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# The Consequences of Not Giving Notice of Disclaimer to Additional Insureds

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Statutes and case law make it tough for insurance companies to disclaim coverage. In most jurisdictions, if an insurance company receives a claim or tender it must respond quickly and with specificity to avoid losing the right to assert an exclusion or other basis to deny coverage. Where the notice of claim comes in from a policyholder, the insurance company–if it chooses to disclaim coverage–simply notifies the policyholder in a timely manner of the basis for the disclaimer. Things get a bit more complicated when there are multiple additional insureds and the claim arises out of a construction project. To whom is the disclaimer owed?

In a recent case, a New York intermediate appellate court, addressed the consequences of not giving notice of a disclaimer to additional insureds.

In *AVR-Powell C Development Corp. v. Utica First Insurance Co.*, No. 2016-11075 (N.Y. App. Div. 2d Dep't Jul. 24, 2019), a subcontractor's employee was allegedly injured while working on a construction site. The subcontractor obtained commercial general liability insurance, which also named the owner/general contractor and another related company as additional insureds. The owner/general contractor and its affiliates had their own general liability policy.

When the worker brought a claim against the additional insureds, the additional insureds' insurer tendered the worker's claim to the subcontractor's insurer. The subcontractor's insurer disclaimed coverage based on the employee exclusion in a letter sent to the subcontractor. After the worker commenced a personal injury action, the additional insureds insurer tendered the lawsuit to the subcontractor with a copy to the subcontractor's insurer. The subcontractor's insurer again disclaimed coverage based on the employee exclusion, but this time to the additional insureds' insurer. Prior to trial, 6 years later, the additional insureds advised the subcontractor's insurer that its disclaimer was ineffective because it was not sent to the additional insureds and made a renewed demand for coverage. The subcontractor's insurer rejected the invalidity claim and, after receiving a copy of the subcontract, disclaimed directly to the additional insureds.

The additional insureds brought a coverage action against the subcontractor's insurer and moved for summary judgment. The motion court granted the motion for summary judgment against the subcontractor's insurer. On appeal, the appellate court affirmed.

In affirming, the court stated that under New York Insurance Law § 3420(d), “an insurer is required to provide its insured and any other claimant with timely written notice of its disclaimer or denial of coverage on the basis of a policy exclusion, and will be estopped from disclaiming liability or denying coverage if it fails to do so.” (citations omitted). Here, said the court, the subcontractor’s insurer did not give timely written notice of its disclaimer direction to the additional insureds until six years after the first demand for coverage was made. This failure, held the court, rendered the late disclaimer ineffective.

The court rejected the subcontractor’s insurer’s claim that its time to disclaim did not run until it received the subcontract. The court stated that the insurer did not need the subcontract to provide a disclaimer directly to the additional insureds based on the employee exclusion. The court held that an insurer may not delay disclaiming on a ground the insurer knows to be valid while investigating other possible grounds for disclaiming coverage. Accordingly, the court affirmed the motion court’s declaration that the subcontractor’s insurer was obligated to defend and indemnify the additional insureds.



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