



Three Key Insurance Law Decisions from 2020

by Joshua Gold

Given all the challenges of 2020, it would be easy to overlook some of the interesting insurance law developments during the last 12 months. The three legal decisions highlighted below from this past year involve dispute points in insurance law that have recurring importance to policyholders' risk management, in-house legal and treasury departments.

CYBER COVERAGE FOR MORE THAN RANSOMWARE PAYMENTS

Ransomware attacks have been unrelenting during the pandemic and aimed at some of the most crucial sectors, including health care. As the *New York Times* reported recently, cyberattacks on hospitals and health systems "have become their own kind of pandemic."

While ransomware demands have exploded, they are not the only harm inflicted by these attacks. A decision from January indicates that policyholders may have insurance coverage across an array of insurance products for losses beyond ransom payments. In *Nat'l Ink & Stitch, LLC, v. State Auto Prop. & Cas. Ins. Co.* (D. Md. Jan. 23, 2020), the court held that a policyholder that suffered serious damage and losses from a ransomware attack was entitled to all-risk property coverage for lost data, lost software, and a dysfunctional computer system and hardware. The court held:

Here, not only did Plaintiff sustain a loss of its data and software, but Plaintiff is left with a slower system, which appears to be harboring a dormant virus, and is unable to access a significant portion of software and stored data. Because the plain language of the Policy provides coverage for such losses and damage, summary judgment will be granted in favor of Plaintiff's interpretation of the Policy terms.

This case underscores that policyholders may have coverage for serious cyber incidents under policies that are not cyber-specific, including not only property policies as in this case, but also policies that insure against crime, D&O and E&O losses and claims.

EXCESS INSURANCE DISPUTES

Excess insurance companies that contest coverage and flee the pro-coverage findings of primary insurance companies can be the bane of a policyholder's existence. In the last decade or so, excess insurance companies have increasingly contested coverage where primary insurance companies honor their coverage obligations. One tactic used by certain excess insurance companies is to claim that underlying insurance is not properly exhausted because the primary insurance company paid "uncovered" loss. This argument gets made even where the excess coverage is "follow form." Fortunately for policyholders, a federal court appellate decision from this spring rejects these arguments.

In *Axis Reinsurance Co. v. Northrop Grumman Corp.* (9th Cir. 2020), the Ninth Circuit held that "excess insurers generally may not avoid or reduce their own liability by contesting payments made at prior levels of insurance," absent fraud, bad faith, or an express provision in their excess policy reserving the right of the excess insurer to contest payments made by underlying insurer.



ers. The issue of improper exhaustion most often comes up in the context of towers of D&O and E&O insurance programs. In Axis Reinsurance, however, the exhaustion of limits defense was asserted by a second layer excess insurance company, which argued that it did not have to provide excess liability insurance coverage under a Fiduciary Liability Insurance policy.

AXIS argued that underlying insurance companies paid an “uncovered” claim arising from Northrop’s settlement of alleged Employee Retirement Income Security Act of 1974 violations, thereby “improperly eroding” their policies’ liability limits and prematurely triggering AXIS’s excess coverage. The Ninth Circuit held there was no authority supporting the theory of “improper erosion” and applied the “general rule favoring the objectively reasonable expectations of the insured.”

RECOVERY OF COVERAGE LITIGATION ATTORNEY FEES

Any policyholder that has been through coverage litigation to enforce its coverage rights and recover its losses knows that this is an expensive endeavor—costing time, resources and money. Many jurisdictions hold that an insurance company that improperly denies coverage can be liable not only for the amount of the coverage owed all along, but also for coverage litigation costs, including the policyholder’s attorney fees. In a decision from this spring, *Houston Cas. Co. v. Prosight Specialty Ins. Co.*, (S.D.N.Y. May 27, 2020), an insurance company called HCC that had paid a claim, brought coverage litigation, standing in the shoes of the policyholder against another insurance company that had refused

to provide additional insured coverage to HCC’s policyholder.

The court held that the defendant insurance company owed additional insured coverage and awarded HCC’s coverage attorney fees, even though litigants usually bear their own attorney fees. The court relied on an oft-cited decision in *Mighty Midgets, Inc. v. Centennial Ins. Co.* (1979) and also the decision rendered in *U.S. Underwriters Insurance Co. v. City Club Hotel, LLC*, (2004), both recognizing that an insurance company that evades its obligations to provide defense cost coverage can be made to pay not only that coverage but also the expenses incurred in pursuing the breaching insurance company.

This decision is an important reminder that policyholders should not hesitate to seek recovery of their coverage litigation fees and costs where the insurance company improperly denies coverage—whether the policyholder is a plaintiff or defendant in the declaratory judgment action.

The issues in dispute in these cases—coverage for losses stemming from a cyberattack under non-cyber policies, failure of excess insurance companies to “follow form” when obligated to do so, and recovery of the costs of coverage litigation—are likely to recur repeatedly in coming years. In a difficult year, these decisions provide a few bright spots for policyholders. ■

Joshua Gold is a shareholder in Anderson Kill’s New York office and chair of Anderson Kill’s Cyber Insurance Recovery Group. He regularly represents policyholders in insurance coverage matters and disputes concerning arbitration, time element insurance, electronic data and other property/casualty insurance coverage issues.