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First District Allows Consumer Fraud Claim Against Insurance Carrier Involving Failure to Pay Out on Policy

In *Burress-Taylor v. American Security Insurance Co.*, 2012 IL App (1st) 110554, the Illinois Appellate Court First District reversed a decision dismissing a claim against an insurance carrier under the Illinois Consumer Fraud & Deceptive Business Practices Act ("Consumer Fraud Act"), 815 ILCS 505/1, *et seq*., involving the carrier's failure to pay an insurance claim.

The plaintiff purchased a residential insurance policy through her mortgage lender, Homecomings Financial LLC (Homecomings), which was underwritten by American Security Insurance Company (American Security). The plaintiff also had a separate homeowner's policy on her home from Hanover Insurance Company (Hanover). Both policies covered losses caused by a fire. *Burress-Taylor*, 2012 IL App (1st) 110554, ¶¶ 3-4.

In August 2006, the plaintiff's home was damaged by a fire. Sometime before November 30, 2006, the plaintiff submitted her claims to both Hanover and American Security. Hanover issued a check to the plaintiff and Homecomings for $56,854.64. Hanover estimated the property damage to the plaintiff's home to be $142,573.15, less $14,666.19 in depreciation, for a total loss of $127,906.96. Homecomings took possession of Hanover's check and disbursed $18,951.55 to the plaintiff. This amount was dispersed under the mortgage agreement between the plaintiff and Homecomings for repairs and restoration. The Hanover claims adjuster informed the plaintiff that Hanover's ratio of coverage was 44.45%, that is, $56,854.64, while American Security's ratio was 55.85%, that is, $71,052.36, based on combining the limits of the two policies and assigning Hanover its pro rata share of the total coverage provided under those policies. On November 30, 2006, Hanover denied the plaintiff's request to reimburse more funds because the shared liability of Hanover and American Security was in dispute, but promised to inform the plaintiff immediately following the resolution of the dispute. In March 2007, American Security sent a letter to the plaintiff, stating that its policy would not respond until all of the insurance had been paid and that Hanover would have to pay $100,000 of its full policy before American Security would pay. *Id*. at ¶¶ 5-6.

The plaintiff submitted a claim to the Illinois Department of Financial Regulation for amounts due from Hanover and American Security, and filed a class action complaint against both of those carriers, as well as Homecomings. Relevant to the appeal, the claims directed against American Security were for breach of contract, deceptive conduct in violation of the Consumer Fraud Act, and a declaratory judgment. The trial court granted American Security's motion to dismiss under Section 2-619, 735 ILCS 5/2-619, and the plaintiff appealed that decision. *Burress-Taylor*, 2012 IL App (1st) 110554, ¶ 9. The First District reversed. *Id*. ¶ 16.

The appellate court reviewed the Consumer Fraud Act claim and noted that the plaintiff alleged the following deceptive conduct:

> (1) "failing to disclose to Plaintiff, at the time***the policies were purchased and paid for, and indeed at all relevant times, both on the policy declaration pages and in any other policy documentation or correspondence, the amounts of coverage they were willing to pay—or rather, the hefty degree of coverage below the policy limits that [it] was not going to pay";
>
> (2) "failing to disclose to Plaintiff the amounts of the coverage they were willing to pay out (and despite the fact that Plaintiff had two insurance policies for her property)"; and
>
> (3) "continuously refusing to honor Plaintiff's insurance claims, instead engaging in acts that are immoral, unethical and oppressive, by consistently informing Plaintiff that the amounts were being disputed when in reality neither company was actively pursuing the issue, and by ricocheting Plaintiff back and forth between both companies regarding the outstanding amount."

Id. ¶ 31.

American Security argued that the Consumer Fraud Act claim was preempted by Section 155 of the Insurance Code, 215 ILCS 5/155. *Burress-Taylor*, 2012 IL App (1st) 110554, ¶ 27. The carrier also argued that the plaintiff's Consumer Fraud Act claim was frivolous, relied on the same facts as the breach of contract claim, and therefore was not actionable under the Consumer Fraud Act. The plaintiff argued that the Consumer Fraud Act was not preempted by Section 155, because it was raised separately and independently from the breach of contract claim. *Id*. ¶ 30.

The appellate court held that the Consumer Fraud Act claim was independent of the breach of contract claim, and thus actionable. Although the plaintiff's Consumer Fraud Act claim incorporated by reference and realleged the factual basis of her breach of contract claim, it was not based on the carrier's breach of the contractual promise contained in the insurance policy. The appellate court found that although the plaintiff's first two allegations referred to the carrier's breach of contract, and therefore did not support the Consumer Fraud Act claim, the third allegation involved more than the carrier's failure to fulfill a financial promise. Specifically, the appellate court found that it involved the question of American Security's conduct by failing to inform the plaintiff of a resolution of the conflict between the carriers within the one-year statute of limitations, and thus satisfied the first element of the Consumer Fraud Act claim. The appellate court also found that the plaintiff sufficiently alleged that American Security intended her to rely on the omissions and alleged conduct and misrepresentations. The appellate court held that the plaintiff stated a Consumer Fraud Act claim that was separate and independent of her breach of contract claim, and thus the claim was not preempted by Section 155 of the Insurance Code. Accordingly, the appellate court held that the trial court erred as a matter of law in granting the carriers' motion to dismiss. *Id*. ¶¶ 31-34.

Although this case has some unique facts, this decision is a victory for those seeking to pursue insurance carriers for fraud claims arising from denial of insurance claims.

About the Author

James K. Borcia is a partner with the Chicago firm of *Tressler LLP*, and is active in the firm's litigation practice with an emphasis on commercial and complex litigation. He was admitted to the bar in 1989 after he received his J.D. from Chicago-Kent College of Law. Mr. Borcia is a member of the Chicago and Illinois State Bar Associations, as well as the IDC and DRI.

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