

## Policyholders' bad faith claim survives summary judgment

Insurer asserted jewelry theft was staged

By Eric T. Berkman

An insurer was not entitled to summary judgment in a bad faith suit brought by policyholders after it denied their claim for jewelry allegedly stolen during a home burglary, a U.S. magistrate judge has decided.

Plaintiffs Ashan and Megan Fernando claimed that more than \$600,000 worth of jewelry was stolen from their Berkley home during a break-in while they were out celebrating Ashan's birthday.

Defendant Federal Insurance Co. refused to pay their claim, contending – among other things – that the jewelry was fraudulently appraised by a felon on parole and that the burglary itself, as recorded by a security camera, was likely staged.

Apparently believing that the denial was based at least in part on racial bias against Ashan, who is Black, the plaintiffs filed suit under Chapters 93A and 176D.

After extensive discovery, Federal Insurance moved for summary

judgment on the plaintiffs' claims and its own fraud and misrepresentation counterclaims.

But Judge Marianne C. Bowler denied the motion.

"Although defendant has introduced facts that cast doubt on plaintiffs' assertion that a burglary occurred ... the facts are not so overwhelming that 'the record as a whole could not lead a rational trier of fact to find for' plaintiffs," Bowler said.

Having found a genuine dispute over material facts, Bowler still went on to rule that an investigative report by a third party on Federal Insurance's behalf constituted inadmissible hearsay.

She also said she would not consider, for summary judgment purposes, expert reports submitted by the insurer as to its claims handling and investigation procedures and the validity of the plaintiffs' jewelry appraisals at this stage, finding questions about the experts' qualifications and admissibility of their reports best suited for a Daubert hearing at a later stage in the litigation.

The 55-page decision is *Fernando, et al. v. Federal Insurance Co., et al.*, Lawyers Weekly No. 02-076-22.

***Fernando, et al. v.  
Federal Insurance Co., et al.***

**THE ISSUE:** Was a homeowner's insurer entitled to summary judgment in a bad-faith suit brought by policyholders after it denied their claim for loss of jewelry during an alleged home burglary?

**DECISION:** No (U.S. District Court)  
**LAWYERS:** Anthony T. Panebianco of Darrow Everett, Providence (plaintiffs). Laura M. Kelly of Rubin & Rudman, Boston (defense)

### CREATING A PATHWAY?

Providence lawyer Anthony T. Panebianco, who represented the plaintiffs, said he and his clients look forward to presenting their case to the court in its entirety.

He also said Bowler's decision not to consider the insurer's expert reports at this stage could "create a pathway" for other litigants to challenge the admissibility of expert opinions for summary judgment purposes.

"Across all types of litigation, well-funded, deep-pocketed companies that have expert opinions have relied on them to try and over-



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power on summary judgment,” Panebianco said. “Being able to exclude that type of report will go a long way toward preventing this type of over-litigation we’ve been seeing in the courts.”

The defendant’s attorney, Laura M. Kelly of Boston, could not be reached for comment.

However, William T. Bogaert of Boston, who handles insurance cases and other complex civil disputes, said he did not see Bowler’s handling of the expert reports as particularly groundbreaking.

“[Bowler] didn’t discard the expert reports; she just said she’s not going to consider them for summary judgment, in part because she didn’t have to, having already determined there was a factual issue,” Bogaert said. “This was a careful consideration by a good judge of an issue under the circumstances of the facts present, and it by no means struck me as a shift in the law or a change in

emphasis about the appropriate use of expert reports on summary judgment.”

But Boston attorney Vincent J. Pisegna said it is possible to read Bowler’s treatment of the expert reports as Panebianco described it.

“But I also think we’re already there,” Pisegna said. “You don’t see too many cases where expert reports are submitted on liability at the summary judgment stage. You may see it on damages and things like that.”

Pisegna found it more surprising that the magistrate judge, after finding a question of material facts, provided such extensive analysis of other issues, including the expert reports.

“I don’t think she was enamored with the plaintiffs’ case and was also puzzled as to why the insurance company moved for summary judgment,” Pisegna said. “It would have been cheaper for the insurance company to just try the case when you look at what they submitted: two expert reports and all the rest of it.”

Meanwhile, Boston lawyer Michael B. Bogdanow said he has noticed an “aura of implicit bias” in the coverage denial.

“Would the denial have been made with very different insureds, but under similar factual circumstances? We’ll never know,” Bogdanow said. “I can tell you that, in my legal career, I’ve encountered implicit bias in insurance coverage

denials similar to this one. But of course implicit bias is not an issue limited to the insurance industry.”

Bogdanow said he found noteworthy the judge’s willingness to deem certain alleged misrepresentations made by the plaintiffs in earlier bankruptcy filings relevant to alleged misrepresentations in this case.

“Plaintiff-side tort lawyers are not always deeply involved in a client’s bankruptcy proceeding, which is generally handled by a bankruptcy lawyer, not a tort lawyer, and her opinion shows that there are times when the two proceedings intersect,” Bogdanow said.

#### **ALLEGED BURGLARY**

The plaintiffs were insured by a Federal Insurance policy from December 2015 to December 2016.

To procure the policy, they submitted jewelry appraisals signed by a “David Youshaie.” The plaintiffs maintained that Amir “David” Youshaie, owner of Victoria Jewelry in Boston, appraised the jewelry, while the insurer claimed it was a different individual, David “Shabab” Youshaie, a convicted felon prohibited from performing appraisals by terms of his probation.

The policy, which listed six items of jewelry valued at \$469,560, repudiated coverage for concealment and fraud. It also required the policyholders to immediately notify the insurer and police following a loss;

submit a signed, sworn proof of loss; and be available for examination under oath.

On March 18, 2016, the plaintiffs allegedly returned to discover a shattered bedroom window and a missing bedroom safe that allegedly contained the jewelry.

They called Berkley police the next day to report the theft, allegedly waiting until then because Ashan was intoxicated and, as a person of color who had prior bad experiences with police, apparently worried about a police interaction in that condition.

They submitted a notice of loss with Federal Insurance, who assigned Jacquelyn Rider to investigate the claim.

On March 21, a claim examiner interviewed Ashan, who told her that all the jewelry except his wife's engagement ring were gifts from his parents, who likely bought the items in Ethiopia or Sri Lanka. The next day, the plaintiffs' insurance agent obtained limited coverage for a tennis bracelet valued at \$165,000 and allegedly stolen in the burglary but not previously insured under the policy.

In her investigation, Rider interviewed Sgt. Daniel Mosher from the Berkley Police Department, who called the claims "highly suspect" and "inflated." Rider also found the various appraisals suspicious because they were on different types of letterhead de-

spite being from the same vendor and because they provided no information about where they were purchased or the price.

Meanwhile, she noted that the plaintiffs' bankruptcy filings from 2011 denied any "real property, including jewelry."

Additionally, the insurer found security footage of the alleged burglary to be suspect because the burglar "conveniently" passed in front of the only security camera capable of recording and storing video despite it being nowhere near his point of entry or egress or the safe from which he allegedly stole.

Ashan's father, meanwhile, testified during an examination that the jewelry in question was previously gifted to him by relatives in Sri Lanka in 2014, but he had no documents relating to the gifting or purchase.

Federal Insurance subsequently retained CoventBridge, a third-party investigator, to locate and validate the relatives, which it was apparently unable to do.

On Jan. 20, 2017, Federal Insurance denied the claim, citing concealment and fraud provisions of the policy.

When the plaintiffs sued in U.S. District Court, the insurer counterclaimed, alleging fraud and misrepresentation. Following discovery, it moved for summary judgment on all claims.

## **QUESTIONS OF FACT**

Bowler denied the motion, finding a dispute of fact as to whether the burglary occurred, emphasizing that a rational factfinder could resolve the issue in either direction and that the entire case hinged on the question.

She also found an issue of fact as to who conducted the appraisals.

"According to plaintiffs, this is a 'genuine issue of material fact' because defendant argues, in part, that 'if [David Youshaie] performed [the appraisals], they were procured [] by fraud and the policy is invalid,'" Bowler said. "Defendant does not address in its reply whether who conducted the appraisals is a genuine issue of material fact. ... Because this court concludes that summary judgment is not appropriate for plaintiffs' claims, so too is summary judgment inappropriate for defendant's counterclaims."

The judge also opted not to consider Federal Insurance's expert reports for summary judgment purposes.

"This court has, as previously noted, determined that material issues of fact exist precluding summary judgment," Bowler said. "Additionally, this court finds that the designated expert witnesses' qualifications and admissibility of their reports are questions best suited for a Daubert hearing and further motion practice."