. v. Winterthur International*,[18] the court noted that the federal courts in this circuit have adopted the view of the First and Fourth departments "both because the greater weight of the state authority was with" those departments, "and because their reasoning better comports with the plain language of §3420."

More recently, in *Vargas v. Boston Chicken, Inc.*,[19] the court, after carefully analyzing the reasons for the different positions taken by the courts on the issue, concluded that "the First Department's reasoning is more persuasive" because: (1) "requiring a third party to obtain a judgment against an insured before commencing an action against an insurer is consistent with the express language and plain meaning of Section 3420;" (2) "the First Department's analysis is consistent with the legislative history of Section 3420;" (3) "the First Department's analysis is consistent with the district courts within this circuit that have addressed this issue;" and (4) "the First Department's analysis is consistent with the jurisprudence concerning declaratory judgments."

Finally, most recently, in *Brady v. United Airways Group*,[20] the court held that "New York State Insurance Law is clear in its requirement that there must first be an event upon which an insurance carrier is called upon to pay before a stranger may bring a direct action against the carrier.... Moreover, the weight of Appellate Division authority leans in favor of this view adopted by the First and Fourth Departments."

Court of Appeals

Notwithstanding all of the pronouncements concerning the failure by the Court of Appeals to address this issue, it does appear that while the Court may not have specifically and/or directly expounded on the subject, it has, in fact, allowed DJ actions brought by injured parties who had not yet obtained judgments against the defendants/insureds.

In *Lalomia v. Bankers & Shippers Ins. Co.*,[21] the injured parties, who were strangers to the insurance contract with the underlying defendants, brought a DJ action seeking to establish that the underlying defendants were covered for the subject accident. The Supreme Court held that coverage existed and entered a judgment declaring in favor of the plaintiffs. The Second Department modified the judgment, but still allowed for a determination of coverage by some of the insurers involved. The Court of Appeals affirmed. Most notably, none of the courts, including the Court of Appeals, rejected the plaintiff's claim on the basis of a lack of standing.

More recently, in *Slayko v. Security Mutual Ins. Co.*,[22] a victim of a shooting, who had not yet secured a money judgment against the shooter (despite having obtained a default judgment), brought a DJ action seeking a declaration that the defendant's homeowner's policy created a duty to defend and indemnify in the underlying action. Although it does not appear that the issue of standing was raised, the Court of Appeals determined the substantive issues. As aptly noted by attorney, Richard H. Bliss, in a Letter to the Editor of this paper on Aug. 4, 2003, insofar as this case came to the Court on appeal from a determination of cross-motion for summary judgment declaring coverage, "a procedural context which arguably would have permitted the court to search the record and grant judgment to the appealing insurer for the injured party's lack of standing," the failure of the Court to do so has significance.

Under the circumstances, it would no doubt be helpful if the Court of Appeals were to clarify its position by issuing an opinion formally and directly addressing the discrepancy between the departments and setting out a firm rule with respect to DJ actions by third parties to the contract. In the alternative, legislative clarification might be appropriate.

1. See Siegel, "New York Practice" (2dEd §437, at 665; 3 Weinstein-Korn-Miller, NY Civ Practice, §2001.22; see also *White v. Nationwide Mutual Ins. Co.*, 228 AD2d 940 (3d Dept. 1996)

2. 182 AD2d 6 (1st Dept. 1992), appeal dismissed and lv. to appeal denied, 80 NY2d 9 (1992).

3. See *Rodriguez v. JLF Properties Inc.*, 1 AD2d 211 (1st Dept. 1993) ("Plaintiff is a stranger to Liberty's insurance agreement with JLF, and is not a third-party beneficiary thereof. Accordingly, plaintiff's only remedy against Liberty arising out of the insurance agreement was by direct action against Liberty pursuant to Ins. L. §3420, which requires as a condition precedent that a copy of the judgment with notice of entry be served on the insurer"); *Mount Vernon Fire Ins. Co. v. Niba Constructing Inc.*, 195 AD2d 425 (1st Dept. 1993) (declaratory relief denied because the injured parties "have failed to satisfy a condition precedent to maintenance of a direct action against the contractor's insurer pursuant to Ins. L. §3420(a)(2) in that no judgment has yet been obtained against the contractor which has gone unsatisfied by plaintiff for 30 days"); *Abdalla v. Yehi*, 246 AD2d 373 (1st Dept. 1998) ("The defendant/third-party plaintiff was not the insured of the third-party defendant, and thus had no legally cognizable interest in the relationship between the co-defendant and his insurer [citing *Clarendon*, supra]. A stranger to an insurance agreement acquires no right to enforce the insurer's obligation until a judgment against the insured has been rendered and remains unsatisfied"); *Tower Ins. Co. v. Skate Key, Inc.*, 273 AD2d 158 (1st Dept. 2000) (same).

4. 198 AD2d 859 (4th Dept. 1993).

5. See also, *Sincerbeaux v. Nationwide Mutual Fire Ins. Co.*, 206 AD2d 907 (4th Dept. 1994); *University Garden Apartments, L.P. v. Nationwide Mutual Ins. Co.*, 284 AD2d 975 (4th Dept. 2001); *Northland Associates, Inc. v. Joseph Baldwin Construction Co., Inc.*, 6 AD3d 1214 (4th Dept. 2004).

6. 189 AD2d 4 (3d Dept. 1993).

7. 228 AD2d 940 (3d Dept. 1995).

8. 309 AD2d 1123 (3d Dept. 2003).

9. 204 AD2d 591 (2d Dept. 1994).

10. 220 AD2d 579 (2d Dept. 1995).

11. See also, *Halali v. Evanston Ins. Co.*, 24 AD2d 422 (2d Dept. 1997); *Abate v. All-City Ins. Co.*, 214 AD2d 627 (2d Dept. 1995); *Reliance Ins. Co. v. Garsant Bldg. Corp.*, 122 AD2d 128 (2d Dept. 1986).

12. 246 AD2d 57 (2d Dept. 1998).

13. See also, *Mortillaro v. Public Service Mutual Ins. Co.*, 285 AD2d 586 (2d Dept. 2001) ("plaintiff need not be in privity to an insurance contract to commence a declaratory judgment action to determine the rights and obligations of the respective parties, so long as the plaintiff stands to benefit from the policy.")

14. NOR 1997 WL 471039 (SDNY 1997).

15. 40 FSupp2d 163 (SDNY 1999).

16. See also, to the same effect, *NAP, Inc. v. Shuttletex, Inc.*, 112 FSupp 369 (SDN. 2000) ("this court believes the First Department's analysis is the more compelling"); cf. *Hartford Fire Ins. Co. v. Rutlaf*, 123 FSupp2d 762 (SDNY 2000) ("This court adopts the *NAP* and *Richard* analysis and concludes that the New York Court of Appeals would not allow an injured third party to intervene in a declaratory judgment action initiated by a marine insurer").

17. N.O.R., 2001 WL 167707 (SDN. 2001).

18. N.O.R., 2002 WL 1391920 (SDNY 2002).

19. 289 F.Supp.2d 92 (E.D.N.Y. 2003).

20. 2004 WL 1570264 (WDNY 2004).

21. 58 Misc2d 530 (Sup. Ct. Suffolk Co. 1968), modified, 35 AD2d 114 (2d Dept. 1970), aff'd 31 NY2d 830 (1972).

22. 98 NY2d 289 (2002).

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