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HEADLINE: Meeting Cooperation's Heavy Burden of Proof

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BODY:

With the proliferation of fraud in the context of automobile accident claims, insurers are increasingly availing themselves of the policy provisions requiring an insured's cooperation in the investigation of a claim.

In the No-Fault context, carriers are frequently conducting examinations under oath (EUO) of the insured/claimant in an effort to verify the nature of the accident and treatment received. In the context of first party coverage, the automobile insurance policies generally require the insured to submit to EUOs and independent medical examinations and produce pertinent documents and/or or authorizations, while the liability provisions of the policy require an insured to cooperate in the investigation, settlement or defense of a claim or risk the loss of coverage.

The purpose of the cooperation clause is to obtain relevant information to enable the insurance carrier to determine its obligations under the policy and to protect against false claims. *Evans v. International Insurance Company*. n1

n1 [168 AD2d 374](#), [562 NYS2d 692](#) (2nd Dept. 1990).

While the stated purposes are equally important in both first party and third-party contexts, the courts are less inclined to uphold a lack of cooperation disclaimer in the third-party context, since the defense of lack of cooperation penalizes the plaintiff for the action of the insured over whom he has no control, and "frustrates the public policy of this state that innocent victims of motor vehicle accidents be recompensed for the injuries inflicted upon them."

Insurance Law @ 3420 (c) provides:

If an action is maintained against an insurer under the provisions of paragraph two of subsection (a) of this section and the insurer alleges in defense that the insured failed or refused to cooperate with the insurer in violation of any provision in the policy or contract requiring such cooperation, the burden shall be upon the insurer to prove such alleged failure or refusal to cooperate.

'Thrasher'

The elements required to establish lack of cooperation were set forth by the Court of Appeals in the seminal case of *Thrasher v. U.S. Liability Insurance Company*.ⁿ² In *Thrasher*, the Court enunciated a three prong test for establishing lack of cooperation: a demonstration by the insurer that it acted diligently in seeking to bring about the insured's cooperation, that its Search - 1 Result - Meeting Cooperation Heavy Burden of Proof Page 1 of 5
http://www.lexis.com/research/retrieve?_m=8429483843325cc91b440aca4a18fd74&csvc=...
10/2/2005 efforts were reasonably calculated to obtain the insured's cooperation and that the attitude of the insured, after his cooperation was sought, was one of "willful and avowed obstruction."

ⁿ² 19 NY2d 159, 278 NYS2d 793 (1967).

In *Thrasher*, less than one month before the commencement of the trial against the insured, the insurer retained an investigator to locate the insured. The efforts employed to obtain the insured's cooperation consisted of visiting the insured's 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 bars and visiting the Department of Motor Vehicles to check for an address for the insured.

Despite such efforts, the Court of Appeals opined that the insurer failed to act diligently in seeking its insured's co-operation and failed to employ reasonable efforts to locate its insured. 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.

As in *Thrasher*, frequently, an insurer points to its insured's failure to respond to correspondence or telephone messages as a ground for disclaiming. The cases which follow *Thrasher* have not required an openly avowed intent to obstruct in order to find that the insured failed to cooperate.

However, the Courts impose a very heavy burden to support the inference that the failure to cooperate was deliberate. *Mount Vernon Fire Insurance Company v. 170 East 106th Street Realty Corp.*ⁿ³

ⁿ³ 212 AD2d 419; 622 NYS2d 758 (1st Dept. 1995).

The courts have consistently held that claims that an insured did not respond to the insurer's communications or that he ignored correspondence, were palpably insufficient to establish lack of cooperation.ⁿ⁴

ⁿ⁴ See *Statewide Insurance Company v. Ray*, 125 AD2d 573, 509 NYS2d 642 (1986), where the alleged non-action of the insured could not be escalated into a finding of willful and avowed obstruction; *Pawtucket Mutual Insurance Company v. Soler*, 184 AD2d 498, 584 NYS2d 192 (2nd Dept. 1992); *Amatucci v. Maryland Casualty Co.*, 25 A.D.2d 583, 267 N.Y.S.2d 41 (3rd Dept. 1966); *Rosen v. United States Fidelity & Guarantee Co.*, 23 A.D.2d 335, 260 N.Y.S.2d 677 (1st Dept. 1965) (overruled on other grounds).

As noted by the Court in *Empire Mutual Insurance Company v. Stroud*, n5 where non-action is being cited as evidence of a lack of cooperation, the inference of non-cooperation must be practically compelling. In the case of *Allstate v. Loester*, n6 the Court specifically noted that it may not be inferred that an insured's failure to answer correspondence from his or her insurer is indicative of an attitude of willful and avowed obstruction.

n5 367 NYS2d 972, 328 NE2d 485 (1975).

n6 177 Misc.2d 372, 675 NYS2d 832 (Queens County, 1998).

In *Commercial Union Insurance Company v. Burr*, n7 the court held that even if the insured's failure to respond constituted compelling evidence of willful and deliberate non-cooperation, the insured's subsequent pledge of full cooperation and an explanation for his previous unavailability were sufficient to preclude the carrier from disclaiming coverage. See also, *Zizzo v. Liberty Mutual Insurance Company*. n8

n7 226 AD2d 416, 641 NYS2d 69 (2nd Dept. 1996).

n8 188 Misc2d 293, 728 NYS2d 343 (2nd Dept. 2001).

The failure to truthfully and accurately advise the insurer of the facts surrounding an accident was sufficient to justify a lack of cooperation disclaimer in *Nationwide Mutual Ins. Co. v. Graham*. n9 In *Graham*, the insured initially advised the insurer that the accident happened while his vehicle was parked and not moving, but over a year later admitted he was driving the vehicle when the claimant fell in the bed of his truck. The failure to make truthful disclosures in reporting the incident was deemed a breach of the cooperation clause as a matter of law and a showing of prejudice was not required.

n9 275 AD2d 1012, 713 NYS2d 602 (4th Dept. 2000).

State Farm Fire and Casualty Company v. Imeri n10 is instructive in demonstrating the extent of the efforts required to uphold a lack of cooperation disclaimer. In *Imeri*, the court upheld a disclaimer finding State Farm's efforts were reasonably calculated to locate their insured and bring about his cooperation. The efforts included numerous telephone calls and personal visits to the insured's last known residence and business addresses, searching the Department of Motor Vehicles, canvassing several establishments in the area of the insured's former place of business and pursuing a lead that the insured had been issued a traffic ticket in Michigan. The court also found that the evidence supported the finding that the insured willfully obstructed State Farm's investigation, where, by verbal instruction and correspondence, the insured was made aware of his duty to cooperate. Furthermore, State Farm produced a claims representative who testified as to several post-accident conversations with the insured.

n10 182 AD2d 683, 582 NYS2d 463 (2nd Dept. 1992).

'In contrast, the courts are more inclined to sustain a lack of cooperation defense in the first party context. Obviously, the same public policy concerns do not exist and it is the insured/claimant who determines the extent of cooperation extended.

In several first-party property damage cases, the courts have upheld lack of cooperation disclaimers where the insured refused to turn over relevant documents or appear for an examination before trial. *Utica Mutual Insurance Company v. Gruzlewski*; n11 *304 Meat Corp. v. New York Property Insurance Underwriting Association*; n12 *Zizzo*, supra.

n11 217 AD2d 903, 630 NYS2d 826 (4th Dept 1995).

n12 188 AD2d 382, 591 NYS2d 390 (1st Dept. 1992).

An insured's refusal to answer questions at an examination under oath, even if at the advice of counsel, has been held to be a breach of the cooperation clause. *Johnson v. Allstate*; n13 *Evans v. International Insurance Company*; n14 but see, *Ingarra v. General Accident*. n15 In fact, such advice could subject the attorney to a legal malpractice claim. *Silver v. Berg*. n16

n13 197 AD2d 672, 602 NYS2d 876 (2nd Dept. 1993).

n14 168 AD2d 374; 562 NYS2d 692 (1st Dept. 1990).

n15 273 AD2d 766, 710 NYS2d 168 (3rd Dept. 2000).

n16 *NYLJ*, Apr. 7, 1995 pg. 34.

In the context of a No-Fault claim, the Appellate Division, Second Department in *Adams v. Allstate* n17 upheld the award of a No-Fault Arbitrator, which denied the claim based upon the insured's failure to appear for one independent medical examination. n18

n17 210 AD2d 319, 620 NYS2d 71 (2nd Dept. 1994).

n18 For a more detailed analysis see Jaffee & Chiu, "Using Independent Medical Examiners in No-Fault" *NYLJ*, May 10, 2001, p.1.

Likewise, a denial was upheld by a no-fault arbitrator where the claimant, a bicyclist struck by a motor vehicle, failed to appear for an Examination Under Oath. n19 See also, *Gallagan and New York Central Mutual*, n20 where a denial was upheld for failure to appear for two independent medical examinations and *Concord Orthopedic Center* and *GEICO*, n21 where a denial was upheld for the claimant's failure to appear for an examination under oath on three separate occasions. But see *Dier* and *Blue Ridge Ins. Co.*, n22 where a denial for failure to attend two independent medical examinations was held unjustified in light of a "breakdown in communication."

n19 *NYS Arbitration Reporter*, Vol. 21, No. 2 Dec. 1996 at p. 16

n20 *NYS Arbitration Reporter*, Vol. 22, No. 3, Sept. 1997 at p. 10

n21 *NYS Arbitration Reporter*, Vol. 23, No. 2, June 1998 at p. 17.

n22 *NYS Arbitration Reporter* Vol. 22, No. 4, December 1997 at p. 26.

Conclusion

Thrasher and its progeny require an insurer to exercise a reasonable degree of effort and persistence in seeking to obtain the insured's cooperation, as well as compelling evidence of obstruction. Although not discussed in this column, the carrier must also timely and properly issue a denial of coverage, which adds yet another hurdle to overcome in properly denying a claim based upon lack of cooperation. n23

n23 See Lisa Solomon, "Timely Disclaimer, Reasonable Efforts and the Uncooperative Insured," *NYLJ*, Nov. 1, 1999 at page 1, and *Ley v. Solomon* "Timely Disclaimer, Reasonable Efforts and the Uncooperative Insured," *NYLJ*, Nov. 1, 1999, page 1.

In order to succeed on the defense of lack of cooperation, the carrier's investigation must be thorough and well documented and the carrier must be prepared to produce evidence in admissible form, as well as supporting testimony at the trial of the action sufficient to support the disclaimer. As demonstrated above, the type of claim being made will have an impact on the court's view of the insured's cooperation and must be considered by the carrier in determining whether to deny based upon an insured's failure to cooperate.