Top Ten Third Party Insurance Issues - Trends - Decisions

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B. TOP TEN THIRD PARTY INSURANCE ISSUES–TRENDS–DECISIONS

This article will discuss significant coverage decisions issued so far in 2019 and decisions that are anticipated over the next several months. The article will focus on trends, changes, and some cases that have the potential to surprise everyone.
First Acceptance Insurance Co. v. Hughes

Case number S18G0517, in the Georgia Supreme Court.

In the Hughes case, the Georgia Supreme Court addressed the question of whether an insured was required to present a valid settlement offer to the insurer as a necessary element to support a later bad faith failure to settle claim. The Court held that it did, holding that bad faith was not triggered simply by the insured sending a letter reference possible settlement negotiations.

In this case, First Acceptance’s insured caused an automobile accident impacting five vehicles, killing the insured and injuring six others. The insured’s policy limits were $25,000 per person and $50,000 per occurrence. After the accident, counsel for two of the claimants sent a correspondence to the carrier, and expressed an interest in settling these two claims for the per occurrence policy limit. They later sent a follow-up correspondence requesting certain policy information.

Due to a clerical error, the carrier did not respond to this correspondence. These two claimants went on to secure a judgment against the insured’s estate for $5.4 million. Subsequently, the administrator of the insured’s estate filed suit against the First Acceptance, seeking the full amount of the judgment based on the carrier’s bad faith failure to settle these claims.

In response, First Acceptance argued that it should not be liable for bad faith because the letter from the claimants expressed only an interest in settling for policy limits, but did not explicitly make a “clear and valid” settlement offer. The insured’s estate argued that where an insurer knows, or reasonable should know, that the failure to settle could create a risk of excess exposure, it has the duty to settle. Here, the letter to the carrier provided sufficient notice to trigger that duty.

However, the Georgia Supreme Court granted certiorari and ultimately decided the issue in the carrier’s favor, holding that a valid settlement offer is necessary to trigger the carrier’s duty. Specifically, the Court held that a valid settlement offer within the policy limits must be issued, or at minimum that the carrier had a good faith basis to believe a settle could be reached. In this case, the Court found that the letter presented a sufficient offer to trigger the duty, However, because there was no deadline to the settlement offer included in the letter, the Court held the carrier did not act unreasonably in failing to accept the offer before it was withdrawn by the claimants.
Calandro v. Sedgwick Claims Management Services

Case number 18-1637, in the U.S. Court of Appeals for the First Circuit

The First Circuit, with a panel that included former Supreme Court Associate Justice David H. Souter, addressed the requirements for maintaining a bad faith action against an insurance claims administrator. The bad faith action was brought under the Massachusetts consumer protection statute. Ultimately, the Court found that the settlement offers made by the insurance claims administrator did not violate the statute as they were given in good faith based on the evidence known at the time.

There, the estate of Genevieve Calandro alleged that her death was caused by negligent treatment at her nursing home, Radius Healthcare Center. Calandro fell from her wheelchair and sustained injuries that led to her death.

During pre-trial negotiations, Sedgwick Claims Management Services, the insurance claims administrator offered to settle the claims for under $300,000. Calandro’s family rejected the offer and went on to secure judgement for $1.4 million in compensatory damages and $12.5 million in punitive damages on the gross negligence claim.

Following the judgment, the nursing home’s carrier settled for the amount of the judgment, plus and additional amount, to release itself and the nursing home. It did not secure a release for Sedgewick. The Calandros then made a demand against Sedgewick for $40 million. When Sedgewick countered with an offer for $2 million, the Calandros filed a bad faith action.

The District Court ultimately ruled that Sedgwick’s offers to settle were reasonable given the lack of specific evidence of negligence by the nursing home at the time of settlement negotiations and, therefore, did not violate the Massachusetts consumer protection statute.

On appeal before the First Circuit, the Court affirmed the District court’s ruling. In its holding, the Court emphasized that while the consumer protection statute requires that “firms that are in the business of insurance” must hand claims in good faith, they are not held to the duty of prescience. Instead, they are allowed to make decisions based on the information that is currently available to them at the time.

The Court did note that because the case was resolved with a bench trial, it reviewed the judgment with deference to the district court’s ruling on the factual findings. Regardless, the panel held that the administrator made reasonable settlement offers at reasonable times given the evidence available before trial.
Acuity Insurance Co. v. 950 West Huron Condominium Association

Case number 1-18-0743, in the Appellate Court of Illinois, First District

In *Acuity Insurance*, the Illinois Appellate Court addressed when a duty to defend against allegations of a construction defect is triggered under a subcontractors commercial general liability policy. This decision is part of a broader shift in how courts are interpreting claim of faulty workmanship under CGL policies.

There, a carpentry subcontractors was sued after allegedly performing defective work on a condominium building that resulted in water damage to the property. Acuity denied coverage and filed a declaratory judgment action, arguing that the faulty workmanship and therefore did not owe a duty to defend or indemnify. Specifically, Acuity argued the policy was not triggered because there was no “occurrence” as required for coverage under the policy.

Cincinnati Insurance Company, which also insured the subcontractor for one of the policy periods, agreed to defend the lawsuit, and ultimately settled the claims against the subcontractor. It then intervened in the declaratory judgment action, seeking contribution from Acuity for the defense costs and settlement proceeds expended. The trial court held that there was no coverage, based on a serious of cases that held that faulty workmanship does not give rise to an “occurrence.”

On appeal, the Court reversed the trial court, holding that Acuity owed a duty to defend and, as a result, owed contribution to Cincinnati for the defense and settlement of the underlying claim. The Court generally held that where a subcontractor’s negligence caused something to occur outside the scope of its work, this would be considered an “occurrence.”

This comports with a growing trend that has resulted in the majority of states holding that faulty workmanship constitutes an “occurrence” under a CGL policy. Moreover, this ruling is a sea change to the law of Illinois, which previously declined to trigger a CGL policy for mere faulty workmanship.

It should be noted that under Illinois law, it still appears that a general contractor would still be unable to secure coverage for defect claims arising from alleged faulty work of their subcontractors. This could result in cases where the subcontractor, but not the general contractor, would have coverage, an illogical result that will likely be addressed in future decisions.
First One Lending Corp. v. Hartford Casualty Insurance Co.

Appeal number 16-AP-1631, in the Wisconsin Supreme Court

In First One Lending Corp. the Wisconsin Supreme court held that confirmed that a carrier that defends and settles a claim on behalf of its insured may then seek contribution from other carriers that also provide insurance on a primary basis. The court allowed contribution for attorney fees and defense costs on a pro rata basis only, declining to order the carrier that breached the duty to defend to cover the full cost of defense.

Greenwich Insurance Company contracted with United Water, a company that provided operational services to MMSD for many years, and named MMSD as an additional insured. Similarly, Steadfast Insurance Company issued a liability policy to Veolia, the company that took over for United water, also naming MMSD as an additional insured.

Following widespread plumbing backups after a significant rainfall, MMSD was named in multiple lawsuits for failure to repair, maintain, and operate the sewerage system. It, in turn, tendered these claims to both carriers.

Greenwich denied coverage, claiming that the sewage backup was not a covered loss because it occurred after MMSD ended its contract with United Water, Greenwich’s insured. Steadfast, to the contrary, accepted coverage and provided a defense to MMSD. After the underlying lawsuit was concluded Steadfast sought the $1.5 million it paid in defense costs, plus $325,000 in attorney fees it expended seeking contribution. The trial court granted summary judgment for Steadfast, awarding the full amount of defense costs and attorney fees. This ruling was affirmed on appeal.

The Supreme Court ultimately held that both carriers were primary and successive insurers in regard to the insured, rejecting Greenwich’s coverage defense. As a result, the Court held that Greenwich breached its contractual duty to defend the insured and as a result, owed Steadfast contribution for the defense costs. However, the Court held that the defense costs would be allocated between the carriers on a pro rata basis, finding that Steadfast had a contractual duty to defend that was not abrogated by Greenwich’s breach of its contractual duty to defend. Finally, the Court held that Steadfast was entitled to recover attorney fees from Greenwich.
William Valls v. Allstate

Case number 17-3495 in the U.S. Court of Appeals for the Second Circuit

Nancy E. Carlson et al. v. Allstate Insurance Co.,

Case number 17-3501 in the U.S. Court of Appeals for the Second Circuit

Alan D. Lees et al. v. Allstate Insurance Co.,

Case number 18-007 in the U.S. Court of Appeals for the Second Circuit

In this series of cases, the Second Circuit held that a common “collapse” provision found in property insurance policies does not cover wall cracking due to faulty foundation work. The cases are part of a series of cases that involve claim of fault concrete used to pour the foundations in upwards of 34,000 homes in northeastern Connecticut by the same contractor.

The Allstate policies, which reflect a common provision found in homeowners policies, provided that coverage would be triggered only for an "entire" and "sudden and accidental" collapse of all or part of a building. Allstate argued that cracking found in a basement wall that remains standing does not fall within this coverage provision.

On appeal the Court held that "the 'collapse' provision in the Allstate homeowner's insurance policy at issue here does not afford coverage for basement walls that exhibit signs of deterioration but that have not collapsed suddenly, accidentally, and entirely, as required by the policy."

This case is notable in part because there are dozens of nearly identical lawsuits currently pending in Connecticut courts, but this is the first cases decided by the federal courts.

Currently pending before the Connecticut Supreme Court are two other nearly identical cases, also originating in the federal courts. In those cases, the homeowners point to prior case law finding an ambiguity in the definition of “collapse” where it does not address a substantial impairment of structural integrity, allowing for coverage only for a completed falling in of a structure.

In its certification of the question, the district court noted that federal courts had, to date, relied on their prediction of how Connecticut courts would rule. However, due to the sheer volume of cases involved, the district court sought a definitive ruling from the Connecticut Supreme Court. These two cases were heard by the Supreme Court in December 2018.
First One Lending Corp. v. Hartford Casualty Insurance Co.

Case number 17-55492, in the U.S. Court of Appeals for the Ninth Circuit

In First One Lending Corporation, the Ninth Circuit held that Hartford must cover a lender’s costs to defend against a lawsuit that alleged an illegal practice of charging fees for mortgage modification services, refusing to apply a California statute that generally prohibits the provision of insurance for willful wrongful conduct.

There, a nonprofit organization, Neighborhood Assistance Corp. of America, filed suit against First One Lending, alleging that First One misrepresented that it was affiliated with the Neighborhood Assistance Corp. of America and charging homeowners illegal fees for mortgagee modification services. It further alleged that these actions damaged its reputation.

The district court ruled that the alleged wrongful acts were uninsurable under a California statute that generally prohibited the provision of insurance for willful wrongful conduct. Further the district court found that a policy exclusion for claims related to financial services separately applied to bar coverage.

On appeal, the Ninth Circuit held that the claim was not entirely foreclosed because there were both covered and noncovered claims alleged in the lawsuit. Specifically, the Complaint filed by Neighborhood Assistance Corp. of America included a count for trademark infringement, which involves neither willful actus under the statute or financial services under the policy exclusion. Absent an exclusion of all claims alleged, the carrier had a duty to defend the insured.

This is a setback for carriers that have attempted to use the California statute as a bar to coverage where the nexus of the claims includes willful wrongful conduct, including for suits that include alternative claims that would not otherwise be contained within the statute or a policy exclusion. Moreover, this ruling will allow plaintiffs to plead claims so as to specifically create a duty to defend even where the nexus of their claim clearly falls within the prohibited areas contained in the statute, thereby providing them leverage for settlement negotiations.