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4 Insurance Battlegrounds To Watch In New Jersey

By **Jeff Sistrunk**

Law360, Los Angeles (June 10, 2015, 9:08 PM ET) -- The New Jersey Supreme Court will soon decide whether insurers can deny coverage on the grounds of late notice without showing prejudice, while courts statewide grapple with sublimits and deductibles in Superstorm Sandy suits. Here, Law360 explores four issues that insurance lawyers are tracking in the Garden State.

Late Notice Prejudice Requirements

The New Jersey Supreme Court in October agreed to review a state appeals court's decision in the case of Templo Fuente De Vida Corp. v. National Union Fire Insurance Co. of Pittsburgh, Pa., which implicates the question of whether an insurer must show prejudice from a policyholder's late notice in order to deny coverage under a claims-made policy.

A panel of the appellate court found that National Union didn't have to cover a $3.2 million settlement on behalf of an insured that allegedly mishandled a church and day care center's real estate loan.

In the case, National Union's policy period ran from Jan. 1, 2006, until Jan. 1, 2007. The policyholder, Morris Mortgage Inc., was served with the plaintiffs' first amended complaint on Feb. 21, 2006, but didn't provide National Union with notice of the claim until Aug. 28, 2006.

The appellate panel upheld a trial judge's finding that MMI didn't give National Union notice of the plaintiffs' claim "as soon as practicable" and, therefore, coverage was barred under the terms of the policy.

According to policyholder attorneys, the panel conflated claims-made and occurrence-based policy concepts and departed from previous decisions by New Jersey courts in not requiring National Union to show prejudice to prevail on its late notice defense.

"I'm hoping that the Supreme Court will reverse," Anderson Kill PC shareholder Robert D. Chesler said. "The 'as soon as practicable' language has been occurrence-based since 1968, when the Supreme Court found that the language required appreciable prejudice. Just because you take that language and put it in a claims-made policy, that shouldn't alter that requirement."

If the state high court affirms the appellate panel's decision, "it could encourage insurers to issue 'gotcha' denials," according to Lynda Bennett, chair of Lowenstein Sandler LLP's insurance coverage practice.

"Here, the delay was six months, but what if it's two weeks?" Bennett said. "That's a dangerous place to go, and that's not how insurance companies have priced premiums for these policies."

Superstorm Sandy Coverage Disputes

New Jersey courts are continuing to address numerous issues pertaining to claims for coverage of damages from Hurricane Sandy, including the application of sublimits and deductibles and questions of causation.

In March, a New Jersey state judge held in the case of Public Service Enterprise Group Inc. v. Ace American Insurance Co. that some $500 million in damages that PSEG had suffered from the storm wasn't subject to flood-related limits in its insurance policies. The flood sublimits capped coverage for losses from storm surge flooding at $250 million per occurrence and limited payouts in particular flood zones to $50 million.

PSEG prevailed on its argument that, in all but one instance, its flood losses were inseparable from provisions covering damage from named storms, which don't have a sublimit. The case settled in April.

"I think for all those people with named storm or hurricane deductibles, it's a great benefit," Chesler said of the PSEG decision.

The ruling was also notable for the judge's interpretation of New Jersey's efficient proximate cause doctrine, which is also known as Appleman's Rule, attorneys say.

The rule applies when a loss results from multiple covered and uncovered events that occur sequentially in a chain of causation. Pursuant to the rule, "the loss is covered if a covered cause starts or ends the sequence of events leading to the loss," according to court documents.

PSEG asserted that wind was the "efficient proximate cause" of the storm surge damages and that the flood sublimits don't come into play, while the insurers argued that the rule doesn't apply outside of disputes essentially involving coverage versus no coverage. The judge disagreed, saying the rule has been applied in other contexts.

"The PSEG decision is important to those litigating Sandy cases — not just on the storm surge issue but on Appleman's Rule," Sherilyn Pastor, practice group leader forMcCarter & English LLP's insurance coverage group, said. "The court rejected insurers' arguments trying to limit Appleman's Rule relating to causation. The court also reiterated the rule of contract interpretation which mandates that more specific insurance provisions govern over more general provisions of a contract."

Allocation in Asbestos Cases

The New Jersey Supreme Court has been asked to review a state appeals court's ruling rejecting excess insurers' contentions that they shouldn't have to cover IMO Industries Inc. under a $1.85 billion insurance program for asbestos claims, a case that attorneys say has significant implications for the allocation of defense costs in long-tail, multiclaim coverage cases.

In an 81-page decision issued in September, an appellate panel rebuffed the excess insurers' appeal of a 2010 verdict and other rulings holding them liable for providing coverage to IMO for underlying personal

injury claims against the company, which manufactured asbestos-containing products. The panel found that the carriers shouldn't be allowed to revisit individual, settled claims where the defense has already been paid by the primary insurers.

"It's interesting that the Appellate Division said that, if excess carriers are given the opportunity to get involved while cases are proceeding and choose not to get involved until the primary coverage is exhausted, they don't get to come in and question the settlement later," Bennett said. "The message to excess carriers is that they either have to participate in the defense or accept the consequences."

The panel also upheld the lower court's ruling that a primary insurer's duty to defend ends once indemnity losses are allocated, regardless of whether there is a payment.

"That doesn't really fulfill the reasonable expectations of the insured," Bennett said. "The benefit of general liability policies is that an unlimited defense is provided, no matter how long it takes, or how much it costs. The court basically treated defense the same as indemnity, and said it's not fair to carriers to keep them on the hook indefinitely, but that is what they agreed to do in the insurance contract."

According to Bennett, the court's holding that an occurrence equates to the sale of an asbestos-containing product, rather than an individual exposure to such a product, "means easier access to defense coverage from excess carriers."

One common theme in the lengthy decision, Bennett said, is that the appellate court "was trying to articulate rulings that would facilitate the efficient use of the insurance resource to address these underlying actions."

"The Appellate Division seemed to be saying that it wants carriers in there defending and getting involved early, and when they do, there is a reward- when carriers spend those defense dollars, they're going to get credit," Bennett said. "The court seemed to acknowledge that these cases are getting too complicated and unwieldy, and it made rulings to allow courts and parties to handle them more efficiently than they do now."

Extracontractual Damages

The New Jersey high court recently refused to create a new judicial standard around bad faith claims in the case of Badiali v. New Jersey Manufacturers Insurance Group, but policyholders may have other avenues to pursue extracontractual damages over insurers' alleged misconduct, according to attorneys.

In March, a New Jersey federal judge held in the case of Bannon v. Allstate Insurance Co. that a homeowner could assert a claim under the state Consumer Fraud Act against Allstate in a dispute over coverage for damages stemming from Superstorm Sandy.

The federal judge looked to the Third Circuit's 2007 decision in Weiss v. First Unum Life Insurance Co. and predicted that the New Jersey Supreme Court would find that the CFA applies to the payment of insurance benefits.

"With Badiali not changing the bad faith standard, this may be a way for policyholders to obtain extracontractual damages through the Consumer Fraud Act, which provides for treble damages and attorneys' fees," Chesler said.

The Bannon court also declined to dismiss the homeowner's bad faith claim, as it was not clear whether the insurance company could prevail on summary judgment.

Pastor said that, specifically in the context of Sandy-related claims, courts will likely allow policyholders to pursue a variety of claims due to what she deemed inappropriate insurer conduct.

"Insurers and their agents have not timely and properly investigated, adjusted and paid claims," she said. "They have stonewalled and stalled. It therefore would not surprise me, given the type of conduct we've seen, for courts to allow breach of contract, bad faith, and CFA claims to move forward against insurers that wrongfully deprive their policyholders of insurance benefits to which they are otherwise entitled."

--Editing by Katherine Rautenberg and Chris Yates.
