# NEW YORK COURT OF APPEALS ROUNDUP: MOVEMENT AWAY FROM THE "NO PREJUDICE" RULE FOR LATE NOTICE OF INSURANCE CLAIMS?

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In two recent decisions that we discuss this month, the Court of Appeals addressed whether an insurer must show prejudice from late notice of a claim in order to prevail in a coverage action. We also discuss the Court's answer to certified questions involving the scope of New York's common law of copyright and cause of action for infringement, and its most recent interpretation of the "castle doctrine," which provides that a person need not retreat before responding to attack with lethal force if he is in his home.

**No Prejudice Rule**

In 1972, the Court in *Security Mutual Ins. Co. of New York v. Acker-Fitzsimons Corp.*, 31 N.Y.2d 436 (1972), clearly held with respect to primary insurance that, as a matter of law, when a policy required the insured to give notice "as soon as possible" after an occurrence, failure to give such notice vitiated the insurance contract for failure to comply with a condition precedent. The insurer had no burden to show prejudice. Rather, strict compliance with the contract of insurance was required to protect the carrier from fraud and collusion, and give it the opportunity to investigate, set reserves, and control the claim.

New York has been in the minority of states that apply the "no showing of prejudice" rule. Two recent decisions by the Court, *The Argo Corp. v. Greater New York Mutual Ins. Co.* and *Rekemeyer v. State Farm Mutual Auto. Ins. Co.*, in opinions by Judge George Bundy Smith for a unanimous court (Chief Judge Judith S. Kaye taking no part), suggest a subtle movement within the Court to consider softening *Security Mutual's* "no prejudice" rule, based upon the facts.

This may be seen from the holding of the Court in *Argo*, in that in affirming the dismissal of the complaint it expressly did so "under the circumstances of this case." *Argo*, as we discuss below, represented a gross failure by the insured to provide timely notice to the insurer so that a dismissal as a matter of law was clearly appropriate. Does the quoted

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language indicate a willingness by the Court, where the circumstances justify it, to demand a more fact-intensive consideration of the notice requirement and a showing that the insurer suffered prejudice? This would be consistent with the Court's statement in *Metropolitan Prop. & Cas. Ins. Co. v. Mancuso*, 93 N.Y.2d 487 (1999), that the notice obligation "contemplates elasticity and a case-by-case inquiry as to whether the timeliness of the notice was reasonable, taking all of the circumstances into account."

In addition, the Court in *Rekemeyer,* and earlier in *Unigard Security Ins. Co. v. North River Ins. Co.*, 79 N.Y.2d 576 (1992), characterized the "no showing of prejudice" rule as a limited exception to the established contract principles that, to escape an obligation to perform under a contract, there must be a material breach or prejudice, and that a strict-compliance duty under a contract will not be construed as a condition precedent absent clear language that the parties intended it to be so.

A review of *Argo* and *Rekemeyer* may help explain where the law stands and where it may be going.

In *Argo,* a tenant fell on ice outside her apartment on January 2, 1997. She sued Argo on February 23, 2000. Argo was served with process, a default judgment was entered against it on February 13, 2001, and the case was set down for a hearing (presumably an inquest to fix damages). A week later Argo was served with a note of issue for trial.

Argo didn't get around to notifying its insurer until May 2, 2001, and the insurer promptly denied coverage. Argo's declaratory judgment suit against the insurer was commenced in January 2003, and the insurer moved to dismiss on the ground that the contract of insurance required notice "as soon as practicable." The motion court granted the dismissal and the Appellate Division affirmed. The Court granted leave to appeal and then affirmed.

In doing so, the Court emphasized that Argo gave notice to its insurer 14 months after it had been sued and 6 months after a default judgment has been entered against it. As stated above, "under the circumstances" of the case, Argo's delay was held to be unreasonable as a matter of law and no showing of prejudice to the insurer was required.

The question left "hanging" was when does delay become unreasonable as a matter of law so that the question of prejudice is irrelevant. The answer appears to lie – perhaps even in a case involving a liability policy – in the underlying facts in each case which portends for further litigation by insureds where coverage is denied.

In *Rekemeyer*, as in *Matter of Brandon v. Nationwide Mutual Ins. Co.*, 97 N.Y.2d 491 (2002), the insurance involved was Supplementary Uninsured Motorists ("SUM") coverage. The plaintiff in *Rekemeyer* was rear-ended on May 8, 1998, while driving. She promptly notified State Farm and made a claim for no-fault benefits. Thereafter her medical condition was

evaluated by State Farm on two occasions between 1998 and 2000. On April 27, 1999, Rekemeyer sued the driver of the car that had rear-ended her, and in July notified State Farm of the lawsuit. In September 1999, Rekemeyer learned that the coverage of the offending driver was $50,000; her demand was for $1 million. For the first time, in March 2000, Rekemeyer advised State Farm that she was seeking SUM coverage under her own policy. One month later State Farm disclaimed on the grounds of late notice.

The Supreme Court denied State Farm's summary judgment motion and granted Rekemeyer's cross-motion; the Appellate Division reversed. The Court of Appeals, after granting leave, reversed the Appellate Division and sent the case back to the trial court.

While the Court agreed with the Appellate Division that plaintiff's notice to State Farm of her SUM claim was untimely, it concluded that the "no prejudice" rule should be relaxed in SUM cases in which the carrier had notice of the accident. In doing so it relied upon its prior decision in *Matter of Brandon*, and fund that general contract principles (as outlined above) should apply. Thus, dismissal was not justified; State Farm will have to show prejudice.

The SUM cases can clearly present fact patterns that would make it unfair to permit denial of coverage. Whether that will "rub off" on other types of insurance remains to be seen.

**Common Law Copyright**

History buffs, as well as entertainment lawyers, will find quite interesting the Court's answer to questions certified by the Court of Appeals for the Second Circuit in *Capitol Records, Inc. v. Naxos of America, Inc.* Federal law provides copyright protection for sound recordings produced after February 15, 1972, and preempts state common law protection for recordings made prior to that date, effective February 15, 2067. Because the recordings at issue were made in the 1930s, the Court was called upon to determine the contours of New York's common law of copyright, and it began its analysis with copyright's 15th Century origins in England.

As Judge Victoria A. Graffeo's opinion for a unanimous Court explains, the exclusive right to reproduce a literary work initially was recognized as belonging to its printer -- the result of the printing trade's desire for protection and the Crown's desire for censorship through regulation of the trade. Only after abolition of the Star Chamber did English law recognize an author's property interest in his creation. During the American Colonial period, English law provided that there was a common law right to control the dissemination of one's work in perpetuity, and that such right could be abrogated by statute.

The drafters of our constitution vested Congress with the authority to adopt copyright laws, and it has done so at various times. But what are the rights of creators of works

not covered by federal statute? In the wake of a Supreme Court decision holding that player piano music rolls did not come within the published works governed by federal statute, Congress provided in the Copyright Act of 1909 that the statute did not limit common law copyright protection for audio works. Somewhat unbelievably, the protection of sound recordings remained the province of state law until 1972.

The subjects of *Capitol Records* were recordings of classical performances made in England in the 1930s and preserved on shellac records. The artists had granted worldwide rights to reproduce and sell copies of the performances to The Gramophone Company, predecessor to Capitol Record's parent. Because United Kingdom law at the time limited copyright protection for sound recordings to 50 years, the recordings entered the public domain there by 1990. In the 1990s two companies issued remastered versions of the original recordings on compact disc – Capitol Records pursuant to a license from Gramophone, and defendant Naxos. Capitol Records sued.

The Second Circuit asked whether any New York common law protection for the recordings terminated when the period of copyright protection in the country of origin expired. The Court of Appeals first held that under New York common law copyright protection extends in perpetuity, at least with respect to sound recordings. This right has not been abrogated for sound recordings either by treaty or, until 2067, by federal statute. "Applying the copyright law of the situs where the infringement occurs," the Court found "no justification under New York law for substituting the British copyright term."

The Second Circuit also inquired as to the elements of an infringement cause of action under New York's common law. These are "(1) the existence of a valid copyright; and (2) unauthorized reproduction of the work protected by the copyright," the Court explained. Neither fraud, nor bad faith, nor a showing of competition or actions designed for commercial benefit is required. In answering the Second Circuit's third question, the Court rejected any exception for infringed works that have slight if any current market value, such as the obsolete shellac records, or for copies that, even if "new products" in the sense that the sound quality has been enhanced through technology and effort, "utilize[] the original elements of the protected performances."

**Duty to Retreat**

In *People v. Aiken*, the issue was whether the defendant, faced with what he believed was a threat to his life, had the duty to retreat when standing in the doorway of his apartment that entered into a common hall. The Court concluded that all Aiken needed to do was retreat into his apartment because the victim was in a common hallway, and that Aiken was not entitled to a jury charge that he had no duty to retreat. Because of the background of the relationship between Aiken and the deceased, however, the defendant was entitled to the

jury charge on justification that was given by the trial court.

In an opinion by Chief Judge Judith S. Kaye for a unanimous Court, affirming the decision by the Appellate Division, the Court traced the history of the "duty to retreat" doctrine from its 16th Century roots through the enactment in 1965 of Penal Law § 35.15. That statute limited the use of lethal defensive force to situations in which the defender cannot "with complete safety as to himself and others avoid the necessity of so doing by retreating," except where the defender is in his own dwelling and is not the aggressor.

Aiken was convicted of manslaughter and sentenced to 16 years in prison. His conviction was affirmed.