



actions on the basis of Stradford's non-cooperation. Because issues of fact remain with respect to the timeliness of plaintiff's disclaimer, we modify the order of the Appellate Division by denying summary judgment to defendants.<sup>1</sup>

I.

In October 1998, defendants Hector Gunaratne and his wife, Rose, and Sumanadasa Perera, as parent and natural guardian of Prashan Perera, separately commenced dental malpractice actions against Stradford. A professional liability policy that Continental issued to Stradford was in effect at that time. The policy required Stradford to notify his insurer of the Gunaratne and Perera actions, gave Continental the right to defend him in those actions, and obligated the insured to "fully cooperate" in the company's litigation and settlement efforts. This cooperation clause explicitly required Stradford's attendance at hearings and trials, as well as his assistance in the securing and giving of evidence and obtaining the attendance of witnesses.

About a month after the underlying malpractice actions were initiated, Stradford notified Continental. Thereafter, Continental's employees and counsel whom the company retained to defend Stradford sought to obtain defendants' treatment records and other materials from him, solicit his views on potential

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<sup>1</sup> Because defendant Stradford has never appeared in this action, use of the term "defendants" in this opinion only refers to defendants Gunaratne and Perera.

expert witnesses, schedule depositions and meetings, and to discuss potential settlements. These many requests took the form of largely unanswered correspondence and telephone calls to Stradford's home and office, and failed visits by defense counsel to Stradford's office pursuant to prearranged meetings. Stradford ignored the vast majority of Continental's requests or otherwise refused to cooperate with the company. In response, Continental repeatedly warned Stradford that his non-cooperative conduct could jeopardize his coverage. These warnings, however, went unheeded.

Nevertheless, at various times, Stradford indicated an awareness of his duty to cooperate and expressed his willingness to do so. For example, Stradford made multiple promises to provide the requested documents, which he claimed were located on his boat or at his residence. Further, although Stradford's deposition in Gunaratne was rescheduled multiple times due to his unexplained absences, he eventually appeared and was deposed.<sup>2</sup> Then, after more than four years had passed without his production of a single relevant document, Stradford participated in a July 2, 2003 conference call -- which he had requested -- to discuss a possible settlement of Gunaratne.

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<sup>2</sup> Stradford's deposition in Perera was rescheduled at least twice due to his failure to appear. Although there is no indication in this record that he was deposed in that action, defendants' counsel swore in an affirmation that he possessed a transcript showing that such deposition did occur.

During that call, Stradford asked for new counsel in both underlying actions, claiming that he had lost confidence in his present attorney's ability to zealously defend him due to the attorney's actions in another malpractice action brought against him. Continental agreed to the request, Stradford's attorney moved to be relieved, and Supreme Court marked all cases pending against Stradford off-calendar, pending the substitution of new counsel. Despite calls and a letter from his new counsel, Stradford never executed the necessary form to effect the requested substitution.

On July 8, 2004, Continental mailed Stradford two detailed letters -- one each for Gunaratne and Perera. In the main, the letters set forth his history of noncompliance, evasion and broken commitments. They also demanded that Stradford schedule a meeting with his newly-retained counsel for a date on or before August 13, warned that further non-cooperation "may imperil" his coverage, and, given adverse expert findings regarding Stradford's care of defendants, recommended that he consent to settlement of both actions. On August 11, both letters were returned to Continental as "unclaimed." Approximately two months later, on October 13, 2004, Continental's outside counsel sent a disclaimer letter to Stradford. Two days after its disclaimer was issued, Continental commenced the present action, seeking a declaratory judgment that it had no duty to defend or indemnify Stradford in the Gunaratne

and Perera actions.

The decision-making process that Continental employed prior to disclaiming and bringing this action was described in the deposition testimony of Thomas Morelli, who by July 8, 2004 was the Continental employee responsible for Gunaratne and Perera. According to him, the "normal protocol" involved a recommendation by him to his director, who would then make a recommendation to Continental's in-house coverage counsel. In addition, in connection with the Gunaratne and Perera disclaimers, Morelli testified that Continental "sought an opinion from outside counsel regarding [its] coverage position."

Continental's decision to disclaim was bolstered by a declaratory judgment issued on June 1, 2004 in two other malpractice actions then pending against Stradford, O'Halloran and Shields. There, the court held that Stradford's failure to respond to multiple letters seeking his cooperation and his absence on trial dates constituted sufficient grounds for a disclaimer of coverage.

In the present action, Continental moved for summary judgment on its declaratory judgment claim that Stradford's non-cooperation had terminated the company's contractual obligation to him.<sup>3</sup> Defendants cross-moved for summary judgment, arguing

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<sup>3</sup> In April and May of 2005, Supreme Court entered judgments awarding defendants damages of \$116,200 and \$50,000, respectively, against Stradford.

that the company's disclaimer was untimely and, in the alternative, that it had not carried its burden of proving Stradford's non-cooperation. Supreme Court granted Continental's motion in all respects and similarly denied the cross-motion. The court concluded that Stradford was not entitled to a defense or indemnification because of his multiple breaches of the cooperation clause.

In a 3-2 decision, the Appellate Division reversed. All members of the panel concluded that Continental had carried its burden of establishing Stradford's non-cooperation. The majority held, however, that Continental's approximately two-month delay in disclaiming -- measured from August 11, 2004 (the date its final letters were returned unclaimed) -- was unreasonable as a matter of law. The dissent disagreed, reasoning that Continental's need to carefully analyze Stradford's conduct and to consult with counsel to ensure that the company had discharged its "heavy burden" of attempting to bring about his cooperation prior to disclaiming, supported the conclusion that Continental's delay was "explained and . . . reasonable under the circumstances" (46 AD3d 604, 605 [2007] [Goldstein & Schmidt, JJ., dissenting] [internal quotation omitted]).

Plaintiff appeals from the order of reversal based on a dual dissent on a question of law. We now modify by denying defendants' cross-motion for summary judgment.

II.

On this appeal, defendants do not dispute the lower courts' conclusions that Continental was entitled to disclaim due to Stradford's non-cooperation. According to them, the timeliness of that disclaimer is the sole issue before us. We now turn to that single issue.

Even if an insurer possesses a valid basis to disclaim for non-cooperation, it must still issue its disclaimer within a reasonable time (see 14 Couch on Insurance 3d § 199:69). When construing Insurance Law § 3420 (d), which requires an insurer to issue a written disclaimer of coverage for death or bodily injuries arising out of accidents "as soon as is reasonably possible," we have made clear that timeliness almost always presents a factual question, requiring an assessment of all relevant circumstances surrounding a particular disclaimer (First Fin. Ins. Co. v Jetco Constr. Corp., 1 NY3d 64, 69 [2003]; Hartford Ins. Co. v County of Nassau, 46 NY2d 1028, 1030 [1979]; Allstate Ins. Co. v Gross, 27 NY2d 263, 270 [1970]).<sup>4</sup> One of those circumstances is the time necessary for an insurer to conduct a prompt investigation into those grounds supporting a potential disclaimer (see Gross, 27 NY2d at 270; First Fin. Ins.

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<sup>4</sup> Continental argues that Insurance Law 3240 (d)'s timeliness standard is inapplicable here. Because that argument was not presented to the courts below, we decline to consider it (see Sega v State of New York, 60 NY2d 183, 190 n 2 [1983]; Scott v Morgan, 94 NY 508, 515 [1884]).

Co., 1 NY3d at 69). Although we have declined to provide a "fixed yardstick" against which to measure reasonableness of a delay in disclaiming coverage (see id. at 70), we have said that cases in which the reasonableness of an insurer's delay may be decided as a matter of law are exceptional and present extreme circumstances (see Hartford, 46 NY2d at 1030; Gross, 27 NY2d at 270). This is not such a case.

Fixing the time from which an insurer's obligation to disclaim runs is difficult. That period begins when an insurer first becomes aware of the ground for its disclaimer (see First Fin. Ins. Co., 1 NY3d at 68-69, quoting Matter of Allcity Ins. Co. [Jimenez], 78 NY2d 1054, 1056 [1991]). But unlike cases involving late notice of claims (see id. at 66-67; Hartford, 46 NY2d at 1029; Gross, 27 NY2d at 268) or other clearly applicable coverage exclusions, an insured's non-cooperative attitude is often not readily apparent. Indeed, as here, such a position can be obscured by repeated pledges to cooperate and actual cooperation.

The challenge of setting an appropriate date is only heightened by the heavy burden that an insurer seeking to establish a non-cooperation defense must carry (see Thrasher v U.S. Liab. Ins. Co., 19 NY2d 159, 168-169 [1967]; accord Matter of Empire Mut. Ins. Co. [Stroud], 36 NY2d 719, 721 [1975]). To further this State's policy in favor of providing full compensation to injured victims, who are unable to control the

actions of an uncooperative insured, insurers must be encouraged to disclaim for non-cooperation only after it is clear that further reasonable attempts to elicit their insured's cooperation will be futile (see Thrasher, 19 NY2d at 168; see also Matter of Liberty Mut. Ins. Co. v Roland-Staine, 21 AD3d 771, 772 [1st Dept 2005] ["strict[] scrutin[y]" of facts supporting non-cooperation defense required to protect "innocent injured parties from suffering the consequences of a lack of coverage"]). In some cases, such as where an insured openly disavows its duty to cooperate (see e.g. Allcity Ins. Co. v 601 Crown Street Realty Corp., 264 AD2d 315, 316-317 [1st Dept 1999]) little time is needed to evaluate the relevant non-cooperative conduct before disclaiming. But here, where an insured has punctuated periods of non-compliance with sporadic cooperation or promises to cooperate, some reasonably longer period for analysis may be warranted.

The Appellate Division majority acknowledged that even after June 1, 2004, when Continental received a declaratory judgment that it was entitled to disclaim coverage in the O'Halloran and Shields actions, the carrier "was continuing to pursue its heavy burden" of attempting to bring about Stradford's compliance in the two actions relevant here (see 46 AD3d at 601). The court also found that the time for disclaimer ran from August 11, 2004, the date when what became Continental's final letters to Stradford were returned unclaimed. Following that date, there

is no indication that the company engaged in further communication with Stradford. Thus, on these facts, we agree with both of the Appellate Division's conclusions.

Contrary to the Appellate Division, however, we conclude that a question of fact remains regarding the amount of time required for Continental to complete its evaluation of Stradford's conduct in the two underlying actions. In this case, the reasonableness of an approximately two-month delay to analyze the pattern of obstructive conduct that permeated the insurer's relationship with its insured for almost six years presents a question of fact that precludes entry of summary judgment for either plaintiff or for defendants (see First Fin. Ins. Co., 1 NY3d at 69 ["[I]nvestigation into issues affecting an insurer's decision whether to disclaim coverage obviously may excuse delay in notifying the policyholder of a disclaimer"]; Hartford, 46 NY2d at 1030 ["[A] two-month delay may often be easily justified, if in fact there be justification"]).

Accordingly, the order of the Appellate Division should be modified, without costs, by denying the cross-motion of defendants Gunaratne and Perera for summary judgment and, as so modified, affirmed.

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Order modified, without costs, by denying the cross motion of defendants Hector Gunaratne, Rose Gunaratne and Sumanadasa Perera for summary judgment and, as so modified, affirmed. Opinion by Judge Ciparick. Chief Judge Kaye and Judges Graffeo, Read, Smith, Pigott and Jones concur.

Decided November 25, 2008