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INSURANCE LAW 2019: THE YEAR IN REVIEW

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As the second decade of the Twenty-First Century careens to a close, we pause to look past over the past year to identify claim and coverage developments and trends that emerged in 2019 that may prove consequential in the years to come.

I. Top 10 Insurance Rulings

While there were numerous important insurance coverage and bad faith rulings in 2019, here are ten that stand out:

1. [James River Ins. Co. v. Doswell Truck Stop LLC](#), No. 180624 (Va. May 16, 2019)(Virginia Supreme Court ruled that CGL exclusion for losses involving "any auto" precluded coverage even though the auto in question was not owned or leased by the insured).

2. [Karas v. Liberty Ins. Corp.](#), SC 20149 (Conn. Nov. 12, 2019)("collapse" does not occur until a building is in imminent danger of falling down and therefore unsafe for its intended purpose; later policies requiring abrupt collapses do not apply to gradual deterioration of insured's concrete foundation).

3. [Keodalah v. Allstate Ins. Co.](#), No. 95867-0 (Wash. Oct. 3, 2019). In a rare win for insurers in Washington, the state Supreme Court ruled that alleged misconduct on the part of a claims adjuster could not form the basis for a bad faith claim pursuant to the state's Consumer Protection Act.

4. [Pitzer College v. Indian Harbor Ins. Co.](#), S239510 (Cal. Aug. 29, 2019)(California Supreme Court refused to give effect to a New York choice of law in an environmental liability policy as it would give effect to consent language that is contrary to fundamental policy of California of requiring prejudice for notice provisions).

5. [RSUI Ind. Co. v. New Horizon Kids Quest, Inc.](#), No. 17-3567(8th Cir. Aug. 12, 2019)(excess insurer was not precluded from contesting whether enough of a \$7 million verdict against the insured day care center was for sexual molestation as to exhaust the \$3 million primary layer).

6. [R.T. Vanderbilt Company v. Hartford Acc. & Ind. Co.](#), No. SC 20000 (Con. October 8, 2019)(Connecticut becomes the first state that both follows a "pro rata" approach to long-tail allocation issues but also recognizes an "unavailability" exception).

7. [Sanders v. Illinois Union Ins. Co.](#) 2019 IL 125465 (Ill. Nov. 21, 2019)(the "offense" of malicious prosecution occurs when a criminal defendant is wrongfully convicted rather than the later date when he or she is exonerated of that offense).

8. [Sapa Extrusions, Inc. v. Liberty Mutual Ins. Co.](#) No. 18-2206 (3rd Cir. Sept 13 2019)(whereas insurers with current "occurrence" wordings were not required to provide coverage for product liability claims against a manufacturer, older policies containing "expected or intended" language were materially different from the more recent "occurrence" forms and required further consideration by the District Court in Pennsylvania).

9. Summit Ins. Co. v. Stricklett, No. 2017-185 (R.I. Feb. 5, 2019)(the fiduciary obligation of liability insurers to settle in good faith runs only to the insured and could not support a bad faith claim by a tort claimant absent an assignment of the insured's rights).

10. Universal Cable Productions LLC v. Atlantic Specialty Ins. Co., No. 17-56672 (9th Cir. July 12, 2019)("war" exclusion did not eliminate first party coverage for losses due to Hamas missile attacks on Jerusalem because the customary usage of "war" in the insurance industry requires that 'war' involve a conflict between actual or de jure governments).

II. New Claim Trends

Cyber-attacks continue to dominate the news, even as growing concerns about data security propel a growing market for cyber-coverage. Travelers' 2019 Risk Survey of 1200 business leaders found that cyber risks are now uppermost on the mind of policyholders. 55% of survey respondents listed cyber as their biggest worry, followed by medical cost inflation (54%), employee benefit costs (53%), the ability to attract and retain talent (46%) and legal liability (44%). Beazley reported that the incidence of ransomware attacks rose 37% in the third quarter of 2019, with a particular emphasis on attacks against IT vendors and their customers. The FBI is no longer discouraging insureds from ransoming their data and even the City of Baltimore, which was crippled for weeks when it resisted a RobbinHood attack earlier in the year, purchased two \$10 million cyber-insurance policies from Chubb and AXA XL. At the same time, a controversial article in ProPublica questioned whether the availability of insurance for cyber-attacks was emboldening thieves to demand more money.

The growing trend towards relaxing statutes of limitations claims for sexual assaults also unleashed a new wave of liability claims in 2019 against institutional insureds such as the Boy Scouts of America, Catholic Dioceses and numerous schools and universities. In New York, over 400 law suits during the first week of the Empire State's yearlong window for expired claims. At year's end, dozens of claims against former Hollywood mogul Harvey Weinstein were reportedly settled with \$25 million in funds contributed by the insurers of Weinstein and Miramax.

On the environmental front, groundwater contamination claims by states and municipalities against E.I. DuPont and other manufacturers and distributors of polyfluoroalkyl (PFA) products) look like the second coming of MTBE.

III. Changes in the Insurance Industry

Guy Carpenter released a new report on the "Changing Nature of Risk" at this year's Rendez-Vous in Monte Carlo concluding that, contrary to past loss cycles, a hardening of insurance and reinsurance markets may now finally be underway and that is being led by losses to property insurers from hurricanes, wildfires and other catastrophic causes.

Brexit is continuing to accelerate the flight of insurance capital from London to Belgium, Luxembourg, Ireland and other European insurance centers.

Technology remains the emerging frontier for insurance underwriting and claims handling. In 2019, Allianz SE announced that it is moving core pieces of its global insurance platform to Microsoft's Azure cloud and will open-source parts of the solution's core to improve and expand capabilities. Meanwhile, Swiss Re became the latest insurer to add telematic features to its personal lines coverage. At year's end, Allstate announced that it is closing down its Esurance and Encompass brands and will consolidate its sales operations to allow consumers to buy car and home insurance through its web site.

At year's end, personal lines insurers in California pushed back against efforts by the state Insurance Commissioner to force them to provide broader coverage for losses due to the wildfires that have become a new normal in the Golden State.

Fresh on the heels of its successful campaigns to persuade several state legislatures to disavow the Restatement of Law, Liability Insurance, the National Council of Insurance Legislators has proposed a Model Act for states to adopt, declaring that the RLLI is "inconsistent or in conflict with: (1) The Constitution of the United States or of this state; (2) A statute of this state; (3) This state's case law precedent; or (4) Other common law that may have been adopted by this state."

IV. Key Rulings By Issue Area

The attached [hyperlink](#) contains a detailed summary of the major 2019 insurance coverage and bad faith rulings by issue area.

V. Insurance Coverage Appeals to Watch In 2020

1. California: TCPA/Coverage B

In late March, the California Supreme Court agreed to accept a certified question from the Ninth Circuit in Yahoo! Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA, No. 17-16452 (9th Cir. Jan. 16, 2019), asking whether TCPA claims involve an "oral or written publication of material that violates a person's right of privacy" and, in particular, whether this privacy "offense" covers the right to secrecy, seclusion or both.

2. Florida: Tripartite Relationship

In June, the Florida Supreme Court accepted jurisdiction in Arch Ins. Co. v. Kubicki Draper LLP, No. 19-673 to decide whether "an insurer has standing to maintain a malpractice against counsel hired to represent the insured where the insurer has a duty to defend."

3. Maryland: Allocation

The Maryland Court of Appeals heard oral argument in September in Rossello v. Zurich American Ins. Co. in a case where a lower court ruled that Zurich was only obligated to pay a pro rata share of a \$3 million judgment that Rossello recovered against its policyholder.

4. Massachusetts: Trigger of Coverage/Continuing Losses

The First Circuit is expected to rule soon in Clarendon National Ins. Co. v. Philadelphia Indemnity Ins. Co., No. 19-1212. At issue is whether a federal district court erred in ruling that a subsequent liability insurer had no obligation to provide coverage for a tenant's mold claims in light of the fact that the mold problem had begun prior to the beginning of Philadelphia's 2007 policy period and had resulted in numerous complaints to the insured property management company prior to the issuance of the policy.

5. Massachusetts: Estoppel/Reservations of Rights

The Supreme Judicial Court will hear oral argument in February in the matter of Dorchester Mutual Ins. Co. v. Russell, SJC-12856 on the issue of whether a "physical abuse" exclusion applied to a reckless assault and/or whether the insurer was estoppel to raise the abuse exclusion since its original reservation of rights had not mentioned it.

6. Nevada: Duty to Defend/Recoupment

Briefing is nearing completion in Nautilus Insurance Co. v. Access Medical, LLC, 79130. July 2, 2019), a case in which the Nevada Supreme Court is considering a certified question from the Ninth Circuit with respect to whether "an insurer entitled to reimbursement of costs already expended in defense of its insureds where a determination has been made that the insurer owed no duty to defend and the insurer expressly reserved its right to seek reimbursement in writing defense has been tendered but where the insurance policy contains no reservation of rights?"

7. Pennsylvania: Bad Faith/Standard of Review

In March, the Pennsylvania Supreme Court agreed to accept review of Berg v. Nationwide Mutual Insurance Co., No. 569 MAL 2018 (Pa. Mar. 29, 2019), in which the Superior Court set aside a \$21 million bad faith award against an auto insurer on the basis of apparent bias by the trial judge and insufficient evidence of bad intent on the part of the insurer. The key issue before the Supreme Court is whether the intermediate appellate court abused its discretion by reweighing and disregarding clear and competent evidence upon which the trial court relied to support its finding of insurance bad faith [pursuant to the standard set forth in Rancosky v. Washington Nat'l Ins Co., 170 A.3d 364 (Pa. 2017)].