

OUTSIDE COUNSEL

BY LISA SOLOMON

Timely Disclaimer, Reasonable Efforts And the Uncooperative Insured

THE EXISTENCE and extent of insurance coverage is a crucial factor in the litigation of personal injury actions.

Yet even where a policy exists that seemingly provides adequate coverage, the insured's breach of any number of policy provisions can provide the insurer with an excuse to disclaim coverage, thus effectively preventing the injured plaintiff from reaching the coverage.

One of these provisions, commonly known as the "cooperation clause," imposes on the insured a duty to cooperate with the insurer in its defense of any claim covered by the policy. The insurer has a duty to make reasonable and diligent efforts to obtain its insured's cooperation, and also has a duty to issue a timely disclaimer once it is clear that the insured has breached the policy's cooperation clause.

An insurer that seeks to disclaim coverage based on its insured's non-cooperation bears the burden of proving the insured's failure to cooperate.¹

In *Thrasher v. United States Liability Insurance Co.*, the Court of Appeals long ago recognized that, "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 . . . accidents be recompensed for the injuries inflicted upon them [citations omitted] . . . the burden of proving lack of cooperation is a heavy one indeed."² The insurer must show that it made reasonable and diligent efforts to obtain its insured's cooperation.³ This is a very fact-specific inquiry.

Cases in which the courts have held that the insurer's efforts failed to meet the standard set out in *Thrasher* include *Alexander v. Stone*,⁴ in which the insurer's efforts included sending four letters to insured during the period of a year, the last two of which warned of disclaimer, and *In Re Savage*,⁵ in which the court noted that the insurer's attempts to locate its insureds were perfunctory and not reasonably calculated to produce results.

In *National Grange Mut. Ins. Co. v. Lococo*,⁶ a pre-*Thrasher* case that is nonetheless consistent with the *Thrasher* rationale, the First Department held that even seemingly substantial efforts to locate an insured may not, in fact, be reasonably calculated to obtain the insured's cooperation; rather, the insurer's efforts must be exercised with a reasonable degree of skill.⁷

Disclaimer's Timeliness

Once it becomes clear that the attitude of the insured, as reflected by its actions or inactions, is one of "willful and avowed obstruction,"⁸ the insurer must move swiftly to disclaim.

Insurance Law Section 3420(d) provides, in relevant part, that any insurer that "disclaim[s] liability or denies coverage for death or bodily injury arising out of . . . any type of accident occurring within this state shall give notice as soon as is reasonably possible of such disclaimer of liability to or denial of coverage to [both] the insured and the injured person"⁹

The Court of Appeals has specifically held that this language - in the predecessor statute to § 3420 - requires that the insurer act promptly not only after the decision to disclaim is made, but in making the decision itself.¹⁰ The insurer bears the burden of explaining any delay in dis-

Lisa Solomon is a solo practitioner based in Ardsley, NY.

claiming coverage.¹¹

The policy of protecting innocent accident victims, which justifies the insurer's heavy burden in demonstrating non-cooperation, also provides one rationale for requiring prompt disclaimer, since a failure to timely disclaim can mislead a plaintiff into pursuing time-consuming and expensive litigation against a tortfeasor with few or no assets against which a potential judgment may be enforced.¹²

Reasonableness, which is the cornerstone of § 3420(d), is measured by the length of the delay from the time the insurer first learns of the grounds for disclaimer to the time it notifies the insured and the injured party of its disclaimer.¹³ The facts supporting the insurer's position need not be unassailable; rather, they need only be "sufficient" facts on which to base a disclaimer.¹⁴

The date from which to measure the reasonableness of a disclaimer may be determined by reference to the insurer's own claims file.¹⁵

By waiting an unreasonable length of time to deny coverage, an insurer essentially waives its right to disclaim. It is not uncommon for delays of only a few months to be held unreasonable.¹⁶ The Second Department has even held a delay as short as 41 days to be unreasonable.¹⁷

Insured's Cooperation

The Appellate Division, First Department, recently addressed the interplay between these two duties in *Allcity Insurance Company v. Patricia Braddy, et al.*¹⁸ The underlying case arose out of a fire at the insured premises that

occurred on Dec. 6, 1987, that resulted in the death of one woman and serious personal injuries suffered by another.¹⁹

In its investigation of the fire, Allcity did not contact the managing agent or the building superintendent, even though it was aware that both of them had examined the premises after the fire.²⁰

A personal injury and wrongful death action was commenced in 1988 against the landlord/owner of the insured premises, 601 Crown Street Realty Corp.²¹ The president of 601 Crown Street Realty Corp., Elimelech Frydberg, failed to appear in response to eight notices from Allcity informing him that his deposition, which was first noticed for July 1989, had been rescheduled.²² Finally, in October 1992, Mr. Frydberg explicitly told Allcity that he was refusing to cooperate because his policy had not been renewed.²³

Nevertheless, Allcity made continued efforts to obtain Mr. Frydberg's cooperation, including sending him a stern letter in November 1992 warning him that his continued non-cooperation would result in breach of contract, subpoenaing him for a deposition in June 1993, telling him in September 1993 that it intended to move the court to discontinue its defense, and attempting in April 1994 to enlist the assistance of his personal attorney, even though Mr. Frydberg first identified the attorney in December 1987.²⁴

The court below - Justice Ira Gammernan - had held that "the insurance company was making a determined effort to secure the cooperation, which would have eliminated the need for a

disclaimer. It seems to me they shouldn't be penalized. Indeed, the opposite argument could be made if immediately upon the failure of the insured to appear or immediately upon a conversation with the insured in which he indicates he is not going to cooperate, at that point they disclaim, and [sic] argument has been made, well they made no good faith efforts to secure the cooperation. So that it seems to me that they are damned if they do and they are damned if they don't"²⁵

In reversing Justice Gammernan's decision, the First Department squarely rejected this reasoning. Citing *Thrasher*, the court noted that in light of Allcity's failure to contact the building's managing agent and superintendent, its efforts to secure the cooperation of its insured "might be regarded as less than diligent."²⁶

More importantly, the court held that the insurer's duty to disclaim arose in October 1992, when it became clear that Mr. Frydberg would not cooperate, regardless of Allcity's continued and unavailing efforts to obtain his cooperation.²⁷

Thus, the court recognized that an insurer's duty to use reasonable and diligent efforts to obtain its insured's cooperation is, in essence, extinguished once the grounds for disclaimer have arisen; at that point, the insurer's duty to timely disclaim governs the rights of the respective parties.

Earlier Case Law

The *Allcity* decision is in accord with earlier case law involving the duty to timely disclaim.

In *Allstate Ins. Co. v. Macaluso*,²⁸ for example, the First Department

held that, where the insurer disclaimed 19 months after it received the complaint in the underlying action, and one year after it received an affidavit, and where the contents of both documents were more than adequate to put the insurer on notice that its insured's original statement was false and that disclaimer was all but certain, it was unreasonable for the insurer to await the insured's deposition without taking other, more prompt steps to investigate the coverage issue.

Similarly, in *Farmers Fire Ins. Co. v. Brighton*,²⁹ the Second Department held that the insurer's asserted need to investigate the claim did not justify a delay in disclaiming for more than two months after the insurer learned of sufficient facts upon which to base its disclaimer.

Conclusion

The implications of the *Allcity* case for both insurers and injured plaintiffs should not be ignored. Insurers should pursue all sources of information in investigating claims, paying particular attention to matters in which a corporate insured's principals seem particularly hesitant to fully cooperate in the corporation's defense.

By following such a strategy, the insurer will maximize the likelihood that a court will deem the insurer's efforts to obtain its insured's cooperation to have been reasonable and diligent.³⁰

But regardless of the reasonableness and diligence of its prior efforts to obtain the insured's cooperation, once it is clear that the insured has breached the policy's cooperation clause, the

insurer must act swiftly in disclaiming. The disclaimer must be timely as to both the insured and the injured party.

Unfortunately, an injured plaintiff has little say in whether an insured tortfeasor will act responsibly in fulfilling its duties under its insurance policy. However, counsel for an injured plaintiff can, to some extent, monitor whether the insured is cooperating in its own defense - for example, has the defendant's deposition been adjourned numerous times due to the defendant's "unavailability?"

Finally, the injured party should question and, if necessary, challenge the timeliness of any disclaimer. A separate declaratory judgment action may be required. However, the effort and expense of instituting such an action is more than outweighed by the potential of ensuring that any judgment in favor of the plaintiff is enforceable.³¹



(1) N.Y. Ins. L. § 3420(c) (CLS 1999).

(2) 19 N.Y.2d 159, 168, 225 N.E.2d 503, 508 (1967).

(3) *Id.*

(4) 45 A.D.2d 216, 220 (4th Dep't 1974).

(5) 39 A.D.2d 523, 523 (1st Dep't 1972).

(6) 20 A.D.2d 785, 785 (1st Dep't 1964), *aff'd*, 16 N.Y.2d 585, 209 N.E.2d 99 (1965).

(7) In *Lococo*, the insureds were Puerto Rican and lived in a Spanish-speaking neighborhood. *Id.* at 786, 248 NYS2d at 151. Five months after the underlying action was commenced, the insurer sent an English-speaking investigator to locate the plaintiffs. *Id.* The investigator, who visited one of the insureds at home and told him to have the other insured call the insurance company's attorney, noted the language barrier. *Id.* Nevertheless, approximately two weeks later, the insurer sent the insureds reservation of rights letters in English. *Id.* About one and one-half years later, after interviewing people at the former place of employment of one of the insureds, another English-speaking investigator recommended the use of a Spanish-speaking adjuster. *Id.* This new Spanish-speaking adjuster unsuccessfully attempted on five occasions to visit the plaintiffs at the address utilized one and one-half years earlier. *Id.* at 786-87, 248 NYS2d at 151.

(8) *E.g.*, *State Farm Fire & Cas. Co. v. Imeri*, 182 A.D.2d 683 (2d Dep't 1992).

(9) N.Y. Ins. L. § 3420(d) (CLS 1999).

(10) *Allstate Ins. Co. v. Gross*, 27 N.Y.2d 263, 267 265 N.E.2d 736, 737 (1970).

(11) *Hartford Ins. Co. v. County of Nassau*, 46 N.Y.2d 1028, 1029, 389 N.E.2d 1061, 1062 (1979).

(12) *See Allstate v. Gross*, 27 N.Y.2d at 267, 265 N.E.2d at 738; *Allstate Ins. Co. v. Bianco*, 28 A.D.2d 676, 677 (2d Dep't 1967).

(13) *Firemen's Fund Ins. Co. of Newark v. Hopkins*, 88 N.Y.2d 836, 837, 666 N.E.2d 1354, 1355 (1996); *Hartford Ins. Co. v. County of Nassau*, 46 N.Y.2d at 1029, 389 N.E.2d at 1062.

(14) *Mohawk Minden Ins. Co. v. Ferry*, 251 A.D.2d 846, 847 (3d Dep't 1998); *Aetna Life & Cas. v. Boucher*, 238 A.D.2d 414, 415 (2d Dep't 1997); *U.S. Underwriters Ins. Co. v. Held Bros., Inc.*, 1998 U.S. Dist. LEXIS 9694, at *9 (SDNY June 30, 1998).

(15) *See Mount Vernon Fire Ins. Co. v. Gatesington Equities, Inc.*, 204 A.D.2d 419, 419 (2d Dep't 1994) (where insurer's claims manager alone made final determination as to when to disclaim coverage, time in which to disclaim was measured from claims manager's receipt of investigator's report containing sufficient information to enable him to conclude that insured had breached notice condition); *Consolidated Edison Co. v. Hartford Ins. Co.*, 203 A.D.2d 83, 83 (1st Dep't 1994) (measuring time for disclaimer from date of insurer's internal memorandum that summarized relevant facts and reasoning upon which insurer would eventually disclaim).

(16) *See, e.g.*, *Firemen's Fund Ins. v. Hopkins*, 88 N.Y.2d at 837-38, 666 N.E.2d at 1355 (eight month delay); *Mohawk v. Ferry*, 251 A.D.2d 846, 848 (3d Dep't 1998) (90 day delay); *Mount Vernon Fire Ins. Co. v. Gatesington Equities*, 204 A.D.2d at 419 (two month delay); *Consolidated Edison v. Hartford*, 203 A.D.2d at 83 (four month delay); *Aetna Cas. & Surety Co. v. Garrett*, 31 A.D.2d 710, 711 (3d Dep't 1968), *aff'd*, 26 N.Y.2d 729, 257 N.E.2d 284 (1970) (nine month delay); *Allstate v. Bianco*, 28 A.D.2d at 677 (seven month delay); *U.S. Underwriters v. Held Bros.*, 1998 U.S. Dist. LEXIS at *15 (three month delay).

(17) *Nationwide Mut. Ins. Co. v. Steiner*, 199 A.D.2d 507, 507 (2d Dep't 1993).

(18) 1999 N.Y. App. Div. LEXIS 8608 (1st Dep't Aug. 5, 1999).

(19) *Id.* at *1.

(20) *Id.* at *4.

(21) *Id.* at *1-*2.

(22) *Id.* at *2.

(23) *Id.*

(24) *Id.* at *2-*3.

(25) Record on Appeal, at pp. 18-19.

(26) 1999 N.Y. App. Div. LEXIS 86068, at *4.

(27) *Id.*

(28) 217 A.D.2d 424, 424-25 (1st Dep't 1995).

(29) 142 A.D.2d 547, 547 (2d Dep't 1988).

(30) Of course, conducting a prompt and full investigation of every claim also enhances the insurer's ability to successfully defend even an uncooperative insured.

(31) In the *Allcity* case, for example, the plaintiffs in the underlying action obtained a substantial verdict that would have been worthless (since the insured corporation had been defunct since 1993) if *Allcity's* disclaimer was deemed effective.

This article is reprinted with permission from the November 1, 1999 edition of the NEW YORK LAW JOURNAL. © 1999 NLP IP Company. All rights reserved. Further duplication without permission is prohibited. For information contact, American Lawyer Media, Reprint Department at 800-888-8300 x6111. #070-03-03-0025

When it's a question of law . . .

LISA SOLOMON, ESQ.

Concentrating exclusively in
legal research and writing, including appellate practice

(914) 674-8573

www.questionoflaw.net