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New York's Second Department Holds That Carrier Must Pay Judgment Obtained by Plaintiff As Carrier Did Not Meet Burden to Prove Willful Non-Cooperation

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In the recent case of *DeLuca v. RLI Insurance Company*, 2020 WL 5931054 (October 7, 2020), the Supreme Court, Appellate Division, Second Department held that RLI had a duty to pay a judgment obtained by an underlying plaintiff against RLI's insured, MLSC. The underlying plaintiff brought the action directly against the carrier after obtaining a judgment against MLSC, and when the judgment remained unsatisfied, serving RLI with the judgment. As an initial matter, the court found that the direct action by the plaintiff was proper under New York Insurance Law 3420(a), which allows for an injured plaintiff to maintain a direct action against a carrier if a judgment against that carrier's insured remains unsatisfied for a period of 30 days and the carrier is served with that judgment. In that event, the plaintiff steps into the shoes of the insured and is entitled to the rights of the insured (and is also subject to the carrier's coverage defenses).

RLI's sole coverage defense was lack of cooperation. The court applied the standard set forth in the seminal *Thrasher* case and its progeny, which requires that the carrier demonstrate: (1) that it acted diligently in seeking to bring about the insured's cooperation, (2) that the efforts employed by the insurer were reasonably calculated to obtain the insured's cooperation, and (3) that the attitude of the insured, after his or her cooperation was sought, was one of willful and avowed obstruction. Upon these standards, the court found that RLI could not meet its burden as a matter of law. To this end, MLSC's principal testified at an examination before trial at length, and although RLI alleged that MLSC's principal refused to respond to calls and letters, such was not enough to rise to the level of willful and avowed obstruction, in the court's view. Further, although MLSC's principal stated that he would not attend trial, such statements were made before a date for the trial had been set, and RLI did not allege that MLSC had missed any court appearance.

This case illustrates the high burden an insurer must meet to prove non-cooperation. It also illustrates the potential risks in disclaiming coverage to an insured, because the injured plaintiff can step into the shoes of the insured, and the carrier will be left with only its coverage defenses, the strength of which may vary.