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'Thrasher' Threshold Thriving

Thirty-eight years ago, in *Thrasher v. U.S. Liability Ins. Co.*, 19 NY2d 159 (1967), the New York Court of Appeals succinctly set forth the general rules, which are still frequently cited and applied today, 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.

Indeed, as will be demonstrated below, there has been a recent flurry of decisions on the issue of whether the *Thrasher* requirements have been met, which provide additional guidance in the assertion or refutation of the noncooperation defense.

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'Thrasher'

In *Thrasher*, supra, less than one month before the commencement of the trial of the personal injury action against the insured, the insurer retained an investigator to locate the insured and prepare him for trial. The efforts employed to obtain the insured's cooperation — which proved unsuccessful — consisted of sending him a letter by the attorneys retained to defend him requesting him to keep them 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."

The action proceeded against the insured in his absence and resulted in a judgment against him. The insurer thereafter disclaimed for failure to cooperate. In a direct action subsequently commenced by the plaintiff against the insurer to recover the amount of the judgment against the insured, the trial court held that the insurer's attempts to locate the insured were "superficial" and, therefore, the disclaimer was invalid. The Appellate Division reversed and held that the record amply established that the insured "violated the co-operation agreement contained in the insurance policy and that the [insurer's] efforts to effect his co-operation were sufficient to sustain its disclaimer."

In reversing the Appellate Division and invalidating the disclaimer, the Court of Appeals noted that, "The burden of proving lack of co-operation 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." Thus, the 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 the *Thrasher* case, the Court said that the insurer failed to act diligently in seeking its insured's cooperation and failed to employ reasonable efforts to locate its insured. Indeed, it characterized the insurer's investigative efforts to locate the insured once it learned that he had moved as "feeble indeed." The Court specifically noted that although the investigator called the insured's employer on the phone, he did not visit him or attempt to talk to any of the insured's fellow employees; although he visited the Department of Motor Vehicles, he never made any formal written request, which was required to obtain the desired information; although he 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 letters as "Undeliverable" and "Unclaimed," nothing was done to re-send those letters to a proper address. Moreover, the Court specifically stated 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.

Elements Clarified

The courts have further clarified the elements of a valid noncooperation defense. In order to be found to have acted diligently to bring about the insured's cooperation, the insurer must, of course, have requested cooperation. *Lauritano v. American Fidelity Fire Ins. Co.*, 3 AD3d 564 (1st Dept. 1957), affd. 4 NY2d 1028 (1958); *Torres v. Countywide Ins. Co.*, 46 AD2d 859 (1st Dept. 1974), affd. 38 NY2d 856 (1976). It must also explain to the insured the effect of a failure to cooperate. *Coleman v. National Grange Mut. Ins. Co.*, 28 AD2d 1073 (4th Dept. 1967), affd. 23 NY2d 836 (1969). When the claimed failure to cooperate is the failure to appear, the insurer must demonstrate that it made a meaningful investigation and appropriate efforts to reach the insured. *Rosen v. U.S. Fidelity & Guaranty Co.*, 23 AD2d 335 (1st Dept. 1965); *Alexander v. Stone*, 45 AD2d 216 (4th Dept. 1974). Efforts reasonably calculated to reach a foreign speaking insured may require the use of an interpreter. *National Grange Mut. Ins. Co. v. Lococo*, 20 AD2d 785 (1st Dept. 1964), affd. 16 NY2d 585 (1965).

With respect to the third prong, the courts have held that "the inference of non-cooperation must be practically compelling." *Matter of Empire Mutual [Stroud]*, 36

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NY2d 719, 722 (1975). Although the insured need not have openly "avowed" the intent to obstruct the insurer, the insurer's showing must support the inference that the insured's failure to cooperate was deliberate. Id. Absent compelling evidence that the insured knew he was to further participate in the defense, the insured cannot be accused of willful obstruction. *Pawtucket Mut. Ins. Co. v. Soler*, 184 AD2d 498 (2d Dept. 1992); *Mt. Vernon Fire Ins. Co. v. 170 East 106th St. Realty Corp.*, 212 AD2d 419, 422 (1st Dept. 1995), lv. to appeal denied, 86 NY2d 707 (1995). Indeed, the mere nonaction of the insured, by itself, will not justify the disclaimer of coverage. Id.; *New York State Insurance Fund v. Merchants Ins. Co. of New Hampshire, Inc.*, 5 AD3d 449 (2d Dept. 2004); *State-Wide Ins. Co. v. Ray*, 125 AD2d 573 (2d Dept. 1986).

A technical failure or immaterial omission will not suffice to provide the insurer with a valid basis for disclaiming. *High Fashions Hair Cutters v. Commercial Union Ins. Co.*, 145 AD2d 465 (2d Dept. 1988); *R&L Realty Development v. New York Central Mutual Fire Ins. Co.*, 219 AD2d 702 (2d Dept. 1995). See also, *Pawtucket Mutual Ins. Co. v. Soler*, 184 AD2d 498 (2d Dept. 1992). The courts have held that the duty of cooperation is satisfied by substantial compliance. *Ashline v. Gennesse Patrons Co-Op Ins. Co.*, 224 AD2d 847 (3d Dept. 1996); *Aravello v. State Farm Fire & Cas. Ins. Co.*, 208 AD2d 483 (2d Dept. 1994).

Non-Cooperation Found

In *State Farm Fire & Casualty Co. v. Ineri*, 182 AD2d 683 (2d Dept. 1992), the court held that the insurer met its burden of establishing noncooperation based upon its evidence of diligent efforts reasonably calculated to locate the missing insured and bring about his cooperation. In addition to numerous telephone calls and personal visits to the insured's last-known residence and business addresses, representatives of the insurer undertook searches of the records of the DMV in New York and Texas, conducted post office and prison index inquiries, canvassed several establishments in the area of the insured's former place of business, personally questioned a former employer, and pursued a lead that the insured had been issued a traffic ticket in Michigan. In addition, the evidence supported the conclusion that the insured willfully obstructed the insurer's defense of the underlying litigation. Despite verbal and written communications making the insured fully aware of his contractual obligation to cooperate in defending the litigation, he remained absent from the trial.

In *Nationwide Mutual Ins. Co. v. Graham*, 275 AD2d 1012 (4th Dept. 2000), the court held that the insurer satisfied its heavy burden of showing lack of cooperation by demonstrating the insured's failure to make fair and truthful disclosures in reporting the incident.

In *New York Central Mutual Fire Ins. Co. v. Salomon*, 11 AD3d 315 (1st Dept. 2004), the insurer, upon receipt of notice of the accident by an attorney for a passenger in the insured vehicle, contacted the insured's broker. Since the broker did not know the insured's telephone number, the insurer sent "contact letters" to her at the address listed on the police report and at the address listed in the insurer's file.

These letters were sent by both regular and certified mail. The letter sent by regular mail did not come back, but the letter sent by certified mail was returned as "Unclaimed."

The insurer then assigned the file to a special investigator. His check of the DMV records revealed that the insured vehicle had been "salvaged" and that the address listed on the police report was the one listed on the insured's driver's license. Certified letters sent to the insured again at both of her addresses were returned as "unable to serve." One letter came back with a forwarding address, which the investigator visited and determined that the insured did not live there at that time. Three deposition notices sent to the insured were sent by certified mail, and one was returned with what purported to be the insured's signature. The insured did not appear for her deposition.

Under these circumstances, the court held that the insurer did not meet its burden of establishing noncooperation by the insured. The evidence was insufficient to support an inference that the insured's failure to cooperate was deliberate and willful. Indeed, the court said that the inference of noncooperation was far from "practically compelling."

"Ultimately, before being permitted to disclaim due to noncooperation, the insurer had an obligation to do somewhat more than merely sending letters."

As explained by the court, the insurer's efforts to locate the insured were "almost entirely limited to sending letters." The assigned investigator never visited either of the insured's possible addresses, and there was no indication that when he visited the third potential address he ever sought to clarify when the insured moved or where she moved to. Thus, as the court summed up, "Ultimately, before being permitted to disclaim due to non-cooperation, the insurer had an obligation to do somewhat more than merely sending letters. It should have ascertained, by on-site visits, whether and when the insured lived in the various locations it had on file, and whether forwarding addresses were available, in order to determine whether the insured was deliberately avoiding responding to the insurer."

In *New York Central Mutual Fire Ins. Co. v. Bresil*, 7 AD3d 716 (2d Dept. 2004), the insured initially declined to answer any questions and provided the insurer with the telephone number of his attorney. Other than sending a letter to the attorney, the insurer's investigato

made no other efforts to secure the attorney's assistance in procuring the insured's examination under oath. Under these circumstances, the court concluded that the insurer failed to establish that its actions were sufficiently diligent and were reasonably calculated to obtain the insured's cooperation. Moreover, the court held that the insured's refusal to answer questions and referral to his attorney did not reflect an attitude of "willful and avowed obstruction."

And, in *Clarendon National Ins. Co. v. Bajwa,* 5 Misc3d 1030(A) (Sup. Ct. Kings Co. 2004), the court held that the insurer failed, as a matter of law, to satisfy its burden of demonstrating that it took sufficient steps to gain the insured's cooperation where the record established that it was unclear whether the letters to the insured seeking his cooperation were sent to an address where he resided; later correspondence between the insurer and its claims service revealed two other "possible" addresses for the insured; when investigators visited those two addresses 18 months after the accident, the insured was not present and his name was not listed on the building directory; and despite the contention that correspondence addressed to the insured was delivered to someone who identified herself as the insured's wife, it was later revealed that the insured had relocated to Pakistan one year earlier.

As summarized by the court, the insurer "failed to act diligently in seeking [the insured's] cooperation and failed to employ reasonable efforts to locate him. Most egregious was the investigators' utter failure to ascertain [the insured's] actual residence by visiting commercial establishments in the neighborhood visiting his place of employment, requesting information from the Department of Motor Vehicles, Board of Elections or by requesting that a credit check be performed. Finally, since the evidence does not support a conclusion that [the insured] was aware of the fact that [the insurer] was seeking his cooperation, it cannot be said that he willfully refused to cooperate."

In addition to the foregoing, in *Eveready Ins. Co. v. Mack,* __ AD3d __ NYS2d __ , 2005 WL 301143 (2d Dept. 2005); *Warnock v. Blue Ridge Ins. Co.,* 6 AD3d 697 (2d Dept. 2004); and *MetLife Auto & Home v. Burgos,* 4 AD3d 477 (2d Dept. 2004), the courts have recently found that the insurers failed to demonstrate that they met the requirements set forth in *Thrasher* to disclaim coverage on the ground of lack of cooperation. See also, *Baust v. Travelers Indemnity Co.,* 13 AD3d 788 (3d Dept. 2004) (questions of fact concerning the reasonableness of plaintiff's cooperation in scheduling examinations and whether he in fact knowingly or willfully failed to attend any scheduled appointments).