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4 Insurance Battles To Watch At State High Courts This Fall

By **Jeff Sistrunk**

Law360 (July 29, 2019, 8:53 PM EDT) -- Insurance attorneys will be awaiting critical guidance from state high courts in the coming months, with the Ohio Supreme Court poised to rule on the proper method for allocating coverage for product liability claims across multiple policies and Delaware's top court set to weigh in on the scope of securities coverage in directors and officers policies.

Here, Law360 breaks down four key insurance cases pending before state supreme courts.

Lubrizol Advanced Materials v. National Union

Ohio's high court will soon have the opportunity to shape state law on the complex question of how to allocate coverage for product liability claims spanning multiple years. It must decide whether Lubrizol Advanced Materials Inc. can require one AIG insurer to pay its $50 million policy limit toward the chemical maker's costs in a suit stemming from its sale of allegedly defective pipe materials.

In March, the Buckeye State justices agreed to answer a certified question from an Ohio federal court in Lubrizol's battle with AIG unit National Union Fire Insurance Co. of Pittsburgh, Pa.: Whether a policyholder is allowed to seek full indemnity under a single policy "providing coverage for 'those sums' the insured becomes legally obligated to pay because of property damage that takes place during the policy period," in situations where the damage occurred over multiple policy periods.

While Lubrizol has urged the Ohio Supreme Court to adopt the full indemnity, or "all sums" allocation method, National Union has asked the justices to instead apply a "pro rata" allocation method, which spreads out coverage proportionally among all triggered policies. According to Lubrizol, given the number of other policies it had in place over the relevant time period, application of the pro rata approach could result in a judgment that National Union owes nothing.

Lubrizol is seeking to force National Union to help cover its costs to defend and settle a $130 million suit brought by IPEX Inc., which accused the company of providing defective resin pellets for use in IPEX's Kitec-brand plastic plumbing pipes. The failure of the pipes led to a slew of consumer class actions against IPEX in Texas and Canada.

From 2001 to 2008, when it was manufacturing the purportedly faulty pellets, Lubrizol held a series of primary and excess liability insurance policies with National Union and several other carriers, according to court documents. After it settled IPEX's suit, Lubrizol asked National Union to pay the full $50 million limit of an excess policy covering 2001 to 2002, but the insurer balked and argued the company's costs must be allocated on a pro rata

basis across all policies in place over the seven-year span, court papers indicate.

Lubrizol proceeded to sue National Union, and in December, U.S. District Judge Dan Polster sought the Ohio Supreme Court's guidance on the allocation question.

In a brief filed with the Ohio high court, Lubrizol asserted that precedent supports the application of the policyholder-friendly all sums allocation method in its case. The Ohio justices adopted the all sums approach in their 2002 decision in Goodyear Tire v. Aetna, which dealt with the tire company's efforts to secure coverage for environmental cleanup costs at 22 industrial sites.

According to Lubrizol's brief, the language of Goodyear's policies differed slightly from Lubrizol's, as they stated they would cover "all sums" that the policyholder incurs for damage occurring during the policy period, rather than "those sums." But the chemical company said there is no real "legal or linguistic distinction" between the two phrases that would support National Union's invitation to apply pro rata allocation.

"Goodyear applies to the instant case," Lubrizol's attorneys wrote. "The policy language tracks the language this court thoroughly analyzed in Goodyear and contains no language that would serve to prorate National Union's liability, and, like the policyholder in Goodyear, Lubrizol seeks coverage for progressive and continuous property damage claims."

National Union, however, countered that its policy's use of the phrase "those sums" is significant and warrants a departure from the all sums allocation method established in the Goodyear case. According to the insurer, a decision adopting Lubrizol's position would stretch National Union's obligations beyond what it bargained for.

"Ignoring the particular terms of the targeted National Union excess policy and applying the 'all sums' method of payment despite the coverage arrangements chosen by Lubrizol would be particularly inequitable here," National Union's attorneys wrote. "Doing so would unfairly expand National Union's obligations beyond the plain terms of the targeted excess policy, and would negate Lubrizol's purposeful decisions to accept a portion of the risk."

The case has been fully briefed and is awaiting an oral argument date.

Lubrizol is represented by its own Julie A. Harris and Nada G. Faddoul.

National Union is represented by Laura A. Foggan of Crowell & Moring LLP, Jonathan T. Viner, Ian A. Cooper, Joel M. Graczyk and Rebecca E. Bennett of Nicolaides Fink Thorpe Michaelides Sullivan LLP and Thomas P. Mannion and Bradley J. Barmen of Lewis Brisbois Bisgaard & Smith LLP.

The case is Lubrizol Advanced Materials Inc. v. National Union Fire Insurance Co. of Pittsburgh, Pa., number 2018-1815, in the Ohio Supreme Court.

In Re: Verizon Insurance Coverage Appeals

In deciding whether to uphold an order directing Verizon Communications Inc.'s insurers to shell out $48 million to cover its defense of a $14 billion shareholder suit, the Delaware Supreme Court will rule on the breadth of a common directors and officers policy provision covering securities claims.

The provision in question extends coverage for claims alleging a violation of any "regulation, rule or statute regulating securities," according to court documents. In a **March 2017 decision**, Delaware Superior Court Judge William C. Carpenter Jr. said the underlying suit, brought by U.S. Bank and spawned by the spinoff of Verizon's Idearc Inc.

electronic directories business, is a securities suit under that definition despite not being rooted in a specific securities law. As such, the judge said that Verizon's primary and excess insurers — including AIG units Illinois National Insurance Co. and National Union, U.S. Specialty Insurance Co. and Zurich American Insurance Co. — must cover the company's defense costs.

Idearc — which became Dex Media Inc. after a 2013 merger with Dex One Corp. — was a wholly owned subsidiary of Verizon, serving as its phone-book unit before being spun off in November 2006. Idearc entered Chapter 11 bankruptcy in March 2009 to shed $6 billion of debt.

U.S. Bank — which served as the litigation trustee for Idearc's creditors — sued Verizon, executive John W. Diercksen, Verizon Financial Services LLC and affiliate GTE Corp. in September 2010 for allegedly engineering the spinoff to benefit Verizon to Idearc's detriment. U.S. Bank argued that Verizon had devised a scheme to get rid of its declining yellow pages and online directory businesses, cooking up a complex deal that would enable Verizon to free itself of the underperforming units and shed debt at the same time.

Verizon won a bench trial of the case in October 2012 and that verdict was later upheld on appeal.

According to court papers, Verizon's insurers refused to pay for the company's defense, arguing that because U.S. Bank made only common-law claims instead of citing specific state or federal securities laws, the suit was not covered under the securities provision.

But Judge Carpenter agreed with Verizon's argument that the insurers' interpretation was too narrow.

"Nothing in the policies' definitions of securities claims purports to exclude common-law rules or to limit coverage to only those claims alleging violations of enumerated state or federal securities statutes and regulations," Judge Carpenter wrote in his March 2017 order.

The insurers challenged Judge Carpenter's judgment on multiple fronts, including that his reading of the securities provision was overly broad. U.S. Specialty and the AIG insurers argued in a brief filed with the Delaware Supreme Court that, if the lower court's ruling is affirmed, it would broaden "what it means to regulate securities to anything that somehow involves securities," resulting in companies securing coverage for a variety of claims that fall outside the securities provision's intended scope.

Verizon, meanwhile, said Judge Carpenter correctly held that the plain language of the provision doesn't limit coverage only to claims based on statutes that "specifically" or "principally" regulate securities.

"While insurers argue that the plain language of the key securities claim definition supports their denial of coverage, every time they describe that supposedly 'plain' language they are forced to add words that appear nowhere in the definition," Verizon's attorneys wrote.

The case has been fully briefed and is awaiting an argument date.

Verizon is represented by Robin L. Cohen, Keith McKenna and Michelle R. Migdon of McKool Smith PC and Jennifer C. Wasson and Carla M. Jones of Potter Anderson & Corroon LLP.

U.S. Specialty is represented by John C. Phillips Jr. and David A. Bilson of Phillips Goldman McLaughlin & Hall PA and Joseph A. Bailey III of Clyde & Co. LLP. The AIG insurers are represented by Kurt M. Heyman and Aaron M. Nelson of Heyman Enerio Gattuso & Hirzel LLP and Scott B. Schreiber, James W. Thomas Jr., William C. Perdue and R. Reeves

Anderson of Arnold & Porter.

Zurich is represented by Ronald P. Schiller, Daniel J. Layden and Jason A. Levine of Hangley Aronchick Segal Pudlin & Schiller and Bruce W. McCullough of Bodell Bove LLC.

The case is In Re: Verizon Insurance Coverage Appeals, numbers 558,2018, 560,2018 and 561,2018, in the Delaware Supreme Court.

Dino v. Safeco Insurance Co. of America

The Connecticut Supreme Court is set to decide which coverage trigger applies to progressive property damage taking place over many years, in a case that could affect thousands of policyholders in the state whose homes contain crumbling concrete foundations.

The litigation concerns Richard and Melanie Dino's efforts to force three of their homeowners insurers — Safeco Insurance Co. of America, Sentinel Insurance Co. Ltd. and Twin City Fire Insurance Co. — to cover their costs to repair damage to the basement walls of their Tolland, Connecticut, home due to the shoddy concrete work.

Ruling on the parties' motions for summary judgment, a state trial court applied a "manifestation trigger," under which the only policy triggered is the one that is in effect when the property damage at issue "becomes known or reasonably discoverable." The lower court noted that the Dinos didn't discover cracking in the walls until summer 2015, after the three insurers' policies had expired. As a result, it held that none of the carriers is obligated to cover the Dinos' repair costs.

On appeal, the Dinos have asked the Connecticut Supreme Court to reject the trial court's use of the manifestation trigger and instead adopt a "continuous trigger," under which all policies in place from the time damage begins to the time it is discovered are triggered. A number of courts have adopted a continuous trigger in other contexts, such as asbestos injury claims, the Dinos noted.

"It would be inequitable to deny a homeowner their recovery based upon the uncertainty of proof where, as here, it is apparent that a structural impairment has resulted from a long term process of decay," the Dinos' attorney wrote. "This potential inequity is equally addressed by a continuous injury trigger in this context as it is in asbestos litigation."

The insurers shot back in a pair of briefs that the Dinos are improperly trying to apply the continuous trigger, which is typically limited to the realm of third-party liability claims, in the first-party property insurance context.

"Unlike individuals afflicted with terrible diseases and cancers which will result in premature death (and which know no limits or geographic boundaries), crumbling foundations in Connecticut concern a finite — but undoubtedly significant and concerning — number of homeowners concentrated in a relatively small, defined area of this state," attorneys for Safeco wrote in one of the briefs.

According to the court filings, the high court's forthcoming decision could help dictate the scope of coverage available to about 34,000 policyholders in the state's Tolland, Hartford and Windham counties whose homes have suffered damage allegedly tied to foundations containing defective concrete. A joint investigation by Connecticut's attorney general and its Department of Consumer Protection concluded in 2016 that the problematic concrete was traceable to a single quarry operated by J.J. Mottes Concrete Co., although the company has disputed that finding.

The case, which has been fully briefed and is awaiting an argument date, is one of three

pending before the Connecticut Supreme Court that touches on coverage issues relating to the crumbling foundation epidemic. In December, the state justices heard arguments in two other cases, Jemiola v. Hartford and Karas v. Liberty, that concern whether various homeowners policy provisions cover the progressive damage caused by the shoddy foundations.

The Dinos are represented by Jeffrey R. Lindequist of The Law Office of Michael D. Parker.

Safeco is represented by Kieran W. Leary of Quilling Selander Lownds Winslett & Moser PC and Philip T. Newbury Jr. of Howd & Ludorf LLC.

Twin City and Sentinel are represented by Thomas O. Farrish and Daniel J. Raccuia of Day Pitney LLP.

The case is Richard N. Dino et al. v. Safeco Insurance Co. of America et al., number SC 20197, in the Connecticut Supreme Court.

Emer's Camper Corral v. Western Heritage Insurance Co.

The Wisconsin Supreme Court recently agreed to tackle a case concerning the requirements for a policyholder to pursue a suit alleging its insurance agent failed to secure a policy with favorable terms.

On July 10, the Badger State's high court granted review in the case of Emer's Camper Corral v. Western Heritage Insurance Co. to answer the following question: In "a suit for failure to procure requested insurance, must the plaintiff prove causal damages by showing she could have personally obtained an insurance policy equal to or better than the policy promised to her by her agent?"

In the case, Camper Corral, a family-owned business that sells new and used campers, sued insurance broker Alderman Inc. in February 2015 after a hail storm resulted in hundreds of thousands of dollars in damage to its inventory.

Camper Corral asserted that Alderman breached its duty as an insurance agent by procuring it a property policy with Western Heritage Insurance Co. that containing a $5,000 per-unit deductible for hail claims, rather than a total aggregate deductible of $5,000. According to the camper dealer, Alderman's error caused it to have to pay $125,000 in deductibles before it could tap into the policy's coverage.

The suit proceeded to a jury trial, but the trial court ultimately granted a directed verdict in Alderman's favor after finding that Camper Corral had failed to present evidence that it would have been able to obtain a policy with a $5,000 aggregate deductible "absent Alderman's alleged negligence." In April, a three-judge panel of the Wisconsin Court of Appeals affirmed the lower court's judgment, prompting Camper Corral to appeal to the state high court.

Camper Corral's opening brief is due on Aug. 9.

Camper Corral is represented by Steven L. Miller of Miller Appellate Practice LLC.

Alderman is represented by Rolf E. Sonnesyn and Beth L. LaCanne of Tomsche Sonnesyn & Tomsche PA.

The case is Emer's Camper Corral LLC v. Western Heritage Insurance Co. et al., number 2018AP458, in the Wisconsin Supreme Court.

--Additional reporting by Rick Archer. Editing by Kelly Duncan and Jill Coffey.