February 2013 • Volume 2, Number 1

INSURANCE WEB SITES OF INTEREST

National Association of Insurance Commissioners
http://www.naic.org

Tennessee Department of Commerce and Insurance
http://tn.gov/commerce/

Dickinson Wright PLLC also publishes a separate informational newsletter with emphasis on Michigan insurance regulation, case law, and legislation. For further information and to subscribe to Dickinson Wright PLLC's Michigan Insurance Legal News, please contact Joseph A. Fink (jfink@dickinsonwright.com) or Ryan M. Shannon (rshannon@dickinsonwright.com).

DICKINSON WRIGHT'S

TENNESSEE INSURANCE LEGALNEWS

AUTO REPAIR TRADE ASSOCIATION REQUESTS THAT DOJ INVESTIGATE THE USE OF MOST FAVORED NATION CLAUSES BY AUTO INSURERS

by James M. Burns, who is a member in Dickinson Wright's Washington, D.C. office, and can be reached at 202.659.6945 or jmburns@dickinsonwright.com

Over the last several years, the use of most favored nation clauses by health insurers has been the focus of significant antitrust scrutiny, with legislation being enacted in several states that prohibits the use of such clauses in provider contracts and the DOJ Antitrust Division taking action against the use of such clauses as well. Now, it appears that the use of such clauses in other insurance contracts may be beginning to attract attention as well.

Specifically, the Automotive Service Association, a trade association of independent automotive service and repair professionals, recently sent a letter to the DOJ Antitrust Division urging the Antitrust Division to examine the use of most favored nation clauses by auto insurers. The association contends that the use of such clauses by national auto insurers, particularly when coupled with direct repair arrangements with other repair shops (typically those in an insurer's "preferred" network), impedes the ability of the association's members to compete for repair shop business from the insurers' insureds. The association further notes that, in its judgment, many of the potential concerns about the use of MFN clauses raised at the FTC/Antitrust Division's MFN clause symposium in September apply in the auto repair industry as well.

The association therefore urges the Antitrust Division to "continue to pursue the MFN clause issue," and requests that the DOJ agree to a meeting with the association's leadership to discuss how the use of most favored nation clauses allegedly impedes competition in the auto repair industry. Notably, however, most antitrust claims by independent repair shops challenging the right of an insurer to utilize a "preferred" network of repair shops, including the recent *Harner v. Allstate* case in the Southern District of New York, have failed, with the courts typically holding that the plaintiff could not allege antitrust injury resulting from the insurers' practices. Whether the Automobile Service Association will have any better success in advocating its views to the Antitrust Division, and if so, where it might lead, remains to be seen. Stay tuned.

TENNESSEE WILL NOT RUN HEALTHCARE EXCHANGE

by John E. Anderson, Sr., who is a member in Dickinson Wright's Nashville office, and can be reached at 615.620.1735 or janderson@dickinsonwright.com

Tennessee Governor Bill Haslam recently announced that Tennessee will not set up a state-run insurance exchange under the Patient Protection and Affordable Care Act. Instead, he will allow the federal government to set up and run a health insurance exchange for the state of Tennessee. Governors in all 50 states were required to announce by December 14, 2012 their intent as to whether they plan to set up a state-run exchange; allow the federal government to run the exchange; or enter into an agreement with the federal government to operate a "partnership" exchange.

According to a transcript of his prepared remarks, Governor Haslam reached this decision after thoughtful consideration: "This decision comes after months of consideration and analysis. It is a business decision based on what is best for Tennesseans with the information we have now that we've been pressed hard to receive from Washington. If this were a political decision, it would have been easy, and I would have made it a long time ago."

Haslam explained, "I am not a fan of the law. The more I know, the more harmful I think it will be for small businesses and costly for state governments and the federal government. It does nothing to address the cost of health care in our country. It only expands a broken system. That is why I have opposed it from the beginning and had hoped it would be successful in court and at the ballot box this year. Now we're faced with the fact that the law remains, and it requires every state to participate in an insurance exchange. Our decision is whether the state or federal government should run it, and the deadline for that decision is Friday."

"Since the Presidential election, we've received 800-plus pages of draft rules from the federal government, some of which actually limit state decisions about running an exchange more than we expected."

"In weighing all of the information we currently have, I informed the federal government today that Tennessee will not run a state-based exchange." Haslam, however, has left the door slightly cracked open for future reconsideration on this issue. "If conditions warrant in the future and it makes sense at a later date for Tennessee to run the exchange, we would consider that as an option at the appropriate time."

NEW OFFICES

The Insurance Division of the Tennessee Department of Commerce and Insurance has moved to the 6th and 7th floors of the Davy Crockett Tower building. The mailing address will remain the same: 500 James Robertson Parkway, Nashville, Tennessee 37243.

CASE LAW SUMMARIES

In a Matter of First Impression, the Tennessee Supreme Court Holds That Damages for Loss of Consumer Credit Are Recoverable Under the Tennessee Consumer Protection Act

by Autumn L. Gentry, who is a member in Dickinson Wright's Nashville office, and can be reached at 615.620.1755 or agentry@dickinsonwright.com

In *Discover Bank v. Morgan*, 363 S.W.3d 479 (Tenn. 2012), the Supreme Court held that under Tenn. Code Ann. § 47-18-109(a) of the Tennessee Consumer Protection Act ("TCPA"), actual damages are recoverable for the loss of available consumer credit due to the actions of a defendant if such damages can be proven with particularity.

In *Discover Bank v. Morgan*, Discover filed an action against Morgan to recover over $16,000 in credit card charges. Morgan filed an answer and counter-complaint denying any liability for the charges, alleging instead that the credit card had been issued to her deceased husband who had designated Morgan as a mere "authorized user" on the account. Morgan also alleged that Discover had previously informed her that she would not be held responsible for the account if she provided a copy of her husband's death certificate. After Morgan did so, however, Discover attempted to collect the balance from Morgan and reported her nonpayment to the credit reporting agency.

At trial, Morgan alleged that Discover's action injured her credit in a number of ways – she could no longer refinance her property as expected which would have lowered her monthly mortgage payments by at least $200 over fifteen years; her accounts were closed and her credit privileges were suspended by other companies which reduced her available credit from over $123,000 to $5,500; she was unable to open new credit accounts; the annual percentage rate on her other credit cards increased; and she could no longer purchase investment homes at the interest rate previously available to her. Morgan submitted no other evidence to support these damages.

Based upon Morgan's testimony, the trial court awarded her $117,900 for her reduction in available credit, $6,800 for additional home equity costs, $500 in additional interest expenses on her credit cards, for a total of $125,200. Finding that the TCPA applied, the trial court trebled the damages to $375,600, citing Discover's "intentional actions." Finally, the trial court awarded Morgan her attorney's fees of $4,460 for a total recovery of $380,060.

The Court of Appeals vacated the damages award and remanded the case for a new hearing on damages, holding that while a decrease in available credit warranted some measure of damages, the amount should not be calculated on a dollar-for-dollar basis. The Tennessee Supreme Court held otherwise.

The Tennessee Supreme Court began its analysis with a review of section 47-18-109(a)(1) of the TCPA which the Court noted provides a private cause of action for any "person who suffers an *ascertainable loss* of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated . . . ." Although the TCPA does not define "ascertainable loss," it commonly appears in other

states' consumer protection laws. After surveying the interpretations of other courts, the Court concluded that Tenn. Code Ann. § 47-18-109(a)(1) does not preclude damages for loss of consumer credit.

In reviewing cases from other jurisdictions which permit a cause of action for loss of available credit, the Court adopted a three-part test necessary for recovery. First, the plaintiff must have suffered a demonstrable loss of credit. Second, the defendant must have proximately caused the loss of credit. And third, the loss of credit must have caused actual harm to the plaintiff, such as lost profits or added costs.

Accordingly, plaintiffs must show something more than mere loss of credit. Rather, plaintiffs must demonstrate how the credit they lost would have resulted in specific profits or savings, e.g., higher interest on loans; lost discounts; or inability to earn interest. As a result, plaintiffs must lay "a sufficient foundation to allow the trier of fact to make a fair and reasonable assessment of damages."

The Court determined that Morgan had not provided a sufficient foundation to assess damages. However, because this was a matter of first impression wherein the Court articulated a new test for determining damages for loss of consumer credit, the Court remanded the case to the trial court for a new hearing on damages.

As long as plaintiffs can prove a loss of credit proximately caused by the defendant, and demonstrate the specific effects of that loss, plaintiffs will have a viable cause of action for loss of credit under the Tennessee Consumer Protection Act. Considering that the Act permits treble damages, insurers should be ever mindful of this new avenue of damages for plaintiffs.

The Supreme Court of Tennessee Decides the Fretful Question of Who Shall Bear the Burden of an Insurance Producer's Mistake

by Kelly M. Telfeyan, who is an associate in Dickinson Wright's Nashville office, and can be reached at 615.620.1721 or ktelfeyan@dickinsonwright.com

In *Allstate Insurance Co. v. Tarrant*, 363 S.W.3d 508 (Tenn. 2012), the Supreme Court of Tennessee held that a change made to an insured's policy of insurance by his insurance agent was not subject to ratification by the insured because the insurance agent was not acting in the insured's stead or for his benefit when it made the change and that the insurance company was estopped from denying coverage.

The relevant facts in *Tarrant* are as follows: On June 17, 2005, Charles Leatherwood was allegedly injured when the motorcycle he was driving collided with a van driven by Diana Lynn Tarrant. Mr. Leatherwood subsequently filed a lawsuit against Diana and John Tarrant, alleging that the accident was caused by Mrs. Tarrant's negligence.

After the negligence lawsuit was filed against the Tarrants, a dispute arose between the Tarrants and Allstate Insurance Company ("Allstate"), their vehicle insurer, as to the amount of liability insurance coverage that was available on the van. Allstate's position was that the van was covered under a personal policy with liability limits of $100,000 person and $300,000 per accident. Meanwhile, the Tarrants maintained that the van was covered under a commercial policy with liability limits of $500,000.

In October 2008, Allstate filed a declaratory judgment action seeking a ruling that the van was covered under the personal policy and, therefore, subject to the lower liability coverage of $100,000/$300,000. Allstate's complaint alleged that in March 2005, before the accident, Mr. Tarrant requested that his Allstate agent, the Lonnie Jones Agency ("the Jones Agency"), move the van from the commercial policy to the personal policy because he wanted to save money on premiums and that, accordingly, the Jones Agency moved the van and two other vehicles from the commercial policy to the personal policy. In their answer, the Tarrants denied that Mr. Tarrant directed the Jones Agency to move the van to the personal policy, alleged that transfer to the personal policy was the Jones Agency's mistake, and requested a declaratory judgment that at the time of the accident the van was covered under the commercial policy.

The trial court ruled that because Allstate had sent Mr. Tarrant a letter and premium bills reflecting the change in coverage and because Mr. Tarrant had paid the premium bills without objection, he had ratified the change in coverage and the van was covered under the personal policy. The Court of Appeals reversed the trial court, holding that Allstate failed to follow Mr. Tarrant's instruction that the van be covered under the commercial policy and that Mr. Tarrant's receipt of notification of the change in coverage and payment of premium bills reflecting the change did not absolve Allstate from liability.

The Supreme Court granted Allstate's application for permission to appeal to address two issues: (1) whether Mr. Tarrant ratified the transfer of the van from the commercial policy to the personal policy and (2) if Mr. Tarrant did not ratify the transfer, whether Allstate was estopped from denying coverage of the van under the commercial policy.

Reviewing the trial court's findings of fact de novo with a presumption of correctness, the Supreme Court concluded that Mr. Tarrant did in fact instruct the Jones Agency to place the van on the commercial policy and that the Jones Agency mistakenly failed to do so. Thus, the issue before the Supreme Court was whether Mr. Tarrant had ratified the transfer of the van to the personal policy.

In order for Mr. Tarrant to ratify the Jones Agency's mistake, the Supreme Court acknowledged that the Jones Agency must have been acting in the stead of Mr. Tarrant and for his benefit when the van was transferred to the personal policy.

Noting that the Jones Agency, by performing the clerical tasks necessary to implement Mr. Tarrant's request, acted in the place of Allstate, not Mr. Tarrant, and relying on Tenn. Code Ann. § 56-6-115(b), which provides that an insurance producer who solicits or negotiates an application for insurance shall be regarded as the agent of the insurer and not the insured, the Supreme Court determined that the Jones Agency did not assume the place of Mr. Tarrant and was, in fact, statutorily precluded from acting in Mr. Tarrant's stead.

The Supreme Court further concluded that the Jones Agency did not act for the benefit of Mr. Tarrant because Mr. Tarrant did not realize a profit or gain from the Jones Agency's actions. To the contrary, the Supreme Court determined that, because Mr. Tarrant had threatened to take his insurance business elsewhere if nothing could be done to lower his insurance premiums, it was Allstate that benefited as a result of the Jones Agency's mistake, as it was able to retain Mr. Tarrant's business.

Because the Jones Agency acted neither in the place or stead of Mr. Tarrant nor for his benefit, the Supreme Court determined that Mr. Tarrant could not have ratified the Jones Agency's mistake by continuing to pay his insurance premiums after receiving premium notices indicating that the van had been moved to the personal policy.

Having concluded that Mr. Tarrant did not ratify the Jones Agency's mistake, the final issue requiring determination was whether Allstate was estopped from denying coverage of the van under the commercial policy. Acknowledging the common law rule that an insurance company is generally deemed estopped to deny policy liability on a matter arising out of the negligence or mistake of its agent on the ground that an insurer – not the insured – should bear the consequences of an error by the insurer's agent, the Supreme Court held that Allstate was estopped from denying coverage of the van under the commercial policy because the van was transferred from the commercial policy to the personal policy as the result of a mistake by the Jones Agency.

So, what should insurance companies take away from the Supreme Court's findings in Tarrant? That an insurance producer is deemed to be the agent of the insurer, not the insured, and, hence, the consequences of any mistake made by an insurance producer will be borne by the insurance company, not the insured.

DICKINSON WRIGHT OFFICES

Detroit
500 Woodward Avenue
Suite 4000
Detroit, MI 48226
Phone: 313.223.3500

Columbus
150 E. Gay Street
Suite 2400
Columbus, OH 43215
Phone: 614.744.2570

Las Vegas
7201 West Lake Mead
Boulevard
Suite 503
Las Vegas, NV 89128
Phone: 702.541.7888

Nashville
424 Church Street
Suite 1401
Nashville, TN 37219
Phone: 615.244.6538

Phoenix
2901 N. Central Avenue
Suite 200
Phoenix, AZ 85012
Phone: 602-285-5000

Toronto
222 Bay Street, 18th Floor
PO Box 124
Toronto, ON, Canada M5K 1H1
Phone: 416.777.0101

Washington, D.C.
1875 Eye Street, NW
Suite 1200
Washington, DC 20006
Phone: 202.457.0160

Ann Arbor
350 S. Main Street
Suite 300
Ann Arbor, MI 48104
Phone: 734-623-7075

Grand Rapids
200 Ottawa Avenue, NW
Suite 1000
Grand Rapids, MI 49503
Phone: 616.458.1300

Lansing
215 S. Washington Square
Suite 200
Lansing, MI 48933
Phone: 517.371.1730

Saginaw
4800 Fashion Square Boulevard
Suite 300
Saginaw, MI 48604
Phone: 989-791-4646

Troy
2600 W. Big Beaver Road
Suite 300
Troy, MI 48084
Phone: 248.433.7200