

1993

General Business Law Regulates Insurance Company's Deceptive Acts

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Recommended Citation

B. J. Slater Jr. *General Business Law Regulates Insurance Company's Deceptive Acts*, 5 Loy. Consumer L. Rev. 95 (1993).
Available at: <http://lawcommons.luc.edu/lclr/vol5/iss3/9>

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evidence to allow a claim of fraud against Bearden go before a jury.

Among the evidence that the Developers produced were sworn affidavits stating that they would receive the multi-million dollar loan along with the \$1 million in exchange for the IEC Building. The affidavits also stated that at the closing, Bearden failed to disclose that Mainland would not provide the loan. The Developers also submitted a letter from Walker to Mainland, in which Walker clarified expectations the parties expected to see in writing at the closing.

Judgment Affirmed for Remaining Claims

Nevertheless, the Fifth Circuit found that the Developers' evidence did not create an issue of material fact for the fraud claim against Hill. The court stated that their evidence of Hill's surprise of the loan problem and Hill's response that he would take care of the situation did not support the allegation that he committed fraud. Similarly, the appellate court did not find sufficient evidence regarding the conspiracy claims against both defendants to allow a jury decide the issue.

The court also affirmed the district court's judgment in favor of Bearden and Hill on claims under the Act. The appellate court stated that an action under the Act required the Developers to establish that they were consumers seeking or acquiring "by purchase or lease, any goods or services." Furthermore, where the borrower fails to allege a complaint regarding the items he intended to acquire with the loan, the Texas courts have ruled the complainant is not a consumer and therefore has no right to sue under the Act. Thus, since the Developers failed to allege a complaint regarding the specific project they intended to fund with the loan, they were not consumers within the scope of the Act. Accordingly, the Fifth Circuit affirmed the dismissal of this claim. ♦

— *Christine Cody*

General Business Law Regulates Insurance Company's Deceptive Acts

In *Riordan v. Nationwide Mutual Fire Insurance*, 977 F.2d 47 (2nd Cir. 1992), the United States Court of Appeals for the Second Circuit held that a New York law prohibiting deceptive practices in business conduct applied to insurance companies. Additionally, the court stated that in appropriate cases, the insured can recover attorney fees.

Burned in More than One Way

In 1988, John Riordan and his wife, Jane Fox, (the "Riordans") purchased a homeowner's insurance policy from Nationwide Mutual Fire Insurance ("Nationwide") for their home in Ossining, New York. The policy guaranteed the replacement cost of the building and its contents in the event of loss. On July 17, 1989, a fire occurred at the home, destroying most of the house and the personal property it contained.

The Riordans notified Nationwide and hired Steven Seltzer, an insurance adjuster, to assist them with their claim. John Hahn, Nationwide's claims adjuster, visited the site two days after the fire and obtained a contractor's estimate for the repair cost of the damage. The Riordans submitted an inventory list to Hahn. Hahn, however, failed to authorize the start of any repairs.

Eventually, the Riordans had the damaged effects cleaned and restored. Nationwide never sent a representative to evaluate the damages to those items, despite persistent requests. The Riordans submitted a timely Proof of Loss form, listing only the irreparably damaged items.

Nationwide advanced \$25,000 to the Riordans on the building portion of the claim. Nationwide stipulated, however, that the Riordans could not use the money for housing repairs without the prior approval of Citibank, the mortgagee of the property. Because Citibank would not release the money

until the building portion of the claim was fully settled, the Riordan's could not live in the unrepaired structure.

Although the parties attempted to settle, Nationwide refused to discharge the building part of the claim unless the Riordans accepted the offer for the contents portion as well. Since Nationwide's offer for the contents was approximately \$21,000 and the Riordan's sought more than \$160,000, the Riordans rejected the all-or-nothing settlement offer.

Suit For Contract Breach and Deceptive Acts

The Riordans filed suit against Nationwide in the United States District Court for the Southern District of New York. They alleged that Nationwide violated § 349 of New York's McKinney's General Business Law (the "Law") by breaching their insurance contract and committing deceptive acts and practices in the claims settlement process. The Riordans sought compensatory and punitive damages as well as attorney fees. The district court entered a judgment in favor of the Riordans on their breach of contract claim.

At trial on the deceptive acts issue, the jury returned a verdict in favor of the Riordans, awarding sums for repair of the house, damage to the contents, and living expenses. In addition, the jury awarded \$1,000 for the deceptive acts and practices violations and \$150,000 in punitive damages. The court also awarded attorney fees. Nationwide appealed the judgment to the United States Court of Appeals for the Second Circuit.

General Business Law Binds Insurance Companies

Nationwide first asserted that New York's Law did not apply to insurance companies since various state statutes already extensively regulated unfair and deceptive practices within the industry. The Second Circuit rejected Nationwide's reasoning because it found that § 349 clearly stated it ap-

plied to all deceptive practices, regardless of whether they were subject to any other state law. Furthermore, the court noted that the statute did not provide an exception for insurance companies.

Nationwide then contended that the legislature, in enacting § 349, did not intend the deceptive practices at issue to be subject to the statutorily created private right of action. Instead, Nationwide argued that the legislature designed the statute to cover retailers or small claims. The Second Circuit, however, found no such restrictions in the statute and held that since all consumers were subject to deceptive practices, all were protected by the statute.

Next, Nationwide challenged the sufficiency of the evidence supporting the jury's verdict. The court stated that the Riordans had presented adequate evidence indicating that Nationwide engaged in deceptive acts. The court specifically noted Nationwide's: (1) failure to acknowledge correspondence from the Riordans; (2) requirement of a Proof of Loss statement without justification; (3) objection to Riordan's inventory merely because it was not on a Nationwide form; (4) failure to respond to the Proof of Loss statement; and (5) requirement that the contents and building loss claims be settled together presented adequate evidence for the verdict. Furthermore, the Riordans demonstrated that Nationwide engaged in similar deceptive practices against other policyholders, thereby meeting the statute's requirement of recursive conduct or conduct affecting the general public.

Attorney Fees Held Appropriate

The Law's § 349(h) permits a court to award a prevailing plaintiff reasonable attorney fees. Nationwide argued that attorney fees were inappropriate because the Riordan's attorneys did not submit contemporaneous time records throughout the case. The Second Circuit denied Nationwide's contention, noting that New York courts rejected the rule that reconstructed time records could not be used as a basis for compensation.

Nationwide next argued that the district court abused its discretion by awarding legal fees. The Second Circuit, however, found no abuse of discretion noting that the district court limited the amount of attorney fees to half of the damages awarded, approximately \$38,000 less than the Riordans requested.

Punitive Damages a State Court Issue

Nationwide contended that New York Insurance Law preempted an insured's recovery of punitive damages from an insurance company based on unfair and deceptive claims practices. In the alternative, Nationwide argued that the Riordans had not presented sufficient evidence to support the award of punitive damages. The Second Circuit, however, did not decide these issues, but rather remanded them to New York's highest state court for determination. ♦

— *B. James Slater, Jr.*

Medical Profession Liable Under the Illinois Consumer Fraud Act

In *Gadson v. Newman*, 807 F. Supp. 1412 (C.D. Ill. 1992), the United States District Court for the Central District of Illinois found that the Illinois Consumer Fraud Act, Ill. Rev. Stat. ch. 121 $\frac{1}{2}$, para. 261 (1991), applied to medical professionals engaging in fraudulent conduct. Furthermore, the court held that a fraudulent commercial contract for medical services between a hospital and a clinic was an unfair trade practice and therefore violated the State Consumer Fraud Act.

Contract Deceives Health Care Consumers and Promotes Unfair Trade

Dr. Richard L. Newman practiced psychiatric medicine through the cor-

poration of Newman Clinic Ltd ("Clinic"). Newman and his psychiatric clinic contracted with St. Mary's Hospital ("SMH") to manage SMH's psychiatric units and to establish inpatient psychiatric programs. Under the contract, Newman's Clinic would develop treatments for patients in the program and would approve all psychiatrists. The agreement further provided that physicians from SMH and from the Clinic could refer patients to the program. In addition, for each patient referred by the Clinic staff who was admitted to the SMH program, SMH agreed to pay Newman's Clinic an added fee of \$90 per day.

Dr. Michael T. Gadson, director of the psychiatric family unit at SMH, sought relief against SMH and Newman under the Illinois Consumer Fraud Act (the "Act") for conspiracy to commit consumer fraud in federal court. Gadson claimed that the contract promoted unfair trade practices by excluding Gadson and other health care competitors from the arrangement, resulting in increased medical costs to the community. He further alleged that Newman's undisclosed financial incentive to admit patients to the SMH program and to prescribe additional medical procedures to be performed at SMH deceived local health care consumers. Finally, Gadson asserted that the arrangement promoted illegal and unethical self-referrals. In response, SMH and Newman moved to dismiss Gadson's claims, arguing that the Act did not apply to the medical profession.

Agreement Constitutes a Commercial Aspect of Medicine

The federal district court first noted that the Act's purpose is "[t]o protect consumers . . . against fraud or deceptive acts or practices in the conduct of any trade or commerce." SMH and Newman argued that they could not be sued under the Act since the medical profession does not engage in "trade or commerce." The court, however, rejected this argument, relying upon federal and state court cases as well as