

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

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4 August Term, 2009

5 (Argued: December 10, 2009 Decided: February 1, 2010)

6 Docket No. 09-1655-cv

7 -----X
8 NGM INSURANCE COMPANY,

9
10 Plaintiff-Counter-Defendant-Appellant,

11 - v. -

12
13
14 BLAKELY PUMPING, INC., d/b/a ASSENTIAL PUMPING, BRIAN J. BLAKELY,

15
16 Defendants-Counter-Claimants-Appellees,

17
18 PETER J. SLINGERLAND, NANCY SLINGERLAND,

19
20 Defendants-Appellees,

21
22 PROGRESSIVE CASUALTY INSURANCE COMPANY,

23
24 Defendant.*

25 -----X
26
27 Before: McLAUGHLIN, KATZMANN, LYNCH, Circuit Judges.

28
29 Appeal from a judgment of the United States District Court
30 for the Southern District of New York (Young, J.) declaring that
31 NGM Insurance Company ("NGM") is obligated to defend and
32 indemnify Blakely Pumping, Inc. ("Blakely Pumping"), against

* Progressive Casualty Insurance Company did not appear before this Court or the court below since it has settled all claims related to its role as Brian Blakely's insurer. The Clerk of the Court is directed to amend the official caption as set forth above.

1 liability arising out of an auto accident involving one of
2 Blakely Pumping's officers. On appeal, NGM argues that the
3 insurance policy in question did not cover the officer's auto
4 under any circumstances and, therefore, the district court erred
5 in finding that New York Insurance Law § 3420(d)(2) required NGM
6 to timely disclaim coverage. We agree.

7 REVERSED.

8
9 HAYDN J. BRILL, Brill & Associates,
10 P.C., New York, New York, for Plaintiff-
11 Counter-Defendant-Appellant.

12
13 ROBERT D. COOK, Cook, Netter, Cloonan,
14 Kurtz & Murphy, P.C., Kingston, New
15 York, for Defendants-Counter-Claimants-
16 Appellees.

17
18 PAUL J. GOLDSTEIN, Goldstein & Metzger,
19 LLP, Poughkeepsie, New York, for
20 Defendants-Appellees.

21 PER CURIAM:

22 NGM Insurance Company ("NGM") appeals from a judgment of the
23 United States District Court for the Southern District of New
24 York (Young, J.) declaring that NGM is obligated to defend and
25 indemnify Blakely Pumping, Inc. ("Blakely Pumping"), against
26 liability arising out of an auto accident involving Brian Blakely
27 ("Blakely"), an officer and employee of Blakely Pumping. Blakely
28 Pumping had purchased an insurance policy and endorsement from
29 NGM that covered liability arising out of the use of a "Hired
30 Auto" or "Non-Owned Auto" - terms defined so as not to include an
31 auto owned by an executive officer or employee of Blakely

1 Pumping. The determinative question is whether these definitions
2 constitute "exclusions" of coverage. If they do, NGM was
3 required under New York Insurance Law § 3420(d)(2) to timely
4 notify Blakely Pumping that it was disclaiming coverage based on
5 a policy exclusion. On appeal, NGM argues that the district
6 court erred in finding that the definitions were exclusions since
7 Blakely's auto could not qualify as a "Hired Auto" or "Non-Owned
8 Auto" under any circumstances. For the reasons stated herein, we
9 agree and reverse the district court's judgment.

10 **BACKGROUND**

11 On November 3, 2005, Blakely crashed his pickup truck into
12 Peter Slingerland's car in Kingston, New York. Blakely was
13 driving the truck in the course of his work for Blakely Pumping,
14 as he frequently did. Slingerland and his wife brought a
15 personal injury action against both Blakely and Blakely Pumping.

16 In a letter dated March 18, 2006, Blakely Pumping requested
17 that NGM defend the action pursuant to an insurance policy for
18 "Businessowners Liability Coverage" (the "Policy") that Blakely
19 Pumping had purchased from NGM. The Policy generally covered
20 liability for personal injuries but contained a section entitled
21 "Exclusions" that expressly disclaimed coverage for damages
22 "arising out of the ownership, maintenance, use or entrustment to
23 others of any . . . 'auto' . . . owned or operated by or rented
24 or loaned to any insured." Blakely Pumping, however, had also

1 purchased an endorsement (the "Endorsement") from NGM that
2 modified the Policy; the Endorsement extended coverage to bodily
3 injury arising from the use of a "Hired Auto" or a "Non-Owned
4 Auto" by the company or one of its employees. The Endorsement
5 defined these terms as follows:

6 "Hired Auto" means any "auto" you lease, hire or
7 borrow. This does not include any "auto" you
8 lease, hire or borrow from any of your
9 "employees" or members of their households, or
10 from any partner or "executive officer" of yours.

11
12 "Non-Owned Auto" means any "auto" you do not own,
13 lease, hire or borrow which is used in connection
14 with your business.

15
16 On March 23, 2006, NGM disclaimed coverage, based on the
17 Policy's exclusion for autos. In a letter dated July 24, 2006,
18 counsel for the Slingerlands called NGM's attention to the
19 Endorsement's extension of coverage for bodily injuries arising
20 out of the use of a "Hired Auto" or "Non-Owned Auto." Two weeks
21 later, NGM again disclaimed coverage, this time on the ground
22 that Blakely was an executive officer of Blakely Pumping and
23 therefore his pickup truck was neither a "Hired Auto" nor "Non-
24 Owned Auto" as defined in the Endorsement.

25 On July 19, 2007, NGM sued Blakely Pumping, Blakely, and the
26 Slingerlands, seeking a declaratory judgment that it was under no
27 obligation to defend or indemnify Blakely Pumping. On March 24,
28 2009, after the parties cross-moved for summary judgment, the
29 district court entered a judgment declaring that NGM was indeed

1 obligated to defend and indemnify Blakely Pumping.¹ Although the
2 court concluded that Blakely Pumping had borrowed the auto of one
3 of its officers and that the accident was therefore not covered
4 under the terms of the Policy as modified by the Endorsement,
5 this did not end the analysis. The court turned to New York
6 Insurance Law § 3420(d)(2), requiring insurers to provide written
7 notice when they disclaim coverage pursuant to a policy
8 exclusion. According to the court, since the Endorsement
9 "generally covered auto accidents," the definitions of "Hired
10 Auto" and "Non-Owned Auto" constituted exclusions of that general
11 coverage. NGM was therefore required to provide written notice
12 that it was disclaiming coverage on the ground that Blakely's
13 pickup truck was neither a "Hired Auto" nor "Non-Owned Auto"; but
14 because NGM originally disclaimed coverage pursuant to the
15 Policy's exclusion for autos, it had waived its right to disclaim
16 coverage on other grounds. Thus, NGM's subsequent notice of
17 disclaimer was ineffective, meaning NGM could not now rely on
18 those exclusions.

¹ With the parties' consent, the district court treated the case as a "case stated," a procedural device most often used in the First Circuit. In a case stated, the parties "stipulate a record for decision allow[ing] the judge to decide any significant issues of material fact that he discovers." Boston Five Cents Sav. Bank v. Sec'y of Dep't of Hous. & Urban Dev., 768 F.2d 5, 11-12 (1st Cir. 1985) (Breyer, J.); see also United Paperworkers Int'l Union, Local 14 v. Int'l Paper Co., 64 F.3d 28, 31 (1st Cir. 1995). Because the district court decided only an issue of law below, the use of the case stated procedure has no bearing on our analysis.

1 **DISCUSSION**

2 We review de novo the district court's conclusions of law.
3 BrandAid Mktg. Corp. v. Biss, 462 F.3d 216, 218 (2d Cir. 2006).

4 According to New York Insurance Law § 3420(d)(2), which the
5 parties agree controls,

6 [i]f under a liability policy issued or
7 delivered in [New York], an insurer shall
8 disclaim liability or deny coverage for death or
9 bodily injury arising out of a motor vehicle
10 accident . . . it shall give written notice as
11 soon as is reasonably possible of such disclaimer
12 of liability or denial of coverage to the insured
13 and the injured person or any other claimant.
14

15 The statute's purpose is to "avoid prejudice to the insured, the
16 injured claimant and the Motor Vehicle Accident Indemnity
17 Corporation, each of whom could be harmed by delay in learning of
18 the carrier's position." Zappone v. Home Ins. Co., 55 N.Y.2d
19 131, 137 (1982). If the insurance carrier fails to disclaim
20 coverage in a timely manner, it is precluded from later
21 successfully disclaiming coverage. Hartford Ins. Co. v. County
22 of Nassau, 46 N.Y.2d 1028, 1029 (1979).

23 In the seminal case Zappone v. Home Insurance Co., the New
24 York Court of Appeals interpreted the statute as requiring notice
25 only for a "denial of liability predicated upon an exclusion set
26 forth in a policy which, without the exclusion, would provide
27 coverage for the liability in question." 55 N.Y.2d at 134. In
28 other words, notice is required where there is no coverage "by
29 reason of exclusion." Id. at 137. The Zappone court held that

1 the statute does not apply, however, where "the policy as written
2 could not have covered the liability in question under any
3 circumstances," id. at 134; that is, notice is not required where
4 there is no coverage "by reason of lack of inclusion," id. at 137
5 (internal quotation marks omitted). This rule avoids extending
6 insurance coverage to liabilities "incurred neither by the person
7 insured nor in the vehicle insured." Id. at 135.

8 Determining whether there is no coverage by reason of
9 exclusion as opposed to lack of inclusion can be "problematic."
10 Worcester Ins. Co. v. Bettenhauser, 95 N.Y.2d 185, 189 (2000).
11 We find guidance in Planet Insurance Co. v. Bright Bay Classic
12 Vehicles, Inc., 75 N.Y.2d 394 (1990), a case that is particularly
13 applicable to the facts before us. There, the New York Court of
14 Appeals considered whether definitional language that did not
15 appear in the section of an insurance policy entitled
16 "Exclusions" eliminated coverage by reason of exclusion or lack
17 of inclusion. Defendant Bright Bay obtained the policy in
18 question for its fleet of rental cars. The policy defined
19 "covered rental cars" as those rented for periods of less than 12
20 months. Id. at 398. One of Bright Bay's cars was later involved
21 in an accident while being rented for a 24-month period. The
22 court found that, although the insurance company disclaimed
23 coverage based on the definition of "covered rental cars" as
24 opposed to a provision in the policy's "Exclusion" section, the

1 definition's limiting language still amounted to an exclusion.
2 Id. at 400. The court explained that the car was initially
3 covered by the policy and only "became 'uncovered' upon the
4 happening of a subsequent event: i.e., the rental . . . for a
5 lease period other than that prescribed in the policy." Id. at
6 401. Since the car was at one point covered, this was not a case
7 where there "was never a policy in effect covering the involved
8 automobile." Id.

9 In the instant case, the principal issue in dispute is
10 whether the district court erred in finding that the
11 Endorsement's definitions of "Hired Auto" and "Non-Owned Auto"
12 constitute exclusions requiring a notice of disclaimer.² We
13 conclude that the district court did err in so finding.

14 The Endorsement did not generally cover auto accidents; it
15 covered only accidents arising from the use of a "Hired Auto" or
16 "Non-Owned Auto." Those terms were defined in such a way that an
17 employee's or officer's vehicle, like Blakely's pickup truck,
18 could never be covered. This is not a case then where "the

² Blakely Pumping also suggests that simply because it has a contractual relationship with NGM, anything limiting NGM's coverage must be an exclusion. However, while the Policy broadly covered liability for personal injuries, NGM did, in fact, timely disclaim based on the Policy's general auto exclusion. The question, then, is whether NGM's disclaimer needed to specifically reference the Endorsement to be effective, and that question turns on the proper interpretation of the definitions of "Hired Auto" and "Non-Owned Auto." Accordingly, the sheer fact of Blakely's contractual relationship with NGM does not resolve the matter.

1 happening of a subsequent event" implicated a definitional term
2 that "uncovered" a formerly covered car. Id. Rather, it is a
3 case in which "the policy as written could not have covered the
4 liability in question under any circumstances." Zappone, 55
5 N.Y.2d at 134. In short, there was no coverage "by reason of
6 lack of inclusion," and thus no notice of disclaimer was
7 required. Id. at 137 (internal quotation marks omitted).

8 The Appellees direct us to two cases in which New York
9 appellate courts found that definitional language could
10 constitute a policy exclusion for the purposes of New York
11 Insurance Law § 3420(d)(2). Neither case changes our analysis.
12 In Greater New York Mutual Insurance Co. v. Miller, 613 N.Y.S.2d
13 295 (App. Div. 1994), the Third Department found that an
14 insurance policy's definition of an "insured" was an exclusion
15 where it withheld coverage for drivers who used the auto in
16 question without permission. But unlike the instant case, Miller
17 dealt with an insurance policy that explicitly covered the auto
18 and its driver in many other circumstances. See id. at 297.
19 This is a critical distinction. See Zappone, 55 N.Y.2d at 135-
20 36.

21 In United Services Automobile Association v. Meier, 454
22 N.Y.S.2d 319 (App. Div. 1982), the Second Department found that
23 various definitions in an insurance policy that withheld coverage
24 from individuals engaged in automobile businesses were

1 exclusions. The court termed these "negative definitions, which,
2 in effect, are nothing more than exclusions." Id. at 321. This
3 case, however, does not stand for the proposition that all
4 definitions that limit coverage are exclusions. In fact, the
5 Meier court found that other definitions in the same policy -
6 such as the definitions of "owned vehicle," "newly acquired
7 vehicle," and "temporary substitute vehicle" - were not
8 exclusions. Id. at 320-21. According to the court, the failure
9 of the vehicle in question to qualify as one of these defined
10 terms meant that there was never a "contract of insurance with
11 the person or for the vehicle involved in the accident." Id. at
12 321. We employ identical logic in our analysis.

13 We have considered the Appellees' other arguments and find
14 them to be without merit.

15 **CONCLUSION**

16 The district court erred in finding that the Endorsement's
17 definitions of "Hired Auto" and "Non-Owned Auto" were exclusions
18 triggering the notice requirement of New York Insurance Law §
19 3420(d)(2). Because no party disputes the district court's
20 conclusion that NGM would not be obligated to defend and
21 indemnify Blakely Pumping but for the operation of this statute,
22 we REVERSE.