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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

9 Key NY Insurance Cases Of 2014

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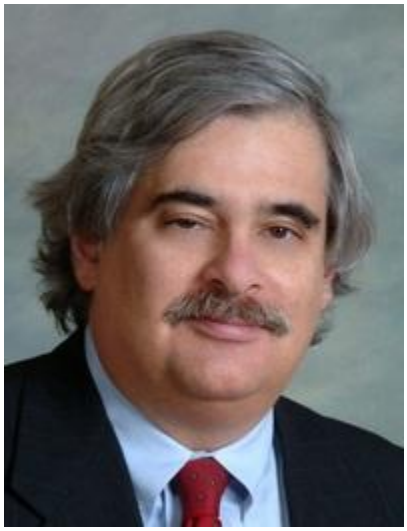

Robert D. Chesler

In 2014, New York courts developed significant legal precedent in a broad array of insurance coverage issues, including broker liability, allocation, data breach, right to attorneys' fees, discovery and bankruptcy. In the coming year, policyholders, insurance companies and brokers will grapple with these legal developments and New York courts will surely be given ample opportunities to analyze and review the new insurance law created by the 2014 rulings discussed below.

1. Zurich American Insurance Company v. Sony Corporation of America

On a national level, this is perhaps the most important insurance coverage case of 2014. Around 1974, the insurance industry added personal and advertising injury coverage to comprehensive general liability policies. This coverage included injury arising out of the publication of material that violates a person's right of privacy. For the past decade, this language has been subject to raging litigation across the country over whether violations of the Telephone Consumer Protection Act are "published" within the meaning of personal and advertising coverage.

In Zurich v. Sony, the battleground has shifted to coverage for data breaches. Millions of Sony customers' personal information was compromised. This resulted in over 50 class actions, which were multidistricted in California. Sony's primary insurance companies, Zurich American Insurance Company and Mitsui Sumitomo Insurance Company of America, sued Sony in New York. The court found that there was no coverage because there was no publication. The court reasoned that publication required an affirmative action by the policyholder and not an act by a third party. Since Sony's system was hacked, the court held that Sony did not transmit the information to a third party and was not entitled to coverage.

2. K-2 Investment Group LLC v. American Guarantee & Liability Insurance Company

This is perhaps the most perplexing of the 2014 insurance coverage decisions. The New York Court of Appeals initially held that if an insurance company wrongly denied its duty to defend, it was estopped

from later asserting coverage defenses. However, the court then agreed to a rehearing. On reconsideration, the court fully reversed itself. It found that it had overlooked controlling precedent, and on the basis of stare decisis, reversed its earlier decision. The precedent was Servidone Constr. Corp. v. Security Ins. Co. of Hartford, 64 N.Y. 2d 419 (1985). The court ultimately ruled that the insurance company was not barred from relying on policy exclusions as a defense to the coverage suit.

3. Keyspan Gas East Corporation v. Munich Reinsurance America Inc.

In an environmental cleanup insurance coverage action, the New York Supreme Court held that Keyspan was entitled to a pro rata "time on the risk" allocation, because the incurred property damage triggered multiple insurance policies. Under this formula, costs are allocated to each year, based on the number of years when the policy was in effect (numerator) over the total number of years of the claimant's injury (denominator). For years where a policyholder has no insurance coverage, it is treated as self-insured and bears the responsibility for its pro rata share of damages. However, when insurance was unavailable, proration to the policyholder is inappropriate.

Under NY Insurance Law 46 (which was later repealed), the issuance of pollution insurance was prohibited from 1971 to 1982, and environmental cleanup coverage was therefore unavailable. Still, the court held that the years between 1971 and 1982 should be included in the denominator of the pro rata calculation. The court held that "Keyspan shall be considered self-insured and bear responsibility for the pro rata share of costs" even though pollution coverage was statutorily prohibited during this time.

4. Voss v. Netherlands Insurance Company

Under New York law, it is difficult for a consumer to hold its insurance broker liable. In Murphy v. Kuhn, 90 N.Y.2d 266 (N.Y. 1997), the court of appeals essentially held that a broker was an order taker, not a professional, and would not be liable in most cases unless there was a "special relationship" between the policyholder and agent. Until Voss, the court did not elaborate on what constitutes a "special relationship."

In Voss, the broker reviewed the client's business information and gave extensive advice, including how much business interruption coverage she needed to buy. The advice was wrong, resulting in severe losses to the client, who sued the broker. The broker moved to dismiss the complaint, asserting that no special relationship existed between the broker and client. While the lower courts granted the motion, the court of appeals reversed and denied it, holding that whether a special relationship existed could not be decided on summary judgment. This case's holding is in tandem with American Building Supply Corp. v. Petrocelli Group, 19 N.Y.3d 730 (N.Y. 2012), in which the court of appeals held that a client's failure to read the policy did not bar an action against the broker. Major changes may be coming to New York broker law.

5. National Union Fire Insurance Company of Pittsburgh PA v. TransCanada Energy USA Inc.

This is another case where the insurance company sued its policyholder in New York. In this case, the court rejected most of the assertions of privilege by the insurance company. The assertions were based on the fact that attorneys had handled the claims. The court found that claims handling was the insurance company's normal business practice, and the mere fact that the insurance company used attorneys to handle claims did not "cloak" the documents in privilege. The court did draw a line between claims-handling documents and those documents providing legal advice, which would be privileged. This distinction will undoubtedly produce further litigation.

6. Newman Myers Kreines Gross PC v. Great Northern Insurance Co.

This Superstorm Sandy case arises out of Con Edison's decision to shut down certain electrical services to prevent damage — no damage had occurred. As a result of the electrical shutdown, lawyers at Newman Myers could not enter their building. The firm submitted a claim for business interruption with its property insurance company, which was denied. The U.S. District Court for the Southern District of New York upheld the denial.

The court found that coverage under the policy was triggered by "direct physical loss or damage." The policyholder argued that direct physical loss or damage meant "an initial satisfactory state that was changed by some external event into an unsatisfactory state." The policyholder posited that the cessation of electrical services was "direct physical loss or damage," since it prevented access to the building. The court disagreed. It reviewed the case law upon which the policyholder relied, and found that the relied-upon cases involved "some compromise to the physical integrity of the workplace." It found that no such physical change occurred as a result of the storm.

7. Executive Plaza LLC v. Peerless Insurance Company

This case represents a welcome victory for legal realism over formalism. The policyholder's building was damaged by fire. The dispute was whether the policyholder would receive replacement cost value or actual cost value, which differed by $242,187.50. The policy had two disputed clauses. First, suit had to be brought by the policyholder within two years after the loss. Second, the policyholder could not bring suit until it had finished the repairs.

The policyholder sued Peerless in state court when two years had expired. Peerless removed the case to federal court and then successfully moved to dismiss because the action was premature — the repairs were not complete. The policyholder then sued again in state court when it finished the repairs. The matter was again removed to federal court by Peerless, only to have the suit once again dismissed because more than two years had elapsed after the loss.

The Second Circuit certified the case to the court of appeals, which reversed and found coverage. It held that the Peerless clauses modifying the statute of limitations were unreasonable. The court held that there was nothing per se unreasonable about a two-year limitations period, but that the period became unreasonable when the policyholder could not repair the building within the two-year period.

8. American Home Assurance Company v. Port Authority of New York and New Jersey

The New York Appellate Division, First Department recently bolstered the holding of Mighty Midgets. The First Department unanimously affirmed Judge Eileen Bransten's ruling in favor of the Port Authority of New York and New Jersey's right to its attorneys' fees in a successful asbestos insurance coverage action stemming from the construction of the original World Trade Center.

The First Department held that the Port Authority's counterclaim for declaratory relief did not cast the American Home Assurance Company in a "defensive posture." Instead, the First Department held that Port Authority's counterclaim was the "mirror image" of American Home's declaratory claim. An insurance company suing for a declaration of no coverage, including no defense coverage, is now liable for its policyholder's attorneys' fees even where the policyholder moved for summary judgment on its counterclaim for defense coverage.

9. In re MF Global Holdings Ltd.

In this case, the U.S. Bankruptcy Court for the Southern District of New York considered whether insurance proceeds under directors and officers liability policies constituted property of the bankruptcy estate. MF Global's former directors and officers sought payment under the policies for defense costs they had incurred in legal actions against them. The court granted their motion, stating "it appears that the D&O Proceeds are not property of the … Debtors' estates[.]" The court allowed payment of the policies' proceeds, less $13.06 million, which constituted the amount MF Global Holdings Ltd. could claim against the policies if it paid certain estimated indemnification claims, minus a self-retention.

In reaching this decision, the court considered that lawsuits against MF Global Inc. and MF Global Holdings Ltd. and indemnification obligations giving rise to a claim against the D&O policies (other than the claims already filed) were unlikely. The court also found particularly persuasive a "priority of payment" provision in the policies requiring payment to the former directors and officers prior to payment to MF Global Holdings Ltd. or its subsidiaries for: (1) amounts they might pay as indemnification to the directors and officers or (2) claims made against MF Global Holdings Ltd. or its subsidiaries.

Conclusion

If the above cases are any indication, 2015 will likely be fraught with actions tackling the insurance trends of 2014, particularly in the areas of coverage for data breaches and broker liability. Whether New York courts will continue to expand broker exposure remains to be seen. Similarly, whether courts will continue to limit coverage for data breaches will depend in large part on how courts interpret the newly popularized cyberinsurance policies. Still, the fact that insurance companies continue to bring suit against policyholders in New York suggests that the Empire State's law continues to provide a forum that will see many filings on novel issues.

—By Robert D. Chesler, Anna M. Piazza and Janine M. Stanisz, Anderson Kill PC

DISCLOSURE: Anderson Kill represents the policyholder in National Union Fire Insurance Company of Pittsburgh PA v. TransCanada Energy USA Inc. and American Home Assurance Company v. Port Authority of New York and New Jersey. In addition, Anderson Kill's William G. Passannante filed an amicus brief on behalf of United Policyholders in Executive Plaza LLC v. Peerless Insurance Company.

Robert Chesler is a shareholder and Janine Stanisz is an associate in Anderson Kill's Newark, New Jersey, office.

Anna Piazza is a shareholder in Anderson Kill's New York office.