

CONFLICTING DECISIONS ON WHETHER ACTUAL REPAIR OR REPLACEMENT IS A CONDITION PRECEDENT FOR RECOVERY OF REPLACEMENT COSTS; PARTIAL PAYMENT OF INSUREDS' CLAIM DOES NOT WAIVE CONTRACTUAL LIMITATIONS PERIOD

In *Il Cambio Inc. v. U.S. Fidelity and Guaranty Co.*, Index No.: 4647, 105030/06, 2011 N.Y. Slip Op 2465 (1st Dep't March 29, 2011), the plaintiff insureds sought to obtain reimbursement on a replacement-cost claim despite the fact that they failed to satisfy the condition precedent of completing actual repair or replacement of their damaged premises. The Appellate Division, First Department noted that insureds have the burden of proving that their alleged loss is covered under the insurance policy at issue, and dismissed plaintiffs' complaint because the plaintiffs conceded that they had not repaired or replaced their damaged premises.

The court applied the well-established rule that an insured is not entitled to replacement costs unless it has complied with the condition precedent of rebuilding and, accordingly, the plaintiffs had not met their burden of proving that their alleged loss was covered under the insurance policy at issue. The court noted that because there was no dispute that the plaintiffs had not rebuilt or replaced their insured restaurant, the plaintiffs' request for further discovery should be denied because further discovery would not be productive. Finally, the court stated that the defendant insurer's partial payment on the plaintiffs' claim was not a waiver of what it described as an "unambiguous two-year suit limitations period in the policy," and held that the insurer was not estopped from asserting a defense based on that limitations period.

The First Department's decision in *Il Cambio* contrasts sharply with the Appellate Division, Fourth Department's decision in *Bakos v. New York Central Mutual Fire Ins. Co.*, Index No.: I2009002354, 2011 N.Y. Slip Op. 2611 (4th Dep't April 1, 2011) that was issued three days later. There, the plaintiff had commenced an action against his insurer just before the expiration of his policy's two year contractual limitations period. In his lawsuit, the plaintiff sought a declaratory judgment preventing the insurer from relying on the policy's limitations period and requiring the insurer to pay him replacement costs, even though he conceded that he had not spent more than the actual cash value payment that he had already received from the insurer in completing repair or replacement of his fire damaged home. The plaintiff argued that he intended to complete repairs, that the policy did not specifically require completion of repairs in any particular time frame, and that the policy had to be construed against the insurer. Despite the well established rule in New York that in order to have a claim for replacement costs an insured must actually have completed repair or replacement of his damaged property, the Fourth Department affirmed the trial court's denial of the insurer's motion to dismiss the plaintiff's complaint for failure to state a cause of action.

The Fourth Department's decision in *Bakos* no doubt will be seized on by dilatory insureds in this state and could significantly increase

litigation, with insureds suing within the two year limitations period in order to protect their right to submit replacement cost claims far into the future. Efforts currently are underway to ask that the Fourth Department reconsider its holding in *Bakos*, or in the alternative, requesting that the Fourth Department permit an appeal of its decision to the Court of Appeals, New York's highest court.

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2011 First-Party Property Claims Seminar

Thursday, July 21, 2011
1-4pm
(Happy Hour to follow)

Templeton Landing
2 Templeton Terrace
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Topics to Include:
Handling motions to compel appraisal
Important deadlines in property claims
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Formal invitations coming soon!

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INSURER'S FAILURE TO INCLUDE CLAIM OF MISREPRESENTATION IN ITS DENIAL LETTER WILL NOT AUTOMATICALLY PRECLUDE ITS RIGHT TO ASSERT THE CLAIM OF MISREPRESENTATION IN ITS ANSWER ONCE THE POLICYHOLDER COMMENCES AN ACTION

Recently, a court upheld an insurer's ability to assert an affirmative defense based on an insured's material misrepresentations despite the insurer's failure to include a claim of misrepresentation in its denial letter to the insured. In *Nunez v. United States Underwriters Ins. Co.*, 2011 NY Slip Op 21050; 2011 N.Y. Misc. LEXIS 394 (Sup. Ct. Queens Co. February 10, 2011), the plaintiff commenced an action against the insurance company after sustaining water damage as a result of a fire at the insured premises. A property inspection revealed that plaintiff had no smoke detectors at the premises, despite her representation on the insurance application that she had smoke detectors. The insurer denied the claim, noting in the denial letter the plaintiff's failure to comply with a protective safeguard endorsement relating to the smoke detectors. The insurer did not include the insured's

misrepresentation as a basis to deny the claim.

After the action was commenced, the insurer alleged in its answer and as a counterclaim that the insured materially misrepresented the presence of smoke detectors on her insurance application. The plaintiff moved for summary judgment, and argued that the insurer's failure to include the claim of misrepresentation in its denial letter constituted a waiver of its right to assert the material-misrepresentation defense.

The court disagreed with the plaintiff and denied her motion for summary judgment holding that absent some proof that she was prejudiced by the delay, the insurer could still rescind the policy or disclaim coverage based upon her material misrepresentation in the insurance application.

Practice Pointer: This case calls into question the long-standing rule that defenses not contained in a denial letter are waived if litigation later is pursued. It will be interesting to see how the Appellate Divisions address this issue in future decisions, since this case suggests that waiver of a policy defense somehow is predicated on the potential prejudice an insured may suffer by virtue of the insurer's failure to include a coverage defense in a denial letter. This new rule articulated in *Nunez* is consistent with the rule followed by courts in litigated matters for deciding whether to allow amendments of pleadings. In order to avoid leaving this in a court's hands, it always is advisable to include material misrepresentation in the denial letter when the insurer's investigation finds a basis for its inclusion.

COURTS DIFFER ON WHETHER RESIDENCY PROVISIONS ARE AMBIGUOUS

Dean v. Tower Ins. Co. of N.Y.

2011 NY Slip Op 3899, 2011 N.Y. App. Div. LEXIS 3806
Appellate Division First Department (May 10, 2011)

Vela v. Tower Ins. Co. of N.Y.

2011 NY Slip Op 3588, 2011 N.Y. App. Div. LEXIS 3571
Appellate Division Second Department (April 26, 2011)

In *Dean*, plaintiffs were unable to fulfill their intention of establishing residency at the subject premises after purchase due to their discovery of termite damage that required major renovations. Following a subsequent loss, defendant denied coverage on the basis that the property was not the plaintiffs' residence premises. The First Department held that defendant failed to satisfy its *prima facie* burden on its motion for summary judgment because the "residence premises" provisions failed to define what qualifies as "resides" for the purpose of attaching coverage. The court distinguished the case from prior decisions on the issue, in part, because plaintiffs in prior decisions had no intention of living at the premises - unlike the plaintiffs in this case. As a result, the court denied defendant's motion for summary judgment because an issue of fact existed as to whether plaintiffs misrepresented their intention to reside in the subject premises as contemplated by the insurance policy.

In *Vela*, defendant issued a homeowners' insurance policy to plaintiff that contained a "residence premises" provision specifying that coverage attached to the one- or two-family dwelling where the insured resides and which is shown as the "residence premises" in the Declarations. When the property suffered a \$228,000 water loss, defendant disclaimed coverage on the grounds that plaintiff never resided at the property. The Second Department held that

the Supreme Court erred in denying defendant's motion for summary judgment because the standard for determining residency for purposes of insurance requires something more than temporary physical presence and requires some degree of permanency or intention to stay. The Court also held that the "residence premises" provision was not ambiguous and the plaintiff's mere intention to reside at the premises was insufficient to satisfy the policy's requirement.

Practice Pointer: These cases highlight a split in the Appellate Departments regarding whether or not the standard "residence premises" provisions contained in homeowners' insurance policies are ambiguous with respect to an insured who has an intention to reside at an insured property but never actually does. The *Dean* case, in particular, is an example of a court protecting an insured from the consequences of an unintentional breach of an insurance policy, and the holding is outcome-oriented because the residency provision does not purport to consider the homeowners' "intentions." As both cases are recent decisions, it remains to be seen where the line will be drawn on this issue; however, these cases do not alter New York law in situations where it is clear that an insured was not residing at the insured property at the time of loss and had no intention of residing at the property before the loss occurred.

INSURER'S BREACH OF AN INSURANCE CONTRACT STILL IS NOT A TORT

In *McGowan v. Great Northern Ins. Co.*, No.: 2009 08861, 2010 N.Y. Slip. Op. 08909 (2d Dep't Nov. 30, 2010), the plaintiff attempted to assert multiple causes of action, including breach of contract and a tort cause of action, against his insurer based on the insurer's alleged failure to perform its obligations under the insurance contract. The trial court denied the insurer's motion for summary judgment dismissing the plaintiff's cause of action alleging that the insurer's breach of its obligations under the contract constituted a tort. In reversing the trial court, the Appellate Division, Second Department reaffirmed New York's rule that an insured does not possess a separate cause of action in tort based on an insurer's alleged failure to perform its obligations under an insurance contract.

Practice Pointer: Plaintiff insureds frequently attempt to bolster breach of contract claims against insurers by alleging that the insurer's conduct with respect to the contract somehow was tortious, entitling them to punitive damages and other extra contractual damages. *McGowan* underscores the fact that when an insured sues based on an alleged breach of an insurance contract, he has a contract cause of action, and absent extraordinary circumstances, cannot allege a tort claim against the insurer.

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**TIME LIMIT FOR SUBMISSION OF SWORN PROOF OF LOSS TO BE STRICTLY ADHERED TO;
UNTIMELY SUBMISSION AN ABSOLUTE BAR TO AN INSURED'S CLAIM**

In *Stopani v. Allegany Co-op Insurance Company*, No. 403 CA 10 02141, 2011 NY Slip Op 2588 (4th Dep't April 1, 2011), the Appellate Division, Fourth Department made very clear that the requirement that insureds submit sworn proof of loss within 60 days of the insurer's demand will be strictly enforced.

Stopani involved a dispute over fire-insurance coverage. The Stopanis commenced an action against the defendant insurer, and in its answer, one of the affirmative defenses that the insurer asserted was that it had properly disclaimed coverage for the loss because the Stopanis failed to submit a sworn proof of loss within the 60-day time limit set forth in their insurance policy.

The insurer mailed its demand for a proof of loss by both first-class and certified mail on March 4, 2009. The claims manager submitted an affidavit stating that one of the insureds called her and acknowledged receipt of the demand on March 6, 2009. The demand sent by certified mail, however, was not delivered to the insureds until March 9, 2009. The insureds did not submit their completed proof of loss to the insurer until May 8, 2009, 63 days after they

acknowledged receipt of the demand, but exactly 60 days after the demand sent by certified mail was delivered to them.

The trial court granted the insureds' motion to dismiss the insurer's affirmative defense based on the 60-day rule, reasoning that they had complied with the demand sent by certified mail and submitted the proof of loss within 60 days of receipt of that demand. In addition, the trial court concluded that even if the 60 day period were measured from the insureds first receipt of the demand letter on March 6, 2009, a three day delay was *de minimis* and excusable under contract law.

On appeal, the Fourth Department reversed the trial court's decision, noting that an insured's failure to submit a sworn proof of loss within 60 days of the insurer's demand for same is an absolute defense to an action on the policy. The court stated that when an insurer's demand for a proof of loss is sent by two different methods on the same day, the 60 day period should be measured from the date the insured first receives the demand letter. According to the court, such a rule is consistent with the reciprocal principle that the timeliness of an insurer's disclaimer of

coverage is measured from the date on which it first received information that would disqualify the claim. Due to the absolute nature of an insurer's defense to an insured's claim based on the insured's untimely submission of a proof of loss, even a brief delay could not be excused. In addition, the court pragmatically considered the fact that if the rule were otherwise, an insured could indefinitely extend his time to submit a proof of loss by simply refusing to accept a demand sent by certified mail.

Practice Pointer: The *Stopani* case reaffirms the well-settled rule in New York that an insured's failure to submit a sworn proof of loss within 60 days of the insurer's request is fatal to the insured's claim, regardless of whether that claim is legitimate, or not. It serves as an excellent reminder of the importance of paying attention to detail and deadlines imposed by the terms and conditions of insurance policies.

For answers to your legal questions, feel free to contact Marco Cercone, Esq. at Rupp, Baase, Pfalzgraf, Cunningham & Coppola LLC, 1600 Liberty Building, Buffalo, New York 14202, 716-854-3400, www.ruppbaase.com



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