Top 10 Insurance Cases of 2019

In the 2019 edition of SDV's Top Ten Insurance Cases, we probe wiretapping claims under an armed security services policy, delicately sniff out E&O coverage for a company using cow manure to create electricity, scour the earth for coverage for crumbling foundation claims, and inspect D&O policies for government investigation coverage. In addition, we preview some important and exciting decisions due in 2020. Without further ado, SDV raises the curtain on the most informative and influential insurance coverage decisions of 2019.[1]

By Jeffrey Vita, Grace Hebbel and Andrew Heckler

1 *ACE American Ins. Co. v. American Medical Plumbing, Inc.,*

206 A.3d 437 (N.J. Super. Ct. App. Div. 2019)
April 4, 2019

Is waiver of subrogation language in a standard AIA201 contract sufficient to bar an insurer's subrogation rights?

The New Jersey Supreme Court held that it was. Equinox Development obtained a comprehensive blanket all-risk policy with limits of $32 million per occurrence from ACE American Ins. Co. ("ACE"). The policy covered Equinox's new project in Summit, New Jersey. Equinox hired Grace Construction as GC, who in turn subcontracted the plumbing scope of work to American Medical Plumbing, Inc. ("American"). After completion of the work under the subcontract, a water main failed and flooded the entire project. ACE paid the limits of the policy and subrogated against American to recover its losses. American argued that there was a waiver of subrogation in the AIA201 contract that barred the suit. ACE challenged the validity of the AIA provision, arguing that it applied only to claims before completion of construction and that it only applied to damage to the work itself and not to adjacent property. The court rejected both arguments, finding that the AIA provision effectively barred ACE's subrogation claim. This decision provides guidance on a frequently used contract form for contractors across the country.

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2 *Scott Fetzer Company v. Zurich American Insurance Company,*

769 Fed.Appx. 322 (6th Cir. 2019)
April 30, 2019

Do three separate allegations of sexual harassment, combined with a negligent supervision claim against an employer, constitute one occurrence or three separate occurrences under the employer's CGL policy?

The 6th Circuit found the "accident" to be negligent supervision, and therefore, the three allegations

[1] These cases appear in chronological order

constituted one occurrence. Scott Fetzer Company ("Fetzer"), a manufacturer of vacuum cleaners, was sued by three women alleging sexually inappropriate conduct of an independent vacuum dealer, John Fields. The women alleged various unsolicited sexual acts, including assault and battery by Fields and alleged negligent supervision as to Fetzer. Fetzer settled the claims and sought reimbursement from Zurich American Insurance Company ("Zurich") under its two general liability policies. The policies provided coverage in the amount of $2 million per occurrence, the first $1 million of which was subject to a deductible. Zurich agreed to pay the amount exceeding the deductible for one of the claims but argued that it was not required to indemnify Fetzer for the other two settlements because the allegations constituted three separate "occurrences" and therefore required three separate deductibles. Fetzer argued, however, that there was only one occurrence and therefore only a single deductible applied. The Sixth Circuit agreed with Fetzer, holding that the policy was ambiguous and that the "accident" was Fetzer's negligent supervision, not Fields' independent actions towards the three women. Accordingly, the entire suit constituted one "occurrence" requiring Fetzer to pay only a single deductible.

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3 *Xtreme Protection Services, LLC v. Steadfast Ins. Co.,*

2019 WL 1976482 (Ill. App. Ct. 2019)
May 3, 2019

Does the possibility of a punitive damages award constitute a conflict of interest sufficient to entitle the insured to independent counsel?

The Illinois Appellate Court answered in the affirmative. Xtreme Protection Services, LLC ("Xtreme"), a security services company, was hit with a multi-count complaint for various causes of action including federal wiretapping, intrusion upon seclusion, trespass, and intentional infliction of emotional distress. Xtreme tendered the defense of the claim to its insurer, Steadfast Insurance Company ("Steadfast"), under its "armed security services" liability policy. Specifically, the policy provided coverage for compensatory damages but contained exclusions for intentional conduct and punitive damages. While waiting for a response from Steadfast, Xtreme hired its own counsel and argued that the conflict of interest allowed it to select its own attorney at Steadfast's expense. Steadfast eventually provided its own defense counsel and stated that there was coverage for any compensatory damages, but there would be no coverage for any allegations of intentional conduct or for punitive damages. Xtreme filed a declaratory judgment action seeking a ruling that it was entitled to select its own counsel due to the conflict of interest, while Steadfast argued that Xtreme breached its duty to cooperate. The court held that Xtreme was entitled to select independent counsel due to the conflict of interest between the insurer and the insured with respect to coverage for punitive damages.

Click here to read more.

4 *Conduent State Healthcare, LLC v. AIG Specialty Ins. Co.,*

2019 WL 2612829 (Del. Sup. Ct. 2019) ***& Crowley Maritime Corporation v. National Union Fire Ins. Co.,***
931 F.3d 1112 (11th Cir. 2019)
June 24, 2019

Do government investigations constitute covered "Claims" under a D&O policy?

In both cases, it was determined that two different types of government investigations constituted "claims" under D&O policies. These cases illustrate the significant impact that variations in the definition of "Claim" can have on the availability of coverage for government investigations. In Crowley, the Eleventh Circuit noted that DOJ and FBI investigations constituted a claim, but eventually found no coverage due to an unrelated notice issue. In Conduent, the Delaware Supreme Court similarly held that a Civil Investigative Demand from the Texas Attorney General constituted a "Claim' alleging a 'Wrongful Act.'" These decisions discuss in detail the split in authority that exists across the country on this issue but suggest a possible trend in favor of coverage under D&O policies.

Click here to read more.

5 *Pitzer College v. Indian Harbor Ins. Co.,*
447 P.3d 669 (Cal. 2019)
August 29, 2019

Is the notice-prejudice rule such an important California public policy that it trumps a choice of law provision in an insurance policy?

The California Supreme Court believes so. In August, the Court answered a pair of certified questions from the Ninth Circuit on the applicability of the notice-prejudice rule. Pitzer College's ("Pitzer") Pollution and Remediation Legal Liability Policy was issued by Indian Harbor Insurance Company ("Indian Harbor") and contained a consent provision broadly prohibiting any expenses incurred without the insurer's consent. After discovering problematic darkened soils at the construction site, Pitzer spent nearly $2 million to remedy the soils in an effort to keep the project on schedule. Indian Harbor denied coverage for Pitzer's first party pollution claim on the basis of Pitzer's failure to comply with the policy's consent provision. Pitzer contested the basis of the denial, and a secondary issue arose as to which law should apply - California or New York. The Indian Harbor policy included a New York choice of law provision which Indian Harbor invoked to avoid application of the notice-prejudice rule. Despite the existence of the New York choice of law provision, the California Supreme Court applied the notice-prejudice rule, finding that it is a fundamental policy of the state of California which trumps any applicable choice of law. As a result, a first party insurer cannot contract around the notice-prejudice rule in California.

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6 *Crum & Forster Specialty Insurance Co. v. DVO, Inc.,*
939 F.3d 852 (7th Cir. 2019)
September 23, 2019

Is a breach of contract exclusion within an E&O policy excessively broad as to render coverage "illusory?"

In the Seventh Circuit, yes. The defendant, DVO, Inc. ("DVO"), was in the unique business of building anaerobic digesters used to create biogas and energy. WTE-S&S AG Enterprise, LLC ("WTE") contracted with DVO to build an anaerobic digester that would be used to create electricity from cow manure. When the design-build was unsuccessful, WTE sued DVO for breach of contract and other damages. DVO tendered the claim to Crum & Forster, with whom DVO had multiple policies including E&O coverage. After initially defending pursuant to a reservation of rights, C&F ultimately withdrew its defense of the claim , relying on a breach of contract exclusion within the policy. C&F then brought a declaratory judgment action against DVO seeking a determination that it did not have a duty to defend DVO. DVO argued that the exclusion was so broad as to render the E&O coverage illusory and the Seventh Circuit agreed. C&F was out of luck; it could not raise the breach of contract exclusion to defeat coverage. This case is important for all insureds with broad breach of contract exclusions in their E&O policies. Rarely does a court find insurance coverage illusory, especially for such a generally applicable exclusion.

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7 *RT Vanderbilt Company, Inc. v. Hartford Accident and Indemnity Company, et al.,*
333 Conn. 343 (2019)
October 8, 2019

Does Connecticut recognize an unavailability exception for pro rata allocation of insurance losses?

In a policyholder friendly ruling, the Connecticut Supreme Court recognized an "unavailability exception" to the pro rata allocation scheme for long tail asbestos claims. We first brought this case to your attention in our Top Ten Insurance Cases of 2018. In 2017, the Connecticut Appellate Court ruled that the continuous trigger theory applied to long term exposure claims and also applied an unavailability rule for long tail allocation claims. In October of 2019, the Connecticut Supreme Court affirmed this decision.

The case originated in 2007 when Vanderbilt sued a number of its insurers for coverage related to asbestos injury claims filed over a good part of the 20th century. The parties argued over a number of important coverage issues: whether or not there was

an unavailability exception to the pro rata allocation scheme, the method of contribution from multiple insurers, the policy trigger for long-term exposure claims, and the application of an occupational disease exclusion. Specifically, Vanderbilt argued in favor of an unavailability rule, meaning that the court would not allocate liability costs to an insured for years when insurance was unavailable in the market. The Connecticut Supreme Court affirmed the decision of the Appellate Court, holding that there is an unavailability exception to the pro rata allocation scheme for long term exposure claims. Thus, costs would not be prorated to Vanderbilt for periods in which insurance for asbestos was unavailable in the marketplace. The Supreme Court also held that the continuous trigger theory applies to long tail asbestos injury claims.

Click here to read more.

8 ***T-Mobile USA Inc. v. Selective Ins. Co. of Am.,*** 450 P.3d 150 (Wash. 2019)
October 10, 2019

Can representations made on a COI guarantee additional insured status, despite the presence of disclaiming language?

Yes, so long as the person making the representations is an agent of the insurer. In a significant victory for policyholders, the Washington Supreme Court held that a certificate of insurance ("COI") which included representations from an agent of the insurer afforded T-Mobile USA additional insured status. T-Mobile Northeast ("T-Mobile NE") entered into a contract with a general contractor to construct a cell tower in New York City which required the general contractor to name it as an additional insured on its CGL policy. By virtue of the contract in conjunction with the policy language, T-Mobile NE qualified as an additional insured. T-Mobile USA, however, was not a party to the contract and therefore did not qualify as an additional insured pursuant to the policy language. Nonetheless, T-Mobile USA relied on the assurance of Selective's agent within the COIs that it and its affiliates were included as additional insureds under the contractor's policy. While Selective argued that the standard disclaimer language on the COI makes clear that it does not guarantee coverage, the court held that the disclaimer was ineffective because of the specific representations made by the agent. Though this case does not suggest that every COI is a guarantee of coverage, it illustrates how an insurer may be estopped from denying coverage because of its agent's representations.

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9 ***Karas v. Liberty Ins. Corp.,*** No. 20149, 2019 WL 5455947 (Conn. Nov. 12, 2019);
Vera v. Liberty Mut. Fire Ins. Co., No. 20178, 2019 WL 5955936 (Conn. Nov. 12, 2019); and
E Jemiola Tr. of Edith R. Jemiola Living Tr. v. Hartford Cas. Ins. Co., No. 19978, 2019 WL 5955904 (Conn. Nov. 12, 2019)
November 12, 2019

Are crumbling foundations considered a "collapse" under a traditional homeowner's policy?

No, at least under the policies reviewed by the Connecticut Supreme Court in these three instances. Last year, we noted that the Connecticut Supreme Court was set to decide a series of cases related to the crumbling foundation dilemma in Connecticut. In November, the justices released opinions on all three cases. All of the appeals arose out of denials by homeowners' insurers for cracking and crumbling foundation damage. At the end of the 20th century, a significant number of homes were built with a bad batch of concrete that caused issues for hundeds of Connecticut residents in recent years. The Court first held in Jemiola that the foundational damage did not constitute "an abrupt falling down or caving in" under a Hartford homeowner's policy. In the other two cases, the Court construed Liberty Mutual homeowner's policies and similarly held that there was no "collapse" under the specfic language of the policies.

Read More Here. Karas v. Liberty Ins.Corp
Vera v. Liberty Mut. Fire Ins. Co,
E Jemiola Tr of Edith R. Jemiola

10 ***Rawan v. Continental Casualty Co.,***
Case No. SJC-12691, 2019 WL 6838013 (Mass. 2019)
December 16, 2019

Are consent-to-settle clauses in professional liability policies enforceable?

The Massachusetts Supreme Court held in the affirmative: "consent-to-settle" clauses are enforceable and not in violation of Massachusetts' unfair insurance practices statute. An engineer faced an initial lawsuit for negligence , among other causes of action, arising out of his failed design for the plaintiffs' new home. The engineer received coverage under his professional liability policy which contained a "consent-to-settle" clause that required that Continental Casualty Company ("CNA") obtain his informed consent before settling any claim. Despite repeated offers for settlement, the engineer refused to consent to any settlement and insisted on taking the claim to trial. After receiving a $420,000 verdict against the engineer, the underlying plaintiffs pursued CNA directly for violations of Massachusetts Insurance regulations, specifically alleging that CNA failed to effectuate a prompt settlement and conduct a reasonable investigation to their detriment. The Supreme Judicial Court of Massachusetts heard arguments that the "consent-to-settle" clause violated Mass. Gen. Laws Ann. ch. 176D, § 3(9)(f) which requires insurers to "effectuate prompt, fair, and equitable settlements of claims . . . ." The Court rejected this argument and held that "consent to settle" clauses are enforceable despite the statute, but also noted that an insurer still must make good faith efforts to settle under the statute.

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Cases to Watch in 2020:

Arch Insurance Company v. Kubicki Draper, LLP
On Appeal From: District Court of Appeal of Florida, Fourth District

Kubicki Draper was panel counsel for Arch and was selected to represent its insured in an accounting malpractice action. The underlying case eventually settled within the policy limits. However, Arch brought a professional negligence suit against its panel counsel, Kubicki Draper, alleging that the firm's failure to timely raise a statute of limitations defense resulted in an excessively large settlement. The firm argued that Arch had no legal standing to sue since the firm represented the policyholder and not the insurer. The Fourth District Court of Appeal agreed and now the Florida Supreme Court will decide whether or not an insurer may sue its panel counsel for professional negligence even in the absence of any direct contract for representation. Arch has argued that, due to the tripartite relationship, the panel counsel has a direct contractual relationship with both the insured and the insurer. The decision is important as the parties and the courts often grapple with conflict issues related to panel counsel's representation of the insured.

Rossello v. Zurich American Insurance Company
On Appeal From: Maryland Court of Special Appeals

In 2020, Maryland will join other states that have decided the issue of the appropriate allocation method for long term exposure losses. The case arises out of a mesothelioma claim resulting from long term asbestos exposure. The underlying plaintiff, Patrick Rossello, secured a $2,700,000 judgment against his former employer and was granted the right to pursue its insurers directly. Rossello sought payment of the judgment from the policies in effect between 1974 and 1977. With all of these policies implicated, the Maryland Court of Appeals will decide whether such losses should be allocated on a pro rata or all sums basis for long term exposure losses. Though not a certified question, it is also likely that the Court will consider the proper trigger of coverage for such losses. The Maryland Court of Appeals heard arguments in November and a decision is forthcoming in 2020.

Montrose v. Superior Court
On Appeal From: California Court of Appeal

This year, the California Supreme Court will address the key issue of horizontal vs. vertical exhaustion in the context of high value environmental property damage claims spanning decades. Montrose Chemical Corporation is on the hook for more than $100 million in damages related to a CERCLA action for DDT pollution in Los Angeles Harbor from 1947-1982. Approximately two dozen of Montrose's primary and excess insurers are involved in the coverage litigation and the specific issue to be decided is the order in which Montrose can tap its upper- level excess policies. Montrose has argued that the policies should be exhausted vertically, meaning that Montrose can turn to upper-level insurance for a selected period before exhausting all lower level insurance for all periods. The insurers, however, argue that Montrose must exhaust all underlying policies for all periods before pursuing any upper-level excess coverage. This decision by the California Supreme Court will have far reaching impacts on the priority of coverage debate not only in the environmental contamination context but also in the broader general liability context as well.

For more information on any of these decisions, please contact Jeffrey Vita at jjv@sdvlaw.com, Grace Hebbel at gvh@sdvlaw.com or Andrew Heckler at agh@sdvlaw.com.