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Time to Draw the Line on Insurance Company Surveillance

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As anyone who has done any insurance claim work, particularly health or disability, can tell you, surveillance is an important part of the insurance industry arsenal in combating fraudulent claims. In practice, surveillance rarely yields a "smoking gun" that would legitimately justify a change in claim status, but it is not unheard of. Regardless, insurers love surveillance, and are known to embrace the fruits of same, whether it is probative or not. As plaintiffs' lawyers, we may not like the process, but most of us recognize the right of carriers to reasonably check on the activities of their insureds, to help minimize fraudulent claims.

That said, a new development in the area of disability claims "management" has rung alarm bells throughout the legal community and warrants action by our state legislature. Traditionally, surveillance is conducted by private investigators hired by the insurance industry to monitor the activities of the insureds by, inter alia, sitting outside their homes or offices, or following them on foot or in cars, charting their physical activities to see if they are consistent with the restrictions and limitations reported by the insured. Videotapes are frequently utilized while tracking individuals under surveillance, and on some occasions, such videotapes can be highly probative. Further, despite what plaintiffs' lawyers may argue, there is no question in the minds of the courts that such surveillance is legally appropriate.

Recently however, certain private investigation companies have convinced carriers to take the matter to a new level. Now, rather than sitting outside a person's home or office, or following them through malls, these companies offer to establish stationary cameras which effectively surveil the outside of claimants' homes or offices, 24 hours a day, 7 days a week. In essence, these companies are using state-of-the art, closed-circuit security technology to place the outside of a home or office, and all of its occupants and guests, under surveillance full time. Given the advances in digital technology, there is no question that the current state of "gadgetry" lends itself to a whole new level of cost-effective spying, never before available to the insurance industry.

But what are the legal and social ramifications of this behavior? A review of legal authority relevant to the issue reflects a noticeable lack of any restrictions that would in any way meaningfully limit these activities. New Jersey has the New Jersey Wiretapping and Electronic Surveillance Control Act (WESCA), N.J.S.A. 2A:156A-3, but this statute has been expressly interpreted not to include videotaping. *State v. Diaz*, 308 N.J. Super. 504 (App. Div. 1998).

Indeed, the Appellate Division has been consistent in finding that videotaped surveillance does not violate the New Jersey wiretap statute. *Hornberger v. American Broadcasting Company*, 351 N.J. Super. 577, 619 (App. Div. 2002).

On a federal level, a similar result attaches. Sections 2510 and 2511 of 18 U.S.C., respectively, cover federal restrictions on wiretap and audio interception, but that statute also has been found not to cover videotaped surveillance.

How about an invasion of privacy? N.J.S.A. 2C:14-9 makes invasion of privacy a fourth-degree offense, which includes the "unreasonable intrusion upon seclusion of another." See *Figured v. Paralegal Tech Services*, 231 N.J. Super. 251 (App. Div. 1989). In the context of surveillance, the courts have traditionally exercised a common-law balancing test, which weighs the legitimate social needs against an individual's right to privacy. In these circumstances, outrageous or unreasonable conduct can be a violation of privacy. As the Appellate Division stated in *Soliman v. Kushner*, 433 N.J. Super. 153, 172 (2013), it is "plaintiffs' burden of proof as to liability under the common law, that the intrusion involved here 'would be highly offensive to a reasonable person.'" *Hennessey v. Coastal Eagle Point Oil Co.*, 129 N.J. 81, 95 (1992). Conversely, a legitimate investigation undertaken by an insurance company may very well be deemed "reasonable," even given the use of stationary videography over an extended period of time.

Can such conduct be considered harassment? N.J.S.A. 2C:33-4 makes clear that harassment can occur only in situations where the activity is intended to "alarm or seriously annoy such other person." In *H.E.S. v. J.C.S.*, 815 A.2d 405, 415 (N.J. 2003), the Supreme Court held that a husband's video surveillance of his wife's bedroom could constitute a prima faciecase of harassment, but only if the plaintiff could prove that the purpose of the video surveillance was to "alarm or seriously annoy the plaintiff." Clearly, the fact that the behavior might seriously alarm or annoy the plaintiff would not, in and of itself, be sufficient to constitute harassment if such alarm or annoyance was not the *purpose* of the surveillance.

Similarly, any allegation that such behavior constituted trespass within the meaning of N.J.S.A. 2C:18-3 would also likely fail in the context of surveillance conducted by an insurance carrier, as the trespass statute requires proof of intent to invade the privacy of another person.

It seems clear that the current status of federal and state law regarding surveillance is such that the activity of a carrier planting stationary surveillance equipment outside the home or office of an insured would not run afoul of any current regulatory restrictions.

This begs to question of whether or not such regulation should be enacted. In this context, it should be remembered that this is a matter between two private parties, not a matter between the government and a private citizen. In our constitutional system, there are compelling reasons why the government should have greater restrictions on its ability to spy on its citizens, than private parties should have to endure. Notwithstanding, others might argue that the government has legitimate law enforcement concerns that override many otherwise legitimate privacy interests of the individual, such that the restrictions on private parties should be greater than those placed on the government.

The issue as presented between private parties is more difficult and more nuanced. Though one can recognize the legitimate right and need for insurers to be able to conduct surveillance to root out fraud, there must be reasonable limits on how broad a net an insurer or any other private party should be able to cast in the name of preventing fraud. If, for example, one

accepts the premise that fraudulent claims make up less than 10 percent of all insurance claims filed, it bears questioning whether that relatively small percentage justifies the unfettered ability to spy on 100 percent of insureds continuously and indefinitely, on the theory that such person *could* be one of the less than 10 percent engaged in fraudulent behavior.

Moreover, it must also be remembered that unfettered surveillance is not the only method for investigating and combatting fraudulent insurance claims. Indeed, the Internet and the explosion of social media use make the ability to identify and mitigate against fraudulent behavior greater than ever.

What, then, is the inherent good in permitting insurance companies to set up a stationary surveillance facility outside of a person's home or office in the hopes that eventually *something* will be obtained that can be used against the insured? Arguably, there does not seem to be any legitimate reason why such broad-brush intrusive behavior should be deemed appropriate or necessary in matters concerning insurance claims administration.

To be sure, the insurance industry has a legitimate right to engage in reasonable activities to cut down and avoid fraudulent claims. Reasonable surveillance has long been accepted as a necessary part of the insurance industry's claims administration tools. But should this type of behavior be encouraged? As citizens of this state, do we not have a legitimate need to weigh the needs of the insurance industry against the rights to privacy of the individual? In doing so, is it not incumbent upon us as a society to impose reasonable limits on the ability of the insurance industry to spy on individuals in this broad, unrestricted fashion, simply to better combat the less-than 10 percent of fraudulent claims it faces? Even accepting the legitimate right of the insurance industry to conduct surveillance in general, do we not still have an obligation as a society to assure that such tactics do not unreasonably and unnecessarily interfere with the individual's right of privacy?

In sum, recognizing the legitimate interests in reducing fraud in the insurance field alone does not fully address the problem. It is strongly suggested that the legislature look at this issue now, and consider imposing reasonable limitations on the ability of private parties to conduct virtually unfettered surveillance in the name of commercial enterprise. Frankly, any insurance company that contends that it can only survive and profit through the use of such tactics might well be advised to consider a new industry.

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