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A Claim Without Cooperation Cannot Stand

D&R Plaza Jewelry d/b/a Flawless Jewelry v. Those Lead Underwriters at Bellmarie
2008 N.Y. Slip Op. 52060U, 21 Misc. 3d 1113A (Sup. Ct. Kings Co. 2008)

The insureds commenced an action against their insurer claiming that they were entitled to coverage for the theft of approximately $500,000 worth of jewelry inventory. The insurer argued that the insureds' lawsuit should be dismissed because the insureds failed to submit a sworn statement in proof of loss within 60 days after the insurer made its demand. The insureds argued that they had not been provided with a blank proof of loss form. The insurer offered an affidavit of its insurance adjuster who averred that he provided the insureds with a copy of a printed statement regarding the loss and requested that they fill it out and return the document to the adjuster. The court held that such proof was insufficient because the insurance law required that the insureds specifically be provided with a blank proof of loss form. As a result, the insureds' failure to provide a proof of loss statement within 60 days did not require dismissal of their claim.

On the issue of non-cooperation, the court stated that an insured's claim may be dismissed upon a showing that the insurer acted diligently to bring about the insured's cooperation, that the insurer's efforts were reasonably calculated to bring about the insured's cooperation, and the insured's attitude (after the insurer's diligent efforts) was one of willful and avowed non-cooperation. See *D&R Plaza*, 2008 N.Y. Slip Op. 52060U at p. 21. The insurer presented evidence that it sent letters to the insureds at their personal and business addresses, sent faxes and letters to the insureds' broker, set up interviews with the insureds, left telephone messages with the insureds, and made several trips to the insureds' broker's office to review the claim file. Such efforts were met by the insureds with a pattern of non cooperation that persisted over a two-year period. The insureds did not appear for scheduled appointments and failed to submit documents requested of them to substantiate their claim. The court concluded that the insureds' conduct supported the denial of their claim for non-cooperation. Therefore, although the proof of loss defense was unsuccessful, the insurer's motion for summary judgment on the issue of non-cooperation was granted and the insureds' complaint was dismissed.

Practice Pointer: Due to the technical nature of the sworn proof of loss defense, insurers may want to evaluate the procedures they use in sending out blank proof of loss forms. Insurers may want to consider updating procedures or implementing processes whereby blank forms are mailed in the same manner, and even by the same person, on every occasion. In addition, insurers should consider documenting the process used for each mailing of a blank proof of loss form so that the documentation could be produced in litigation if an insured challenges the receipt of the blank proof of loss form in litigation.

Second Dept. Rules Insureds' Damages too Speculative

In *Fusco v. State Farm Fire & Cas. Co.*, 2008 NY Slip Op 10582 (2d Dep't 2008), plaintiffs suffered a loss when their neighbors' pool heater discharged oil into the soil. Both the plaintiffs and their neighbors were insured by defendant State Farm. State Farm paid for the full cleanup of the oil spill, including remediation of the soil, and replacement of the plaintiff's pool and landscaping. State Farm also installed an aquifer to monitor the ground water and purchased the plaintiffs a beach-club membership. Approximately two years after the aquifer had been installed, the New York State Department of Environmental Conversation determined that clean up was completed and that the monitoring wells could be removed.

Despite being fully compensated for their loss, the plaintiffs commenced suit and sought damages for the diminished value of the property due to the alleged stigma of an oil leak. At trial, the plaintiffs presented evidence from a real estate appraiser who did not provide evidence of sale of properties that had oil leaks compared to properties that did not. The Second Department ruled that the failure to compare sales data rendered the opinion speculative and conclusory. The court also noted that the plaintiffs had been made whole for their loss and that no permanent damages were sustained. Accordingly, the plaintiffs' complaint was dismissed by the Second Department.

Mortgagee Not Named in Policy Denied Coverage

NC Venture I, L.P. v. Valley Forge Ins. Co.
2008 N.Y. Slip Op. 51717U, 20 Misc. 3d 1133A (Sup. Ct. New York Co. 2008)

A mortgagee submitted a claim for losses to a secured property that was destroyed by fire. The insurer denied its claim and the mortgagee brought suit. On the insurer's motion for summary judgment, it argued that the mortgagee's claim properly was denied because it was not the actual mortgagee named on the policy. The mortgagee argued that it was the assignee of the mortgagee named on the policy and that it was entitled to all of the named mortgagee's rights under the insurance contract. The court examined language in the insurance policy that required the insurer to give consent to any transfers of rights or duties. The insurer argued that it never gave written consent to transfer the named-mortgagee's rights to the plaintiff prior to the loss. The trial court agreed. It reasoned that although an insured may transfer its rights to insurance proceeds without consent after a loss, the policy clearly required the insurance company's written consent to any transfers prior to the loss. The court also stated that New York case law has upheld the very condition relied on by the insurer. Therefore, the insurer's motion for summary judgment was granted, and the mortgagee's claim was found to be properly denied.

Practice Pointer: Pay close attention when a mortgagee is assigned the rights of a named mortgagee, and whether the insurance contract requires the insurer's written consent to any transfers of rights or duties. If the contract requires written consent, and the mortgagee claim is made by a party not named on the contract and the claimant did not obtain the insurer's written consent, then a mortgagee claim is subject to denial.

Court Defines Limited Scope of Punitive Damages and Claims for Infliction of Emotional Distress

In *Tartaro v. Allstate Indemnity Co.*, 56 A.D.3d 758 (2d Dep't 2008), the court repeated New York's predisposition to limit the availability of punitive damages and claims for negligent or intentional infliction of emotional distress in breach-of-contract cases. In dismissing the plaintiff's claim for punitive damages, the court reiterated that the purpose of punitive damages "is not to remedy private wrongs but to vindicate public rights." Id. Therefore, punitive damages are not available in an ordinary breach-of-contract case.

The Second Department restated the well-settled rule that for punitive damages to be available in a breach-of-contract case, a party must demonstrate that the conduct associated with the breach of contract also was: (1) an independent tort; (2) particularly egregious in nature; and (3) part of a pattern of similar conduct directed at the general public. Id. at 758-759. Absent a showing of all three elements, a claim for punitive damages will be dismissed.

Furthermore, a similarly restrictive test is used with respect to claims for intentional or negligent infliction of emotional distress. For a party to state a claim for either of these causes of action, it must show that the defendant's conduct was so outrageous and extreme in character that it goes beyond all possible bounds of decency.

Practice Pointer: This case serves as a reminder that courts generally will not allow claims for punitive damages or negligent or intentional infliction of emotional distress in connection with an ordinary breach-of-insurance-contract case. Individual breaches of insurance contracts are unlikely to support claims for punitive damages unless they are particularly egregious and part of a broad policy applied by the insurer to multiple insureds. Similarly, an ordinary breach of contract case rarely will include the extreme and outrageous conduct necessary to support a claim for the infliction of emotional damages. Therefore, it is important for an insurer to be aggressive in seeking the dismissal of punitive damages and emotional-distress claims at the earliest possible moment in litigation to avoid an unnecessary and burdensome discovery fishing expedition.

Insurance Department Discusses Replacement Cost

The New York State Insurance Department recently released a general counsel's opinion that discusses the payment of replacement cost. In opinion number 08-10-12, the Insurance Department discussed a situation in which the insurer's adjuster calculated the "estimated claim" of damages to be $14,000 and paid the insured that amount. The insured maintained that the amount of damages was $20,000. The inquiry to the Insurance Department sought a definition of replacement cost and whether acceptance of the $14,000 check extinguished the insured's right to assert a claim for additional payment.

The Insurance Department noted that the insurance law and regulations do not require or provide a specific definition for replacement cost. The Insurance Department stated that for a specific definition of replacement cost, the insured should refer to the loss settlement provisions contained in the insurance contract. The opinion discusses the difference between actual cash value and payment on a replacement cost basis. The Insurance Department stated that the determination of amounts payable, in the event of a covered loss, is specified by the language of the policy.

The second portion of the inquiry related to disputed payments. The Insurance Department stated that 11 NYCRR § 216.6(e) of Regulation 64, "Standards for prompt, fair and equitable settlements" applies to all authorized New York insurers. In accordance with that regulation, a check to an insured can represent payment of the undisputed elements of a claim. If the insured accepts a check that represents partial payment, the insured can seek additional payment for the disputed amounts.

The Insurance Department stated that other statutory restrictions are placed on insurers with respect to restrictive endorsements on payment checks or drafts and the documents that accompany them. Section 216.6(g) of Regulation 64 prohibits an insurer from attempting to limit its obligations by issuing checks or drafts that contain language to the effect that acceptance constitutes a final settlement or release of any other obligations.