Fields Howell

Case Advisory May 2015

This month, we report on an important decision from the Georgia Supreme Court on the rights of excess insurers, and a Georgia Court of Appeals decision on motor insurance.

Georgia Supreme Court Holds Consent Clause Bars Action Against Insurer

The Georgia Supreme Court has issued a significant decision strengthening the rights of insurers in respect to an insurance policy's consent clause. *Piedmont Office Realty Trust, Inc. v. XL Specialty Ins. Co.* (20 April 2015).

In this case, the insured was a defendant in a federal securities class action lawsuit. It exhausted its primary layer of coverage through payment of defense costs. After years of litigation, the insured had $6 million in remaining limits on its first excess policy. The insured demanded the insurer pay the remaining limit to settle the lawsuit. The excess insurer declined, however, and offered $1 million. The insured then entered into a settlement with the plaintiffs for $4.9 million, without the insurer's consent.

The insured then sued the insurer for breach of contract and bad faith. The insured argued that although the policy wording gave the insurer the right to consent to a settlement, the wording stated such consent "shall not be unreasonably withheld." The insured argued the insurer's refusal to consent was a breach of contract and in bad faith.

The Georgia Supreme Court held, unanimously, that the insurer was within its rights to withhold its consent. The Court held that, having failed to obtain consent, the insured failed to fulfill a condition precedent to coverage, and was precluded as a matter of law from bringing a claim for breach of contract and bad faith. The Court also noted the "consent shall not be unreasonably withheld" wording did not restrict the insurer's right to insist on its consent, because under Georgia law, an insurer's right to consent must always be exercised reasonably as a matter of law, even without that additional wording.

This decision is significant because it shows that the Georgia Supreme Court enforces an insurer's consent clause on cases in which it is providing a defense to an insured. The case strengthens the rights of insurers under Georgia law to control settlement decisions.

Georgia Court of Appeals Rules No Direct Action Against Insurer of Medical Transport Carrier

The Georgia Court of Appeals has held a plaintiff cannot bring a direct action against a liability insurer where the motor carrier at issue is a medical transportation carrier. *Mornay v. National Union Fire Ins. Co.* (6 April 2015).

This case involves a wrongful death action arising from a motor vehicle accident. The decedent was a wheelchair-bound woman who died while riding in a transportation van from her nursing home to a medical appointment. Her estate filed a direct action against the liability insurer of the transportation company.

Under the Georgia Motor Carrier Act, a plaintiff may bring a direct action against a motor carrier. The court stated the intent of the "motor carrier laws is that the insurer is to stand in the shoes of the motor carrier and be liable in any instance of negligence where the motor carrier is liable." However, there are exceptions to the definition of a motor carrier. Among the exceptions are vans used exclusively for non-emergency medical transport.

In this case, the court held the insurer was entitled to summary judgment, because there was no dispute over the fact that the van met the statutory exception. The court's decision demonstrates the Georgia Court of Appeals' willingness to insist on a claimant's strict compliance with statutory criteria in order to bring a direct action against a motor carrier insurer.

For questions or comments,
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