PLUNKETT COONEY

Unavailability Rule, Bad Faith, Additional Insured Coverage Update

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New York, Washington Insurance Coverage Update
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Unavailability Rule – New York

Keyspan Gas East Corp. v. Munich Reinsurance Am., Inc.
--- N.E.3d ---, 2018 WL 1472635 (N.Y. Mar. 27, 2018)

Applying a *pro rata* allocation method in a case involving environmental contamination caused by manufactured gas plants, the New York Court of Appeals held that the insurer was not liable to cover years when there was no applicable insurance coverage available on the market. Though the insurer issued eight excess liability policies, there were some years where the insured had no coverage because insurance was unavailable on the market. As an issue of first impression, the Court of Appeals declined to adopt the unavailability rule, which would have allocated to the insurers those years in which insurance was unavailable to the insured. The appellate court explained that "the unavailability rule is inconsistent with the contract language that provides the foundation for the *pro rata* approach – namely, the 'during the policy period' limitation[.]" The appellate court reasoned that this rule would "impose liability in perpetuity (or retroactively to periods prior to coverage) on an insurer who issued insurance coverage for only a limited number of years, thereby eviscerating much of the distinction between *pro rata* and all sums allocation." The appellate court further held that applying the unavailability rule in such a case "would effectively provide insurance coverage to policyholders for years in which no premiums were paid and in which insurers made the calculated choice not to assume or accept premiums for the risk in question." According to the appellate court, this would "contravene the reasonable expectations of the average insured, who would not expect to receive coverage without regard to the number of years for which it purchased applicable insurance[.]" Ultimately, the appellate court ruled that "because 'the very essence of *pro rata* allocation is that the insurance policy language limits indemnification to losses and occurrences during the policy period'... the unavailability rule cannot be reconciled with the *pro rata* approach."

Bad Faith – Washington

Keodalah v. Allstate Insurance Co.
--- P.3d ---, 2018 WL 1465526 (Wash. App. Mar. 26, 2018)

The Washington Court of Appeals reversed a lower court's dismissal of claims against an Allstate Insurance Company (Allstate) adjuster for bad faith and violations of the state's Consumer Protection Act (CPA), holding that "[n]othing in the statute limits the duty of good faith to corporate insurance adjusters or relieves individual insurance adjusters from this duty." The insured was injured in an auto accident with a motorcyclist, whom a jury determined to be solely at fault, and sought the limits of his underinsured motorist coverage. The adjuster claimed that the insured was talking on his cell phone and ran a stop sign at the time of the accident and concluded that the insured was 70 percent at fault. As a result, the adjuster offered an amount less than the policy limit. The adjuster later admitted that the police report and Allstate's own accident reconstructionist invalidated those allegations, but argued that she was acting within the scope of her employment and that state law did not impose an individual duty of good faith on her. The appellate court disagreed, holding that "[t]he code's broad definition of 'person' includes both individuals and corporations and does not make any distinction between the duties they owe." The appellate court disagreed with the adjuster's argument that a contractual relationship is needed to claim a CPA violation, saying this was inconsistent with a Washington Supreme Court's ruling, reasoning that "requiring a consumer relationship is inconsistent with the plain language of the CPA and undermines the purposes it serves."

Additional Insured – New York

Gilbane Bldg. Co./TDX Constr. Corp. v. St. Paul Fire & Marine Ins. Co.
--- N.E.3d ---, 2018 WL 1473553 (N.Y. Mar. 27, 2018)

The Court of Appeals of New York affirmed the Appellate Division's determination that the language of an additional insured provision plainly and unambiguously did not apply to provide Gilbane JV, the construction manager, with insurance coverage under the insurance policy issued to Samson Construction Company (Samson), the general contractor. The additional insured provision provided that the Who Is An Insured Section "is amended to include as an insured any person or organization with whom you have agreed to add as an additional insured by written contract but only with respect to liability arising out of your operations or premises owned by or rented to you." It was undisputed that "Gilbane JV ha[d] no written contract with Samson denominating it an additional insured," and that "the endorsement is facially clear and does not provide for coverage unless Gilbane JV is an organization 'with whom' Samson has a written contract." The appellate court concluded that Gilbane JV did not qualify as an additional insured under the policy issued to Samson "because the terms of the policy at issue here require a written contract between the named insured and an additional insured, if coverage

is to be extended to an additional insured."

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