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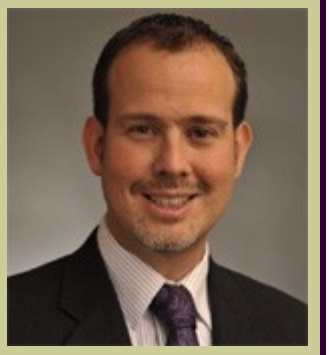

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ISSUES SURROUNDING LATE DISCLAIMERS -

WHAT TO DO, WHAT TO DO?

In the words of Chaucer: "For bet than never is late," [*Better late than never*] is a phrase insurers in New York should avoid at all costs in providing notices of disclaimer of coverage to their insureds. Under New York Insurance Law § 3420(d), an insurer disclaiming coverage liability or denying coverage for death or bodily injury arising out of an accident must provide written notice *as soon as is reasonably possible* of such disclaimer of coverage to the insured and injured person or any other claimant. New York courts have held that an insurer's failure to provide notice of disclaimer as soon as is reasonably possible after first learning of the accident (or of grounds for disclaimer of liability or denial of coverage) precludes the insurer from disclaiming coverage, even where the insured's own notice of the incident or claim is untimely. What is less clear is what exactly constitutes "as soon as is reasonably possible."

The determination of whether the disclaimer was issued as soon as reasonably possible first begins by referencing the time when the insurer first acquired knowledge of the ground(s) upon which it disclaimed. The reasonableness of any delay is computed from the time the insurer becomes sufficiently aware of the facts supporting a disclaimer. Most often, the question of whether a notice of disclaimer has been sent as soon as reasonably possible will be a question of fact, dependent on all of the circumstances of a case that make it reasonable, or unreasonable, for an insurer to investigate coverage. However, where the basis for the disclaimer was, or should have been, readily apparent *before* the onset of the delay, any explanation by the insurer for its delay will be insufficient as a matter of law (underscoring the importance of avoiding Chaucer's sarcasm above). Additionally, where delays are unexplained, or unexcused, by the insurer, New York courts have held that waiting periods of approximately two months or longer were unreasonable as a matter of law.

Before and after the seminal Court of Appeals case of *Jetco, supra note 3*, insurers have offered several excuses for a late denial, mostly in vain. These excuses primarily fall into four categories: (1) delay due to an insurers investigation into different, independent grounds for rejecting the claim; (2) delay due to an insurer's need for additional time to investigate other possible sources of insurance; (3) delay due to non-cooperation from its policyholders; and (4) delays occasioned by a reasonably prompt, thorough, and diligent investigation of the claim, of which only the latter is an acceptable excuse. This article will explore the viability of each of these "excuses."

Insurer's Investigation into other Independent Grounds

Delays based on the excuse for the need to investigate other independent grounds for denial of coverage have been repeatedly rejected by the courts, most recently by the First Department in *George Campbell Painting v. National Union Fire Ins. Co. of Pittsburgh, PA.* In *Campbell,* the Court held that Insurance Law § 3420 precludes an insurer from delaying issuance of a disclaimer on a ground that the insurer knows to be valid (more often than not based on late notice of the claim), while investigating other possible grounds for disclaiming. By doing so, the First Department rejected the argument by an insurer from delaying issuance of a disclaimer on the ground that the insurer required additional time to investigate other possible grounds for disclaiming. The Court stated that the statute's plain language does not permit an insurer to delay disclaiming on a ground fully know to it until it has completed its investigation (however diligently conducted) into different, independent grounds for rejecting the claim. Once the insurer knows of one ground for disclaiming liability, a disclaimer on that ground must be issued as soon as reasonably possible. An insurer's ongoing investigation of whether a claim falls within a policy exclusion is an insufficient excuse.

The First Department's holding in *Campbell* relied on the Court of Appeals' precedent set in

First Fin. Ins. Co. v. Jetco Contr. Corp. and explained that the policy behind the statute was to assist consumers or claimants in obtaining an expeditious resolution to liability claims by requiring insurance companies to give prompt notification when a claim is being denied.

Moreover, the First Department specifically stated that its holding was in line with a Second Department decision in *City of New York v. Northern Ins. Co. of N.Y.* which similarly held that § 3420(d) precludes an insurer from delaying issuance of a disclaimer on a ground that the insurer knows to be valid—here, late notice of the claim—while investigating other possible grounds for disclaiming. In *Northern*, the Second Department held that an insurer was not entitled, under § 3420(d), to delay issuing a late-notice disclaimer until it finished "investigat[ing] whether the City was an additional insured" because "such an investigation was unrelated to the reason for the disclaimer and [the defense of lack of additional insured status] could have been asserted at any time."

Investigating Other Sources of Insurance

Likewise, delays based on investigating other sources of insurance are not an acceptable reason for an untimely denial of coverage by an insurer. In *Jetco*, the Court rejected the insurer's argument that such inquiries should be encouraged because the delay and investigation into other sources of insurance benefit the insured. The Court flatly rejected that argument stating that the delay in providing the policyholder with a disclaimer "as soon as is reasonably possible" may also be in the insurer's interest in reducing its ultimate risk, rather than benefitting the policyholder. Moreover, the Court reasoned that the delay may detrimentally delay the policyholder's own search for alternative coverage. When the insurer promptly disclaims coverage, the policyholder is "best motivated by its own interest to explore alternative avenues of protection."

Having concluded that investigation into other sources of insurance was not an acceptable reason for delayed disclaimer, the Court went on to address what constituted a "reasonable delay." Stating that there was no "fixed yardstick against which to measure an insurer's delay," the question of whether a notice of disclaimer has been sent "as soon as is reasonably possible" will be a question of fact, dependent on all of the circumstances of a case that make it reasonable, or unreasonable, for an insurer to investigate coverage.

Non-cooperation of Policyholder

A delay based on non-cooperation by a policyholder has only enjoyed more moderate success. Once exception to the stringent rule is where the basis for the denial was not readily apparent following notice from the insured and where there is non-compliance by the policyholder. Complicating the issue for the insurer is the fact that an insured's noncooperative attitude is often not readily apparent. Indeed, such a position can be obscured by repeated pledges by the policyholder to cooperate only for the insurer's attempts to verify coverage thwarted. In those cases, an insurer must possess a valid basis to disclaim for noncooperation and do so within a reasonable time by submitting evidence justifying the delay due to the necessity of conducting a thorough and diligent investigation and explain the reasonableness of any delay in disclaiming coverage.

For example, in *Hunter Roberts Const. Group. LLC v. Arch Ins. Co*., where the insurer issued a denial of coverage for additional insured coverage over 103 days after notification of the claim on the basis that the Construction Manager (Hunter) and employees of its own insureds were uncooperative, the First Department rejected the insurer's ground for its untimely disclaimer In furtherance of its excuse for the untimely denial, the insurer submitted an investigator's affidavit, along with the "invoices detailing his investigatory work and the difficulty he experienced in locating and speaking to the insured's employees." The court rejected this argument due to the fact that the denial of coverage was based upon lack of coverage as an additional insured pursuant to an additional insured endorsement. Therefore, the court opined, a timely disclaimer was unnecessary.

The court also held that even if the claim did not involve additional insured coverage, an insurer who seeks to disclaim for noncooperation has a heavy burden of proof and must demonstrate that "it acted diligently in seeking to bring about the insured's cooperation[,] . . . that the efforts employed by the insurer were reasonably calculated to obtain the insure[d]'s co-operation . . . and that the attitude of the insured, after his co-operation was sought, was one of 'willful and avowed obstruction'"

The First Department's recent holding in *Hunter* was consistent with the Court of Appeals decisions which have repeatedly held that "insurers must be encouraged to disclaim for noncooperation only after it is clear that further reasonable attempts to elicit their insured's cooperation will be futile." The Court of Appeals indicated, however, the different scenarios faced by insurers by and non-cooperating policyholders. According to the Court Appeals, in cases where an insured openly disavows its duty to cooperate, little time is needed to evaluate the relevant noncooperative conduct before disclaiming. However, the Court of Appeals indicated that in the event where a policyholder promises to cooperate, or complies partially, some reasonably longer period for investigating the claim may be warranted even in excess of a two month delay in light of the policyholder's obstructive conduct.

Reasonably Prompt, Thorough, and Diligent Investigation of the Claim

It remains clear that where delays are "unexplained" by the insurer, waiting periods of approximately two months or longer are unreasonable as a matter of law. Despite the foreboding case law affecting an insurer's ability to issue a delayed denial of coverage, *Jetco* and its progeny holds a silver lining. That being, where a delay exists as a result of 'reasonably prompt, thorough, and diligent investigation of the claim' the disclaimer will not be untimely because an investigation is often necessary to determine whether there is any basis for disclaiming coverage." In so holding, the Court of Appeals provided examples by reference of what was previously held to be a "reasonable delay." For example, the First Department held that a reasonable delay existed where an insurer needed to review a 500-page file and conduct legal research, and found that an insurer's delay of slightly more than two months was satisfactorily explained.

Likewise, the Third Department found that a delay of more than one year was reasonable due to the disappearance and lack of cooperation of the insured. The Fourth Department held that a delay of four months was reasonable because of an insurer's difficulty gathering evidence as all of those involved in the underlying accident had been killed.

Conclusion

Although there are no hard and fast rules, and it is known that Chaucer's advice should not be followed when disclaiming insurance claims, what is known for sure is the fact that insurers must pay close attention to not only the timing of their denials, but also the cause behind them. Moreover, in the event that they are required to come forward with an excuse for the delay, the courts are unanimous on the fact that their efforts must be meticulously documented as evidenced by the above.

The Yeoman's Prologue and Tale*, Canterbury Tales, Geoffrey Chaucer, circa 1386.*
N.Y.INS. LAW § 3420(d).
First Fin. Ins. Co. v. Jetco Contr. Corp., 1 N.Y.3d 64, 67 (2003); Hunter Roberts Const. Group, LLC v. Arch Ins. Co., 75 A.D.3d 404 (1st Dep't. 2010).
Hunter Roberts, supra at 409, citing Pawley Interior Cont., Inc. v. Harleysville Ins. Co., 11 A.D.3d 595 (2004). See also, Continental Casualty Co. v. Stradford, 11 N.Y.3d 443 (2008), citing Jetco, supra at 68-69.
Continental Cas. Co. v. Stradford, 11 N.Y.3d 443, 449 (2008).
Matter of New York Cent. Mut. Fire Ins. Co. v. Aguirre, 7 N.Y.3d 772, 774 [2006] citing Jetco, supra ***70****. See also, Bovis Lend Lease LMB, Inc. v. Royal Surplus Lines Ins. Co., 27 A.D.3d 84, 88 (2005).*
Hartford Ins. Co. v. County of Nassau, 46 N.Y.2d 1028, 1029 (1979); Jetco , supra. at 70
Continental Casualty, supra at 449; Hunter Roberts, supra at 409 citing Thrasher v. United States Liab. Ins. Co., 19 N.Y.2d 159, 168 (1967); Matter of State Farm Indem. Co. v. Moore, 58 A.D3d 429 (2009); Matter of Liberty Mut. Ins. Co. v. Roland-Staine, 21 A.D.3d 771, 772 (2005). Campbell, supra at 133; Jetco, supra. at 69.
Jetco, supra at 69; *2540 Assoc. v. Assicurazioni Generali*, 271 A.D.2d 282 (1st Dep't. 2000); *DeSantis Bros. Allstate Ins. Co.*, 244 A.D.2d 183, 184 (1st Dep't. 19970; *Aetna Cas. & Sur. Co. v. Brice*, 72 A.D.2d 927, 928-929 (4th Dep't. 1979)
See fn. 4.
Id. at 133-34.
Id. at 114 citing *Jetco*, supra at 66.
See fn. 4.
Id. at 115
284 A.D.2d 291 at 292 (2d Dep't. 2001)
Id.
Jetco, supra at 69.
Id.
Id. at 70.
Continental Casualty Company v. Stradford, 11 N.Y.3d 443, 449 (2008).
See fn 4
Id. at 407.
Id. citing Markevics v. Liberty Mut. Ins. Co., 97 N.Y.2d 646, 648 (2001); *Perkins v. Allstate Ins. Co*., 51 A.D.3d 647, 649 (2008).
Id. at 410 citing Thrasher v. United States Liab. Ins. Co., 19 N.Y.2d 159, 168 (1967); See also *Matter of State Farm Indem. Co. v. Moore*, 58 A.D.3d 429, 430 (2009); and *Matter of Liberty Mut. Ins. Co. v. Roland-Staine*, 21A.D.3d 771, 772 (2005) stating that "strict scrutiny" of facts supporting the noncooperation defense is required to protect "innocent injured parties form suffering the consequences of a lack of coverage."
Continental, supra at 450 *citing Thrasher* at 168.
Id.
Hartford supra at 1029; Jetco at 70.
Jetco supra at 69.
DeSantis Bros. v. Allstate Ins. Co., 244 A.D.2d 183, 184 (1st Dep't. 1997); *Silk v. City of New York*, 203 A.D.3d 103 (1st Dep't. 1994)(30-day delay); *Public Service Mut. Ins. Co. v. Harlen Housing Associates*, 7 A.D.3d 421 (1st Dep't. 2004)(37-day delay); *Castro v. Prana Associates Twenty One, LP*, 95 A.D.3d 693 (20-day delay).
Campbell v. Travelers Ins. Co., 35 A.D.2d 362, 317 N.Y.S.2d 444 (3rd Dep't.1970); *Aetna Cas. & Sur. Co. v.. Brice, 72 A.D.2d 927, 928-929 (4th Dep't. 1979).*

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