INSURANCE LAW

Court of Appeals Clarifies Timeliness Of Non-Cooperation Disclaimer

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We have, in the past, observed that "when the Court of Appeals speaks on insurance law issues, it is noteworthy (at least in this space)."[1] How much more so is this statement true when the state's highest court addresses three opinions on insurance law issues on the very same day?

Although space restrictions prohibit us from discussing and analyzing all three important Court of Appeals decisions in this single column, we wish, at least, to call our readers' attention to *K2 Investment Group, LLC v. American Guarantee & Liability Ins. Co. (K2-II)*, 2014 N.Y. Slip Op. 01102; *QBE Insurance Corporation v. Jinx-Proof, Inc.*, 2014 N.Y. Slip Op. 01100; and *Country-Wide Ins. Co. v. Preferred Trucking Services Corp.*, 2014 N.Y. Slip Op. 01099—all of which were decided on Feb. 18, 2014.

In view of the numerous articles that previously have been written in these pages on the initial K2 Investment Group, LLC decision (*K2-I*), which the Court of Appeals has, upon reargument, vacated,[2] we leave it to others to review and analyze the K2-II decision in more depth. As between *QBE Insurance Corp. v. Jinx-Proof, Inc.*, an affirmance of a fact-specific case pertaining to "reservation of rights letters," and *Country-Wide Ins. Co. v. Preferred Trucking Services, Corp.*, a reversal, which sets forth more general principles of law pertaining to disclaimers based upon the noncooperation defense, we elect at this time to discuss the latter, and reserve discussion of the former, perhaps, to a future article.

Noncooperation Disclaimers

In *Thrasher v. U.S. Liability Ins. Co.*, 19 NY2d 159 (1967), the New York Court of Appeals succinctly set forth the general rules applicable to an insurer's attempt to disclaim coverage based upon the insured's lack of cooperation, in violation of the cooperation provision of the policy, which are still cited and applied today.

In that case, less than a month before the commencement of the trial of the personal injury action against the insured, the insurer retained an investigator to locate and prepare the insured for trial. The efforts employed to obtain the insured's cooperation—which proved unsuccessful—consisted of a letter from the attorneys retained to defend him requesting him to be kept informed of his address; visiting his last known address on two different occasions; telephoning his last known employer and obtaining from the employer a new address; visiting the new address; telephoning one of the plaintiffs (who had borrowed the car from the insured on the date of the accident); checking some local bars; visiting the Department of Motor Vehicles to check for an address for the insured; and sending letters to two addresses, by certified mail, which were returned marked "undeliverable" and "unclaimed."

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In invalidating the insurer's disclaimer, the court noted that "The burden of proving lack of cooperation of the insured is placed upon the insurer [citation omitted]. Since the defense of lack of cooperation penalizes the plaintiff for the action of the insured over whom he has no control, and since the defense frustrates the policy of this State that innocent victims of motor vehicle accidents be recompensed for the injuries inflicted upon them [citations omitted], the courts have consistently held that the burden of proving the lack of co-operation is a heavy one indeed." *Empire Ins. Co. v. Stroud*, 36 NY2d 719 (1975); *Hunter Roberts Construction Group, LLC v. Arch Ins. Co.*, 75 AD3d 404 (1st Dept. 2010) ("'strict scrutiny' of facts supporting the noncooperation defense is required to protect 'innocent parties from suffering the consequences of a lack of coverage'").

Thus, the Thrasher court set out a three-pronged test for determining whether the carrier can properly disclaim for lack of cooperation. In such cases, the insurer must demonstrate that: (1) it acted diligently in seeking to bring about the insured's cooperation; (2) the efforts it employed were reasonably calculated to obtain the insured's cooperation; and (3) the attitude of the insured, after his or her cooperation was sought, was one of "willful and avowed obstruction."

Under the facts and circumstances of *Thrasher*, the court opined that the insurer failed to act diligently in seeking its insured's cooperation and failed to employ reasonable efforts to locate its insured. In fact, it characterized the insurer's investigative efforts to locate the insured once it learned that he had moved as "feeble indeed," noting that although the investigator telephoned the insured's employer, he did not visit him or attempt to talk to any of the insured's fellow employees; although the investigator visited the DMV, he never made any formal written request, which was required to obtain the desired information; although the investigator checked neighborhood bars, he never checked local stores or cleaning establishments, never checked the Board of Elections, and never requested any credit reports; and, after the return of the undelivered letters, » Page 8

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nothing was done to re-send them to a proper address. Moreover, the court held that the evidence did not support the conclusion that the insured "willfully obstructed," since there was no showing that he knew the insurer wanted him to testify at trial.

Recent Decisions

In the 47 years since the Thrasher decision, the courts have further clarified the elements of a valid non-cooperation defense.[3] As indicated by the recent cases cited and discussed below, the courts take pains to assess all of the relevant factors and circumstances surrounding the noncooperation disclaimer in order to determine whether the three-pronged Thrasher test has been met.

In *New South Ins. Co./GMAC Insurance v. Krum*, 39 AD3d 1110 (3d Dept. 2007), the insurer's lack of cooperation defense was upheld where it placed unsuccessful calls to insured at his home and work numbers, sent three certified and regular mail letters to his last known address, personally visited his home on two occasions and left a message with his mother to stress the importance of his cooperation, but insured never responded.

In *Preferred Mut. Ins. Co. v. SAV Carpentry, Inc.*, 44 AD3d 921 (2d Dept. 2007), the defense was upheld where the insurer presented evidence that it sent the insured numerous letters regarding its discovery obligations, and hired two separate investigators to locate and interview the insured's principal, who avoided all attempted contacts for approximately one month.

In *Continental Casualty Co. v. Stradford*, 46 AD3d 598 (2d Dept. 2007), modified 11 NY3d 443 (2008), the noncooperation defense was upheld where the insured ignored a series of written correspondence and telephone calls from the insurer's representatives and defense counsel, repeatedly refused to provide requested documents, records and evidence, unreasonably refused to consent to a recommended settlement, refused to execute a stipulation consenting to a change of attorney, failed to appear for scheduled depositions and meetings, and failed to claim two certified mail letters advising that he risked a disclaimer of coverage if he continued to breach the cooperation clause of his policy.

In *State Farm Indemnity Co. v. Moore*, 58 AD3d 429 (1st Dept. 2009), the defense was upheld where the insurer made numerous unsuccessful attempts to contact the insured, including numerous telephone calls, certified and registered letters [including at least one signed for by the insured], and visits to the insured's address and to his mother.

On the other hand, in *St. Paul Travelers Ins. Co. v. Kreibich-D'Angelo*, 48 AD3d 1009 (3d Dept. 2008), the insurer's noncooperation defense was rejected where it made efforts to locate its insured through its database, directory assistance, Skiptrace, and information provided in insured's recorded statement, placed six telephone calls to insured's supposed residence, left four voicemail messages, and sent reservation of rights letter to that address, but never attempted to contact the insured at the North Carolina address listed in the police accident report, never explained or clarified the confusion regarding insured's actual address, and there was no indication that the insured knew that his cooperation was sought and/or that he willfully refused to cooperate.

In *Country-Wide Ins. Co. v. Henderson*, 50 AD3d 789 (2d Dept. 2008), the defense was rejected because evidence of efforts made to locate the insured constituted inadmissible hearsay, and were, in any event, deficient.

In *Hunter-Roberts Construction Group, LLC v. Arch Ins. Co.*, 75 AD3d 404 (1st Dept. 2010), the defense was rejected where the insurer's investigator called the insured's main business number three times and was told he would have to supply the name of the individual with whom he wished to speak, but never went to the office personally, nor made specific demand to produce an appropriate person for interview, and there was no indication that further efforts would have been futile.

And, in *American Transit Ins. Co. v. Hossain*, 100 AD3d 421 (1st Dept. 2012), mot. for leave to appeal denied, 20 NY3d 859 (2013), the defense was rejected where the insurer sent letters and investigators to three different addresses for the insured, but there was no indication that the insured received the letters or had actual notice of the attempts to contact him, and the insurer never attempted contact at various other addresses in its file or at a possible work location for the insured.

'Continental Casualty'

As previously noted, in *Continental Casualty Co. v. Stradford*, supra, the Appellate Division majority held that the insurer carried its burden to establish a valid noncooperation defense. However, the majority also concluded that the insurer's disclaimer was untimely, finding that the insurer had sufficient information to support a disclaimer no later than Aug. 11, 2004,

when its two letters were returned unclaimed, but did not disclaim until more than two months later, on Oct. 13, 2004, without any explanation for the delay.

In her dissenting opinion, Justice Gloria Goldstein argued that the noncooperation disclaimer was proper and timely. Goldstein noted that in a noncooperation case the reason to disclaim is not apparent as soon as the claim is made because even where it is apparent that the insured has not cooperated, the insurance carrier has the "heavy burden" of satisfying the Thrasher requirements. Goldstein astutely observed that "The majority's position places the carrier in an untenable dilemma: the carrier must diligently seek to bring about the insured's cooperation and may only disclaim after the insured has demonstrated willful and avowed obstruction, while adhering to time constraints applicable to situations where the reason to disclaim is 'immediately apparent' upon receipt of the claim [citation omitted]. Requiring the carrier to adhere to such time constraints would encourage precipitous disclaimers, contrary to the public policy of requiring the carrier to make diligent efforts and to defer the decision to disclaim until after the insured has demonstrated 'willful and avowed obstruction' [citing *Thrasher*, supra]. Perhaps, with hindsight, an argument could be made that there was sufficient evidence of noncooperation earlier in the proceedings. However, no authority is cited for the proposition that the carrier was required to do the legal minimum and no more, assuming arguendo it could judge what the legal minimum was under these circumstances. Imposing a requirement that the carrier immediately disclaim after it has done the legal minimum to sustain its 'heavy' burden...is an oxymoron which would not serve the interests of innocent claimants such as the appellants who have no control over the conduct of the insured."

The Court of Appeals, dealing solely with the issue of timeliness of disclaimer for lack of cooperation, noted that "Even if an insurer possesses a valid basis to disclaim for non-cooperation, it must still issue its disclaimer within a reasonable time." Then, channeling Justice Goldstein, the court also noted that "Fixing the time from which an insurer's obligation to disclaim runs is difficult" and that "unlike cases involving late notice of claims...or other clearly applicable coverage exclusions, an insured's non-cooperation attitude is often not readily apparent," as it "can be obscured by repeated pledges to cooperate and actual cooperation."

Moreover, the court observed that "To further this State's policy in favor of providing full compensation to injured victims, who are unable to control the actions of an uncooperative insured, insurers must be encouraged to disclaim for non-cooperation only after it is clear that further reasonable attempts to elicit their insured's cooperation will be futile [citing, inter alia, *Thrasher*, above]." Insofar as the court found that a question of fact existed as to the amount of time required for the insurer to complete its investigation of the insured's conduct, it modified the order below by holding that the reasonableness of the two-month delay "to analyze the pattern of obstructive conduct that permeated the insurer's relationship with its insured for almost six years" presented a question of fact sufficient to defeat summary judgment in the insured's favor.

The court unanimously found compelling Country-Wide's argument that although it knew or should have known in July 2008 that the president of Preferred would not cooperate, it was not in a position to know that the driver would not cooperate until Oct. 13, 2008, when he advised that he did not "care about the date."

'Country-Wide'

It is against this backdrop that the Court of Appeals recently decided *Country-Wide v. Preferred Trucking*. There, a personal injury action was commenced against Preferred Trucking and its driver in March 2007 by an individual injured in the course of unloading a Preferred truck. Throughout the spring of 2007, Country-Wide, the insurer of the truck, made "numerous attempts" to contact the president of Preferred, and the driver—with no success. Preferred and driver did not respond to the lawsuit either, thus leading the plaintiff to file an application for a default judgment in September 2007.

Country-Wide's receipt from the plaintiff's attorney of a copy of the default motion on Oct. 4, 2007, was its first notice of the lawsuit. Thus, on Oct. 10, 2007, Country-Wide informed Preferred and the driver by letter that it was exercising its "right to issue a disclaimer of indemnity" and reserving its "right to disclaim any duty

to defend" because of their failure to cooperate.

During the ensuing eight months, Preferred's president contacted Country-Wide once to express his willingness to cooperate, but then the president proved impossible to reach. Country-Wide continued its efforts to contact the president and driver through the summer of 2008. The defense lawyers retained by Country-Wide sent "multiple letters" to the driver advising him of a scheduled deposition and reminding him of the need to cooperate.

Additional efforts to reach the president and driver after the court warned that failure to appear for deposition would result in preclusion of evidence in support of Preferred's claims or defenses proved to be futile. In July 2008, a Country-Wide investigator visited the president's home for the sixth time and left a message for him with his wife, to which the president failed to respond. Three weeks later, another investigator was able to speak to the driver's daughter, who advised that the driver did not speak English.

On Aug. 18, 2008, a Spanish-speaking investigator finally reached the driver, who stated that he would cooperate. The next day, the lawyers wrote to the driver in Spanish informing him of the upcoming deposition and his need to respond. The driver never responded to that letter. On Oct. 13, 2008, the Spanish-speaking investigator again spoke to the driver, who said (for the first time) that he did not "care about the EBT date" because of a "family situation." The driver ignored subsequent telephone messages explaining the urgent need for his appearance, and did not, in fact, appear. On Oct. 16, 2008, the court granted the plaintiff's motion to strike the Defendants' Answer for failure to appear. On Nov. 6, 2008, Country-Wide disclaimed its obligation to defend and indemnify Preferred and the driver based upon their refusal to cooperate.

Addressing the sole question of whether the Nov. 6, 2008, disclaimer was timely as a matter of law, the Court of Appeals, reminiscent of Justice Goldstein's dissenting opinion in *Continental Cas. Co. v. Stradford*, supra, noted that in the context of a disclaimer for noncooperation "a determination as to whether such a disclaimer was made within a reasonable time is more complex because an insured's noncooperative attitude is often not readily apparent' [citing *Continental Cas. Co. v. Stradford*, 11 NY3d 443, 449 (2008)]." Further, the court explained that "The primary reason that we allow a longer period for disclaimer for noncooperation lies in a well-established principle of our case law, which is intended to facilitate the full compensation of injured victims suing for damages. This is the requirement that an insurer may not properly disclaim for non-cooperation unless it has satisfied its burden, described in the precedent as 'a heavy one indeed,'" of showing compliance with the three-pronged Thrasher threshold.

Thus, the court unanimously found compelling Country-Wide's argument that although it knew or should have known in July 2008 that the president of Preferred would not cooperate, it was not in a position to know that the driver would not cooperate until Oct. 13, 2008, when he advised that he did not "care about the date." The court noted that during most of the period between July and October, "the situation with respect to [the owner] remained opaque."

Under the circumstances of the numerous efforts and contacts had by Country-Wide with the driver and family members, in which the driver "punctuated periods of noncompliance with sporadic cooperation or promises to cooperate," the court held that "Country-Wide established as a matter of law that its delay was reasonable." As the court further explained, the named insured was Preferred Trucking, and its cooperation could occur through the driver. The driver, unlike the president, "had personal knowledge of the accident and was in a position to provide a meaningful defense, or alternatively, testify in such a manner as to bind Preferred Trucking. As Country-Wide argues, as long as it was still seeking [the driver's] cooperation in good faith, it could not disclaim."

Accordingly, the Court of Appeals reversed the order of the Appellate Division, and granted judgment in favor of Country-Wide declaring that it had no obligation to defend and/or indemnify Preferred for the $2.6 million judgment entered against it in the underlying action, or for its $500,000 policy limits.

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1. See Dachs, N. and Dachs, J., "Rafellini: Status Quo Restored," N.Y.L.J., Jan. 8, 2008, p. 3, col. 1; "Court of Appeals Addresses Uninsured, Underinsured Motorists Coverage," N.Y.L.J., Jul. 14, 2009, p. 3, col. 1.

2. See Kohane, Dan D. and Pelper, Steven E., "Draconian Penalty Adopted for Wrongfully Refusing to Defend," N.Y.L.J., June 24, 2013; Booth, Charles A. and Anania, Michael L., "'K2' Ruling On Insurer Refusal to Defend Fits Within Established Law," N.Y.L.J., July 8, 2013; Cohen, Robin L., Sherwin, Elizabeth A., and Winsbro, Jack P., "New Ruling Precludes Insurers From Contesting Indemnity Coverage," N.Y.L.J., July 15, 2013, Schulman, Jeffrey L. and Zola, Jared, "State High Court Reminds Insurers of Risks in Breaching Duty to Defend," N.Y.L.J., July 26, 2013; Gollub, Michael S. and Ziolkowski, Steven M., "'K2 Investment Group' Ruling: Radical...Or Not?" N.Y.L.J., Jul. 31, 2013; Siegel, Matthew, "What's So Special About 'K2'?" N.Y.L.J., Dec. 31, 2013.

3. See Dachs, N. and Dachs, J., "'Thrasher' Threshold Thriving," N.Y.L.J., March 15, 2005, p. 3, col. 1.