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Insurance Coverage and Claims Handling: A Patchwork of Laws Applies to National Endeavors

By Jonathan M. Stern

Two recent decisions remind us that a one-size-fits-all approach to coverage analysis and claims handling is ill-advised. Insurance claims representatives situated within the jurisdiction for which they handle claims generally need to familiarize themselves with the law of one jurisdiction. Not so with claims representatives who frequently handle wide swaths of territory, such as those in the aviation insurance business. Their ability to maintain familiarity with the ever-changing law in numerous states presents greater challenges, and differentiated handling is required by the patchwork of state laws. As illustrated by the two recent cases discussed in this Alert, local distinctions can create different duties and procedural requirements with outsized consequences potentially befalling the insurer that fails properly to account for these differences in its coverage analysis and claims handling.

The first recent case, which was decided by the U.S. Court of Appeals for the Ninth Circuit on June 11, 2012 held that insurers have a duty to make reasonable efforts to settle cases when their insured's liability is reasonably clear and likely to exceed the policy's limit of liability, irrespective of whether a settlement demand is made by the plaintiff. In *Yang Fang Du v. Allstate Ins. Co.*, No. 10-56422 (9th Cir. Jun. 15, 2012), the panel predicted that California law imposes this duty on insurers but concluded that the Allstate subsidiary involved in that case had insufficient information about other persons injured in the subject accident to have been obligated to agree to a global settlement. The company had offered $100,000 (the applicable per claim limit), but refused to put up the remaining $200,000 available under its policy for a global settlement.

In most jurisdictions, a settlement demand within policy limits is a prerequisite to exposure in excess of policy limits. In cases governed by California law involving entry of a judgment in excess of limits, plaintiffs are likely to use the *Yang Fang Du* case to support bad faith arguments. While proactive steps to settle a case in which liability is clear typically are appropriate whether or not a demand has been made, the need to do so now is greater in cases governed by California law. An insurer that fails to make affirmative efforts to do so may end up with extracontractual liability.

The other recent case is from the Supreme Court of Georgia. It held that an insurer disclaiming coverage of a lawsuit is limited to the grounds for noncoverage asserted in the disclaimer. In *Hoover v. Maxum Indem. Co.*, Nos. S11G1681, S11G1683 (Ga. June 18, 2012), the high court ruled that only those insurers that undertake the defense of their insureds under a reservation of rights are permitted to assert additional grounds for their subsequent disclaimers.

Hoover was severely injured when he fell from a ladder. He sued his employer, EWES, which

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tendered its defense to Maxum. Maxum declined coverage on the basis of an employer's liability exclusion. After a large judgment was entered for Hoover against EWES, EWES assigned its rights against Maxum to Hoover. Maxum defended the suit that Hoover filed against it on two grounds, the exclusion and late notice of the occurrence. The trial court ruled that Maxum, on the basis of late notice of the occurrence, did not have a duty to indemnify, even though it found that the exclusion did not apply, but held that Maxum did have a duty to defend. The Court of Appeals held that Maxum, because of the late notice, had neither a duty to defend nor a duty to indemnify.

The Supreme Court of Georgia reversed and held that insurers may reserve rights to assert additional defenses only if they undertake an insured's defense and then bring an action for declaratory judgment. As a result, insurers handling cases governed by Georgia law may choose to defend under a reservation of rights rather than decline in order to avoid waiver of unenumerated grounds for the declination.

These two recent decisions serve as a reminder that insurance generally is governed by state law and that the rules of interpretation and the requirements for claims handling vary from jurisdiction to jurisdiction. Familiarity with the applicable rules in a particular jurisdiction is important, and consultation with counsel at the beginning of the handling of a new claim may be justified to avoid waiver of viable defenses or the creation of potential extracontractual liability. ◆

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