PLUNKETT COONEY

Allocation, Standing, Exhaustion Insurance Coverage Update

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Allocation – Maryland

Rossello v. Zurich Am. Ins. Co.
--- A.3d ---, 2020 WL 1650385 (Md. Apr. 3, 2020)

The Maryland Court of Appeals (Maryland's highest court) held that an insurer was only required to pay a portion of a $2.7 million judgment based on the time-period in which its policies were in effect. In the underlying action, the plaintiff sued an asbestos installer after being diagnosed with mesothelioma.

The plaintiff was exposed to asbestos in the workplace approximately 40 years before his diagnosis. After the plaintiff obtained a $2.7 million judgment, the Circuit Court for Baltimore City issued a writ of garnishment to the insurer of the asbestos installer. The asbestos installer argued that its insurer was liable for the entire judgment, which was for injuries that spanned 40 years, even though the insurer only issued liability policies from 1974 to 1977. Specifically, the installer advocated for an "all sums" or "joint and several" approach pursuant to which any policy triggered by a claim is required to pay the entire loss.

The Court of Appeals of Maryland disagreed with this position and instead applied the "pro rata" approach – under which an insurer is only liable for the time it was on the risk – as adopted in 2002 by the Court of Special Appeals in *Mayor and City Council of Baltimore v. Utica Mut. Ins. Co.*, 145 Md. App. 256; 802 A.2d 1070 (Md. Ct. Spec. App. 2002). The appellate court recognized that the "pro rata" approach is "unmistakably consistent with the language of standard CGL policies." "Consistent with the policy language limiting coverage to that which occurs 'during the policy period,' the timing of the injury dictates both the manner in which the policies are triggered and the portion of damages for which each policy is responsible." Thus, the appellate court ruled that the insurer was only liable for a pro rata share of the insured's damages based on the insurer's time on the risk.

Standing – Texas

Farmers Texas Cnty. Mut. Ins. Co. v. Beasley
--- S.W.3d ---, 2020 WL 1492412 (Tex. Mar. 27, 2020)

The Texas Supreme Court reversed the court of appeals' holding that an insured had standing to sue his personal injury protection insurer for failing to pay "reasonable medical expenses" incurred by the insured and dismissed the lawsuit against the insurer.

In 2007, Ronald Beasley (Beasley) was injured in a car accident and received medical treatment. The medical provider billed over $2,600 for its services. Beasley's medical insurer negotiated a reduced rate of approximately $1,069 and paid that amount to the medical provider. A few years later, Beasley claimed personal injury protection benefits from his insurer, Farmers Texas County Mutual Insurance Company (Farmers), for the treatment in the amount of $2,500, which was his policy's limit for reimbursement of medical expenses. When Farmers refused, Beasley instituted a lawsuit against Farmers, alleging violations of the Texas insurance code and the state's Deceptive Trade Practices Act.

The trial court dismissed the action on the basis that Beasley lacked standing to bring the action because he had not suffered an injury. The trial court reasoned that since the medical provider accepted the reduced rate offered by Beasley's medical insurer as full satisfaction for its services, he had not actually incurred any additional expenses. The appellate court reversed, saying that Beasley's allegations of breach of the personal injury protection agreement were sufficient to confer standing for Beasley to bring the action.

The Texas Supreme Court reversed the appellate court's ruling, reinstating the dismissal of the action based on Beasley's lack of standing. The Supreme Court agreed with the trial court that "Beasley had not suffered any actual or threatened injury" because he was never responsible for paying the difference between the billed amount and the reduced rate amount for his medical procedure. In its decision, the Supreme Court rejected Beasley's argument that Farmers improperly considered a collateral source of benefits in determining the amount of benefits it would pay under the personal injury protection coverage, finding that the health insurer's negotiated discount did not constitute a collateral source of benefits.

Exhaustion – California

Montrose Chem. Corp. v. Superior Court of Los Angeles Cnty.
--- F.3d ---, 2020 WL 1284958 (5th Cir. Mar. 18, 2020)

The California Supreme Court recently ruled that former pesticide maker Montrose Chemical Corporation of California (Montrose) is not required to exhaust all of its lower-level insurance policies prior to invoking its excess insurance policies for environmental damage claims. The claims at issue stem from Montrose's production of DDT in the Los Angeles area between 1947 and 1982.

In order to determine "whether the administrative task of spreading the loss among insurers is one that must be borne by the insurer instead of the insured," the California Supreme Court compared the

"vertical exhaustion" and "horizontal exhaustion" methods of allocation. Under the "horizontal exhaustion" method, which was determined to be the correct one by the California Court of Appeals, Montrose would be required to exhaust all of its available primary insurance before allocating losses to excess insurers. Under the "vertical exhaustion" method, Montrose could request coverage from an excess policy, if the underlying policy in that same year has been depleted. Under this method, the excess insurers that are required to provide coverage can bring a contribution action for reimbursement from the other carriers.

In reviewing Montrose's excess insurance policies, the Supreme Court determined that reasonable arguments could be made for both methods of allocation. However, the Supreme Court found that certain aspects of the excess policies suggested that the exhaustion requirement language is not intended to apply to policies in other policy periods. Additionally, the Supreme Court noted that the horizontal method of allocation would be procedurally difficult to implement, expensive and time consuming. Thus, the Supreme Court held that the "vertical exhaustion" method was the proper way to allocate the multi-year losses.

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