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DIVERSE LEGAL ISSUES CAN ARISE IN INSURANCE FRAUD PROSECUTIONS

By Evan H. Krinick

Even clear proof of a false insurance claim and a criminal defendant's guilt does not necessarily mean that a criminal case will proceed uneventfully to a conviction, or withstand a defendant's appeal. The author of this article discusses a variety of issues that can arise when prosecuting insurance fraud cases.

The key ingredient in a criminal prosecution for insurance fraud typically is a false insurance claim filed by the defendant. Even clear proof of a false insurance claim and a criminal defendant's guilt, however, does not necessarily mean that a criminal case will proceed uneventfully to a conviction, or withstand a defendant's appeal. In some instances, a defendant who has filed a false insurance claim with intent to defraud an insurance company will file a motion before or after the verdict, or will appeal the verdict (or guilty plea), resulting in some rather interesting—and potentially legally significant—court decisions.

A Juror Issue

Consider the recent decision by the Appellate Division, Second Department, in *People of State of New York v. Guldi*, 2017 N.Y. Slip Op. 05459 (App. Div. 2d Dep't July 5, 2017).

A Suffolk County jury convicted the defendant of grand larceny in the second degree and insurance fraud in the third degree in connection with his wrongful taking of insurance proceeds after his house had been damaged by fire and certain statements that he had provided to his insurance carrier, American International Insurance Company (AIG). The defendant was sentenced, and he appealed.

The Second Department found that the evidence was legally sufficient to establish the defendant's guilt of grand larceny in the second degree and insurance fraud in the third degree beyond a reasonable doubt.

Nevertheless, the appellate court reversed the judgment and ordered a new trial. The Second Department found that the trial court had erred in denying the defendant's for-cause challenge to a prospective juror who was an employee of AIG.

The Second Department explained that a prospective juror may be challenged for cause on several grounds, including that the prospective juror bears a relationship to the person allegedly injured by the crime charged that was "of such [a] nature" as to preclude him or her from rendering an impartial verdict (CPL 270.20(1)(c)). The appellate court noted that such a relationship was referred to as an "implied bias," and required "automatic exclusion from jury service" regardless of whether the prospective juror declared that the relationship would not affect his or her ability to be fair and impartial.

The appellate court reasoned that the risk of prejudice arising out of such a relationship was "so great" that recital of an oath of impartiality "could not convincingly dispel the taint," and created the perception that the accused "might not receive a fair trial before an impartial finder of fact." Indeed, the Second Department pointed out, although not all relationships between a prospective juror and a complainant or other interested party required disqualification for cause as a matter of law, trial courts had to "exercise caution in these situations by leaning toward disqualifying a prospective juror of dubious impartiality."

The Second Department noted that, in this case, during the first round of jury selection, the prospective juror had indicated that she worked for AIG. Upon inquiry by the defendant, the prospective juror explained that her job involved analyzing the financial policies for three divisions at AIG: asset management, financial services, and domestic life.

According to the Second Department, the prospective juror did not provide a "completely unequivocal assurance that she could be fair and impartial." She indicated that she thought that she could be fair and impartial, but conceded that there "may be" a conflict of interest from the defendant's perspective, and that it might be better if she were on a different case so as to enable the defendant to feel "comfortable" that he "wouldn't be prejudiced in any way."

The Second Department pointed out that the trial court denied the defendant's for-cause challenge without asking the prospective juror any questions about her employment at AIG or how it might affect her ability to serve as a juror, notwithstanding that the trial court had an obligation to try and determine "[a]ll issues of fact or law arising on the challenge" (CPL 270.20(2)).

Then, the Second Department ruled that, contrary to the trial court's determination, the prospective juror's professional relationship with her employer, AIG—which had drafted and funded the insurance check underlying several counts of the indictment, and which was the named complainant in the count alleging insurance fraud in the third degree—“rendered her unsuitable for jury service and necessitated her removal for cause.” It found a “considerable risk” that this prospective juror could “unwittingly give undue credence to witnesses from AIG” and that her service “would give rise to the perception” that the defendant had not received a fair trial.

Because the defendant had peremptorily challenged the prospective juror and his peremptory challenges had been exhausted before the selection of the jury was complete, the trial court had committed reversible error when it denied the defendant's challenge for cause to this prospective juror, the Second Department concluded.

Prosecutorial Misconduct

A different issue was at the heart of the defendant's appeal in *People of State of New York v. Hayward-Crawford*, 151 A.D.3d 1584 (4th Dep't June 9, 2017), from a judgment of a trial court in Ontario County. That court had convicted the defendant, upon a jury verdict, of arson in the third degree, arson in the fourth degree (two counts), attempted insurance fraud in the second degree, and conspiracy in the fifth degree, based on allegations that she had conspired with others to set fire to her vacant rental property to collect insurance money. The fire had destroyed the defendant's property and caused damage to two neighboring properties.

The Appellate Division, Fourth Department, first ruled that the verdict was “not against the weight of the evidence.”

The Fourth Department, however, then agreed with the defendant that she had been denied a fair trial based on the “cumulative effect” of “the prosecutor's misconduct” during jury selection, cross-examination, and summation.”

The appellate court found that, during jury selection, the prosecutor had “improperly inquired” if the defendant “look[ed] like an arsonist” because she was dressed in red-colored clothing. Moreover, the Fourth Department continued, during cross-examination, the prosecutor had “improperly questioned” the defendant on her inability to make bail, thus indicating that the defendant was incarcerated, and had “improperly questioned” the defendant about the conviction of her co-defendant husband of the same crime.

According to the Fourth Department, the prosecutor also had improperly questioned the defendant concerning the criminal history of her husband and, during summation, had commented on the failure of the defendant's husband to testify regarding her financial condition, “again implying that her husband had been convicted of the same crime and was incarcerated.”

The appellate court acknowledged that the trial court had sustained many of defense counsel's objections and had given curative instructions, but ruled that it could not conclude that any resulting prejudice had been alleviated. Moreover, it added, even when a trial court repeatedly sustained a defendant's objections and instructed the jury to disregard certain remarks by the prosecutor, “[a]fter a certain point, ... the cumulative effect of a prosecutor's improper comments ... may overwhelm a defendant's right to a fair trial.” The Fourth Department ruled that that was the case here.

Accordingly, it reversed the conviction and granted the defendant a new trial, without even determining whether the errors had contributed to the defendant's conviction. The right to a fair trial was “self-standing,” it concluded, and proof of guilt, however overwhelming, could “never be permitted to negate this right.”

Assistance of Counsel

Another recent decision by the Fourth Department, in *People of State of New York v. Wong*, 2017 N.Y. Slip Op. 04997 (App. Div. 4th Dep't June 16, 2017), addressed claims of ineffective assistance of counsel.

Here, the defendant had pleaded guilty to insurance fraud in the fourth degree and criminal possession of a forged instrument in the second degree. He subsequently moved to withdraw his plea on the ground that he had been denied effective assistance of counsel. The trial court in Monroe County denied his motion, and he appealed.

The Fourth Department explained that the decision to permit a defendant to withdraw a guilty plea was in the “sound discretion of the court,” and that a guilty plea would be upheld as valid “if it was entered voluntarily, knowingly and intelligently.”

Here, the appellate court ruled, the defendant's claim that he had pleaded guilty because of ineffective assistance of counsel was “not supported by the record. According to the Fourth Department, the defendant had “communicated adequately with defense counsel” and had received a “favorable plea bargain.” The trial court had properly determined that the plea had been “knowing and voluntary,” the Fourth Department added.

The appellate court then rejected the defendant's claim that he had been denied effective assistance of counsel based on his counsel's alleged failure to advise him of the immigration consequences of the guilty plea. It said that the record revealed that both the trial court and defense counsel had advised the defendant of potential immigration consequences of his plea, including the risk of deportation.

Accordingly, it concluded that the defendant's guilty plea had been knowingly, voluntarily, and intelligently entered, and that the trial court had not erred in denying his motion.

Conclusion

As these decisions suggest, a variety of constitutional and statutory issues can arise in criminal prosecutions of insurance fraud. Of course, none should obscure the essential purpose of these cases: to prosecute those who have defrauded, or who have sought to defraud, insurance companies and their policyholders to the full extent permitted by the law.

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About the Author

Evan H. Krinick, managing partner of **Rivkin Radler LLP**, can be reached at evan.krinick@rivkin.com.

This article was published in the Fall 2017 Insurance Coverage Law Report.

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