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Second Circuit Denies Motion to Compel Appraisal because Insurer Sought to Submit Question of Law to Appraisers

In the Second Circuit, appraisal provisions in insurance policies and other contracts are, as a matter of federal common law, considered arbitration agreements for purposes of the Federal Arbitration Act. **Bakoss v. Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135**, 707 F.3d 140, 143 (2d Cir. 2013). That is because they ?clearly manifest[] an intention by the parties to submit certain disputes to a specified third party for binding resolution.? **McDonnell Douglas Finance Corp. v. Pennsylvania Power & Light Co.**, 858 F.2d 825, 830 (2d Cir. 1988); Bakoss, 707 F.3d at 143. That appraisal clauses typically do not use the term ?arbitration? is of no moment?all that counts ?is that the parties clearly intended to submit some disputes to their chosen instrument [appraisal] for the definitive settlement of certain grievances under the Agreement." Id. (quotations omitted); see Bakoss, 707 F.3d at 143.

In Milligan v. CCC Info. Servs. Inc.], ___ F.3d ___, No. 18-cv-1405, slip op. (2d Cir. April 3, 2019) the Second Circuit affirmed a district court decision that denied an insurer (the ?Insurer?)'s motion to compel, under the Federal Arbitration Act, appraisal of a dispute concerning the Insurer's obligation to indemnify the insured (the ?Insured?) for total loss of a leased vehicle. The Second Circuit held that the dispute the Insurer sought to submit to appraisal concerned interpretation of the policy, and thus presented a question of law that was outside the scope of the appraisal clause.

Background

The appraisal clause in the policy provided that:

If we and the insured do not agree on the amount of loss, either may, within 60 days after proof of loss is filed, demand an appraisal of the loss. In that event, we and the insured will each select a competent appraiser. The appraiser will select a competent and disinterested umpire. The appraisers will state separately the actual cash value and the amount of the loss. If they fail to agree, they

will submit the dispute to the umpire. An award in writing of any two will determine the amount of loss. We and the insured will each pay his chosen appraiser and will bear equally the other expenses of the appraisal and umpire. . . . . (emphasis deleted)

The Insured leased her vehicle in March 2015, and was informed that the purchase price was $51,400. Three months later the insured was involved in an automobile accident that rendered the vehicle beyond repair, and thus a total loss.

The Insured made a claim on the policy for total loss; the Insurer obtained a so-called ?Market Valuation Report? from the Insurer's contractor, CCC Information Services ("CCC"), which valued the Insured's vehicle at $45,924 ($5,476.00 less than the purchase price); and the Insurer paid that $45,924 amount to the lienholder, Toyota Lien Trust.

The Insured disputed the Insurer's handling of the claim, and that dispute resulted in the Insured filing a putative class action in the Federal District Court for the Eastern District of New York asserting against the Insurer and CCC claims for breach of contract, negligence, unjust enrichment, and violations of New York insurance Regulation 64 (?Regulation 64?), 11 N.Y.C.R.R. § 216.7, and New York General Business Law § 349 (unfair and deceptive trade practices). The putative class action complaint sought damages, declaratory, and injunctive relief. It invoked federal subject matter jurisdiction based on the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d)(2).

The Insured's claims, and those of the putative class she seeks to represent, turn principally on Regulation 64, which defines a ?current model year automobile,? and, where an insured vehicle is such a ?current model year automobile,? requires the insurer to ?pay to the insured the reasonable purchase price to the insured on the date of loss of a new identical vehicle, less any applicable deductible, and an allowance for depreciation. . . .[:]"

A private passenger automobile of the current model year means a current model year automobile that has not been superseded in the marketplace by an officially introduced succeeding model, or an automobile of the previous model year purchased new within 90 days prior to the date of loss. If the insured vehicle is a private passenger automobile of the current model year, the insurer shall pay to the insured the reasonable purchase price to the insured on the date of loss of a new identical vehicle, less any applicable deductible and an allowance for depreciation in accordance with [a set schedule], except [under circumstances not relevant here]. 11 N.Y.C.R.R. § 216.7(c)(3).

The Controversy Concerning Appraisal

The Insured claimed that ?her vehicle was a ?current model year' automobile as defined by Regulation 64[,]? but ?that rather than paying her the reasonable purchase price of a new identical vehicle on the date of loss less any applicable deductible and depreciation allowances, as required by Regulation 64, [the Insurer] paid [her] the amount contained in CCC's Market Valuation

Report, which calculated her loss using the average of three similar dealer vehicles that were available or recently sold in the marketplace at the time of the valuation.? Slip op. at 5.

The Insurer demanded, and then moved to compel, an appraisal to determine what the Insured's loss was, that is, $45,924, the amount the Insurer paid the Toyota Lien Trust; $51,400, the amount the dealer represented, and the Insured understood, to be the sticker price of her vehicle; or some other amount. See slip op. at 3-4, & 18.

The Insured opposed the motion because the issue the
Insurer argued should be submitted to appraisal concerned a legal question ?
the interpretation of the policy. The Court agreed and affirmed the district
court's denial of the motion.

The Court's Analysis and Decision

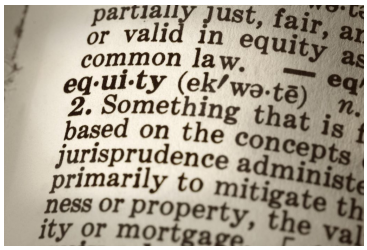
Citing **Amerex Grp., Inc. v. Lexington Ins. Co.**, 678 F.3d 193, 204-05 (2d Cir. 2012), the Court explained that, under New York law, ?an an appraiser may not resolve coverage disputes raising legal questions about the interpretation of an insurance policy.? Slip op. at 14-15. ?An appraisal is appropriate,? said the Court, not to resolve legal questions, but rather to address ?factual disputes over the amount of loss for which an insurer is liable.'" Slip op. at 16 (quoting Amerex, 678 F.3d at 204).

Applying the facts to the law, the Court determined that ?[t]he dispute here concerns a legal issue about the meaning of Regulation 64[,]? ?which [was] incorporated into the policy.? Slip op. at 17. The Insured was ?not claiming simply that the value of her loss was greater than [the Insurer's] calculation[?]? ?her complaint is that by calculating her loss using the average of three comparable vehicles available in the market (the methodology used in the [CCC's] Market Valuation Report), [the Insurer] failed to comply with Regulation 64. . . .? Slip op. at 17.

The Insurer and CCC argued that ?this case does not present a coverage issue because [the Insurer] paid [the Insured's] claim under the Policy[,]? but the Court said that argument ?misses the mark.? For ?[w]hether a loss is covered is not the only legal question presented in an insurance case[,]? explained the Court. Slip op. at 17. ?Legal questions of contract interpretation? also include ?[q]uestions over the extent of coverage and how to define the amount of loss. . . .? Slip op. at 18. "The dispute here,? said the Court, ?concerns the meaning of ?the reasonable purchase price to the insured on the date of loss of a new identical vehicle[,]'? and ?[t]hat is a legal question requiring the interpretation of Regulation 64.? Slip op. at 18.

The Insured's position was that Regulation 64 ?requires the insurer to pay her the sticker price of a new identical vehicle[,]? while the Insurer's position is that ?Regulation 64 permits it to determine the reasonable purchase price of a vehicle as of the date of loss by reference to evidence of the prices actually paid for such vehicles in the relevant market at or about the relevant time.? Slip op. at 18. ?Whichever view is correct,? explained the Court, ?the disagreement presents a legal question regarding the meaning of Regulation 64, which is for the district court to decide.? Slip op. at 18.

The Court Affirms the
District Court's Denial of Nonsignatory CCC's Motion to Compel Appraisal



CCC was not a party to the policy, but it contended it had the right to demand arbitration as a nonsignatory based on equitable estoppel. The Court acknowledged that ?[u]nder certain circumstances we have compelled signatories to an arbitration agreement to arbitrate their claims against nonsignatories if ?the relationship among the parties, the contracts they signed . . . , and the issues that had arisen among them discloses that the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.'? Slip op. at 19 (quoting]Denney v].]BDO Seidman],]LLP], 412 F.3d 58, 70 (2d Cir. 2005) (quotations omitted)).

But it was unnecessary for the Court to decide whether CCC met the requirements of the equitable estoppel doctrine, for assuming it did, its right to demand appraisal was ?derivative? of the Insurer's right to compel appraisal. Slip op. at 19. And since the Insurer could not compel appraisal, CCC likewise could not, and the Court therefore affirmed the district court's denial of CCC's motion to compel appraisal. See slip op. at 19.

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