INSURANCE LAW

"Thrasher" Threshold Continues To Thrive

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More than thirteen years ago, my father, Norman H. Dachs, and I co-wrote an article in this space, alliteratively entitled "'Thrasher' Threshold Thriving" (see N.Y.L.J., March 15, 2005, at p. 3, col. 1). Therein, we discussed the seminal case on disclaimers of coverage based upon the insured's lack of cooperation -- Thrasher v. U.S. Liability Ins. Co., 19 NY2d 159 (1967), and its progeny.

As will be demonstrated below, since that article was published, decisions on the issue of whether the Thrasher requirements for a valid noncooperation disclaimer have been met continue to abound, and to provide additional guidance for the assertion and/or refutation of the noncooperation defense.

Thrasher

In Thrasher, supra, the Court of Appeals famously explained 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 co-operation 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 co-operation [citations omitted]; [2] that the efforts employed by the insurer were reasonably calculated to obtain the insured's co-operation [citations omitted]; and [3] that the attitude of the insured, after his co-operation was sought, was one of 'willful and avowed obstruction' [citations omitted]." See also

Continental Ins. Co. v. Bautz, 29 AD3d 989 (2d Dept. 2006); Allstate Ins. Co. v. Guillaume, 23 AD3d 379 (2d Dept. 2005).

In applying that test to the facts of the Thrasher case -- where the efforts employed by the insurer 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 court held that the evidence did not support the insurer's disclaimer for noncooperation, and, indeed, the insurer's investigative efforts to locate the insured once it deemed that he had moved were "feeble indeed." 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.

In numerous cases decided after our 2005 article, the courts held that the Thrasher threshold had not been met by the insurer, and, thus, invalidated the insurer's noncooperation disclaimers.

In Rucaj v. Progressive Ins. Co., 19 AD3d 270 (1st Dept. 2005), for example, the insurer's claims specialist indicated that he contacted the insured by cell phone on October 8, 2002, questioned him about his license and residence, and asked him to send proof of residency, which the insured never did. While a residency skip trace confirmed the insured's New York license and Virginia residence, the insurer's investigator did not attempt to contact him again until eight months later, when he learned that a lawsuit had been commenced against the insured, and that the underlying plaintiff had obtained a default judgment against him. At that point, the investigator's attempts to contact the insured were limited to telephone calls to his cell phone number, his Virginia number, and his mother's residence in the Bronx. Although those calls were either unanswered, or answered by unidentified persons who refused to provide any information concerning the insured's whereabouts, the investigator did nothing more than conduct another trace search, which revealed no new information. No attempt was made to send an investigator to the insured at his residence in Virginia, or his mother's residence in the Bronx, to inquire of neighbors and/or family members as to the insured's whereabouts. Nor was an attempt made to contact the insured's place of employment and speak to his employer or co-workers. The only written correspondence sent to the insured was apparently the disclaimer letter, which was sent on July 8, 2003, and was returned as "Unclaimed."

In support of its determination that the parties' submissions did not establish that the insured willfully obstructed the insurer's attempt to investigate, the court observed that the insurer's assertion in that regard was based merely upon the claim that the insured was apparently aware of the lawsuit since he was served with the Summons and Complaint and the default motion, from which, alone, it could not be concluded that he was aware of the lawsuit and an obligation to cooperate with his insurer. As the court explained, "even assuming [the insured] was aware of the lawsuit, he could have believed his insurance company was taking care of it." Thus, the court concluded that "While [the insured] may be guilty of inaction, carelessness or neglect, it cannot be concluded that defendant insurer provided sufficient evidence from which it could be inferred that after [the

insured's] cooperation was sought his attitude was one of willful and avowed obstruction."

In Liberty Mutual Ins. Co. v. Roland-Staine, 21 AD3d 771 (1st Dept. 2005), a special investigator employed by the tortfeasor's insurer, testified at a framed issue hearing that on June 24, 2002, he went to a 174th Street address on file with the insurer for the insured. No one was there, and he left a letter requesting the insured to contact the insurer. Three weeks later, the investigator looked for the insured at another address, on Nelson Avenue, and again at the 174th Street address. No one was at either location, and he left "contact letters" in both places. On cross-examination, the investigator admitted that he did not attempt to contact the driver of the insured vehicle, even though he knew where the driver lived.

The insurer also introduced into evidence four letters, all of which were sent to the insured by certified mail. The first letter, which was returned as "Unclaimed," was sent to the 174th Street address. It advised the insured that he had breached the terms of his policy by failing to report the accident, but did not request that the insured contact the insurer. The second letter, also sent to the 174th Street address, was written by a claims adjustor, who requested the insured to contact the insurer to provide a statement about the accident. The third letter, also returned as "Unclaimed," was sent to the Nelson Avenue address, and informed the insured that coverage could be denied because of his failure to fulfill his obligations under the policy. Again, however, this letter did not request that the insured contact the insurer. The fourth letter, which was sent to both 174th Street and Nelson Avenue, disclaimed coverage due to the insured's failure to report the loss, confirm the details of the accident, or contact the insurer.

Although the hearing referee concluded that the insurer had a valid noncooperation defense, the Appellate Division reversed. In holding that the evidence was insufficient to support an inference that the insured's failure to cooperate was deliberate and willful, and that the inference of noncooperation was far from the "practically compelling" showing necessary to support a noncooperation disclaimer, the court noted that when the insurer's investigator went to the insured's purported addresses and did not find him there, he did not speak to anyone at either location to verify the insured's address. Further, there was no indication that the insured received any of the letters mailed to him or left

at either of the two locations visited by the investigator. The insurer did not attempt to contact the driver to inquire as to the insured's whereabouts, and no one else was questioned to determine whether the insured actually lived at either of the addresses.

In St. Paul Travelers Ins. Co. v. Kreibich-D'Angelo, 48 AD3d 1009 (3d Dept. 2008), the record established that after the tortfeasor's insurer became aware of the lawsuit against its insured in April 2005, it made efforts to locate the insured through its database, directory assistance, skiptrace, and the information provided by him in his recorded statement. Between April and May 2005, the insurer placed six telephone calls to what it believed to be the insured's residence and left voicemail messages on all but two occasions. A reservation of rights letter was then sent by certified and first class mail to the insured at "47 McCleary Avenue." Subsequently, the insurer made contact with someone purporting to be the insured's brother, who suggested that it contact the Maritime School in Maryland. Once the number he provided proved to be incorrect, no further efforts were made. In May 2005, someone claiming to be the insured's sister advised the insurer that the insured was residing with his mother at the "McCreary Avenue" address. When the insurer finally went to that address, at a time not disclosed in the record, no one was home. A denial letter was sent by certified and first class mail to the insured at the "McCleary Avenue" address in June 2005.

The court held that these efforts were insufficient under Thrasher because the insurer never explained the seeming confusion in the record between a McCleary Avenue address and a McCreary Avenue address, nor the discrepancy between McCleary Street and McCleary Avenue. Moreover, the court noted that nothing in the record explained the failure to contact the insured at his North Carolina address listed in the police report. Thus, the court concluded that with no evidence indicating that the insured knew that [the insurer] was seeking his cooperation, and that he willfully refused to cooperate [citing Thrasher], it could not cannot agree that his attitude was one of "willful and avowed obstruction."

In Country-Wide Ins. Co. v. Henderson, 50 AD3d 789 (2d Dept. 2008), the sole evidence presented by the insurer in support of its noncooperation disclaimer was an affidavit from an investigator within its Special Investigations Unit, who had no personal knowledge of the efforts made to locate the insured. The affidavit

merely recited the apparent efforts of an unnamed investigator and attached copies of letters to the insured from a claims representative. The affidavit was based entirely upon hearsay evidence with no proof that it fell within any exception to the hearsay rule, e.g., the business records exception. Thus, the court held that it was inadmissible and failed to provide a sufficient basis upon which to determine the validity of the insurer's disclaimer [citations omitted]. See also DeLuca v. RLI Ins. Co., 153 AD3d 662 (2d Dept. 2017) (letters from attorneys representing the insured in an underlying lawsuit, and investigation reports regarding statements by the insured's president and reciting their content, which the insurer contended demonstrated the insured's willingness to cooperate, were inadmissible hearsay, which could not be considered on the insurer's motion for summary judgment on its noncooperation defense).

In any event, the Henderson court held that the insurer failed to demonstrate that it met the requirements set forth in Thrasher to disclaim coverage based upon the insured's lack of cooperation. While the insurer's efforts to locate the insured and send correspondence to him demonstrated that it acted diligently in trying to secure his cooperation, the insurer failed to demonstrate that its efforts were reasonably calculated to bring about his cooperation. While the affidavit of the investigator correctly showed that the surname of their insured was "Pierre Charles," the correspondence from the claims representative and the Department of Motor Vehicles and Board of Elections search requests in both New York City and Nassau County incorrectly gave "Kessel" as the surname. Under such circumstances, it could not be said that the efforts employed, even if diligently undertaken, were reasonably calculated to bring about Pierre Charles' cooperation. As for the third prong of the Thrasher test, the court held that it was highly questionable that Pierre Charles ever received notice of the disclaimer from the insurer as a result of the incorrect name identification. Moreover, even if had received notice, mere efforts by the insurer and mere inaction on the part of the insured, without more, are insufficient to establish noncooperation as "the inference of non-co-operation must be practically compelling."

In Hunter Roberts Construction Group LLC v. Arch Ins. Co., 75 AD3d 404 (1st Dept. 2010), the insurer's noncooperation disclaimer was rejected where the evidence established that its investigator called the insured's main business number three times and was told that he would have to supply the name of the person with

whom he wished to speak, but never went to the office personally, nor made specific demand to produce an appropriate person for interview, and there was no evidence that further efforts to communicate with the insured would have been futile.

And, in American Transit Ins. Co. v. Hussain, 100 AD3d 421 (1st Dept. 2012), lv. to appeal denied, 20 NY3d 859 (2013), the evidence at a framed-issue hearing was deemed insufficient to establish a lack of cooperation. Although the insurer sent letters and investigators to three different addresses for the insured, the record did not establish that the insured received the letters or had actual notice of the insurer's attempts to contact him. Further, the insurer never attempted to contact the insured at various other addresses in its file or at a possible work location.

'Thrasher' Threshold Met

On the other hand, in numerous other cases, the courts concluded from the facts and evidence before them that, indeed, the three-pronged Thrasher test was met, and the insurers' noncooperation disclaimers were, therefore, proper and effective.

For example, in Allstate Ins. Co. v. United International Ins. Co., 16 AD3d 605 (2d Dept. 2005), the court held that the record suggested a finding that the insurer undertook diligent efforts that were reasonably calculated to bring about the insured corporation's cooperation where the insurer's representatives contacted the insured's principal owner "on more than one occasion" to ensure that he would be present on the day of his scheduled testimony, including on the night before his scheduled testimony. The court also found that the insured's president's attitude after his cooperation was sought was one of "willful and avowed obstruction" insofar as he failed to appear to testify at the last minute, without explanation, despite promising to testify and being under subpoena from the plaintiff's attorney. [The court further noted that the insurer was not required to show prejudice as a result of the insured's lack of cooperation].

In Utica First Ins. Co. v. Arken, Inc., 18 AD3d 644 (2d Dept. 2005), the court held that the insurer and the law firm it retained to defend the corporate insured in the underlying action made diligent efforts, "by means of

correspondence and numerous telephone calls," which were reasonably calculated to bring about the insured's cooperation, and that the insured wilfully obstructed the insurer's defense of the underlying action by essentially ignoring the insurer's "verbal instruction and written correspondence" regarding its contractual obligation to cooperate in defending the litigation.

In New South Insurance Company/GMAC Insurance v. Krum, 39 AD3d 1110 (3d Dept. 2007), the record demonstrated that the tortfeasor's insurer, "in an effort to discuss the matter with and obtain assistance from [its insured]," placed unsuccessful telephone calls to him at the home and work numbers he had provided. In addition, the insurer sent three letters via certified and registered mail to the insured's last known address, which it confirmed through, inter alia, the insurer's database and directory assistance. Further, the insurer's personnel visited the insured's home address on two separate occasions. On the first such visit, nobody was at home, but on the second visit, the insured's mother answered the door and explained that the insured was aware of the accident, had received the insurer's letters, and that she would stress to him that his cooperation was necessary. Notwithstanding all of the foregoing, the insured never responded to the insurer, nor assisted it in the investigation of the claim. Under these circumstances, the court upheld the insurer's noncooperation disclaimer based upon the Thrasher test.

In Continental Cas. Co. v. Stradford, 46 AD3d 598 (2d Dept. 2007), affd. as modified, 11 NY3d 443 (2008), the insured ignored a series of written correspondence and telephone calls from the insurer's representatives and from defense counsel during the course of the insurer's investigation and defense of the underlying action. The insured also repeatedly refused to provide requested documents, records and evidence, and "unreasonably refused" to consent to a recommended settlement, and then refused to execute a Consent to Change Attorney form despite his own request for new counsel. He also failed to appear for scheduled depositions and meetings. Two separate letters advising the insured that he risked a disclaimer if he continued to fail to cooperate were returned to the insurer's office marked "Unclaimed." Under these undisputed facts, the court concluded that the insurer carried its burden to establish all three prongs of the Thrasher test.

In State Farm Indemnity Co. v. Moore, 58 AD3d 429 (1st Dept. 2009), the evidence demonstrated that upon being informed of the accident involving its insured, the insurer promptly commenced a detailed investigation and "diligently followed up on it." In addition to numerous telephone calls being made to the number that the insured provided to it, the insurer sent letters via certified mail or registered mail to the address provided, and the insured signed for one of those letters. In addition, visits were made to the insured's address, and conversations were had with the insured's mother, who maintained that she did not know his whereabouts. Based upon the foregoing, the court concluded that the insurer's unsuccessful efforts were reasonably calculated to obtain the insured's cooperation, and that "the inference that [the insured] deliberately chose not to cooperate is compelling."

Most recently, in Robinson v. Global Liberty Ins. Co. of New York, 164 AD3d 1385 (2d Dept. 2018), the insurer sent letters to the owner and operator of the insured vehicle advising them of their responsibility to cooperate in the investigation and defense of the underlying action. With respect to the driver, an investigator hired by the insurer to locate him communicated with him, but he refused to cooperate. Under these circumstances, the court held that the insurer met its burden under Thrasher to establish a valid noncooperation defense.

By contrast, however, with respect to the vehicle owner/insured, the evidence established that the insurer repeatedly sent letters to an address where the owner did not reside. Moreover, the investigator searched for the driver under an incorrect name. For those reasons, the court held that the insurer failed to meet its heavy burden of proving lack of cooperation as to the owner/insured.

Timeliness of Noncooperation Disclaimers

Notably, in Robinson v. Global Liberty Ins. Co., supra, the court ultimately held that the insurer's otherwise meritorious noncooperation disclaimers were invalid because they were untimely, having not been sent within a reasonable time after the insurer had sufficient information upon which to disclaim on the basis of noncooperation. The topic of the timeliness of noncooperation disclaimers has previously been covered in Dachs, Norman H. and Dachs, Jonathan A., "Court of Appeals Clarifies Timeliness of Noncooperation Disclaimer," N.Y.L.J., March 11,

2014, p. 3, col. 1. See also Continental Cas. Co. v. Stradford, supra; Country-Wide Ins. Co. v. Preferred Trucking Services Corp., 22 NY3d 571 (2014).

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