

Case Law Update (cont'd.)

(Continued from page 30)
tions caused no property damage within the meaning of the policy.

In 2001, Donald and Carole Raines sold their home to Maurya Lyons. Approximately three months after closing, Lyons filed suit against the Raineses for fraud, negligence misrepresentation and breach of contract arising out of alleged misrepresentation and con-

cealments regarding the home.

The Raineses tendered the suit to their homeowners insurer, Safeco, for defense and indemnity, but Safeco denied coverage. The Raineses assumed their own defense costs and eventually prevailed against Lyons. They then filed suit against Safeco for breach of contract and to recover their attorneys' fees in the Lyons suit.

Safeco's policy provided coverage for liability for "property damage" caused by an "occurrence." The policy defined "property damage" as "physical damage to or destruction of tangible property, including loss of use of the property." Based on this definition, the court found that "the undisputed facts in the present case do not suggest even a remote possibility of cover-

age under Kansas law"

Lyons' suit did not claim "property damage" as the term is used in the policy, but rather sought damages for economic harm resulting from the Raineses' misrepresentations regarding the property's condition. The damage to the home, if any, was not caused by the misrepresentations. Therefore, the court found Safeco was entitled to a judgment in its

New York Chapter Update, by Joshua E. Mackey, Esq.



On June 28, 2011, NSPII® and its newly formed New York State Chapter partnered with the International Association of Arson Investigators to present an educational session entitled, "Strengthening Relationships Between Public and Private Sector Fire Investigators & Addressing Ethical Considerations," held in Jamaica, New York. The International Association of Arson Investigators, Inc. (IAAI) is an association of more than 5,000 fire investigation professionals from across the world, serving as a resource for fire investigation training, technology, research and professional development, with a goal to suppress arson through proper fire investigation.

The program was presented by Jack Morgan of the Cincinnati Insurance Companies and Past National and State NSPII President Matthew J. Smith of Smith, Rolfes & Skavdahl Company, L.P.A.

The program also served as a kick-off event for the NSPII-New York State Chapter. Joshua E. Mackey, President of the NSPII-New York Chapter, helped moderate the program and conducted an informational meeting after the program for those interested in joining the NSPII-New York Chapter. Many who attended that meeting also expressed interest in serving on the NSPII-New York Chapter Board of Directors. Those who showed such interest will meet sometime in October 2011 to officially appoint the Board and conduct other business.

The program covered emerging investigation trends, ethical considerations in the investigation of fire losses, and detection of deception in interviewing. The initial portion of the program focused on identifying new trends, techniques and analysis methods for investigating fire losses ranging from socioeconomic analysis through computer-generated fraud.

The ethics portion of the program was developed to be hands-on and was presented in a discussion format using video scenarios from actual fire scene investigations and courtroom testimony. The attendants participated directly in this class in addressing head-on the type of ethical issues which arise in the investigation of fire losses.

Finally, the class covered the different detection of deception techniques that are taught and used all over the country, and incorporated the best techniques. This portion of the program was also interactive using video clips that shared actual deceptive clues that are done under pressure and/or stress. The class taught participants how to develop rapport with the subject, interviewing tips, and how to use clusters of what is called the "100%ers" to detect when someone is lying to you in any interview situation.

The NSPII-New York Chapter was excited to host its first event as it develops into a full fledged Chapter. The program attracted a variety of local attorneys, fire investigators, and insurance professionals.

Hurdles to Overcome When Denying Claims Based Upon an Insured's Failure to Appear for an EUO or Failure to Produce Documents. How Many Chances Do They Get?

By Frank P. Izzo, Esq., Iseman, Cunningham, Riester & Hyde, LLP

New York State has long held that the failure of an insured to appear for an examination under oath, or provide proper proof of loss constitutes a material breach of the insurance policy precluding recovery. The burden, however, rests with the insurance carrier to prove, via a preponderance of evidence, that the insured's non-compliance was willful. There are small differences between fire insurance policies and motor vehicle policies due to New York's specialized No-Fault Insurance regulations. Regardless of the type of loss, New York courts have expressed the burden of proving non-cooperation as a "heavy" one and that facet of New York law provides the greatest protection to insureds, as they are afforded numerous opportunities to comply, and the greatest hurdles for carriers.

In order to satisfy this burden of proof, "the insurer must demonstrate that it acted diligently in seeking to bring about the insured's cooperation (sic); that the efforts employed by the insurer were reasonably calculated to obtain the insurer's cooperation (sic); and that the attitude of the insured, after his co-operation was sought, was one of "willful and avowed obstruction." This standard ties directly into the amount of chances an insured may get and the actions required by a carrier to obtain cooperation.

The policy language and/or communications from the carrier control the time period by which the insured must either submit to an examination under oath or provide proper proof of loss. The New York Insurance Law contains standard provisions for most policies, including fire and motor vehicle. In fire insurance contracts, the statute proscribes a sixty (60) day time period in which to provide proof of loss upon request by the carrier. This time period can be extended, but not shortened, if the notice itself sets forth an extended time to comply.

With respect to motor vehicle accidents under New York's No-Fault Law, examinations under oath are treated differently than requests for production of documents. It has been held in New York that a claimant or assignee must be given two opportunities to appear for an examination under oath and the subsequent failure to do so is grounds for denial of the claim. There is currently a split amongst the four Appellate Divisions in New York as to whether such breach, which has been labeled a condition precedent to coverage, requires a timely denial within thirty (30) days of receipt of the claim or can be raised at any time as a non-precluded coverage defense.

On the other hand, failure to provide documentary verification in motor vehicle claims perpetually tolls the

carrier's obligation to pay or deny the claim, but also prevents the six-year statute of limitations from beginning to run. The result is that the claimant or that person's assignee will not prevail on an action to recover benefits as it will be dismissed as premature but the claim remains in limbo until and unless the claimant or assignee provides the requested documents. This is a disadvantage for the carrier as hundreds and eventually thousands of claims cannot be processed, yet must still be tracked due to potential liability or lawsuits down the road.

For all insurance policies, in addition to providing adequate time periods to secure an insured's compliance, carriers must always be diligent in their efforts to communicate with the insured in good faith and refrain from treating them as adversaries. If an insured requests more time to respond to a demand for documentary verification or for an adjournment of an EUO, the carrier is expected to comply. Furthermore, to sustain its heavy burden of proving non-cooperation, carriers must be sure to document the entirety of their efforts and provide the insured every opportunity to comply or else suffer the consequences of paying an illegitimate or even fraudulent claim based on technicalities.

Carriers have a contractual

and statutory right to receive all information necessary to investigate and verify the loss, but it is clear the law in New York is designed to provide the insured every benefit of the doubt. In order to fetter out improper and fraudulent claims, Carriers must remain diligent in their efforts and create a record that shows they have acted in good faith throughout the claims process. Doing so will enable them to overcome litigation hurdles when a non-responsive insured brings a lawsuit down the road.

¹See, e.g., *Baerga v. Transstate Ins. Co.*, 213 A.D.2d 217, 217 (1st Dept. 1995) citing *Lentini Bros. Moving & Storage Co. v. New York Property Ins. Underwriting Ass'n*, 53 N.Y.2d 835 (1981).

²*Yerushalmi v. Hartford Acci. & Indem. Co.*, 158 A.D.2d 407, 407 (1st Dept. 1990).

³*Dyno-Bite, Inc. v. Travelers Companies, et al.*, 80 A.D.2d 471 (4th Dept. 1981) appeal dismissed 54 N.Y.2d 1027 (1981).

⁴See, e.g., *Thrasher v. United States Liability Ins. Co.*, 19 N.Y.2d 159 (1967) (internal citations omitted).

⁵N.Y. INS LAW § 3404, et seq.

⁶*Igbara Realty Corp. v. New York Property Ins. Underwriting Ass'n*, 63 N.Y.2d 201, 209 (1984).

(Continued on page 33)



Hurdles to Overcome When Denying Claims (cont'd.)

(Continued from page 32)

⁷*Crescent Radiology, PLLC v American Tr. Ins. Co.*, 2011 NY Slip Op 50622U (App. Term 2d Dept. 2011).

⁸*Compare Points of Health Acupuncture, P.C. v Lancer*

Ins. Co., 2010 NY Slip Op 51455U (App. Term 2d Dept. 2010) (stating timely denials were issued signifying compliance with the thirty day period was required) with *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy,*

PLLC, 2011 NY Slip Op 01948 (1st Dept. 2011) (stating breach of a condition precedent is a coverage defense enabling retroactive denial of the claim, regardless of compliance with the thirty-day period).

⁹*Jesa Med. Supply, Inc. v Progressive Ins. Co.*, 2011 NY Slip Op 51603U (App. Term 2d Dept. 2011)

News From Our Ohio Chapter

The Chapter President's Message from Christie Charlton...



Hello Membership! Please let me begin by stating what an honor it has been to serve as the Ohio Chapter President. I have been an avid supporter of NSPII for twelve years and truly believe in this organization. I am extremely proud of this Ohio Chapter and we would not be what we are today without you.

Our annual golf outing was a big success! We had great food, fellowship and golf. Be sure to check out the photos on the next page and the article below for more information. A special thank you goes out to Chris Sharon of State Farm Insurance and Patty Heagerty of State Auto for all they did to make it such a big success.

On October 6, 2011, we will be hosting our 2nd Annual Ohio Chapter Fire Investigator Training Seminar. This is geared specifically towards the public sector. We received many notes of appreciation from the attendees of last year's seminar that we decided to make this an annual event. A special thank you goes to Brian Churchwell of Churchwell Fire Consultants and George Grossenbaugh of Cincinnati Insurance for making this seminar happen.

If you haven't already done so, please mark your calendars and plan to attend the 2011 Advanced Insurance Fraud Seminar being hosted on November 14-15 in the Chicago area. You can obtain more information and registration forms by visiting our website: www.nspii.com.

As always, if you would like to be involved in this organization, please contact any member of the board. We have many different committees that you can volunteer for, many of which will not require a large time commitment. Volunteerism is a great way to give back to the organization while making new friends in the industry.

Thank you again for your continued support. I look forward to seeing you at our upcoming events!

Ohio Chapter Golf Outing Wrap-Up, by Chris Sharon

The Ohio Chapter hosted its annual Golf Outing and Cookout on June 15, 2011 at the Granville Golf Course in Granville, Ohio. We had a great turnout with 48 golfers and a host of volunteers.

The winning team shot a 10 under par, round of 61. This

team consisted of Domenic Dalla Riva, Matt Planey, Brad Sherman, and Josh Bills. Second place honors with a score of 63 went to the team consisting of Rob Raker, Greg Rankin, Tony Vaughn, and Kevin Keaton. The third place team was a distant 8 strokes back. Con-

gratulations to the first and second place teams for some fine golf.

The entertainment of the day was provided by the self-proclaimed "Stud Monkees." The team, consisting of Jim Delwiche, Brian Ramm, Cal Miller, and Rob Kohli,

played a stellar round of golf in shirts donning their high school senior class photo and visors that spelled out, "Studs." Thanks guys for the laughs. Can't wait to see what you have for us next year!!

(Continued on page 34)