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Lawyer Insights

Top Insurance Cases of 2020: Part 2-Other Noteworthy Cases

The start of a new year gives us an opportunity to highlight some of 2020's most notable coverage decisions.

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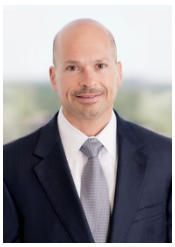

COVID-19 radically changed our daily lives and disrupted the court system. Courts at all levels closed their doors and postponed oral arguments and trials. When courts did re-open, measures taken to address the dangers of COVID-19 exacerbated the significant backlog of cases. Courts attempted to balance public safety and the safety of its staff against the constitutional rights of citizens and, accordingly, prioritized criminal cases over civil, resulting in a decrease of issued opinions compared to past years. Despite this decrease, however, the courts still managed to issue some fairly significant rulings outside of the COVID-19 context.

- *Arch Ins. Co. v. Murdock*, No. N16C-01-104, 2020 WL 1865752 (Del. Super. Ct. Jan. 17, 2020).

In a matter of first impression, the Delaware Superior Court adopted the "larger settlement rule" to govern allocation of settlement amounts where (i) a settlement resolves, at least in part, insured claims; (ii) the parties cannot agree as to the allocation of amounts attributable to covered versus non-covered claims; and (iii) the policy's allocation provision does not prescribe a specific allocation method.

In reaching this conclusion, the court found that while the allocation provision is "unambiguous," it is "mostly unhelpful under the facts presented here." The court found that the allocation provision "speaks only to situations where the insurer and policyholder use their best efforts to arrive at a fair and proper allocation of covered loss," but "does not address the situation where the parties fail to agree." In the absence of language specifying what is to be done if the parties do not agree, and in light of the policy language, the court ruled that the larger settlement rule applied.

- Georgia Jury Awards $21M against Trucking Insurer and its Insured in Pedestrian Death. (https://www.huntoninsurancerecoveryblog.com/2020/02/articles/bad-faith/georgia-jury-awards-21m-against-trucking-insurer-and-its-insured-in-pedestrian-death/) *Holland v. Cypress Ins. Co.*, No. 2:17-CV-0120, 2020 WL 4196250 (N.D. Ga. Feb. 5, 2020).

A Georgia federal jury popped a motor carrier liability insurer and it's insured with a $21 million verdict in a wrongful death suit. According to the Complaint, the insured driver lost control of his tractor-trailer, which resulted in the trailer disconnecting from the tractor and overturning. The trailer caused fatal injuries to a pedestrian walking along the highway's shoulder and his estate filed suit against the drier and the driver's insurer under Georgia's Direct Action Statute, which allows plaintiffs to name motor carrier insurers as defendants along with their insureds.

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Plaintiff demanded settlement for the policy's $1 million limit during the litigation, which defendants refused. The jury took less than an hour to return an initial verdict of approximately $15 million for wrongful death, pain and suffering, and medical expenses. The jury then added $6 million to the judgment for litigation expenses after hearing evidence that the driver's post-accident drug screen found opioids in his system. The insurer appealed the case to the Eleventh Circuit asserting that its liability for coverage in the automobile accident is capped at $1 million. The appeal is still pending.

- *West Bend Mut. Ins. Co. v. Krishna Schaumburg Tan, Inc.*, 2020 IL App (1st) 191834, 2020 WL 1330494 (Ill. Ct. App. Mar. 20, 2020).

The Illinois Appellate Court found that underlying allegations of violations of the Illinois Information Privacy Act ("BIPA") constituted "personal and advertising injury." The court also found that the Telephone Consumer Protection Act exclusion, which prohibits coverage for claims alleging the distribution of materials and information without consumers' consent, did not apply.

In *West Bend*, the insured was sued in a putative class action for alleged violation of the BIPA. According to the underlying complaint, customers purchasing services at plaintiff's tanning salon were automatically enrolled into a national membership database to allow customers to use and access certain tanning locations. The lawsuit alleges that customers were required to have their fingerprints scanned for the purpose of verifying their identification, but were never provided, nor were they asked to sign, a written release allowing plaintiff to disclose customers' biometric data to third parties. The lawsuit further alleged that plaintiff violated BIPA by disclosing customers' fingerprint data to an out-of-state third party vendor, without customers' consent.

The insured tendered the claim to West Bend under a Business Owners Liability Coverage Policy. West Bend denied coverage and filed suit seeking a declaration that it had no duty to defend or indemnify the insured against the putative class action because the allegations did not fall within the definition of "personal injury" and because they fell within the scope of the TCPA exclusion, which barred coverage for personal injury arising out of any statute, ordinance, or regulation that prohibits the distribution of materials or information. The appellate court rejected both of the insurer's arguments. *West Bend*, the first opinion finding coverage for alleged BIPA violations under a liability policy, is likely to open the door for a flood of claims related to one of the fastest-growing areas of privacy litigation in the country.

- California Supreme Court Rule In Favor Of Vertical Exhaustion. (https://www.huntoninsurancerecoveryblog.com/2020/04/articles/general-liability/california-supreme-court-rules-in-favor-of-vertical-exhaustion/) *Montrose Chem Corp. v. Superior Court*, 460 P.3d 1201 (Cal. 2020).

The California Supreme Court ruled that vertical exhaustion applied to determine how a policyholder could access its excess insurance policies. The case involved coverage for Montrose Chemical Corporation's environmental liabilities at its Torrance, California facility under insurance policies issued from 1961 to 1985. Montrose and its insurers agreed that Montrose's primary policies were exhausted but disputed the sequence in which Montrose could access coverage under the excess insurance policies. Montrose argued for vertical exhaustion, in which each excess policy would be triggered after the exhaustion of any underlying excess policies in the same policy period. The insurers argued for horizontal exhaustion, whereby the excess layer of policies could be triggered only after the exhaustion of all lower-layer policies across all relevant policy years.

The California Supreme Court sided with Montrose. Relying on settled principles of insurance law, the court first examined the other insurance provisions and concluded that those clauses "do not clarly specify whether a rule of horizontal or vertical exhaustion applies here." Notably, the court cited the recent Restatement of Liability Insurance on other insurance clauses in support of its conclusion, which provides that "'other insurance' clauses have generally been used to address ' [a]llocation questions with respect to overlapping concurrent policies.'"

- *In re: Solera Insurance Coverage Appeals*, 240 A.3d 1121 (Del. 2020).

The Delaware Supreme Court dealt a blow to companies incorporated in the state when it held that a stockholder appraisal action challenging Solera Holdings Inc.'s buyout by Vista Equity Partners did not trigger the coverage for securities-related claims in Solera's excess directors and officers policies. The ruling marked a significant victory for D&O insurers.

We previously wrote (https://www.huntoninsurancerecoveryblog.com/2019/08/articles/defense-costs/delaware-court-says-appraisal-action-constitutes-a-securities-claim-triggers-do-coverage/) about this case in August 2019, when the Superior Court of Delaware denied the insurers' motion for summary judgment and held that the appraisal action, which included $39 million in attorneys' fees, prejudgment interest, and costs incurred in defending litigation that arose out of Solera Holdings Inc.'s acquisition by Vista Equity Partners LP, constituted a covered "securities claim" under Solera's directors and officers liability insurance policy. The insurers appealed.

In July 2020, Hunton insurance recovery partner, Syed Ahmad identified the *Solera* appeals as a case to watch in the second half of 2020, explaining that "the ultimate impact of the Delaware Supreme Court's ruling on the core issue of whether an appraisal action triggers D&O coverage will depend on the scope of the justices' reasoning," and that the Delaware justices' decision on the prejudice question would be instructive for insurance lawyers.

In a unanimous decision, Delaware's high court ruled that the state judge erred. It found that an appraisal action is a "neutral proceeding" that serves only to determine the value of the shares held by stockholders who object to the merger, and the action did not fit the policies' definition of a securities claim.

- Staying the Course, Texas Supreme Court Rejects Insurer's Argument for Exception to Eight-Corners Rule in Determining Duty to Defend. (https://www.huntoninsurancerecoveryblog.com/2020/03/articles/covid-19/staying-the-course-texas-supreme-court-rejects-insurers-argument-for-exception-to-eight-corners-rule-in-determining-duty-to-defend/) *Richards v. State Farm Lloyds*, 597 S.W.3d 492 (Tex. 2020).

In March, the Texas Supreme Court answered a certified question from the Fifth Circuit court asking if the state recognizes a limited exception to the "eight-corners rule," which establishes that when deciding whether an insurer has a duty to defend its policyholder, the court may only refer to the terms of the policy and the factual allegations in the lawsuit against the insureds. The Supreme Court said the eight corners rule applies even if the policy doesn't promise coverage for groundless claims.

The case stemmed from the death of a 10-year old who succumbed to injuries suffered in an ATV accident near a couple's home in Weatherford, Texas. The 10-year old's mother sued the couple, alleging that they negligently failed to supervise the child. The couple submitted a claim under their State Farm

homeowner's policy for legal defense. State Farm agreed to defend the couple, while reserving its rights to challenge its coverage obligations, then filed suit in Texas federal court. On a motion for summary judgment, State Farm relied on a variety of documents outside of the policy to support its claim that a pair of policy exclusions, the motor vehicle exclusion and the insured exclusion which eliminated coverage for children in the policyholders' care, barred coverage for the couple. The federal judge, over the couple's objections, considered the evidence and granted State Farm's motion for summary judgment. The couple appealed.

Ultimately, the Fifth Circuit ruled that the district court wrongly considered State Farm's outside documents in granting its motion for summary judgment, and rejected State Farm's argument that a narrow exception to the eight-corners rule – which allows extrinsic evidence in cases where it is initially impossible to discern whether coverage is implicated and the evidence does not overlap with the merits or truth or falsity of the allegations – applied.

- Court Awards Prejudgment Interest For Time Before And After Arbitration Award. (https://www.huntoninsurancerecoveryblog.com/2020/05/articles/general/court-awards-prejudgment-interest-for-time-before-and-after-arbitration-award/) *ExxonMobil Oil Corp. v. TIG Ins. Co.*, No. 16 Civ. 9527 (ER), 2020 WL 2539063 (S.D.N.Y. May 18, 2020).

A federal court added prejudgment interest for the period before and after an arbitration award despite the panel's prior refusal to award interest. The arbitration panel found that TIG owed Exxon the full $25 million policy limit. Exxon asked the panel to award more than $6 million of prejudgment interest running from the date of breach. The panel refused, finding that the arbitration agreement did not allow it to award prejudgment interest.

Exxon then asked a federal court to confirm the panel's award and to order TIG to pay prejudgment interest. The Court granted that request. Specifically regarding interest from the date of breach until the panel's award, the court found it could consider the issue given that the panel found it was without jurisdiction to do so. While the arbitration provision in the parties' contract did not permit the panel to award prejudgment interest, that provision did not bar the court from awarding prejudgment interest. As the court explained, to decline the imposition of interest would embolden parties, like insurers, to wrongfully withhold payment with no material repercussion.

Additional Highlights

- While OFAC Cautions Cyber Insurers About Facilitating Ransomware Payments, Policyholders Should Ensure They're Covered. (https://www.huntoninsurancerecoveryblog.com/2020/11/articles/cyber/while-ofac-cautions-cyber-insurers-about-facilitating-ransomware-payments-policyholders-should-ensure-theyre-covered/) U.S. Department of Treasury's Office of Foreign Assets Control's October 1, 2020 Advisory

Last, but certainly not least, 2020 saw the U.S. Department of Treasury's Office of Foreign Assets Control's ("OFAC") issue an advisory on October 1, 2020, cautioning insurers that they may be violating anti-money laundering and sanctions regulations if ransomware payments are paid to cybercriminals. This can present a problem for policyholders who thought they purchased insurance specifically to cover ransomware attacks and now may be facing a recalcitrant insurer.

OFAC makes clear its concern that the payment of ransom demands emboldens threat actors to engage in future attacks. The practical problem for insurers and their insureds, however, is that it is exceptionally difficult to determine who the threat actor is during the short time constraints involved in ransomware attack ransom demands. And every hour that the insured's company is crippled by the ransomware attack may translate to thousands, if not hundreds of thousands or millions, of dollars lost. This can present a particular problem for policyholders who thought they purchased insurance specifically to cover ransomware attacks and now may be facing a recalcitrant insurer.

The advisory appears to serve as a cautionary reminder of existing law that would require insurers to first make sure the threat actor has not been identified by OFAC as a specially designated national or blocked person before making any ransom payment. However, in response to OFAC requirements and the advisory, some insurers are broadening OFAC and/or related exclusions in cyber insurance policies.

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