Case Summaries

Staying Up To Date On Insurance Policy Law Is Critical. Here Are A Few Significant Insurance Cases Decided Recently.

December 10, 2019 | | Policyholder Protection,Policy,Claims

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Georgia Policyholders Required to Be Specific to Have Chance at Bad Faith Damages

First Acceptance Insurance Company of Georgia, Inc. v. Hughes, 826 S.E.2d 71 (Ga. 2019)

Like most states, Georgia has a general rule that an insurer may be liable for an excess judgment entered against its policyholder if the insurer acted in bad faith in refusing to settle the claim within policy limits. The Georgia Supreme Court recently clarified the requirements for proving a negligent or bad faith failure-to-settle claim. The dispute stemmed from a motor vehicle accident caused by the policyholder that severely injured the underlying claimants. The claimants' attorney sent two letters to the insurer, one expressing an interest in settling the claims within policy limits, and the other requesting information about the policy within 30 days. Neither letter set a specific deadline for the carrier to respond to the claimants' offer to settle.

The insurer did not respond to either letter, so the claimants sued the policyholder's estate and won a $5.3 million judgment, which was well above policy limits. The policyholder's estate countered that an insurer's duty to settle did not turn on whether the claimant offered to settle, but rather on whether "the insurer knows or reasonably should know that settlement within the insured's policy limits is possible."

The Georgia Supreme Court agreed with the carrier, concluding that "an insurer's duty to settle arises only when the injured party presents a valid offer to settle within the insured's policy limits." The question then became whether the claimants' letters constituted "valid offers to settle." The court ruled that the offer "was not a time-limited settlement demand," and, thus, the insurance company "was not put on notice that its failure to accept the offer within any specific period would constitute a refusal of the offer." Accordingly, it is now the rule in Georgia that it is the claimant's or policyholder's burden to make a clear, time-limited settlement demand in order to trigger the carrier's duty to settle. In the absence of an explicit, time-sensitive demand, the insurer does not have a duty to settle, and the insurer cannot be held liable for bad faith.

This decision has been criticized by commentators as an overly narrow approach that places an unreasonable burden on policyholders. Historically, whether an insurer has a duty to settle has been a multifaceted question of fact, with the specific nuances of each case considered together to determine whether the carrier acted in bad faith. The insurer could not summarily snuff out the bad faith claim by ignoring the plaintiff's explicit stated desire to settle a case at or within limits and contending that no clear settlement demand had been made. Now, in order to have a shot at bad faith damages in Georgia, the policyholder must choreograph settlement negotiations to ensure a record is made of an unconditional, time-limited demand by plaintiff. Carriers undoubtedly will cite this case to show that an adjuster is under no obligation to take any action in response to a settlement overture that does not constitute a formal offer susceptible to immediate acceptance, and may ignore demand letters unless they contain a specific deadline – something that previously might have been considered bad faith in Georgia, as it would be in many other states.

California High Court Holds That New York Choice-of-Law Provision, Barring Application of the Notice-Prejudice Rule Under a First-Party Policy, is Unenforceable

Pitzer College v. Indian Harbor Insurance Company, 8 Cal.5th 93 (Cal. Supreme Court, August 29, 2019)

The California Supreme Court has handed down a groundbreaking decision for insurance policyholders, refusing to enforce a New York choice-of-law provision in a first-party policy that would have barred coverage for a claim the insurer contended had been submitted late.

The court held that the Notice-Prejudice Rule, which protects policyholders failing to report a claim within the policy's reporting deadline unless the insurer can show the late notice caused it "substantial prejudice," is a fundamental public policy of California. Because New York does not apply the rule to policies like this, the choice-of-law provision would have eliminated coverage for the claim at issue had the law of that state been applied. California enforces such provisions only when the other state's laws are not contrary to public policy. The Supreme Court ruled that the Notice-Prejudice Rule represents just such a policy, rendering New York law – and its rejection of the rule – inapplicable to this claim. The court also held that the Notice-Prejudice Rule applies to consent provisions requiring approval by the insurer to incur covered expenses.

In January 2011, Pitzer College discovered evidence of environmental contamination near a construction site on its Claremont, California, campus. It determined that immediate remediation had to be done for construction to continue, and completed this work by the end of April 2011. Pitzer gave notice of claim in July 2011 to its insurer, Indian Harbor, which denied coverage based on late notice and the insured's failure to obtain its consent before incurring remediation expenses. The federal district court granted the carrier's motion for summary judgment based on the policy's New York choice-of-law provision, holding that the Notice-Prejudice Rule did not apply under the law of that state.

The Ninth Circuit certified to the California Supreme Court the questions of whether the Notice-Prejudice Rule is a fundamental rule of public policy affecting the enforceability of an out-of-state choice-of-law provision, and whether the rule applies to provisions in first-party insurance policies requiring the insured to obtain the insurer's consent before incurring otherwise-covered expenses. The Supreme Court answered the first question "yes," nullifying Indian Harbor's New York choice-of-law provision, and therefore New York's rejection of the Notice-Prejudice Rule, as a defense to coverage for Pitzer's claim.

The court was unable to answer the second question. It held that while the rule applies to consent provisions under first-party policies, a third-party policy is subject to a different analysis. The court observed that because a third-party insurer has a right to control the defense and settlement of a claim, a policyholder's failure to obtain its consent to incur some expense could hamper performance of its coverage obligations. Pitzer and Indian Harbor disagreed over whether the policy at issue was first-party or third-party. As a result, the Supreme Court declined to decide whether the Notice-Prejudice Rule applied to the consent provision in the policy giving rise to Pitzer's claim.

Insurance companies often add New York choice-oflaw provisions to their policies because they regard that state's laws as more favorable than those of other states. Regarding application of the Notice-Prejudice Rule to policies issued outside New York (such as Indian Harbor's), this view certainly is justified. The Pitzer College decision establishes that in California, choice-of-law provisions in first-party policies that defeat the Rule are unenforceable. This ruling, together with the court's holding that consent provisions are also subject to the Notice-Prejudice Rule, are potent weapons for policyholders. California insureds now have the ability to resist the effect of out-of-state choice-of-law clauses which would relieve first-party carriers of the burden of proving prejudice before they can deny coverage based on late notice.

Connecticut Supreme Court Decides Major Coverage Issues Relating to Asbestos Litigation

R.T. Vanderbilt Company, Inc. v. Hartford Accident & Indemnity Company, 2019 WL 4926802 (Conn. Supreme Court, October 8, 2019)

On Oct. 8, 2019, the Connecticut Supreme Court issued a long-awaited decision on several important insurance coverage issues raised by long-tail liability asbestos claims under commercial general liability policies – and came out largely in favor of corporate policyholders.

R.T. Vanderbilt, sued by thousands of underlying plaintiffs alleging injuries from exposure to industrial talc containing asbestos that it mined and sold, sought coverage for these liabilities under multiple policy periods spanning 1948 to 2008. Following trial, the Appellate Court of Connecticut rendered what the Supreme Court called "an opinion of extraordinary complexity and comprehensiveness" that the high court upheld in all respects.

The Appellate Court had ruled that Vanderbilt was not responsible for costs during years it was uninsured, based on the "unavailability of coverage" exception to Connecticut's pro rata "time on the risk" formula for allocating coverage for claims arising from continuous exposure to asbestos. Under this rule, the policyholder is liable for a prorated share of indemnity and defense costs during the periods which it is uninsured or underinsured. The exception to this rule excuses the policyholder from paying its share of defense expenses, settlements and judgments during these periods if no insurance for such liabilities was available. The Supreme Court upheld the Appellate Court's ruling that this exception applied here. Noting that there might be a different result if the policyholder kept making products containing asbestos after 1986 aware that such products were hazardous and uninsurable, the court nevertheless held that these facts were not present in this case.

The Supreme Court also affirmed the Appellate Court's application of a "continuous trigger" for the underlying asbestos liability claims, holding that all policies in effect from a claimant's date of first exposure to asbestos to the time of the claimant's death are applicable. In addition, it adopted the Appellate Court's conclusion that the pollution exclusions were intended to apply only to "traditional environmental pollution" and not to disease caused by exposure to asbestos.

In an issue of first impression, the Supreme Court affirmed the Appellate Court's ruling that the occupational disease exclusions contained in certain excess policies applied not only to asbestos-related claims brought by Vanderbilt employees, but also to claims by non-employees "who contracted an occupational disease in the course of their work for other employers" as the result of exposure to talc manufactured by the company.

This decision is generally very favorable for insureds. With the exception of its ruling concerning occupational disease exclusions, the Connecticut Supreme Court has come down solidly on the side of corporate policyholders seeking the broadest possible interpretation of coverage for asbestos liabilities.

Ninth Circuit Shuts Down Carrier's Attempt to Expand California's Prohibition on Coverage for Willful Wrongful Conduct

First One Lending Corporation v. Hartford Casualty Insurance Company, 755 Fed. Appx. 710 (9th Cir. 2019)

The U.S. Court of Appeals for the Ninth Circuit recently declined to broaden the reach of California's Insurance Code Section 533, which prohibits an insurer from indemnifying policyholders for liability arising from the policyholder's intentionally harmful conduct (e.g., fraud). The crux of the claim against the insured was that it engaged in illegal mortgage-lending practices by misrepresenting its affiliations with the claimant. The complaint also included a claim for trademark infringement arising from the policyholder's allegedly unauthorized use of the claimant's slogan. On summary judgment, the carrier argued that Section 533 barred coverage for all claims, including the trademark infringement claim, since they ultimately sought "uninsurable restitution." The U.S. District Court for the Central District of California agreed, emphasizing the public policy of making Lanham Act violations "unprofitable" to the infringing party. It also ruled that a policy exclusion for financial services claims independently barred coverage.

The Ninth Circuit, however, took a narrower approach and refused to find the claims so "'inseparably intertwined' with willful conduct" as to render the entire action barred from coverage under Section 533. The court held that, despite the claim generally arising from allegedly intentional conduct, the claimant could have recovered on its trademark infringement claim without actually showing willful wrongful acts. It also held that the financial services exclusion did not apply to the trademark infringement claim. Accordingly, the carrier had a duty to defend the action.

This is a win for California policyholders in the face of numerous efforts by insurers to expand the scope of Section 533 and make it a catchall exclusion when there is no other way to avoid coverage.

This article was originally published in the Fall 2019 edition of Corporate Policyholder Magazine.