INSURANCE LAW

Court of Appeals Decisions: 'Jinx-Proof' And 'Reservation of Rights Letters'

By **Norman H. Dachs** And **Jonathan A. Dachs**

In our last column,[1] we noted how busy the Court of Appeals was on Feb. 18 of this year dealing with a series of significant insurance law issues. Limited by space restrictions and noting the existence of several articles that had already been written about *K2 Investment Group v. American Guarantee & Liability Ins. (K2-II)*, 22 NY3d 578 (Feb. 18, 2014), we elected to write about *Country-Wide Ins. v. Preferred Trucking Services*, 22 NY3d 571 (Feb. 18, 2014), and to reserve to another day a discussion of *QBE Insurance v. Jinx-Proof*, 22 NY3d 1105 (Feb. 18, 2014), which deals with "reservation of rights" letters. This is that day.

One of the most well-established principles of New York Insurance Law is that reservation of rights letters get little respect in this state. The New York courts have consistently held that a letter in which an insurer simply reserves its rights to deny or disclaim coverage, but does not unequivocally deny or disclaim, "has no relevance to the question whether the insurer has timely sent a notice of disclaimer of liability or denial of coverage," and, thus, whether certain defenses to coverage have been waived. *Hartford Ins. v. County of Nassau*, 46 NY2d 1028 (1979). See also, *Strauss Painting v. Mt. Hawley Ins.* 105 AD3d 512 (1st Dept. 2013) (letters intended to preserve carrier's right to disclaim were insufficient to actually disclaim coverage); *Long Island Lighting v. Allianz Underwriters Ins.*, 104 AD3d 581 (1st Dept. 2013) (reservation of rights letter, which specifically reserved defense of late notice and sought additional information, did not preclude finding of waiver due to failure to timely issue a disclaimer); *Penn Millers Ins. v. C.W. Cold Storage*, 103 AD3d 1132 (4th Dept. 2013) (reservation of rights letter allowed insured to 'preserve its defense under the policy until the facts supporting disclaimer became clear,' but did not permit it "to unreasonably delay the exercise of those rights to the detriment of [the insured]").

Consistent with the foregoing, in *QBE Ins. v. Jinx-Proof*, 102 AD3d 508 (1st Dept. 2013), affd. 22 NY3d 1105 (2014), a rare 2-2-1 decision of the Appellate Division, one of the concurring justices in the First Department wrote that "the time within which to issue [a disclaimer or denial under Ins. L. §3420(d)(2)] cannot be extended by reserving the right to do so in the future." 102 AD3d at 509, n. 1 (Friedman, J., concurring). The dissenting justice wrote, in pertinent part: "A reservation of rights letter may be used to rebut a claim that the carrier waived the right to disclaim by defending its insured [citation omitted], but it does not qualify as a timely disclaimer and 'has no relevance to the question whether the insurer has timely sent a notice of disclaimer of liability or denial of coverage [citations omitted]." 102 AD3d at 514 (Andrias, J.).

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Instructive Case

Jinx-Proof was a declaratory judgment that arose out of an assault on the premises of a bar owned by Jinx-Proof. The individual assaulted, who was allegedly struck in the face by a glass thrown by a security guard employed by Jinx-Proof, brought suit against Jinx-Proof and the individuals involved in the assault in December 2007. Jinx-Proof notified its insurer, QBE of the suit on Jan. 28, 2008. Three days later, QBE responded with a letter that read in pertinent part, as follows:

> This company will promptly and diligently attempt to ascertain factual information to help us in establishing if this late notice has in any way handicapped our ability to investigate and defend this claim... As soon as we can obtain the information, you will be notified of our decision.
>
> Furthermore, we are making this reservation of rights because your policy specifically excludes coverage for actions and proceedings to recover damages for bodily injuries arising from assault and batteries....Consequently...*QBE Insurance Company will not be defending or indemnifying you under the General Liability portion of the policy for the assault and battery allegations. Accordingly, we suggest that you consult an attorney in order to protect your interests and provide a defense for the assault and battery claim.* [Emphasis added].

On Feb. 26, 2008, QBE sent another letter to its insured, stating: "[W]e are defending this matter under the Liquor Liability portion of the CGL coverage, and under strict reservation of rights for allegations of Assault and Battery. Your policy excludes coverage for assault and battery claims.... Therefore, should this matter proceed to verdict, any awards by the Court stemming from allegations of Assault and Battery will not be covered under your Commercial General Liability policy."

After the underlying plaintiff's claims against Jinx-Proof for negligent hiring, supervision and training, and violation of the Dram Shop Act were dismissed on summary judgment, QBE commenced its declaratory judgment action seeking a declaration

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'Jinx-Proof'

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that it was not obligated to defend or indemnify Jinx-Proof in the underlying action. The Supreme Court granted QBE's motion for that declaration, finding that "the underlying incident falls within the assault and battery exclusion of the insurance policy" and that the Jan. 31, 2008, and Feb. 26, 2008, letters served as effective written notices of disclaimer.

Appellate Division

In voting to affirm the Supreme Court's order, Appellate Division Justices David Friedman and Nelson Román wrote, in pertinent part, that "QBE's use of the term 'reservation of rights' in the letters upon which it relies should not be deemed to negate its otherwise clear and unambiguous disclaimer of coverage of claims falling within the policy's assault and battery exclusion because, at the time the letters were issued, QBE was, in fact, obligated to defend even claims falling within exclusion, and had no right simply to wash its hands of such claims by issuing a disclaimer."

In also voting in favor of affirmance, in a separate concurring opinion, Justices John Sweeny and Sallie Manzanet-Daniels opined that "the disclaimers, issued three days and one month after receipt of notice from the insured, were timely. Moreover, the letters, taken individually and collectively, apprised the insured in no uncertain terms that coverage was barred by the assault and battery exclusion contained in the policy."

As these justices further explained, "Although 'reservation of rights' language may have appeared in the letters, the letters clearly state that 'QBE Insurance Company will not be defending or indemnifying you under the General Liability portion of the policy for the assault and battery allegations,' and 'should this matter proceed to verdict, any awards by the Court stemming from allegations of Assault and Battery will not be covered under your Commercial General Liability policy.' Such statements cannot be construed by a reasonable person as anything other than a disclaimer of coverage on the ground of the exclusion for assault and battery. Notwithstanding the allegedly 'contradictory' language, the letters 'specifically disclaimed coverage and sufficiently informed the defendants [of the basis for] the disclaimer (see *Blue Ridge Ins. v. Jiminez*, 7 AD3d 652, 653 [2004] [disclaimer effective notwithstanding fact that letter purported to reserve rights as well as to disclaim coverage])."

By contrast, in his dissenting opinion, Justice Richard Andrias wrote that he did not believe that either the Jan. 31, 2008, or Feb. 26, 2008, letters, both of which were styled by QBE as "reservation of rights," could serve as written notice of disclaimer of coverage of the assault and battery-based claims asserted against Jinx-Proof in the underlying action. Rejecting the conclusion that the "reservation of rights letters" served as effective written notices of disclaimer, Andrias observed that "A notice of disclaimer should be 'unequivocal [and] unambiguous written notice, properly served' (*Norfolk & Dedham Mut. Fire Ins. v. Petrizzi*, 121 AD2d 276, 277 [1st Dept. 1986], lv denied 68 NY2d 611 [1986])."

In the dissenter's view, the Jan. 31, 2008, letter was clearly a reservation of the right to disclaim, and not a disclaimer. Support for this view was found in the letter's advice to the insured that "[b]ased on the information presently available to us, *it is possible* your policy with our company may not provide coverage," and that "*we are making this reservation of rights* because your policy specifically excludes coverage for actions and proceedings to recover damages for bodily injuries arising from assault and batteries [emphasis added]."

As for the Feb. 26, 2008, letter, the dissenter noted that it confirmed that the earlier letter was a reservation of rights, stating that "[a]s previously stated in our reservation of right letter to you dated January 31, 2008 we are defending this matter under the Liquor Liability portion of the CGL coverage, and under strict reservation of rights for allegations of Assault and Battery." Moreover, in its verified complaint in the declaratory judgment action, QBE described the Feb. 26, 2008, letter as a "reservation of rights letter," and QBE's counsel stated in an affidavit that QBE "did not issue a denial." These constituted "judicial admissions" in Andrias' view, which should not simply have been ignored. Thus, he concluded that "neither of [QBE's] admitted reservation of rights letters, which contain contradictory and confusing language, can be construed as an unequivocal and unambiguous disclaimer of coverage."

> The lesson of 'Jinx-Proof' is that an insurer that wants to deny or disclaim coverage—even in a situation where it is obligated to defend some, but not all, causes of action—must do so in unequivocal language.

Court of Appeals Decision

In affirming the order of the Appellate Division, by a 5-2 majority, the Court of Appeals held that the courts below properly determined that QBE effectively disclaimed coverage for the assault and battery claims asserted in the underlying action. Specifically, the majority (Judges Victoria Graffeo, Susan Read, Robert Smith, Jenny Rivera and Sheila Abdus-Salaam) noted that the Jan. 31, 2008, letter stated that QBE would not defend or indemnify Jinx-Proof "under the General Liability portion of the policy for assault and battery allegations" and that Jinx-Proof did not have liquor liability coverage. The Feb. 26, 2008, letter stated that Jinx-Proof did have liquor liability coverage but that the policy excluded coverage for assault and battery claims.

In the view of the majority, "Although the letters contained some contradictory and confusing language, the confusion was not relevant to the issue in this case. The letters specifically and consistently stated that Jinx-Proof's insurance policy excludes coverage for assault and battery claims. These statements were sufficient to apprise Jinx-Proof that QBE was disclaiming coverage on the ground of the exclusion for assault and battery, and the disclaimer was effective even though the letters also contained 'reservation of rights' language (see e.g., *Blue Ridge Ins. v. Jiminez*, 7 AD3d 652, 653 [1st Dept. 2007])."

In their dissenting opinion, Chief Judge Jonathan Lippman and Judge Eugene Pigott wrote that QBE's two letters "do not communicate the requisite unequivocal written notice of disclaimer, and therefore do not constitute disclaimers of coverage." The "contradictory and confusing language" contained in both letters "simply cannot serve to properly advise an insured of his rights and remedies under the policy." Rather, the dissenters argued, these ambiguities must be construed in the insured's favor, and, therefore, these letters cannot be treated as a disclaimer, which must be "unequivocal" and "unambiguous." Simply stated, according to the dissenting judges, "A letter that describes itself as a 'reservation of rights letter' but contains expressly contradictory language suggesting disclaimer is not a valid disclaimer."

Lippman and Pigott added that a reservation of rights reserves arguments for another day, whereas a disclaimer is required to "apprise the claimant with a high degree

of specificity of the ground or grounds on which the disclaimer is predicated" (*General Accident v. Cirucci*, 46 NY2d 862, 864 [1979]). Thus, they concluded that QBE did not timely disclaim in this case, and was, therefore, required to provide a defense and indemnity to its insured.

The lesson of *Jinx-Proof* is that an insurer that wants to deny or disclaim coverage—even in a situation where it is obligated to defend some, but not all, causes of action—must do so in unequivocal language. Disclaimers should be specific and definite, and should avoid speculative, hypothetical and/or future-looking language, or mere threats to act. Referring to a disclaimer as a reservation of rights when it is, in fact, a disclaimer, can only cause unnecessary confusion—and litigation. This should obviously be avoided, unless in fact, the letter is intended simply to reserve the insurer's rights while it is defending an action on behalf of its insured, and thus avoid an estoppel argument down the road.

More Insurance Decisions

Feb. 18, 2014, was not the only busy day for the court with regard to insurance cases. Indeed, the court has decided several other interesting and important insurance cases in 2014—see e.g., *Executive Plaza, LLC v. Peerless Insurance Company*, 22 NY3d 511 (Feb. 13, 2014) (holding two-year limitation to bring suit in fire insurance policy unenforceable where policy required replacement of destroyed property before payment, but property could not be replaced within two years); *Voss v. The Netherlands Ins. Co.*, NY3d_, 2014 N.Y. Slip Op. 01259, 2014 WL 696528 (Feb. 25, 2014) (holding, inter alia, that insurance broker did not satisfy initial burden of establishing absence of material issue of fact as to existence of a "special relationship" pursuant to which it could be held liable for failing to advise or direct client to obtain additional coverage); and *Preferred Mutual Ins. Co. v. Donnelly*, NY3d_, 2014 N.Y. Slip Op. 02328, 2014 WL 1315583 (April 3, 2014) (holding that insurer met burden of establishing mailing of notice of lead exclusion amendment of policy via submission of evidence of standard office practice or procedure designed to insure that items were properly addressed and mailed).

In addition, we take note of the fact that leave to appeal has been granted recently in several other interesting and important cases, which will, in all likelihood, be heard and/or decided in 2014, including *Nesmith v. Allstate Ins. Co.* 103 AD3d 190 (4th Dept. 2013), lv. to appeal granted 21 NY3d 866 (Sept. 17, 2013) (involving the issue of the applicable coverage limits for two children exposed to lead paint in the same apartment during two different tenancies, the definition of "occurrence," and the effect of the policy's non-cumulation clause); *Sierra v. 4401 Sunset Park, LLC*, 101 AD3d 983 (2d Dept. 2012) lv. to appeal granted 22 NY3d 854 (Oct. 22, 2013) (involving the issue of whether, where an insurer tenders a claim for defense and indemnification to another insurer, on behalf of its insured, the second insurer must, pursuant to Ins. L. §3420(d), provide written notice of disclaimer to the insureds, rather than just to the tendering insurer); and *State Farm Mut. Auto. Ins. Co. v. Fitzgerald*, 112 AD3d 166 (2d Dept. 2013), lv. to appeal granted NY3d_, 2014 N.Y. Slip Op. 68083, 2014 WL 1281953 (April 1, 2014) (involving the issue of whether a "police vehicle" may be deemed a "motor vehicle" in the context of a police officer's personal supplementary uninsured/underinsured motorist [SUM] endorsement).

Thus, it appears that there will be no shortage of material for future articles on the Court of Appeals' recent insurance law decisions.

1. Dachs, N. and Dachs, J., "Court of Appeals Clarifies Timeliness of Non-Cooperation Disclaimer," N.Y.L.J., March 11, 2014, p. 3, col. 1.