6 Recent Insurance Decisions You May Have Overlooked

By **Robert Chesler, Nicholas Insua and John Lacey** (July 14, 2020)

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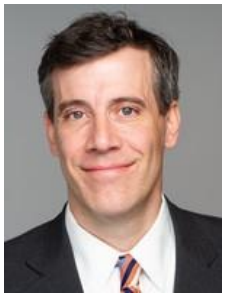

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While the pandemic has disrupted the courts across the country, it has not interfered with the flow of important coverage decisions in the first six months of 2020. In addition to the cases cited in a recent Law360 article, a number of other decisions of note have come down that deserve the attention of every coverage attorney.

Reservation of Rights

In Selective Way Insurance Co. v. MAK Services Inc.,[1] the Superior Court of Pennsylvania estopped the insurance company from denying coverage based on its failure to investigate, as evidenced by a boilerplate reservation of rights letter that did not cite to a controlling exclusion. The insurance policy at issue contained an exclusion for snow and ice removal, which stated that the insurance did not apply to claims arising out of snow and ice removal activities.

MAK was sued for negligence in removing snow and ice from a parking lot. Selective appointed defense counsel to represent MAK, and sent a boilerplate reservation of rights letter that did not mention the exclusion. The letter advised MAK that the claim was potentially covered, that defense counsel was being appointed and that MAK had the right to retain private counsel. The letter also instructed MAK not to discuss the case with anyone "other than your attorney or a properly identified representative of Selective." The letter also contained a general reservation of rights under the policy.

Eighteen months later, Selective sued MAK for a declaration that it did not owe coverage because of the snow and ice removal exclusion. The trial court awarded judgment to Selective, and the appellate court reversed.

Interestingly, the appellate court based its decision not on an inadequate reservation of rights letter but on Selective's failure to investigate. The court found that any investigation by Selective would have uncovered the snow and ice removal exclusion. Selective's failure to mention the exclusion in its reservation of rights letter was evidence of its failure to investigate. The court further held that under the facts of the case, it would presume prejudice to the insured.

The decision should be a wake-up call to insurance companies on the need to investigate claims and prepare meaningful reservation of rights letters. It also reinforces policyholders' arguments that an insurance company's failure to investigate can create an estoppel — or in the right circumstance, constitute bad faith.

The South Carolina Supreme Court has also nullified a form reservation of rights letter.[2] Insurance companies and policyholders must evaluate the sufficiency of reservation of rights letters, and see if other courts will follow Selective Way and Heritage in carefully scrutinizing such letters.

Ambiguity

In Mariam Inc. v. Universal Underwriters Insurance Co.,[3] the U.S. Court of Appeals for the Fourth Circuit ruled in favor of coverage based on the doctrine of ambiguity. In the underlying case, the plaintiff sued the policyholders for tortious interference with economic relationships and tortious interference with contract, both of which required "intentional, malicious acts that were calculated to cause harm." The insurance company denied coverage on the basis of an exclusion for actions taken with the intent to cause harm. The district court found coverage, and the Fourth Circuit affirmed.

The policyholder argued that the term "harm" could be read to apply only to physical harm, while the insurance company maintained that it meant any harm whatsoever. The court found that the exclusion could have more than one meaning to a reasonably prudent layperson, and was therefore ambiguous.

Mariam indicates the continuing vitality of the doctrine of ambiguity. The case evidences how even an apparently clear word such as "harm" can be found to be ambiguous in the right context. Every policyholder in every case must examine its insurance policy wording to determine if it can argue that an ambiguity exists based on the facts of its case.

Defining "Arising out of"

The Fourth Circuit issued another policyholder friendly decision in Affinity Living Group LLC v. StarStone Specialty Insurance Co.[4] That case concerned the frequently litigated phrase "arising out of." Affinity was sued in a false claims act suit for submitting false claims concerning personal services that it allegedly did not provide to residents at an adult care home. The insurance policy provided coverage for "damages resulting from a claim arising out of a medical incident."

The parties agreed that providing personal services was a medical incident. However, the insurance company contended that the false claims act claim was independent of the medical incident and not covered. The district court ruled in favor of the insurance company, and the Fourth Circuit reversed.

The Fourth Circuit noted that the phrase "arising out of" was defined broadly to require causation only when it appeared in a coverage-extending policy provision, but narrowly when it appeared in a coverage reducing provision. The court found that without the personal incidents, the false claims act claim would not have existed, and that a causal connection therefore existed.

"Arising out of" is a phrase that has engendered much insurance litigation, much of which is contradictory. Affinity Living is important for policyholders because it finds that the term can have different meanings when used in coverage-extending versus coverage-reducing provisions. Affinity Living's application of basic principles of insurance policy construction to reach this result again demonstrates for policyholders the critical role that these principles play in determining coverage.

Expected or Intended

Erie Insurance Exchange v. Moore,[5] decided by the Pennsylvania Supreme Court in a 4-3 decision, also examines an issue that has long vexed insurance coverage — the meaning of "expected or intended." The case concerned unusual facts.

Harold McCutcheon decided to commit a murder-suicide. He went to his former girlfriend's

house and shot her. Before he could shoot himself, Richard Carly, the current boyfriend, came to the door. The two scuffled, the gun went off, and McCutcheon killed Carly. McCutcheon then committed suicide.

When Carly's heirs sued McCutcheon's estate, McCutcheon's insurance company denied coverage, asserting that the killing was expected or intended by McCutcheon. In their suit against McCutcheon's estate, Carly's heirs alleged that the shooting of Carly was negligent, careless and reckless.

The insurance company asserted that when McCutcheon went to the door with a gun in his hand and fought with Carly in the midst of a murder-suicide, the requisite degree of fortuity did not exist to allow for a holding that the shooting was unintended and unexpected. The majority of the court disagreed.

It stressed the breadth of the duty to defend, which was based on the four corners of the underlying complaint. It disagreed with the insurance company that Carly's heirs use of the negligent, careless and reckless language was mere artful pleading. Rather, the majority found that if taken as true, the allegations of the underlying complaint presented a covered cause of action, and the insurance company had to defend.

Practitioners should note that this is a duty to defend and not a duty to indemnify case. Courts use a broad, pro-policyholder construction of the allegations of a complaint to determine the duty to defend. Sometimes, a savvy plaintiffs attorney will use the proper insurance buzzwords, such as negligent and reckless, to trigger insurance coverage for its adversary. This strategy worked, but by a bare 4-3 vote, in Erie v. Moore.

Concurrent Cause

In North Star Mutual Insurance v. Ackerman,[6] the Supreme Court of North Dakota issued an important pro policyholder decision concerning the concurrent cause doctrine.

There, a policyholder's wheelbarrow fell out of his pickup truck while driving along Interstate 94 in North Dakota. After the wheelbarrow fell out of the policyholder's pickup truck it landed on the interstate, and ultimately caused an accident between two motorists.

Thereafter, the insurance company filed a declaratory judgment action, arguing the policyholder's potential liability in connection with the accident was excluded under its commercial general liability policy — namely, because of an exclusion for accidents arising out of the use of an automobile.

The Supreme Court of North Dakota rejected the insurance company's argument. While the court did acknowledge that the transportation of the wheelbarrow and its fall out of the vehicle onto the interstate were vehicle-related activities, which constitute use of an automobile, the court held the wheelbarrow also was on the road for some time before the accident occurred, and the policyholder did not remove it or warn other drivers of its presence, which constitute independent, non-vehicle-related acts that did not arise out of the use of the automobile.

Accordingly, the court concluded that, because both covered and uncovered risks under the policy contributed to the accident, the concurrent cause doctrine applied, and thus, the policyholder's potential liability in connection with the accident was covered under the subject policy.

Concurrent causation is originally a property insurance concept. North Dakota is the second state supreme court to apply it in the liability context.[7] The doctrine of concurrent causation is a tremendous tool for policyholders to avoid policy exclusions.

Allocation

In QBE Specialty Insurance Co. v. Scrap Inc.,[8] the U.S. Court of Appeals for the Eleventh Circuit issued a significant decision underscoring the importance of obtaining a special verdict in an underlying claim that may involve both covered and uncovered damages.

There, two families in Florida filed suit against the policyholder for nuisance in connection with the policyholder's operation of a metal shredding facility. Initially, the insurance company agreed to defend the policyholder in the underlying action, subject to a reservation of rights. Ultimately, the case went to trial, resulting in a jury award of $750,000 for the two families.

Thereafter, the insurance company filed a declaratory judgment action, arguing it was not obligated to indemnify the policyholder for the underlying judgment, because the policyholder could not establish which damages were covered damages under the policy.

Under Florida law, a policyholder has the initial burden of establishing that a settlement or judgment involves damages that are covered under the policy. Generally, that burden will not shift to the insurance company, unless the insurance company fails to adequately advise the policyholder that it should obtain a special verdict.

The court held the insurance company adequately advised the policyholder, including through five pieces of correspondence during the proceeding, as well as two attempts to intervene for the limited purpose of assisting with the preparation of special-interrogatory verdict forms.

The Eleventh Circuit affirmed the trial court's grant of summary judgment in favor of the insurance company, holding that the policyholder essentially forfeited coverage because it failed to obtain a special verdict in the underlying claim, and could not provide a plausible method for allocating the jury award between covered and uncovered damages.

Attorneys handling complex claims are often unaware of insurance issues. Allocation is an example of how underlying counsel must work with insurance counsel in order to protect the insured's ability to recover from its insurance company. It is noteworthy that the court in QBE v. Scrap found that the policyholder did not offer a plausible method for allocation. Query whether the policyholder could have met its burden on allocation through expert testimony and other evidence.

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[1] Selective Way Insurance Co. v. MAK Services Inc., 2020 PA Super 103 (Pa. Super. Apr.

24, 2020).

[2] Harleysville Group Ins. V. Heritage Communities, 2017 WL 105021 (S. Car. Sup. Ct.),mod. Opinion no. 27698 (2017).

[3] Mariam Inc. v. Universal Underwriters Insurance Co., 804 Fed. Appx. 205 (4th Cir. 2020).

[4] Affinity Living Group LLC v. StarStone Specialty Insurance Co., 959 F.3d 634 (4th Cir. 2020).

[5] Erie Ins. Exch. v. Moore, No. 20 WAP 2018, 2020 WL 1932642 (Pa. Apr. 22, 2020).

[6] N. Star Mut. Ins. v. Ackerman, 940 N.W.2d 857 (N.D. 2020).

[7] Xia v. ProBulders Ins. Co., 400 P. 3d 1234 (Wash. 2017).

[8] QBE Specialty Insurance Co. v. Scrap Inc., 806 F. App'x 692 (11th Cir. 2020) (applying Florida law).