PLUNKETT COONEY

Bad Faith, Licensing and Incorporation Coverage Update

June 17, 2019
The e-POST

Bad Faith – South Carolina

In re Mt. Hawley Ins. Co.
--- S.E.2d ---, 2019 WL 2441119 (S.C. June 12, 2019)

Answering a certified question from the U.S. Court of Appeals for the Fourth Circuit, the Supreme Court of South Carolina held that insurers do not automatically trigger the "at-issue" exception to the attorney-client privilege by denying liability in a bad faith action. In the underlying case, the insured was sued for performing defective construction. The insured ultimately settled the construction defect action and brought a bad faith action against its insurer, Mt. Hawley Insurance Company (Mt. Hawley), for failing to provide a defense in the underlying case. Mt. Hawley claimed that it denied coverage to its insured in good faith, and the insured subsequently sought various documents to discover why Mt. Hawley had denied coverage. Mt. Hawley asserted that the documents were protected from disclosure by the attorney-client privilege.

The appellate court certified to the Supreme Court the question of whether an insurer automatically waives the attorney-client privilege by denying liability in a bad faith action. The Supreme Court ruled that an insurer's denial of bad-faith, without more, is not enough to waive the attorney-client privilege. Instead the Supreme Court adopted the standard announced by the Supreme Court of Arizona in *State Farm Mut. Auto. Ins. Co. v. Lee*, 13 P.3d 1169 (Ariz. 2000). The holding in *Lee* states that a party does not waive the attorney-client privilege unless it has "asserted some claim or defense, such as the reasonableness of its evaluation of the law, which necessarily includes the information received from counsel." The Supreme Court held that "the *Lee* framework is the most consistent with South Carolina's policy of strictly construing the attorney-client privilege and requiring waiver to be 'distinct and unequivocal.'"

Licensing and Incorporation – New York

Andrew Carothers, M.D., P.C. v. Progressive Ins. Co.
--- N.E.3d ---, 2019 WL 2424476 (N.Y. June 11, 2019)

The New York Court of Appeals ruled that a group of insurers did not have to pay approximately $20 million to a radiology practice for MRI services it provided to car accident victims. This dispute arose

when Andrew Carothers MD, PC (Carothers) sued several insurance carriers (the insurers) for refusing to reimburse Carothers for MRI services it provided to patients between 2005 and 2006. The insurers refused to provide reimbursement on the basis that Carothers was illegally controlled by non-physicians. At trial, a jury issued a verdict in favor of the insurers after finding that non-physicians were the *de facto* owners of Carothers, and, therefore, that Carothers was incorporated in violation of state law.

On appeal to the New York Court of Appeals, Carothers argued that, under the court's prior decision in *State Farm Mut. Auto. Ins. Co. v. Mallela*, 827 N.E.2d 758 (N.Y. 2005), a finding of fraud was required for the insurers to withhold payments to Carothers. The appellate court disagreed and stated that "[t]oday we clarify that *Mallela* does not require a finding of fraud for the insurer to withhold payments to a medical service corporation improperly controlled by nonphysicians." Therefore, the appellate court upheld the jury's verdict and found that the trial court did not err in failing to instruct the jury that a finding of fraudulent intent or conduct was required.

Plunkett Cooney's insurance coverage update, The e-Post, is published bi-monthly via email. To receive your copy when it is issued, simply email - subscribe@plunkettcooney.com. Please indicate in the email that you would like to be added to the marketing list for the e-POST.