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Tricks of the Trade: Let the "Trickster" and "Trickee" Beware

"Trick — an action or device designed to deceive, swindle, etc; artifice; a dodge; ruse; stratagem; deception."

Source: Webster's New Universal Unabridged Dictionary (Deluxe Second Edition), p. 1950

"The timing and manner of service of papers should not be designed to cause disadvantage to the party receiving the papers."

"Lawyers should not mislead other persons involved in the litigation process."

Source: New York State Unified Court System, Standards of Civility, ¶¶V and IX.[1]

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A recent Appellate Division, Second Department, decision has called attention to the games some people play within the context of litigation, most particularly, in this case, the litigation of uninsured and underinsured motorist claims, and has inspired us to provide a survey of decisions dealing with actual or perceived attempts to gain unfair advantage through deception, ruse and/or artifice in the service of Demands for Arbitration and/or Notices of Intent to Arbitrate. It is hoped that by becoming familiar with this case law, those inclined to resort to trickery will be dissuaded from such unethical conduct. At the very least, it is hoped that those who would otherwise be victimized by such conduct will be alerted to the attempts to trick them and thus be better equipped to avoid falling into the traps set by their adversaries.

"Sharp Practice" Disdained

One of the most basic of all public policies is the policy against permitting unscrupulous persons from profiting from their own wrong. See *Tannenbaum v. Provident Mut. Life Ins. Co.*[1] As long as 115 years ago, the Court of Appeals stated, "No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to find any claim upon his own inequity, or to acquire property by his own crime." *Riggs v. Palmer.*[2] These words are as true today as they were then. As stated by the Appellate Division, First Department, in another context, where counsel is guilty of "sharp practice," "[t]o sanction such conduct would be to encourage employment of this kind of ruse in future proceedings, thus defeating the fundamental purpose of the statute." *Matter of Carlos, T.*[3] Moreover, the First Departmented stated, counsel, in such circumstances, "should not be permitted to benefit from [their] own misdeeds."

Indeed, our appellate courts have been particularly sensitive to these principles and have frequently responded to efforts to deceive in the context of uninsured and/or underinsured motorist litigation by estopping claimants from raising the issue of the timeliness of the insurer's attempts to stay arbitration "when [the claimant's] attorney engages in tactics calculated to hinder or prevent a contest by petitioner of the arbitrability issue..."

One common ploy designed to hinder or prevent a contest of the arbitrability issue, which has been frowned upon by the courts, is the attempt by claimant's counsel to hide or "bury" the demand for arbitration or notice of intention to arbitrate among or within a batch or packet of other documents simultaneously sent to the insurer in the hope that it would slip by unseen or unnoticed. In *Nationwide Mutual Ins. Co. v. Monroe*,[4] for example, where the demand for arbitration was served hidden in a stack of 18 documents sent to the insurer with a cover letter that made only indirect reference to the enclosed demand, and where the demand had been folded into quarters and stapled to the back of the eleventh piece of paper, with its lettering facing inward, the court allowed and considered the insurer's petition to stay arbitration even though the proceeding was commenced beyond the statutorily prescribed 20-day period because it found that this service was intended to hinder or prevent a contest. As stated by the court:

> The function of process is to give notice. Process must be served in a manner calculated to notify the opposing party of the relief sought and must give that party an opportunity to defend or oppose .... When 'notice is a person's due, process which is a mere gesture is not due process' [citations omitted]. A method of service which is misleading and disguises the contents or seeks to prevent actual knowledge of the contents before it is too late to interpose opposition is no service at all. If the purpose of service is to give notice of the proceeding and effectively limit the time in which to respond or resist, it must be held that where the notice is physically masked and concealed, it is invalid [citations omitted].

Accordingly, in *Rider Insurance Co. v. Marino*,[5] where the claimant mailed the demand for arbitration to the insurer at a post-office box address location used for business unrelated to the claim, notwithstanding knowledge of the proper address for the service of arbitration demands, and where the demand was enclosed in the middle of a packet of documents submitted in support of the claimant's benefits claim, under a cover letter that made only "vague and superficial reference" to the demand in itemizing all of the enclosed documents, the court held, "The totality of the circumstances indicates that respondent's service of the arbitration demand was calculated to hinder or prevent a contest by petitioner of the arbitrability issue," and, therefore, the court offset the insurer's tardiness in serving the petition to stay arbitration against the claimant's "improper preclusion tactics in serving the demand."

In *American Security Ins. Co. v. Tabacchi*,[6] the insurer complained about this "sharp practice," and the court held, "Claimant cannot raise the issue of untimeliness when his attorney engages in tactics calculated to hinder or prevent a contest by petitioner of the arbitrability issue by enclosing notice of the adversarial proceeding of arbitration in the middle of a packet of documents

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submitted in support of his benefits claim under cover of a letter that buried reference to the notice in the final paragraph between two sentences politely inviting the petitioner to telephone if it had any questions respecting amicable settlement of the claim . . . Sandwiching the reference to the arbitration demand at that point in an otherwise undemanding communication was no different than slipping it in between the list of supporting documents as was done in the *Rider Ins. Co. v. Marino* case."[7] See also, *Travelers Ins. Co. v. Thompson*[8] (Demand for arbitration, which was not on the American Arbitration Association's recognizable form, buried in the middle of the claimant's hospital record); *Balboa Ins. Co. v. Barnes*[9] (Demand concealed amidst a packet of eleven documents, mailed to the insurer's home office in California, despite a prior specific request to send all future correspondence to New York office); *Insinga v. Liberty Mutual Ins. Co.*[10] (Demand hidden among "voluminous other documents to prevent respondent from contesting the issue of arbitrability.")

On the other hand, and by contrast, in *State Farm Mut. Auto. Ins. Co. v. Santiago*,[11] where the claimant's attorney sent the demand for arbitration together with some 35 other documents, including medical records, police reports and letters, the court held that claimant did not intend to mislead the insurer because the cover letter that accompanied those documents made specific and explicit reference to "the Demand for Arbitration herein."

Misdirected Demands

Another common ploy or trick, already alluded to in some of the above-cited cases, is the misdirection of the demand or notice to the wrong office of the insurer. Based upon the principle that "service not designed to give notice cannot be grounds for a default,"[12] the courts have frequently held that demands or notices that are intentionally or even inadvertently sent to the wrong office of the insurer (such as an office that the claimant or his attorney knows is not the office handling the claim), cannot serve to start the twenty-day period running. Such service is considered a ploy for the purpose of hindering or preventing the insurer's ability to stay the arbitration within the statutory time period that should not be countenanced. See *Empire Mutual Ins. Co. v. Levy*;[13] *Metropolitan Property & Liability Ins. Co. v. Boisette*;[14] *Continental Ins. Co. v. Sarno*;[15] *Dandy Dan Taxi, Inc. v. Ins. Co. of the State of Pennsylvania*.[16] But cf., *Colonial Penn Ins. Co. v. Ennab*;[17] *U.S. Fire Ins. Co. v. Lihterman*;[18] *Avis Rent-A-Car System, Inc. v. Mitchell*.[19]

It should be noted that the American Arbitration Association Rules of Arbitration of Supplementary Uninsured/Underinsured Motorist Insurance Disputes in New York, effective with respect to disputes involving SUM or UM coverage resulting in requests for arbitration after Oct. 1, 1998, do not require that the demand or notice be served upon the office of the insurer where the claim was last discussed, but, rather, simply upon a "claim office of the insurer." See Rule 4. Thus, it is now less likely than before that an insurer will have a valid complaint if service of the demand or notice is made upon a remote claims office, and insurers must be more attuned to the importance of recognizing the appropriate claims office for handling of the matter and of promptly forwarding the pertinent papers to that office so that appropriate action can be taken within twenty days of receipt of the demand or notice by the first-served office.

Another potentially effective anti-contest device is the creation of demand or notice forms that appear to be something they are not.

In *State-Wide Ins. Co. v. Rowe*[20]—a case in which we were involved—the claimant's attorney served upon the insurer a blue-colored form entitled "Notice of Intention to Make Claim and Arbitrate," which was cleverly, skillfully and, it appeared, intentionally created so as to appear virtually identical in appearance, content, layout, and even color to the Blumberg form entitled "Notice of Intention to Make Claim," that was widely in use at that time.

The insurer's claims representative stated in his affidavit, submitted in support of a motion to renew and/or reargue the denial of the insurer's Petition to Stay on the ground of untimeliness, that because the form "looked no different from the Blumberg Notice of Intention to Make Claim form" customarily received as the first notice of a claim, but which does not require any immediate action by the insurer, and was, indeed, "virtually identical" to it, he did not see and/or appreciate the significance of the 20-day notice contained therein and, therefore, "took no steps to alert [the insurer's] attorneys to apply to the court for a stay of arbitration." Moreover, he believed "that the alteration of the Blumberg form in this manner was designed to mislead me into believing that it was something other than what it really was and, to my embarrassment and dismay, it accomplished its intended purpose."

Claimant's counsel, for his part, argued that, contrary to the insurer's assertions that the form was fraudulent and deceitful, "the form itself was open, obvious, and direct as it could have been." As he further explained, "the notice . . . did not hide the fact that it was a notice of intent to arbitrate, and was correctly entitled a 'NOTICE OF INTENT TO MAKE CLAIM AND ARBITRATE,' in big, bold, capital letters. All one had to do was read the heading to know that [the claimant] intended to demand an arbitration."

Although the insurer's motion to renew was denied by the Supreme Court, on the ground that the new and additional information concerning the misleading nature of the notice was or should have been known to the insurer at the time of the original motion, but was inexcusably not raised at that time, the court nevertheless added its opinion that the application of the facts of this case to the line of cases in which ploys or tricks were used to hinder or prevent a contest of the arbitrability issue was "strained."

The Appellate Division, Second Department, affirmed both the original denial of the petition and the denial of the renewal motion, holding, most notably, that the additional facts regarding the alleged deception by claimant demonstrated that the petition's untimeliness "was the result of its own employee's neglect, not any deception on the part of the respondent."

Apparently emboldened by the appellate division's failure to criticize his efforts and, indeed, its tacit approval thereof, counsel for the claimant in *Rowe* has apparently continued to use the same form over the years. That form and its service was the subject of the recent appeal in *Nationwide Ins. Co. v. Singh*[21] decided by the Second Department on April 5, 2004.

Demand for Arbitration

In *Singh*, the claimant's counsel sent to the insurer, by certified mail, return receipt requested, a letter enclosing a no-fault application and the "Notice of Intention to Make Claim and Arbitrate" discussed above. More than three months later, and after the insurer disclaimed coverage on the grounds of late notice, counsel served a demand for arbitration upon the insurer. Within 20 days of receipt of the demand — but nearly four months after receipt of the notice of intention — the insurer commenced a proceeding to stay arbitration. Claimant cross-moved to dismiss the stay proceeding on the ground that it was not timely commenced following the undisputed receipt of the notice. In opposition to the cross-motion, the insurer argued, incorrectly, in an affirmation of its counsel, that the notice of intention to arbitrate was not a formal demand to arbitrate against which a proceeding to stay would be required. Counsel did not, however, argue that the notice was misleading or deceptive.

The Supreme Court, sua sponte, raised the issue and held that the notice of intention to arbitrate, in its timing and circumstances, was intended to mislead. Thus, the court measured the 20-day period from the subsequent demand for arbitration and granted the petition.

On appeal, however, the Second Department reversed that determination. Despite recognizing that "service intended to conceal a notice of intention to arbitrate and to precipitate an insurer's default will not be given preclusive effect when the notice is buried among unrelated documents or is served on a remote office of the insurer," citing several of the cases cited above, the court noted that "these cases were not decided in a vacuum." The court further stated, "The issue of misleading tactics had to be raised by the petitioners who tardily sought to stay arbitration, and had to be supported by someone with knowledge of the facts on the basis of which they contended that they had been misled." Noting that the insurer never claimed to have been misled and that, therefore, no affidavit was submitted by an insurance company employee to support such a contention, the court felt itself bound by its prior decision in *Rowe*, supra — where, as noted, although such an affidavit was, in fact, submitted, it was rejected for technical reasons — to reverse and deny the petition. Interestingly, the court focused solely upon the fact that claimant's counsel, to his credit, did not bury the notice among a sheaf of other documents, and that service of the notice to the insurer's North Syracuse office did not adversely affect its ability promptly to respond thereto; the court did not comment at all on the misleading and deceptive nature of the notice itself.

Green Light for Form

One must wonder whether different results would have obtained in *Rowe* had the evidence of the misleading nature of the notice been raised in a timely fashion, and in *Singh* had such evidence been submitted at all. It does, however, appear from these two decisions, that either by luck or by skill, claimant's counsel has been given the green light to utilize his self-created form in order to start the 20 days running.

We frequently advise our readers to ALWAYS READ THE POLICY, AND ALWAYS READ IT CAREFULLY. To this important general rule of insurance law practice, applicable to both claimants and insurers, we add the following new rule, particularly applicable to insurers: ALWAYS READ THE NOTICE OF INTENTION TO MAKE CLAIM AND ARBITRATE, AND ALWAYS READ IT CAREFULLY.

1. 41 NY2d 1087, 1090 (1977).
2. 115 NY 506, 511-512 (1889).
3. 187 AD2d 38, 42 (1st Dept. 1993).
4. 75 AD2d 765 (1st Dept. 1980).
5. 84 AD2d 832 (2d Dept. 1981).
6. 95 AD2d 808 (2d Dept. 1983).
7. Interestingly, in *Tabacchi*, supra, the court noted that the claimant's attorney in *Rider Ins. Co. v. Marino*, supra, who was also involved in *Tabacchi*, was censured in a written decision of the Supreme Court, Kings County, in yet another matter wherein he engaged in the same tactic of burying the demand for arbitration.
8. 117 AD2d 595 (2d Dept. 1986).
9. 123 AD2d 691 (2d Dept. 1986).
10. 265 AD2d 411 (2d Dept. 1999).
11. 84 AD2d 552 (2d Dept. 1981).
12. *Mullane v. Central Hanover Trust Co.*, 339 US 306 (1950).
13. 35 AD2d 916 (1st Dept. 1970).
14. 105 AD2d 785 (2d Dept. 1984).
15. 128 AD2d 870 (2d Dept. 1987).
16. 155 AD2d 458 (2d Dept. 1989).
17. 168 AD2d 494 (2d Dept. 1990).
18. 201 AD2d 267 (1st Dept. 1994).
19. The New York Law Journal, April 6, 1995, p. 31, col. 3 (Sup Ct Nassau Co.).
20. 228 AD2d 606 (2d Dept. 1996).
21. __AD2d__, __NYS2d__, 2004 WL 23355423 (2d Dept. 2004).