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Insurance Law Alert

November 2019

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Delaware Supreme Court Rules That Claims Alleging Fraudulent Transfer, Unlawful Dividend And Breach Of Fiduciary Duty Are Not Covered "Securities Claims"

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Connecticut Supreme Court Rules That Crumbling Foundation Claims Are Not Covered Under "Collapse" Provisions In Homeowners' Policies

In three decisions issued this month, the Connecticut Supreme Court ruled that "collapse" provisions in homeowners' insurance policies do not encompass claims arising from defective concrete. *Karas v. Liberty Ins. Corp.*, 2019 WL 5955947 (Conn. Nov. 12, 2019); *Vera v. Liberty Mut. Ins. Co.*, 2019 WL 5955936 (Conn. Nov. 12, 2019); *Jemiola v. Hartford Cas. Ins. Co.*, 2019 WL 5955904 (Conn. Nov. 12, 2019). (Click here for full article)

Two Collisions Within One Second Constitute Two Separate Occurrences, Says Pennsylvania Court

A Pennsylvania federal district court ruled that an automobile accident involving two collisions within a second of each other gave rise to two separate occurrences for insurance coverage purposes. *Busby v. Steadfast Ins. Co.*, 2019 WL 5682758 (E.D. Pa. Oct. 31, 2019). (Click here for full article)

West Virginia Does Not Recognize Broker's Duty To Advise Or Special Relationship Test, Says State Supreme Court

The Supreme Court of Appeals of West Virginia ruled that West Virginia does not recognize a broker's duty to advise clients or any "special relationship" exception that would trigger such a duty. *Mine Temp, LLC v. Wells Fargo Ins. Servs. of W. Va.*, 2019 WL 5692296 (W. Va. Nov. 4, 2019). (Click here for full article)

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A Michigan appellate court ruled that an insurer was entitled to rescind a policy based on a material misrepresentation in the application but remanded the matter for a determination as to whether the policy should be reformed to provide coverage for an additional insured. *Doa Doa, Inc. v. PrimeOne Ins. Co.*, 2019 WL 5680994 (Mich. Ct. App. Oct. 31, 2019). (Click here for full article)

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A Michigan federal district court ruled that an insurance policy was an executory contract and that an otherwise applicable bankruptcy exclusion constituted an unenforceable *ipso facto* clause. *In re Cmty. Mem'l Hosp.*, 2019 WL 3296994 (E.D. Mich. July 23, 2019). (Click here for full article)

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An Ohio federal district court compelled an insured to produce a confidential settlement agreement, finding the agreement relevant to a pending action between the insurer and insured, and not otherwise privileged. *Navigators Specialty Ins. Co. v. Guild Assocs., Inc.*, 2019 WL 5962686 (S.D. Ohio Nov. 12, 2019). (Click here for full article)

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Securities Claim Alert:

Delaware Supreme Court Rules That Claims Alleging Fraudulent Transfer, Unlawful Dividend And Breach Of Fiduciary Duty Are Not Covered "Securities Claims"

The Supreme Court of Delaware ruled that a Securities Claim coverage provision in an Executive and Organization Liability policy is unambiguous and does not encompass a variety of statutory and common law claims arising out of a corporate "spin-off" transaction. *In re Verizon Ins. Coverage Appeals*, 2019 WL 5615263 (Del. Oct. 31, 2019).

The coverage dispute arose out of a "spin-off" transaction by which Verizon created Idearc, a new corporate entity, and distributed shares of Idearc common stock to Verizon shareholders. When Idearc filed for bankruptcy several years later, U.S. Bank, as trustee for creditors, sued Verizon and others, alleging violations of fraudulent transfer statutes, payment of unlawful dividends and common law claims for breach of fiduciary duty, unjust enrichment and alter ego liability. Verizon ultimately prevailed at trial after incurring more than $48 million in defense costs. Verizon's insurers refused to cover the defense costs on the basis that the complaint did not allege covered "Securities Claims," defined, in part, as claims alleging a "violation of any federal, state, local or foreign regulation, rule or statute regulating securities."

A Delaware trial court ruled that the Securities Claim provision was ambiguous and should be construed in Verizon's favor. In doing so, the trial court interpreted the provision to encompass any claim "pertaining to laws one must follow when engaging in securities transactions." Based on this interpretation, the trial court granted Verizon's summary judgment motion.

The Supreme Court of Delaware reversed, deeming the provision unambiguous. The court reasoned that the language of the provision mirrors the language used in "a specific area of the law recognized as securities regulation." Therefore, the court explained, the Securities Claim provision is "aimed at a particular area of the law, securities law, and not of general application to other areas of the law." Because none of the underlying claims implicated a regulation, rule or statute specifically directed at securities law, the court held that the insurers had no duty to fund Verizon's defense. As the court noted, the New York Court of Appeals and the Ninth Circuit have construed similar provisions in the same manner.

Defective Concrete Alert:

Connecticut Supreme Court Rules That Crumbling Foundation Claims Are Not Covered Under "Collapse" Provisions In Homeowners' Policies

In three decisions issued this month, the Connecticut Supreme Court ruled that "collapse" provisions in homeowners' insurance policies do not encompass claims arising from defective concrete. These decisions illustrate the absence of insurance coverage for the vast majority of claims stemming from the faulty concrete used to construct the foundations of thousands of Connecticut homes.

In *Karas v. Liberty Ins. Corp.*, 2019 WL 5955947 (Conn. Nov. 12, 2019), the court answered three certified questions. First, the court ruled that "substantial impairment of structural integrity" is the applicable standard for collapse under a Liberty Mutual policy. The insurer argued that the policy's use of the term "collapse" is unambiguous because it specifically excludes settling, cracking, shrinking, bulging or expansion. The insurer therefore asserted that the "substantial impairment" standard—which applies when policies do not define "collapse" and the term is therefore deemed ambiguous—should not be taken into account when interpreting the policy at issue. Rejecting this contention, the court concluded that the language was insufficient to remove ambiguity as to the exact scope of "collapse." In so ruling, the court noted that the insurer could have used more precise verbiage to limit collapse to a sudden and catastrophic event, had it so intended.

Second, the court clarified that the structural impairment standard includes a temporal element, requiring collapse to be imminent to qualify for coverage. The court noted that this conclusion was supported by Connecticut's and other states' case law and comports with a reasonable layperson understanding of the term "collapse." The court emphasized that whether the evidence satisfies this standard in any given case necessarily turns on the specific facts, including in particular, expert testimony.

Third, the court ruled that a policy exclusion relating to the collapse of a "foundation" unambiguously applies to the basement walls of a home. The Connecticut Supreme Court deemed inapposite or unpersuasive federal and state court decisions that have "rejected insurers' claims that the foundation of a home clearly includes the home's basement walls" and have reasoned that "foundation" can reasonably be interpreted to refer solely to the footings beneath the basement walls.

On the same day that *Karas* was decided, the Connecticut Supreme Court also found no coverage available for concrete claims in a case involving substantially identical policy language. *See Vera v. Liberty Mut. Ins. Co.*, 2019 WL 5955936 (Conn. Nov. 12, 2019). In a third case, *Jemiola v. Hartford Cas. Ins. Co.*, 2019 WL 5955904 (Conn. Nov. 12, 2019), the court affirmed a trial court decision holding that Hartford had no duty to cover the costs of replacing crumbling walls. The court ruled that the collapse provision at issue—which defined collapse as "an abrupt falling down or caving in" such that it "cannot be occupied for its current intended purpose"—unambiguously foreclosed coverage given that the home remained standing and continued to be occupied by the homeowner.

Number Of Occurrences Alert:

Two Collisions Within One Second Constitute Two Separate Occurrences, Says Pennsylvania Court

A Pennsylvania federal district court ruled that an automobile accident involving two collisions within a second of each other gave rise to two separate occurrences for insurance coverage purposes. *Busby v. Steadfast Ins. Co.*, 2019 WL 5682758 (E.D. Pa. Oct. 31, 2019).

A Lyft car carrying passenger Busby rear-ended a car when traffic came to a stop. Approximately one second later, the Lyft car was hit by the car behind it. Busby sued both drivers and settled for an undisclosed amount. Steadfast, Lyft's insurer, paid Busby the $1 million per-accident policy limit. In addition, USAA, Busby's automobile insurer paid her $300,000, the per-accident limit. Thereafter, Busby sued both insurers seeking an additional $1 million from Steadfast and $200,000 from USAA for what she deemed "the second accident"—*i.e.,* the rear-ending of the Lyft car. The insurers denied coverage, arguing that the accident involved only one covered accident.

The court disagreed and granted Busby's summary judgment motion. Applying Pennsylvania's cause-oriented approach, the court concluded that there was not one proximate, uninterrupted cause of Busby's injuries. Although the two crashes took place only one second apart, the court explained that "it was enough time for Busby to be thrown forward as a result of the Lyft crash and then again as a result of the [second] crash." The court further reasoned that the first collision was not the proximate cause of the second collision, which might still have occurred even if the first had not taken place. Notably, the court distinguished multi-car collisions initiated by the last car in line, stating: "[w]hat happened here is not like a chain reaction motor vehicle crash where the last car hits the car in front of it which then hits the car in front of it as a result of the first impact . . . . [S]uch a 'domino' type of collision . . . would be one accident under the relevant policies."

Courts in other jurisdictions have reached conflicting decisions as to whether and under what circumstances multi-car collisions constitute a single occurrence or multiple occurrences. *See* January 2019 Alert; June 2018 Alert; March 2016 Alert; October 2015 Alert.

Broker Liability Alert:

West Virginia Does Not Recognize Broker's Duty To Advise Or Special Relationship Test, Says State Supreme Court

Courts in numerous jurisdictions have ruled that insurance brokers may be liable to insureds for negligent procurement or failure to advise if the broker and insured share a "special relationship." *See* February 2018 Alert; October and March 2014 Alerts; December 2012 Alert. This month, the Supreme Court of Appeals of West Virginia weighed in, ruling that West Virginia does not recognize a broker's duty to advise clients or any "special relationship" exception that would trigger such a duty. *Mine Temp, LLC v. Wells Fargo Ins. Servs. of W. Va.*, 2019 WL 5692296 (W. Va. Nov. 4, 2019).

Mine Temp, a mining company, contracted with Wolf Run Mining to provide independent contractors to work at a coal mine operated by Wolf Run. Pursuant to the contract, Mine Temp was required to indemnify Wolf Run for claims arising out of the mining operation and to obtain general liability insurance with a $1 million limit. Mine Temp utilized Wells Fargo's brokerage services to obtain such insurance and ultimately purchased a policy from Chubb Custom Insurance Company. When a Mine Temp employee was fatally injured at a Wolf Run mine, his estate sued Mine Temp and Wolf Run. Chubb refused to defend or indemnify Mine Temp on the basis of an Employer's Liability Exclusion. Thereafter, Mine Temp sued Wells Fargo, claiming that the broker breached its duty to act with reasonable care in obtaining the appropriate insurance. A West Virginia Circuit court granted Wells Fargo's summary judgment motion.

The Supreme Court of Appeals of West Virginia affirmed, holding that West Virginia law does not recognize a negligent procurement claim against an insurance agent, even under special circumstances. The court stated: "this Court has never recognized an insurance agent's 'duty to advise' . . . nor the 'special relationship' exception that would trigger such a duty." Further, the court noted that regardless of whether a duty to advise exists, the negligent procurement claim based on the lack of coverage for claims arising out of the mining contract was moot. The court explained that because the independent contractor agreement had expired prior to the fatal accident, it was no longer an "insured contract" under the policy.

Rescission Alert:

Reversing Trial Court, Michigan Appellate Court Deems Application Misrepresentation Material, Warranting Rescission

A Michigan appellate court ruled that an insurer was entitled to rescind a policy based on a material misrepresentation in the application but remanded the matter to determine whether the policy should be reformed to provide coverage for an additional insured. *Doa Doa, Inc. v. PrimeOne Ins. Co.*, 2019 WL 5680994 (Mich. Ct. App. Oct. 31, 2019).

PrimeOne issued general liability and property insurance to Doa Doa ("DDI"), the owner of a bar. Garden City Real Estate ("GCRE"), the owner of the building in which the bar was located, was listed as an additional insured in the general liability section of the policy, but not the property section. When a fire destroyed the bar, DDI and GCRE sought coverage from PrimeOne. During its claim investigation, PrimeOne discovered that the bar had called the police several times during the prior few years in response to various incidents of criminal activity. This contradicted a statement made by DDI in the policy application, which asked: "Number of police calls within the past year (If any describe in detail)." In response, DDI stated that one call relating to a fight had been placed. PrimeOne sought to rescind the policy based on this misrepresentation.

A trial court denied PrimeOne's summary judgment motion, finding that issues of fact existed as to whether the alleged misstatement was material. The trial court reasoned that materiality turned on credibility determinations regarding the testimony of PrimeOne's President and underwriter, both of whom stated that the policy would not have been issued had they known about the bar's history of police activity.

The appellate court reversed, deeming the misrepresentation material as a matter of law. The appellate court emphasized that the application asked not only about the number of police calls, but also the nature of those calls. The bar's failure to provide that information was material, the court reasoned, because PrimeOne's underwriting guidelines provided that it would not insure any business with two or more assault or battery incidents within the past three years. Had the bar answered the application question fully and honestly, PrimeOne would have rejected the application as a matter of course. As such, the contested testimony and subsequent credibility determination were unnecessary to prove materiality.

The court rejected DDI's contention that PrimeOne's failure to ask about police call activity in most of its other policy applications evidenced a lack of materiality. The court stated: "differently worded questions designed to collect information about risk do not bear upon the question of whether, if presented with the information about the multiple prior police calls to Bar 153, defendant would have chosen to issue the particular insurance policy to DDI."

With respect to GCRE's coverage claim, the court noted that the remedy of rescission as to "innocent third parties" uninvolved in making any misrepresentations is a matter of equity within the court's discretion. Here, there was no indication in the record that GCRE was involved in filling out the insurance application. Therefore, the court remanded the matter to determine whether rescission as to GCRE would be equitable or whether reformation was warranted.

Bankruptcy Alert:

Michigan Court Rules That Insurance Policy Is Executory Contract And That Insurer Cannot Enforce Bankruptcy Exclusion

A Michigan federal district court ruled that an insurance policy was an executory contract and that an otherwise applicable bankruptcy exclusion constituted an unenforceable *ipso facto* clause. *In re Cmty. Mem'l Hosp.*, 2019 WL 3296994 (E.D. Mich. July 23, 2019).

At the time of its bankruptcy filing, Community Memorial Hospital ("CMH") was insured under a D&O policy issued by National Union. Following its bankruptcy petition, CMH renewed the policy. At CMH's request, the renewal policy included a "tail" endorsement that provided coverage for claims made during the three-year period following the wind-down. When a trust, acting as assignee of CMH's rights, sued former directors and officers, National Union denied coverage. The insurer argued that coverage was barred by Endorsement 10 to the policy, which excluded coverage for loss in connection with a claim "alleging, arising out of, based upon, attributable to, or in any way involving . . . any Wrongful Act which is alleged to have led to or caused . . . bankruptcy." Thereafter, the trust filed suit, seeking a ruling that Endorsement 10 was an unenforceable *ipso facto* clause—*i.e.*, "a provision in an executory contract that provides for termination or modification based on the filing of a bankruptcy petition." Such clauses are prohibited under federal bankruptcy law. *See* 11 U.S.C. § 365(e)(1).

As a preliminary matter, the court addressed whether the insurance policy was an "executory contract," because the prohibition on *ipso facto* clauses applies only to such contracts. Under bankruptcy precedent, courts have defined "executory contract" to mean a contract "so far unperformed that failure of either [party] to complete performance would constitute a material breach excusing performance of the other."

National Union argued that the tail coverage at issue constituted a policy distinct from the pre-bankruptcy insurance policy and was therefore not subject to the Bankruptcy Code prohibitions relating to executory contracts. In contrast, the trust asserted that the tail

coverage was merely a continuation of the pre-petition policy and was part of that original, unperformed contract. The court agreed with the trust, explaining that the tail coverage was "an appendage to the 2012 policy," with "pre-petition roots that make it part of an executory contract."

Having deemed the policy an executory contract, the court also concluded that Endorsement 10 was an unenforceable *ipso facto* clause. As to this point, the court noted that it had held in a previous ruling that the *ipso facto* prohibition may be triggered even if the challenged clause invalidates only part of a contract, rather than the entire contract.

The decision is significant in its finding that the pre- and post-petition insurance policies at issue were "essentially the same" for purposes of the executory contract analysis. However, the court expressly distinguished cases involving "distinctively different" insurance policies issued before and after the bankruptcy and cases in which the debtor entered into a new policy with a different insurer post-petition, such that there was no continuing relationship between the parties. In those instances, courts have not deemed insurance policies to be executory contracts.

Discovery Alert:

Insurer Entitled To Compel Production Of Confidential Settlement Agreement Between Insured And Third Party In Separate Matter, Says Ohio Court

An Ohio federal district court compelled an insured to produce a confidential settlement agreement, finding the agreement relevant to a pending action between the insurer and insured, and not otherwise privileged. *Navigators Specialty Ins. Co. v. Guild Assocs., Inc.*, 2019 WL 5962686 (S.D. Ohio Nov. 12, 2019).

Ace American Insurance Company, a non-party to the action, sought to compel production of a settlement agreement filed under seal between its policyholder, Bio-Energy LLC, and Guild Associates. Ace American argued that the settlement agreement was relevant to its own litigation with Bio-Energy because the damages sought by Bio-Energy in both litigations overlapped, entitling Ace American to view the settlement to ensure there would be no double recovery.

The court noted that third parties have standing to challenge confidentiality orders in order to obtain relevant information. Furthermore, the court explained, "absent some privilege or other compelling reason to protect the contents of a settlement agreement, there is a strong public policy in favor of granting access to such documents."

Applying these principles, the court granted Ace American's motion to compel. The court reasoned that the information contained in the settlement agreement was not privileged and was relevant to Ace American's pending litigation given the substantial overlap of damages sought by Bio-Energy in both cases. However, the court cautioned that the ultimate issue of admissibility of the settlement agreement in Ace American's litigation was a separate issue to be determined by the trial court in that matter.

STB News Alerts

Andy Frankel was named a *Law360* MVP in the practice area of Insurance, an honor given to top attorneys selected by the publication from a group of over 900 submissions.

Susannah Geltman and Summer Craig co-authored *The Insurance Disputes Law Review (U.S.)* (edition 2). The publication provides an overview of recent developments and expected trends in insurance law, including an analysis of recent cases in the areas of cyber-related incidents, climate change litigation and allocation.

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Simpson Thacher has been an international leader in the practice of insurance and reinsurance law for more than a quarter of a century. Our insurance litigation team practices worldwide.

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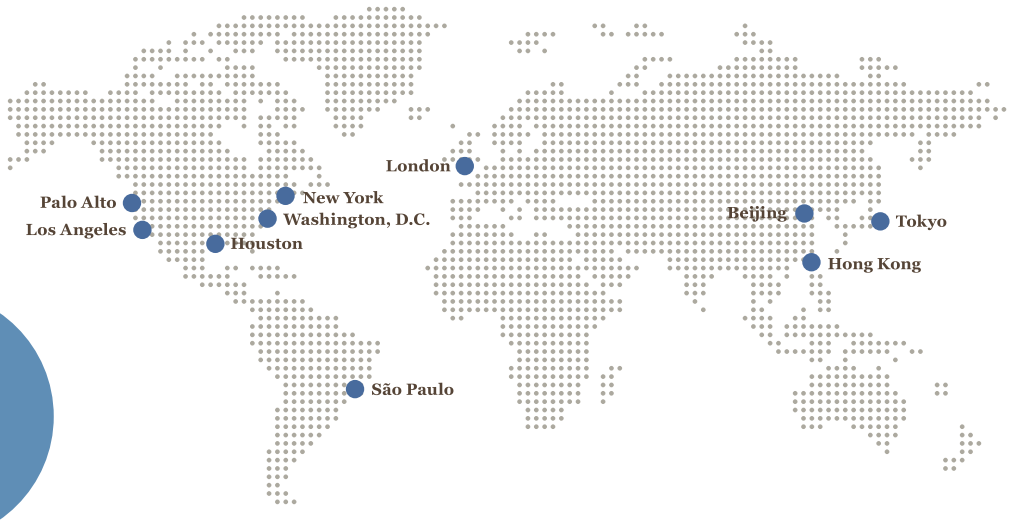

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