PLUNKETT COONEY

Number of Occurrences, Consumer Fraud Claims Coverage Update

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Texas, New Jersey, Pennsylvania Coverage Update
The e-POST

Number of Occurrences – Fifth Circuit (Texas Law)

Evanston Ins. Co. v. Mid-Continent Cas. Co.
--- F.3d ---, 2018 WL 6037507 (5th Cir. Nov. 19, 2018)

The U.S. Court of Appeals for the Fifth Circuit held that a series of automobile accidents constituted a single occurrence under a policy of primary insurance issued by Mid-Continent Casualty Co. (Mid-Continent). Mid-Continent had issued a primary liability policy to truck owner Global Waste Services, Inc. (Global). Global's employee was driving a truck when he lost control and collided with several other vehicles, causing multiple serious injuries. Global's excess carrier, Evanston Insurance Company (Evanston), brought suit against Mid-Continent, seeking a declaration that the accident constituted multiple occurrences such that Mid-Continent would be required to contribute a larger amount to the settlement with the accident victims.

The district court found that the collisions constituted different occurrences that had independent causes. The appellate court disagreed, finding that because Global's employee never applied the brakes during the course of the collisions, the collisions were all caused by one continuous, unbroken incidence of negligence. Therefore, according to the appellate court, the collisions constituted continuous, repeated exposure to the same general harmful conditions under the Mid-Continent policy, and, thus, was one occurrence. As a result, the limits of the Mid-Continent Policy were exhausted under the occurrence limit of the policy.

Consumer Fraud Claims – Third Circuit (New Jersey Law)

Alpizar-Fallas v. Favero et al.
--- F.3d ---, 2018 WL 5987140 (3rd Cir. Nov. 15, 2018)

The U.S. Court of Appeals for the Third Circuit held that Progressive Garden State Insurance Company (Progressive) and its agent Bryan Barbosa (Barbosa) may be liable under New Jersey's Consumer Fraud Act (CFA) in a suit alleging that they fraudulently induced insured Ana Lidia Alpizar-Fallas (Alpizar-Fallas) to release another Progressive policyholder from liability resulting from an automobile accident. Alpizar-Fallas alleged that Barbosa had informed her that the accident had "a

questionable issue of liability" and required her to sign a document that "he expressly represented would expedite the property damage claim of the accident." The document, however, actually released the other Progressive policyholder involved in the accident from all claims related to the accident.

Alpizar-Fallas alleged that such deceptive practices stripped Progressive policyholders of their rights to pursue claims. The appellate court agreed, finding that the facts "amount[ed] to an allegation of fraud in connection with the subsequent performance of a consumer contract, a situation explicitly covered by the language of the CFA, sanctioned by this court in *Weiss* [*v. First Unum Life Insurance Co*., 482 F.3d 254 (3rd Cir. 2007)], and supported by the New Jersey Supreme Court's broad statements regarding the application of the CFA." The appellate court predicted that the New Jersey Supreme Court "would apply the CFA to Alpizar-Fallas's claim, where an insurance company is alleged to have fraudulently performed a contract with a consumer," and held that her claim, therefore, stated a viable cause of action under the CFA.

Subrogation Rights – Pennsylvania

Hartford Ins. Grp. on Behalf of Chen v. Kamara et al.
--- A.3d ---, 2018 WL 6070474 (Pa. Nov. 12, 2018)

The Supreme Court of Pennsylvania ruled that a workers' compensation insurer was prohibited from bringing a subrogation action against an alleged tortfeasor to recoup the amount paid in workers' compensation benefits because the injured employee had not independently sued the tortfeasor, had not joined in the insurer's action, and had not assigned her cause of action to the insurer. The injured employee had sustained injuries to her head, back and neck when she was struck by a vehicle driven by Kafumba Kamara (Kamara) in a Thrifty Car Rental (Thrifty) parking lot. The insurer ultimately paid over $59,000 in medical and wage benefits to the injured employee pursuant to her employer's workers' compensation insurance policy, and subsequently filed an action against Kamara and Thrifty on the injured employee's behalf.

The Supreme Court of Pennsylvania, however, held that allowing the insurer's claim to proceed would "contravene[ ] the very jurisprudence establishing that it is the injured worker who retains the cause of action against the tortfeasor." The appellate court concluded that "absent the injured employee's assignment or voluntary participation as a party plaintiff," an insurer may not enforce its statutory right to subrogation by filing an action directly against a tortfeasor.

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