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Post-Appraisal Disclaimer May Result in Bad Faith, Per the Third Department by Eric Stern

By Eric Stern

On July 19, 2018, the New York Appellate Division, Third Department, ruled in Roemer v. Allstate Insurance, 2018 NY Slip Op 05392 (3d Dept. 2018), that there was a question of fact as to whether a Homeowner's Insurer acted in bad faith when it disclaimed coverage after an appraisal determined the damages suffered in the loss.

Specifically, in March of 2010, a fire destroyed the insured's residence. Following the fire, the insured notified the insurer of the loss and an investigation ensued. The parties' attempts to reach a settlement with respect to the amount of loss proved unsuccessful. The insured, then, initiated the appraisal process as set forth in the insurance policy. The appraisal provision in the standard homeowner's policy sets forth a process subject to strict deadlines used to ascertain damages. Appraisal does not await a determination regarding coverage or the result of any coverage investigation.

The independent appraisers hired by the parties ultimately agreed upon the amount of loss in June of 2011. On July 1, 2011 the insurer issued a disclaimer of coverage after it determined that the insured lacked an insurable interest in the property. The insurer discovered through its investigation that the insured was not the titled owner of the property, but rather the titled owner was a corporation in which the insured was a shareholder. The decision is devoid of information regarding when the insurer discovered this information.

The insured sought a declaration from the Court that he had an insurable interest in the property and that the insurer acted in bad faith. The motion court denied the insurer's motion for summary judgement on the issue of bad faith and the Third Department agreed.

Typically, under New York law, to establish a prima facie case of bad faith, it must be established "that the insurer's conduct constituted a gross disregard of the insured's interests — that is, a deliberate or reckless failure to place on equal footing the interests of its insured with its own interests when considering a settlement offer" (Pavia v State Farm Mut. Auto. Ins. Co., 82 NY2d 445, 453 (1993)). In establishing a claim for bad faith, "the courts will consider the facts and circumstances surrounding the case, including whether liability is clear, whether the potential damages far exceed the insurance coverage and any other evidence which tends to establish or negate the insurer's bad faith in refusing to settle" (Redcross v Aetna Cas. & Sur. Co., 260 AD2d 908, 911 (1999)

The Third Department found a question of fact, here, ruling that the insurer failed to present evidence in support of its motion "to explain why, after 16 months of investigation, it only disclaimed coverage after the parties' independent appraisers had reached a mutual agreement as to the amount of loss incurred." The Court further held that the disclaimer on this basis was unexpected.

The Third Department's decision is remarkable because the Court denied the motion for summary judgment on bad faith despite the fact that there was no finding that liability was clear, that the damages far exceed coverage or that the refusal to settle was in bad faith. Rather bad faith was left open for the jury to determine based upon delay and surprise.

Based on this decision, to guard against insureds who are attempting to rely on the Third Department's decision to trigger a bad faith cause of action, insurers can reserve rights to insureds on potentially available grounds, move quickly and aggressively through investigations and document those investigations thoroughly.