ON LATE DENIAL OF INSURANCE COVERAGE AND CAR FORFEITURE STATUTE

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An insurer's unexcused 48-day delay in notifying its policyholder that it was disclaiming coverage was unreasonable as a matter of law and thus rendered the disclaimer ineffective, the Court of Appeals held in *First Financial Ins. Co. v. Jetco Contracting Corp.* This month we discuss that decision, as well as *County of Nassau v. Canavan*, in which the Court found unconstitutional Nassau County's forfeiture statute. We also discuss *O'Connell v. Corcoran,* which resolved an Appellate Division split by holding that a party seeking a divorce in a foreign state must also seek distribution of marital property in that foreign proceeding rather than seek such distribution in a subsequent New York action.

Late Denial of Coverage

The Court of Appeals held in *First Financial Ins. Co. v. Jetco Contracting Corp.,* that, "once [an] insurer has sufficient knowledge of facts entitling it to disclaim, or knows that it will disclaim coverage, it must notify the policyholder in writing as soon as is reasonably possible." The Court further held that the unexcused delay in notifying the insured in this case of 48 days was unreasonable as a matter of law, precluding effective disclaimer of coverage. These holdings answered two questions that had been certified to the Court by the Court of Appeals for the Second Circuit.

First Financial arose out of a scaffolding accident by an employee of one of Jetco's subcontractors in July 1998, an accident that Jetco's President learned of the day it occurred. The employee sued Jetco in January 1999. Jetco did not inform First Financial of the accident or the lawsuit. The insurer learned of the suit from Jetco's co-defendant on February 23, 1999. In a letter dated March 2, 1999, the insurer reserved its right to deny coverage of Jetco due to the late notice. By March 30, First Financial had confirmed that Jetco's President had known of the accident since the day it occurred, the fact that led the company to deny coverage. First Financial, however, did not immediately inform Jetco that it was denying coverage; instead, it waited 48 days to do so, during which period First Financial investigated other sources of insurance for Jetco. It was established that the insurer would have denied coverage regardless of whether Jetco had other insurance coverage.

First Financial commenced a declaratory judgment action in the District Court for the Southern District of New York. That Court found that the 48-day delay was reasonable because First Financial's investigation into other coverage was for the benefit of Jetco and was conduct

that should be encouraged. The District Court accordingly entered judgment for the insurer. On appeal, the Second Circuit certified to the Court of Appeals the questions of whether an insurer may delay notifying its insured of denial of coverage while it investigates alternative sources of coverage and, if not, whether a 48-day delay occasioned by the investigation is unreasonable as a matter of law.

The unanimous Court of Appeals, in an opinion by Chief Justice Judith S. Kaye, stated that Jetco's own untimely notice to First Financial did not affect the determination of whether the insurer's delay in denying coverage was reasonable. Also irrelevant was the fact that Jetco had suffered no prejudice from the delay caused by First Financial's investigation into alternative sources. What was relevant was N.Y. Ins. Law Section 3420(d), which provides that "[i]f . . . an insurer shall disclaim liability or deny coverage . . . it shall give written notice as soon as is reasonably possible . . . to the insured . . . ." This provision is intended to "expedite the disclaimer process, thus enabling a policyholder to pursue other avenues expeditiously."

While an investigation into issues affecting whether an insurer will disclaim coverage may excuse delay in denying coverage, the Court stated, a delay unrelated to the coverage decision – such as the investigation into alternative sources here – is not excusable. Untimely notice of coverage denial for this reason may delay an insured's own search for alternative coverage, to the insured's detriment. Thus, First Financial's explanation for its failure to promptly deny coverage was deemed "unsatisfactory" by the Court.

That conclusion led to the question of whether the length of delay was unreasonable. In enacting Section 3420(d), the Legislature failed to define specifically how much of a delay is unreasonable, and the Court would not take it upon itself to adopt a hard and fast rule. Under the facts of this case, however, the Court found a 48-day delay was unreasonable as a matter of law.

Car Forfeiture Statute Unconstitutional

While the civil forfeiture of vehicles is an effective tool in fighting drunk driving, it can be implemented only where the statutory basis for such forfeiture satisfies principles established under the Federal and State Constitutions. So said the Court in *County of Nassau v. Canavan*, in an opinion by Chief Judge Judith S. Kaye for a unanimous Court, in affirming the result in the Appellate Division, Second Department, which had held Nassau County's forfeiture statute to be unconstitutional.

Canavan was arrested for driving while intoxicated, speeding and failure to signal. At Canavan's arrest, her car, valued at $6,500, was seized. She was advised at the time that the car might be forfeited under the Administrative Code of the County ("Code").

Canavan later pled guilty to driving while impaired by alcohol and speeding, both traffic infractions, and was sentenced to a $400 fine, completion of a driver education program, and the suspension of her license for 90 days. When she subsequently demanded the return of

her car, the County brought a civil forfeiture action under the Code. Canavan moved for summary judgment, but the motion court granted the County's cross-motion. The Appellate Division reversed, holding that the Code was unconstitutional in that it was vague in failing to comply with the due process requirement of providing the public with sufficient notice of what offending conduct would result in forfeiture.

The Code, § 8-7.0 (g)(3), as relevant here, basically provided for civil forfeiture where the "instrumentality of a crime" (here the car) was seized at the time of an arrest for a "misdemeanor crime or a petty offense." Reviewing the Code, the Court of Appeals disagreed with the Appellate Division's conclusion that it was vague, finding the Code clearly provided notice of the conduct that could result in forfeiture – any misdemeanor or petty offense, including traffic infractions – and would not thereby lead to arbitrary or discriminatory enforcement.

The Court nonetheless affirmed the result in the Appellate Division. In doing so it concluded that while the forfeiture provision, as punitive, was subject to the Excessive Fines Clause of the Federal and State Constitutions, the forfeiture of Canavan's car was in no respect disproportionate to the gravity of her most serious offense. On the other hand, because the Code authorized forfeiture for even minor traffic infractions, such as driving with a broken tail light, it could produce a result "grossly disproportionate" to the gravity of the offense and therefore violated the Excessive Fines Clause.

The Court also dealt with the requirement of pre-seizure and post-seizure hearings. It rejected Canavan's argument that, under the Code, she was denied due process when her car was seized at her arrest without a hearing, on the basis that the arrest was for drunk driving, no one else was with her to drive the car and seizing it was a way to preserve its presence in the State for a later forfeiture proceeding.

With respect to a post-seizure hearing, however, the Court concluded that a prompt retention hearing was essential to satisfy due process requirements not only with regard to the offending driver of the vehicle, but also others including the vehicle's owner and those dependent on the availability of the vehicle in their daily lives. In these respects, the Court concluded, additional constitutional concerns were raised by the Code. A prompt hearing was required in which the County would be obligated, in order to retain the vehicle, to establish probable cause for the warrantless arrest, the likelihood of it succeeding in the forfeiture action, and the need to preserve the vehicle from destruction or sale during the pendency of the proceeding.

Finally, the Court acknowledged that the County during the pendency of the case had made additions to the Code to deal with some of the issues addressed by the Court. The Court suggested as a better alternative a total redrafting of the Code, originally enacted in 1939, to deal with its shortcomings.

Out of State Divorce

In *O'Connell v. Corcoran,* the Court resolved a split between Departments of the Appellate Division and held that a party obtaining a divorce in a foreign state must seek distribution of marital property in that foreign proceeding, because the full faith and credit clause precludes a New York court from subsequently hearing distribution claims that could have been brought in the foreign proceeding.

The spouses in *O'Connell* had lived in New York and all marital assets were located here. The wife had attempted to get a New York divorce on grounds of cruel and inhuman treatment, but her action was dismissed for failure of proof. Eleven years later the wife moved to Vermont, and a year after that commenced a divorce proceeding in Vermont under that state's no-fault divorce law. The husband appeared in the Vermont action and unsuccessfully contested the divorce. During the divorce proceeding the Vermont court inquired about property division, and was erroneously advised by plaintiff's counsel that the court lacked jurisdiction over the issue because the property was located in New York, to which the court responded "All right."

The wife later attempted to commence an equitable distribution action in New York, pursuant to Domestic Relations Law Section 236 (B)(5)(a), which authorizes this state's courts to distribute marital property after a foreign divorce. The husband moved to dismiss the action on the grounds of res judicata, arguing that the Vermont court had jurisdiction over the parties and could have resolved any property issues. The Supreme Court denied the husband's motion and was affirmed by the Third Department in an order that was brought up for appeal to the Court of Appeals following a trial in which the wife was awarded approximately half of the marital estate.

The issue on appeal was whether the Domestic Relations Law is constrained by the constitutional full faith and credit clause such that a judgment from a bilateral (as opposed to ex parte) foreign divorce proceeding that could have addressed property issues should be given res judicata effect barring litigation of those issues in a subsequent New York proceeding. The Court of Appeals, agreeing with the Fourth Department in another case,[1] held that the statute was so constrained, noting "the statute should be interpreted to extend only as far as the Constitution permits."

The Court's opinion, by Judge Carmen Beauchamp Ciparick, observed that because the husband appeared in the Vermont action and that court had personal jurisdiction over both parties, Vermont could have distributed the marital property wherever located, under Vermont law. Further, the Vermont courts have expressed a preference for property issues to be resolved in a single action with the divorce. Because res judicata bars the litigation not only of claims that were brought in another proceeding but also claims that could have been brought there, the

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1 *See Erhart v. Erhart,* 226 A.D.2d 26 (4th Dep't 1996).

Vermont divorce judgment would preclude the wife from litigating the property issue in an separate Vermont action. And because under the full faith and credit clause a New York court must give "conclusive effect" to a sister state's judgment, New York must give the same effect to the Vermont judgment as Vermont would. The wife therefore was barred from litigating in a subsequent New York proceeding the property issue that she could have litigated in Vermont. This result, the Court stated, was consistent with the public policy of both states, which "frowns upon forum shopping and the bifurcation of divorce and equitable distribution proceedings."

Judge George Bundy Smith dissented. Relying upon the Vermont judge's statement, "All right," Judge Smith argued that the court had "expressly declined" to adjudicate the equitable distribution issue, allowing the issue to be litigated in a separate proceeding. The dissent also argued that the Vermont Supreme Court "has recognized that the judge-made [res judicata] doctrine is flexible and should not be applied mechanically," suggesting that a Vermont court would not find separate litigation of the property issue to be barred in these circumstances.