

# BINDING AUTHORITY

Insurance Coverage Decisions: Issued Today - Impact Tomorrow



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## **New York Appellate Division Issues a Strong Decision on an Insured's Right to Independent Counsel**

On June 5, the Supreme Court of New York, Appellate Division (3d. Dept.), held that an insurer commits a deceptive business practice under *General Business Law* § 349 by not advising its insured that it is entitled to retain independent counsel (in a situation where such right exists). *Elacqua v. Physician's Reciprocal Insurers*, 2008 N.Y. App. Div. LEXIS 4831 (*Elacqua II*).

In Thursday's decision, the N.Y. Appellate Division returned to its 2005 decision in *Elacqua v. Physician's Reciprocal Insurers (Elacqua I)*. In *Elacqua I*, the court held that, when an insured is entitled to defense counsel of his or her own choosing, at the expense of the insurer (i.e., *Goldfarb* (N.Y. 1981) applies), the insurer has an affirmative obligation to advise the insured of such right.

In *Elacqua II*, the Appellate Division went a step further: *General Business Law* § 349 prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state,' and one injured by such conduct may bring an action to recover damages[.] A claim brought under this statute must be predicated on an act or practice which is 'consumer-oriented,' that is, an act having the potential to affect the public at large, as distinguished from merely a private contractual dispute[.] A plaintiff must further demonstrate that such act or practice was 'deceptive or misleading in a material way and that plaintiff has been injured by reason thereof.'" *Elacqua II* at \*\* 3 - \*\*4 (citations omitted).

The *Elacqua II* court held: "The deceptive practice alleged by plaintiffs is that defendant failed to inform them that they had a right to select independent counsel of their choosing at defendant's expense. Supreme Court properly found that the alleged offending practice of defendant was consumer-oriented inasmuch as its failure to inform plaintiffs of their right to select independent counsel was not an isolated incident, but a routine practice that affected many similarly situated insureds. Gregory Mignella, an attorney for defendant, acknowledged that defendant's practice is not to inform its insureds with whom it has conflicts that they have the right to select independent counsel at defendant's expense, and defendant's general counsel, James Tuffin, confirmed that practice. We further find that this practice was deceptive within the meaning of *General Business Law* § 349." *Id.* at \*\*4-\*\*5.

The *Elacqua II* court further held that the insureds were required to demonstrate ““actual, although not necessarily pecuniary, harm’ as a result of defendant’s deceptive practice.” *Id.* at \*\*6 - \*\*7. On the issue of harm, the court held: “This threat of divided loyalty and conflict of interest between the insurer and insured is the precise evil sought to be remedied by *Goldfarb* and our decision in *Elacqua I*, hence the requirement that independent counsel be provided at the expense of the insurer and that the insurer advise the insured of this right. Defendant’s failure to inform plaintiffs of this right, together with plaintiffs’ showing that undivided and uncompromised conflict-free representation was not provided to them, constitutes harm within the meaning of *General Business Law* § 349.” *Id.* at \*\*8.

The Appellate Division remitted the case to the lower court for a trial on damages.

Query whether the court’s decision was influenced by the following: “Equally disturbing is the fact that defendant continued to send similar letters to its insureds, failing to inform them of their rights, even after this Court’s pronouncement in *Elacqua I*.” *Id.* at \*\*6.

The decision in *Elacqua II* is not lengthy, but there is a lot there. A link to the decision is here:

<http://decisions.courts.state.ny.us/ad3/Decisions/2008/502964.pdf>

Please let me know if you have any comments or questions.

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