Skipping Depositions does not Constitute Failure to Cooperate in New York

Insurance policies typically impose, on the insured, a duty to cooperate with the insurer during investigation and litigation of a claim. Non-cooperation can be grounds for denying coverage. This begs the question: what constitutes non-cooperation?

Recently, a New York appellate court affirmed a trial court's decision that failure by an employee of the insured to show up for three court-ordered depositions did not rise to the level of "willful and avowed obstruction" and therefore, the insurer could not deny coverage on the basis of non-cooperation. *See Foddrell v. Utica First Insurance Co.*, 178 A.D.3d 901 (N.Y. App. Div. 2019). In so holding, the *Foddrell* court applied the *Thrasher* test: "To effectively deny coverage based upon lack of cooperation, an insurance carrier must demonstrate (1) that it acted diligently in seeking to bring about the insured's cooperation, (2) that the efforts employed by the insured were reasonably calculated to obtain the insured's cooperation, and (3) that the attitude of the insured, after his or her cooperation was sought, was one of willful and avowed obstruction." *Id.; see Thrasher v. U. S. Liab. Ins. Co.*, 19 N.Y.2d 159, 167 (1967).

Thomas Foddrell's suit against Utica First Insurance Company ("Utica First") stemmed from his personal injury suit against Janey & Rana Construction Corporation ("J&R") (Utica First's insured). During that lawsuit, J&R's principal, Gardeep Singh, failed to appear for two court-ordered depositions. After his failure to appear at those depositions, Utica First sent an investigator to inform Singh that he was scheduled for a third deposition. Singh responded to the investigator that he would speak with J&R's attorneys about the matter. Ultimately, Singh did not appear for the third court-ordered deposition. In response to Singh's repeated failure to appear for the depositions, Utica First sent Singh a letter advising him that because of his lack of cooperation, Utica would no longer agree to indemnify J&R.

Following Utica First's letter disclaiming coverage for non-cooperation, J&R's attorneys were allowed to step down as counsel leaving J&R without representation. In addition, Foddrell moved to strike J&R's answer from the lawsuit. The court granted the motion on the condition that J&R did not appear at a fourth deposition. After Singh failed to appear for the fourth time, the court issued an order striking J&R's answer and later issued a judgment for damages in excess of $673,000 against J&R.

After J&R did not pay the judgment, Foddrell sued Utica First to recover the unsatisfied judgment pursuant to New York's direct action statute. Utica First moved to dismiss the lawsuit, arguing that it had no duty to indemnify J&R because Singh's failure to cooperate led it to deny coverage. The trial court denied Utica First's motion and Utica First appealed.

In affirming the decision of the trial court, the court explained mere efforts by the insurer and mere inaction by the insured are not sufficient to establish non-cooperation. In this case, Utica First showed that it had acted diligently to obtain Singh's cooperation with numerous letters, telephone calls, and visits to Singh's home. However, Utica First failed to meet its "heavy burden" of demonstrating J&R's non-cooperation that must reach the level of "willful and avowed obstruction." *Foddrell,* at *2 (N.Y. App. Div. Dec. 18, 2019).

This case reaffirms the rule in New York that an insurer must present admissible evidence that the insured intentionally and actively obstructed the insurer's efforts to litigate or investigate a claim. It is important for policyholders to understand what is required from them to satisfy their duty to cooperate and to know that mere inactions will not allow insurers to disclaim coverage and refuse to recognize their duty to indemnify.

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