

MEALEY'S LITIGATION REPORTS

INSURANCE FRAUD

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Insurance Investigations And The Right To Privacy

By

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Introduction

Insurance companies routinely investigate suspicious claims by dispatching their investigators to engage in video and audio surveillance of subjects they have reason to believe may be guilty of insurance fraud. In doing so, they may inadvertently violate an individual's common law right to privacy.

Indeed, the case law is replete with reports of large verdicts awarded against insurance companies where juries found that investigators crossed the line of acceptable conduct in search for the truth. Therefore, insurers

need to understand how to investigate claims without fear of reprisal under the various privacy laws. This article will review the common law development of the right to privacy as it relates to the surveillance of claimants.

COMMENTARY

Common Law Definition Of Invasion Of Privacy

While the law governing invasion of privacy is commonly thought of as one tort, in actuality it consists of four distinct kinds of invasion: (a) unreasonable or wrongful intrusion, (b) appropriation of the other's name or likeness, (c) unreasonable publicity given to one's private life and (d) publicity that normally places the other in a false light before the public.¹

In the context of claims investigations, the invasion primarily involved and typically invoked by claimants is unreasonable intrusion upon solitude or seclusion. Since this prong of the tort of invasion of privacy is the one investigators are most likely to be accused of violating, this handout will concentrate on explaining its potential application to claims investigations.

MEALEY'S LITIGATION REPORTS

INSURANCE FRAUD

July 31, 1996

Vol. 3, #12

While not all jurisdictions have recognized the tort of wrongful intrusion, those that have generally define it as the intentional interference with another's interest in solitude or seclusion, either as to the person or to their private affairs or concerns, which would be highly offensive or objectionable to a reasonable person.² A cause of action for wrongful intrusion is personal in nature and therefore a corporation, which is incapable of emotional suffering, cannot maintain such a claim.³

Two Threshold Questions Are Asked To Determine If Investigation Was Reasonable

In determining whether to sustain a claim for wrongful intrusion, the courts ask two questions: First, was there a legitimate purpose for the investigation that led to the intrusion? Second, were the means employed in conducting the investigation reasonable?⁴

In recognizing that society benefits from the exposure of fraudulent claims as well as the validation of meritorious ones, the courts have uniformly held that an individual who files a claim for "personal injuries must expect reasonable inquiry and investigation to be made of [the] claim and to this extent that [individual's] interest in privacy is circumscribed."⁵ Consequently, by filing a claim for personal injuries, claimants subject themselves to a degree of public observation that they would not otherwise be exposed to in the confines of their own home.⁶ Under these circumstances, such individuals are deemed to have waived their right to privacy to the extent of a reasonable investigation.⁷

Accordingly, an insurance company that conducts an investigation based on the filing of a claim will be held to have had a legitimate purpose for doing so and will therefore benefit from a qualified protection from the courts. As indicated below, the protection is qualified in that if it is ultimately determined that the investigation was conducted in an offensive, objectionable or unreasonable manner, the company will be liable for wrongful intrusion even though it may have had a legitimate purpose for the surveillance.

Because investigations are almost always triggered by the filing of a claim, in most cases it is relatively easy for insurance companies to demonstrate they had a legitimate purpose for the surveillance. In the exceptional case where an insurance company elects to surveil someone for reasons unrelated to a claim, the benefit from the qualified right to invade that person's privacy would not apply since it would be unable to demonstrate a valid reason for the investigation.

Conduct That Constitutes A Reasonable Investigation

Assuming a legitimate purpose for the investigation, the focus shifts to the means employed, and whether it was offensive or objectionable. If the surveillance was conducted in a reasonable manner the insurance company will not incur liability for invasion of privacy based on wrongful intrusion. Therefore, it is extremely important for insurance companies to be cognizant of the various types of surveillance that have been upheld in connection with the investigation of a claim as compared to those that have been found to have crossed the line of acceptable conduct.

While the indigenous factual nature of wrongful intrusion claims mandate that they be decided on a case by case basis, a canvassing of state and federal court decisions provides ample guidance to avoid liability. For example, as a general rule, surveillance conducted in a reasonable and unob-

MEALEY'S LITIGATION REPORTS

INSURANCE FRAUD

Vol. 3, #12

July 31, 1996

trusive matter, and from a public vantage point in which passersby could have made the same observations, usually will not give rise to a cause of action for invasion of privacy.⁸ Thus, videotaping or photographing a claimant engaged in particular activities on his or her property is a perfectly permissible method for obtaining evidence to be used in defense of a claim.⁹ It is also permissible to clandestinely follow a claimant by automobile and make observations from outside public venues, such as shopping centers, convenience stores, roads or even a friend's home.¹⁰

In fact, some jurisdictions will tolerate minor criminal infractions, such as trespassing upon the claimant's property, provided it is done unobtrusively to photograph or observe the claimant and involves only intruding upon the periphery of the property.¹¹ For instance, in McLain v. Boise Cascade Corp.,¹² an investigator trespassed upon the border of the claimant's property to obtain a better position to videotape the claimant during daylight hours. In affirming the dismissal of the claim, the Supreme Court of Oregon overlooked the trespass because the claimant (1) was unaware that he was being videotaped and (2) conceded that the activities filmed could have been observed by his neighbors or passersby watching from an adjacent road. Under these circumstances, the Court found the investigator's conduct could not constitute an unreasonable surveillance highly offensive to a reasonable person.¹³

As a caveat, the Oregon Supreme Court's holding should not be construed as an invitation to investigators to invade a claimant's property. Indeed, the Court noted that trespass was a factor to be considered in determining whether a particular surveillance was unreasonable. As discussed below, depending on the nature of the trespass, an insurance company may be liable based, in part, upon such acts.

Moreover, an action for wrongful intrusion will not lie based on communications with third parties, such as a claimant's friends, even if "pursued using subterfuge and fraud."¹⁴ To the extent that third parties are willing to talk to investigators, the courts will not find a violation because the claimant had already made the information public by voluntarily revealing it to others and thereby "assumed the risk that a friend or acquaintance in whom he had confided might breach the confidence."¹⁵ Absent an investigator's inducement of a breach of a privileged communication recognized in law or the commission of a crime in obtaining information from third parties, most courts will dismiss a claim alleging wrongful intrusion based on conversations with people possessing knowledge about the claimant.¹⁶

Similarly, information about a claimant legally obtained from public records or sources will not expose insurance companies to liability for invasion of privacy.¹⁷ Thus, for example, in investigating a suspicious fire loss claim under a home owner's policy, investigators may cause a search of public records to obtain the deed, mortgage and financing concerning the insured property prior to conducting an examination under oath.

Conduct That Constitutes An Unreasonable Investigation

As noted above, an insurance company investigating a claim may surveil the claimant, provided its conduct is reasonable, unobtrusive and within legal bounds.¹⁸ The converse of this precept is that insurance companies that conduct investigations in a vicious or malicious manner not reasonably limited and designed to obtain information needed for the defense of a claim or "deliberately calculated to frighten or torment the [claimant]" may be liable for wrongful intrusion.¹⁹

MEALEY'S LITIGATION REPORTS

INSURANCE FRAUD

Vol. 3, #12

July 31, 1996

Case law carefully delineates between that which can be observed by any casual observer as a result of the claimant's actions and that which requires the investigator to pry into the claimant's private concerns even though it may occur in a public place. If the facts demonstrate that any passerby could not have made the observations or heard the conversation without invading the claimant's private sphere, a claim for wrongful intrusion may exist.³⁰ Contrariwise, however, liability will not attach if the claimant acted in such a way that anyone could have heard his or her conversation or made the same observations as the investigator.

Consequently, insurance companies must be cognizant that the invitation to investigate that accompanies the filing of a personal injury claim only means the insurer has a legitimate reason to surveil the claimant in an unobtrusive manner in public. It should not be viewed as an unfettered right to pry into the claimant's private affairs.

3. Obtrusive Surveillance Or "Rough Shadowing"

As indicated above, the corollary of the right to conduct a reasonable and unobtrusive investigation is that the surveillance cannot be conducted in an unreasonable and obtrusive manner that a reasonable person would find highly offensive.³¹ Since the typical surveillance includes following claimants during the course of their daily activities, recording their movements on film and tracing their whereabouts for days at a time, investigators must be aware of the various methods that have been declared offensive.

The seminal case of investigators engaged in impermissible conduct is Pinkerton National Detective Agency, Inc. v. Stevens.³² There, investigators openly and notoriously followed the claimant for well over three months during all times of the day and night; cut a hole in her hedges to peep into her windows 24 hours a day; eavesdropped upon her activities in her house; parked outside the home on a regular basis; routinely drove by her house to alert her of their presence; trespassed upon her property late at night to peek in near her windows; moved about the woods located on and about the premises to ensure claimant was aware of their activities; trailed her openly and closely in an automobile; followed her into a restaurant and waited outside a restroom when she came out and on "one occasion the [claimant] returned home at night after she was so closely followed that she ran into the house in panic, hit a piece of furniture and knocked herself unconscious."³³ The investigators made no attempt to conceal their surveillance and the claimant and her neighbors were well aware that she was being investigated. In fact, the claimant's neighbors stopped associating with her because they believed she must have been engaged in illicit activities to warrant the investigation.³⁴

In finding that the investigators had engaged in offensive conduct, the Pinkerton Court concluded that their conduct was done in a vicious and malicious manner that was not reasonably limited and designed to obtain information needed to defend the claimant's claim. In addition, by intentionally conducting the surveillance openly to ensure the claimant and the general public knew of their activities, the court also concluded the investigators purpose was to harass, frighten, intimidate and torment the claimant rather than obtain evidence to be used at a trial.

The facts in Pinkerton are set forth above because they provide a good, if not extreme, example of the concept of "rough shadowing." By definition, rough shadowing means that the investigators are not interested in concealing their identities or the fact that the claimant is being surveilled or followed. The idea is to conduct the investigation in such an obtrusive fashion that both the

MEALEY'S LITIGATION REPORTS

INSURANCE FRAUD

July 31, 1996

Vol. 3, #12

claimant and the public are aware of the shadowing.³⁵ Since the gathering of evidence to use to defeat a claim is merely incidental to the intent behind rough shadowing, the employment of this tactic usually will be declared unreasonable and result in liability.

Significantly, a claimant's awareness that he or she is being followed is not sufficient by itself to set forth grounds for invasion of privacy. Most courts will not impose liability where efforts are made to conduct a surveillance in an unobtrusive manner but through mere inadvertence the claimant becomes aware of the investigation.³⁶ For instance, in *Forster v. Manchester*,³⁷ the claimant noticed investigators following her on several occasions and taking motion pictures. In noting that the record demonstrated that the investigators did not intentionally expose their cover to the claimant, the court dismissed the claim for wrongful intrusion.³⁸ Many courts have followed *Forster* in holding that the unintentional disclosure of an investigation will not in itself be sufficient to sustain such a cause of action.

Where surveillance is conducted in a covert manner, without trespassing or violating any criminal laws, and carried out in public places from which any passerby could make similar observations, a claim for invasion of privacy will not stand.³⁹ Moreover, again assuming the absence of the commission of any crimes, claims for invasion of privacy will usually be rejected where the facts prove claimant was unaware of the investigation.⁴⁰

Another issue sometimes arises when the insurance company receives notice from the claimant's attorney that the claimant is aware of the surveillance and as a result is purportedly suffering emotional distress. If its investigators are employing rough shadowing tactics, the insurance company would be well advised to instruct its investigators to discontinue its operations immediately.⁴¹ If they persist despite the notice, the company may be exposed to a substantial punitive damages award.

To the extent, however, that the claimant became aware of the activities through mere inadvertence, the company may continue with its surveillance, provided it does so in an unobtrusive manner, reasonably designed not to be seen. The courts recognize that claimants sometimes ask their attorneys to exaggerate their mental suffering to prevent insurers from exercising their right to investigate a personal injury claim. Therefore, absent proof documenting the mental suffering, insurers are free to continue with a reasonable investigation.⁴²

Invasion Of Privacy In Jurisdictions That Do Not Recognize Common Law Invasion Of Privacy

Finally, while the vast majority of jurisdictions recognize a common law right to privacy, some states do not. For example, in New York State, the right to privacy is defined by statute and limited to disputes involving the unauthorized use of a person's name or likeness for advertising or trade.⁴³ Accordingly, in New York, a claimant could not sustain a cause of action for wrongful intrusion.

To avoid dismissal, the claim would have to be pleaded as one for intentional infliction of emotional distress. In New York, however, the pleading requirements for this particular brand of tort are extremely rigorous and difficult to satisfy. In fact, at the time of this publication, the Court of Appeals had yet to sustain a recovery for intentional infliction of emotional distress. New York State insurers, however, should not construe this to mean open season on claimants.

MEALEY'S LITIGATION REPORTS

INSURANCE FRAUD

Vol. 3, #12

July 31, 1996

Indeed, lower courts have sustained such causes of action, and there is no reason to believe that investigators who engage in rough shadowing will not be exposed to liability for causing emotional distress to a claimant.

Conclusion

By concealing their surveillance and acting in a reasonable manner, insurance companies can aggressively investigate suspicious claims without fear of reprisal under state right-to-privacy laws. To ensure that investigators are aware of what constitutes acceptable conduct, counsel to insurance companies should review their investigative techniques to determine if they need to be modified to comport with the law.

ENDNOTES

1. Restatement (Second) of Torts § 652A.
2. W. Prosser & W. Keeton, *The Law of Torts*, p. 851 (5th ed. 1984). See also Restatement (Second) of Torts § 652B (stating "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.")
3. N.O.C., Inc. v. Schaffer, 197 N.J. Super 249, 484 A.2d 729 (N.J. Super. L. 1984). See also Desnick v. Capital Cities/ABC, Inc., 851 F.Supp. 303 (N.D. Ill. 1994).
4. Forster v. Manchester, 410 Pa. 192, 189 A.2d 147 (1963). See also Pinkerton v. National Detective Agency, Inc. v. Stevens, 108 Ga. App. 159, 132 S.E.2d 119 (Ga. Ct. of App. 1963); Johnson v. Corporate Special Services, 602 So.2d 385 (Ala. 1992).
5. Id.
6. Alabama Electric Co-Cooperative, Inc. v. Partridge, 284 Ala. 442, 225 So.2d 848 (S.Ct. 1969). See also Johnson v. Corp. Special Serv., 602 So.2 385 (Ala. 1992).
7. Tucker v. American Employers' Ins. Co., 171 So.2d 437, (Fla. App. 1965). See also Sounder v. Pendleton Detectives, Inc., 88 So.2d 716 (La. App. 1956); Ellenberg v. Pinkerton's Inc., 130 Ga. App. 254, 202 S.E.2d 701 (1973); Forster, 410 Pa. 192, 189 A.2d 147; McLain v. Boise Cascade Corp., 533 P.2d 343 (S.Ct. 1975).
8. Forster, 410 Pa. 192, 189 A.2d 147. See also McLain 533 P.2d 343; Tucker, 171 So.2d 437, (Fla. App. 1965); Sounder, 88 So.2d 716 (La. App. 1956).
9. Forster, 410 Pa. 192, 189 A.2d 147.

MEALEY'S LITIGATION REPORTS

INSURANCE FRAUD

July 31, 1996

Vol. 3, #12

10. Pemberton v. Bethlehem Steel Corp., 65 Md. App. 133, 502 A.2d.. 1101 (Ad. App. 1986). See also Figured v. Paralegal Tech. Serv., 231 N.J.Super 251, 555 A.2d 663 (N.J. Super A.D. 1989).
11. McLain 533 P.2d 343. Importantly, it should be noted that while a relatively insignificant act of trespassing upon the periphery of a claimant's property may be overlooked by the courts in an action for wrongful intrusion in a civil proceeding, the same may not necessarily hold true if the claimant is successful in persuading local authorities to press criminal charges.
12. Id.
13. Id.
14. Wolf v. Regardie, 553 A.2d 1213 (D.C. App. 1989).
15. Nader v. General Motors Corp., 25 N.Y.2d 560, 307 N.Y.S.2d 647 (Ct. of App. 1970) (construing District of Columbia law).
16. Id. (stating information about an individual that was already known to others cannot be regarded as private to that individual). See also Brisbee v. John C. Conover Agency, Inc., 186 N.J. Super 335, 452 A.2d 689 (App. Div. 1982).
17. Wolf, 553 A.2d 1213. See also Nader, 25 N.Y.2d 560, 307 N.Y.S.2d 647.
18. Souder v. Pendlton Detectives, Inc., 88 So.2d 716 (La. Ct. App. 1956). See also Forster v. Manchester, 410 Pa. 192, 189 A.2d 147 (Pa. S. Ct. 1963); Pinkerton v. National Detective Agency, Inc. v. Stevens, 108 Ga. App. 159, 132 S.E.2d 119 (Ga. Ct. of App. 1963).
19. Forster 410 Pa. 192, 189 A.2d 147. See also Tucker v. American Employers' Ins. Co., 171 So.2d 437, Fla. Ct. of App. 1965; Pinkerton v. National Detective Agency, Inc. v. Stevens, 108 Ga. App. 159, 132 S.E.2d 119 (Ga. Ct. of App. 1963); Ellenberg v. Pinkerton's, Inc., 130 Ga. App. 254, 202 S.E.2d 701 (Ga. Ct. App. 1973).
20. Nader v. General Motors Corp., 25 N.Y.2d 560, 307 N.Y.S.2d 647 (Ct. of App. 1970) (construing District of Columbia law); Werner v. Kliewer, 238 Kan. 289, 710 P.2d 1250 (Kan. S. Ct. 1985); Gonzales v. Southwestern Bell Tel Co., 555 S.W.2d 219 (Tx. Ct. App. 1977); Wolf v. Regardie, 553 A.2d 1213 (D.C. App. 1989); Pemberton v. Bethlehem Steel Corp., 65 Md. App. 133, 502 A.2d 1101 (Md. Ct. of App. 1986).
21. Souder v. Pendleton Detective's Inc., 88 So.2d 716 (Ct. App. 1956).
22. 88 So.2d 716 (Ct. App. 1956).
23. Id.
24. Pinkerton v. National Detective Agency, Inc. v. Stevens, 108 Ga. App. 159, 132 S.E.2d 119 (Ga. Ct. of App. 1963).
25. Noble v. Sears, Roebuck and Co., 33 Cal App.3d 654, 109 Cal. Rept. 269 (Ca. 1973). See also Comeaux v. Brown & Williamson Tobacco Co., 915 F.2d 1264 (9th Cir. 1990) (construing California Law).
26. 18 U.S.C.A. §1701, *et seq.* (West 1984, & Supp, 1995). See also Birnbaum v. United States, 436 F.Supp.967 (E.D.N.Y. 1977), *aff'd in part and rev'd in part*, 588 F.2d 319 (2d Cir. 1978).

