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Can Adjusters Really Get Sued for Denying a Claim?

By: Thomas B. Ward

Attorneys who make a living suing insurance companies bristle at the inability to sue in tort when a claim is not paid. Such attorneys are not satisfied with merely suing for breach of contract to get the benefit of the bargain, as with other contract disputes. Instead, they strain to incorporate extra-contractual duties, often using the insurer's own creative marketing slogans against them in court. The most common argument is that the insurer, by promising to "be like a good neighbor" or by saying that the insured is "in good hands," has assumed fiduciary duties toward the insured.

The arguments and theories are as varied as they are creative. Sometimes insureds and their attorneys will allege that the insurer negligently misrepresented the scope of coverage. Other times, the insurer is accused of negligently training and supervising its adjusters, thereby causing its adjusters to negligently breach the contract. Insurance companies have even been accused of acting like criminal enterprises, reaping illicit profits from their insureds.

Usually, tort claims are alleged as a way to avoid inconvenient policy language – if you don't like an exclusion, bypass the policy by pinning the damage on the adjuster's allegedly tortious conduct. But it is not always about money. Sometimes it is procedural. At one time or another, we have all seen adjusters get sued in tort alongside the insurer as an attempt to defeat diversity jurisdiction and remain in state court. Whatever the goal, the attacks are endless, and can be worrisome for insurers.

That brings us to two recent decisions holding that adjusters can be held personally liable for allegedly wrongful claims-handling conduct.

The first case, *Linron Properties, Ltd. v. Wausau Underwriters Ins. Co.*, 2015 WL 3755071, at *1 (N.D. Tex. June 16, 2015), arose from an effort to remand the case from a Texas federal court back to Texas state court. The *Linron* case involved property damage to a commercial structure following a storm. The insured sought coverage for the cost of repairs and sued claiming the insurance company "wrongfully denied full coverage for the damages." The adjuster, Sara Springham, was also named in the lawsuit for alleged improper claims handling. Specifically, she was sued for allegedly conducting an "outcome-oriented investigation" and for hiring an expert that she allegedly knew would "under-scope the damages" so the insurer could avoid payment on the claim.

To sue Springman individually, the insured relied upon a Texas code governing insurance handling practices. A brief review of that statute is necessary to understanding the reach of this opinion. Under § 541.060 of the Texas Insurance Code, persons involved in the business of insurance may be found liable for "failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement." Previous Texas courts, however, had reasoned that adjusters cannot be held individually liable under this section, because they do not have the power to decide settlement amounts. At first blush, this seems correct. An adjuster's job is solely to assess the damage, not to authorize any kind of settlement figure.

But the *Linron* Court focused on the word "effectuate" in the statute. The court defined effectuate as "to cause to come into being" or to "bring about." This choice in language extended the section broadly to cover all of those involved in reaching a fair and just settlement, not just the person who has the ultimate settlement authority. Arguably, an adjuster's investigation and evaluation plays a large role in determining the settlement amount that is eventually reached. Therefore, any delay or unscrupulous practice by the adjuster could, conceivably, lead to an unfair settlement amount. According to the court, it is not only the *finality* of the settlement that is governed by the statute, it is also the *process* of getting to that settlement.

The end result was that the insured alleged sufficient facts to state a claim against Springman — meaning that the allegation that Springman should be held individually liable for conducting an outcome-oriented investigation is a claim that the court is willing to entertain. In other words, by ruling that Springman could be sued under those facts, the federal court was able to keep the case off its docket by remanding the case back to state court.

The second case, *Kennedy v. Allstate Prop. & Cas. Ins. Co.*, 2015 WL 4111816, at *1 (E.D. Pa. July 8, 2015), is from a federal court in Pennsylvania. This case also had procedural overtones, as the insurance company removed the case to federal court on the basis that its non-diverse adjusters had been fraudulently joined for the purpose of defeating diversity jurisdiction. Thus, the question was whether the insured had stated a valid basis for suing the insurance adjusters individually.

The *Kennedy* case involved an underlying UM claim, however, the merits of the underlying UM claim are not important for the scope of this discussion. The important thing is that the insured was unhappy with the outcome, so she sued Allstate and several adjusters individually for improperly evaluating her UM claim, misrepresenting facts to induce a lower settlement and intentionally delaying the process.

The attorneys for Allstate made all the right arguments. Unfortunately, the court was unwilling to conclude that adjusters could not be sued individually under these facts. Even though Pennsylvania did not have any statutes or cases on point allowing adjusters to be sued in their individual capacity, the court noted that other states have allowed it. The court determined that Pennsylvania state courts should decide this question, because it was a matter of first impression. The court also rejected the argument that the lawsuit was essentially one for breach of contract, stating that an insurer's denial of a claim without an adequate investigation goes to negligence — not a breach of contract.

As ominous as *Linron* and *Kennedy* seem to appear, it is unclear if these decisions signal a willingness to let adjusters be sued under state claims settlement statutes for engaging in ordinary and proper claims handling practices. (NOTE: In Georgia, there is no private cause of action for an insurer's violation of O.C.G.A. § 33-6-37, the Unfair Claims Settlement Practices Act.) Moreover, it is unclear whether the *Linron* decision will force the insurance industry to distance itself from the many insurance related vendors that make the adjusting process more efficient and cost effective. We will have to wait to see how these cases resolve in the respective state courts to which they were remanded for further analysis. More optimistically, however, these decisions could merely show the willingness of federal courts to reduce their docket by finding any reason to defeat removal jurisdiction, even if it requires a willingness to entertain the possibility of claims going forward against an adjuster. If so, we anticipate that the plaintiff's bar will catch onto the game of articulating dubious tort claims against adjusters to deprive insurance companies of the right to removal.

In any event, these cases underscore the importance of strictly adhering to the claim adjustment process outlined by the insurance company, documenting the file and complying with applicable laws and guidelines.

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Zurich v. Omni: Navigating Umpire "Bias" and Other Pitfalls of the Apraisal Process

By: Arthur R. York

It can be easy for someone with years of experience in the insurance industry to forget just how complex insurance policies and related legal principles can be to outsiders. What the industry might consider to be a routine policy provision supported by established law can confound others — including attorneys and judges — who are not as well-versed in such matters.

Such was the scenario in *Zurich v. Omni Health Solutions*, 774 S.E.2d 782 (Ga. Ct. App. 2015), decided by the Georgia Court of Appeals earlier this year. That case began when Omni submitted a claim for hail damage under its commercial property policy. When the parties disagreed on the amount of the loss, Zurich agreed to go to appraisal pursuant to the Policy terms. The appraisal clause contained typical language:

> **Appraisal –** If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding.

Each party chose an appraiser. Zurich consented to use the umpire whom Omni selected. Both appraisers assessed the property and submitted their findings to the umpire, and all three signed an $886,795 award for the structural damage. Sounds simple enough, right? Well, it was — that is, until a couple of months later, when the umpire began working for

Names CAN Hurt You: A Primer on Evaluating Trademark Claims Under General Liability Policies

By: Rebecca E. Strickland

An insured calls. It has been sued for trademark infringement in its advertising and wonders if there is coverage. This scenario is occurring with greater frequency. According to the Economics & Statistics Administration, in 2010, intellectual property intensive industries accounted for 34.8 percent of U.S. gross domestic product (GDP). ("Intellectual Property and the U.S. Economy: Industries in Focus," Economics & Statistics Administration, United States Department of Commerce, March 10, 2012, available at http://www.esa.doc.gov/reports/intellectual-property-and-us-economy-industries-focus.) One type of intellectual property is trademarks. An article in *Forbes* stated that "the single largest source of intangible value in a company is its trademark." Google's trademark was estimated to be worth $44 billion. ("The 10 Most Valuable Trademarks," Sean Stonefield, Forbes.com, June 15, 2011, available at http://www.forbes.com/sites/seanstonefield/2011/06/15/the-10-most-valuable-trademarks/.) With that much at stake, it is no surprise that more and more insureds are inquiring about coverage for trademark disputes.

Trademark Basics

In order to evaluate the claim, it helps to understand the terminology. Trademarks are used to identify the source of goods or services in commerce. A trademark can be a word, phrase or design. Nike and its swoosh are trademarks. Nike's slogan "Just Do It" is also a trademark. Trade dress is a type of trademark that refers to the image of a product. Trade dress can be distinctive packaging, texture, graphics or colors. Home Depot's orange color is an example of trade dress. In general, trademark protection prevents others from using a "confusingly similar" mark to identify similar goods or services.

An insured need not be a Fortune 500 company to find itself involved in a trademark dispute. A company that advertises its services on a billboard using a design that is similar to a competitor might be accused of trademark infringement. A restaurant that mimics a competitor's layout and design scheme might be sued for trade dress infringement.

Policy Considerations

Commercial general liability policies often provide coverage for advertising injury, subject to certain exclusions. The ISO sample policy definition of advertising injury defines advertising injury as arising out of one or more of the following offenses:

a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
b. Oral or written publication of material that violates a person's right of privacy;
c. Misappropriation of advertising ideas or style of doing business;
d. Infringement of copyright, title or slogan; or
e. Infringement of trademark.

Generally, the policy excludes coverage if the insured knowingly violated the rights of another, published material with knowledge of its falsity, or published the potentially infringing material before the policy became effective. In addition, most CGL policies exclude coverage for infringement of copyright, patent, trademark, trade secret or other intellectual property rights, unless the infringement occurs in the insured's advertisements.

Therefore, a central question is whether the insured's conduct constituted "advertising." Many courts have held that advertising requires a "widespread distribution of promotional material to the public." *See, e.g., Zurich Ins. Co. v. Amcor Sunclipse North America*, 241 F.3d 605 (7th Cir. 2001). Other courts have held that distributing promotional materials to a limited audience is sufficient to constitute advertising. *See, e.g., American States Ins. Co. v. Canyon Creek*, 786 F. Supp. 821 (N.D. Cal. 1991). The majority of courts find that individual solicitation of business is not enough to constitute advertising. *Select Design Limited v. Union Mut. Fire Ins. Co.*, 672 A.2d 798 (Vt. 1996); *but see John Deere Ins. Co. v. Shamrock Indus.*, 696 F. Supp. 434 (D. Minn. 1988) (solicitation to a single potential customer was "advertising").

A Sample Declaratory Judgment Case

In *Colony Ins. Co. v. Corrosion Control, Inc.*, 390 F. Supp. 2d 1337 (M.D. Ga. 2005), *aff'd* 187 F. App'x 918, 921 (11th Cir. 2006), Corrpro Companies, Inc. sued Corrosion Control, Inc. and two of its employees, alleging misappropriation of Corrpro's style of doing business, advertising ideas, trade secrets, trade name abbreviation and confidential information; disparagement of its products and services; and infringement of its trademarks and trade name. (*Id.*, 390 F. Supp. 2d at 1338.) The policy provided coverage for advertising injury, which was defined "to include disparagement of an organization's goods, products or services; misappropriation of advertising ideas or style of doing business; and infringement of copyright, title or slogan." (*Id.* at 1339.) However, the policy excluded coverage for any advertising injury that arose "out of oral or written publication of material whose first publication took place before the beginning of the policy period." (*Id.* at 1339-40.) The court noted that the insurer must provide a defense if the claims against the insured "might potentially or arguably fall within the policy's coverage." (*Id.* at 1339.) The court concluded that the allegations of the Complaint included at least one claim that fell within the duty to defend. However, no evidence was presented regarding the date of first publication, so the court found that the insurer had a duty to defend.

As *Colony Ins. Co. v. Corrosion Control, Inc.* illustrates, trademark infringement claims share many similarities with other property claims. The allegations of the Complaint, the facts giving rise to the claim, and the policy language must all be considered in order to make a coverage decision.

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an appraisal firm that did work for many insurance clients, including Zurich. The umpire and Zurich's appraiser (but not Omni's appraiser) subsequently signed an award for the business interruption claim.

After the business interruption award was entered, Omni filed a petition to replace the umpire, alleging that the umpire was biased against Omni because of his new job. While the umpire denied any such bias, he ultimately stepped down. Unable to agree on a new umpire, the parties submitted the issue to the court. The court selected a new umpire — once again, of Omni's choosing.

Omni also wanted the court to instruct the new umpire to disregard the previously-signed awards on the Structure and Business Interruption losses and to create new awards for those items. After briefing and argument, the court subsequently issued an Order ruling that neither of the awards were final, based entirely on argument from Omni that the umpire was biased as a result of his new job. The court denied Zurich's Motion for Reconsideration. Zurich filed an appeal.

The court of appeals reversed the trial court's order as to the structural damage award. The reasoning was straightforward. The language of the appraisal clause plainly stated, "a decision agreed to by any two will be binding." Here, the appraisers for Zurich and Omni both agreed in writing to the structural damage award, rendering that award binding notwithstanding any alleged bias of the original umpire. Basically, even if there were evidence of any bias, such bias was irrelevant because the award would have been binding without the umpire's signature.

As to the business interruption award, however, the court of appeals deferred to the trial court's ruling. It devoted just a few lines to that award, simply stating it would not disturb the trial court's finding of bias because there was no evidence the court had abused its discretion.

So what does all this mean? First and foremost, *Omni* provides further legal support for the enforceability of appraisal clauses. The court of appeals was unequivocal in its opinion that an insured must live with the results of an appraisal award. Were it not for the dubious specter of umpire bias, the court of appeals would almost surely have sided with Zurich on the business interruption award as well.

However, *Omni* also serves as a cautionary tale about umpire selection. Even though the original umpire was vetted by and chosen by the insured, the trial and appellate courts both found that the umpire's later employment with a firm that happened to do some work for Zurich provided grounds for an award to be overturned on the pretense of umpire impartiality. *Omni* could therefore provide legal support for future insureds challenging an appraisal award on grounds of alleged bias. It is important to note that in overturning the business interruption award, the court of appeals ignored Zurich's argument that an appraisal award is a legally binding agreement that cannot be invalidated without proper fact-finding and sufficient admissible evidence of prejudicial conduct. There was no deposition, discovery, evidentiary hearing or fact-finding of any kind to determine the existence, extent or effect of any alleged bias — the trial court simply ruled the umpire was not impartial based solely on argument by Omni's counsel. The legality of such a ruling by the trial court remains vulnerable to attack, notwithstanding the court of appeals' refusal to find the trial court abused its discretion.

Omni further reminds us that appraisers cannot be too specific when drafting appraisal awards. One of Omni's unique arguments was that, despite being signed by all three members of the appraisal panel, the structure award was only a mere portion of a larger award, and was not "final" until awards were entered for each category of damage claimed under the policy. To safeguard against any such arguments in the future, insurers would be well-served to direct appraisers to include a notation on all awards stating that the award as to a specific category of damages is final and binding regardless and independent of any other awards or yet-determined categories of damages.

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Events

Swift Currie Golden Anniversary Firm-Wide Seminar and Cocktail Party
October 8, 2015
Cobb Galleria Centre
Seminar: 8:30 am - 5:00 pm
(Seminar will include breakout rooms for workers' compensation, liability, and property and coverage during the day as well as general sessions at the beginning and end of the day.)
Cocktail Party: 5:00 - 7:00 pm

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