4 Important Insurance Decisions To Watch For This Spring

Law360

Insurance companies and policyholders will be keeping an eye out this spring for courts' guidance on a slew of key insurance issues, including the Florida Supreme Court's decision on the requirements for holding an insurer liable for bad faith claims handling and a federal court's ruling on whether a traditional liability policy covers data breach losses.

Here, Law360 looks at four rulings to watch for over the next few months.

Harvey v. Geico

Florida's highest court is poised to decide whether Geico can be held liable for bad faith for failing to settle claims against a policyholder later hit with an $8.7 million fatal-crash judgment, in a case that will provide clarity on the requirements for insureds to maintain similar claims against their insurance companies.

The case stems from a 2006 automobile accident in which James M. Harvey was determined to be liable for the death of motorist James Potts. Harvey held an insurance policy with Geico General Insurance Co. that provided $100,000 in liability coverage, but the insurer informed him that he was likely to face excess claims far beyond that amount from Potts' widow and three children.

When the settlement process stalled, the Potts estate sued Harvey on a wrongful death claim and won nearly $8.5 million in damages after a jury trial. Harvey then sued Geico for bad faith and won after another jury trial. The trial judge denied Geico's motion for a directed verdict, but on appeal a panel of the state's Fourth District Court of Appeal ruled that Harvey's evidence had been insufficient to prove bad faith.

Harvey has told the Florida justices that the appellate panel failed to follow Sunshine State precedent on the requirements to succeed on a bad faith claim against an insurer, arguing that the evidence clearly supported a ruling against Geico. Nonprofit policyholder advocacy organization United Policyholders and a Florida consumer group backed Harvey's position.

"[T]he Fourth District deviated from that clear precedent and ruled, [among other things], that an insurer does not have to act prudently or even reasonably to satisfy its duty of good faith to its insured," Harvey's attorneys wrote in a brief filed with the high court.

Geico, however, has countered that the Fourth District's decision was entirely consistent with precedent regarding bad faith claims and directed verdicts and that as a result, the Florida high court shouldn't entertain the case. The insurer garnered the support of a slew of insurance and business trade groups.

"The Fourth District Court of Appeal appropriately considered the evidence in the light most favorable to Harvey, applied the correct standard for determining bad faith under Florida law, applied the correct standard for directed verdict, and properly concluded that Geico was entitled to judgment as a matter of law," Geico argued in its brief.

The Florida high court opted to consider Harvey's appeal, and oral arguments were held on Nov. 1.

Harvey is represented by Burlington & Rockenbach PA, Domnick Cunningham & Whalen PA and Boldt Law Firm PA.

Geico is represented by B. Richard Young, Adam A. Duke and Cody S. Pflueger of Young Bill Boles Palmer & Duke PA.

The case is Harvey v. Geico General Insurance Co., case number SC17-85, in the Supreme Court of Florida.

Rosen Millennium v. St. Paul

A Florida federal court will have the chance to address thorny questions about insurance for data breaches under traditional liability policies when it determines whether a Travelers unit must cover a hotel operator's cyberattack losses.

The IT provider, Rosen Millennium Inc., is seeking a determination that Travelers unit St. Paul Fire and Marine Insurance Co. has to defend it under two commercial general liability policies against a claim for at least $1.4 million in damages connected to a breach of the network where sister company Rosen Hotel & Resorts Inc. stored customer credit card information. Unlike many contemporary CGL policies, the St. Paul policies lack explicit exclusions for data breach incidents, court papers show.

Rosen Millennium and St. Paul traded motions for partial summary judgment last fall. The IT company argued in its brief that defense coverage is available under the policies' personal injury and property damage sections.

St. Paul, however, shot back that the dispute stems from the "highly unusual circumstance" of Rosen Hotel & Resorts sending a demand letter to its sister company, requesting payment for the losses it has incurred thus far. The hotel's goal with the "bare-bones, pretextual" letter was to recover its losses through the liability policies issued to a member of its corporate family, but these efforts cannot prevail, the insurer contended.

The insurance company further asserted that, even if the letter were found to qualify as a claim, Rosen still can't succeed on its efforts to trigger the IT provider's policies. At the end of the day, the hotel operator should have bought specialty cyber insurance for its subsidiaries if it wanted coverage for data breach losses, St. Paul argued.

"The issue of coverage for data breaches under general liability policies has been hotly contested over the past several years, during a time period in which many insurers — Travelers included — have developed new products specifically tailored to respond to this new and increasingly common risk," St. Paul's attorneys wrote. "Unfortunately for the hotel, it did not purchase this specialty coverage for its subsidiaries."

St. Paul is represented by Rory Eric Jurman and Aaron M. Dmiszewicki of Fowler White Burnett PA.

Rosen is represented by Darryl R. Richards of Johnson Pope Bokor Ruppel & Burns LLP and Scott N. Godes and Carrie M. Raver of Barnes & Thornburg LLP.

The suit is St. Paul Fire & Marine Insurance Co. v. Rosen Millennium Inc. et al., case number 6:17-cv-00540, in the U.S. District Court for the Middle District of Florida.

InComm v. Great American Insurance Co.

The Eleventh Circuit will add to the burgeoning body of case law on the proper interpretation of crime insurance policies' computer fraud provisions when it issues its ruling in a dispute over whether a processor of prepaid debit cards is entitled to coverage for $11.4 million in losses stemming from a fraudulent redemption scheme.

Policyholder InComm Holdings Inc. provides a service that allows customers to load funds onto debit cards issued by third-party banks and sold by retailers, via a product called a "chit." The retailers send InComm the payment made for the card, and the cardholder can redeem the funds by calling InComm, which then transfers the funds to the issuing bank for the cardholder to draw on.

The losses at issue largely involved debit cards issued by Bankcorp. A coding error in InComm's system allowed cardholders to redeem the cards more than once, which between November 2013 and May 2014 resulted in more than $11.4 million in unauthorized charges, according to court papers.

InComm held a crime policy with GAIC that included a common computer fraud provision covering losses "resulting directly from the use of any computer to fraudulently cause a transfer of" money, securities or other property from "inside the premises or banking premises" to an outside party.

GAIC denied coverage for InComm's losses on the grounds that the redemptions were made over the phone and not by computer, and that the losses were the result of the charges made to the cards after they were redeemed and not directly due to the unauthorized redemptions. In March 2017, U.S. District Judge William S. Duffey Jr. of the Northern District of Georgia agreed with GAIC on both grounds.

InComm's appeal to the Eleventh Circuit raises a question that has frequently come up in disputes over coverage for fraud schemes involving modern technology: What does it mean to use "any computer" to cause a monetary transfer?

As InComm tells it, Judge Duffey erroneously focused on the fact that the fraudsters made the unauthorized redemptions via toll-free phone calls. The calls are merely the mechanism by which consumers access InComm's automated computer system, known as the IVR, the company argued.

"The district court's order improperly focuses on the mechanism by which the fraudsters accessed the

IVR as opposed to the undisputed fact that InComm's IVR is in fact a computer," InComm's attorneys wrote.

Naturally, GAIC says the district judge's analysis was sound. On the question of computer use, the insurer noted there was no evidence the fraudsters knew that their calls led to an interaction with a computer system.

"One cannot use a computer 'fraudulently' if he is unaware he is using a computer at all," GAIC's attorneys wrote.

An Eleventh Circuit panel heard arguments in the case on Nov. 14.

InComm is represented by Daniel F. Diffley, Tejas S. Patel and Kristen K. Bromberek of Alston & Bird LLP.

Great American is represented by Michael A. Graziano and F. Joseph Nealon of Eckert Seamans Cherin & Mellott LLC and H. Michael Bagley of Drew Eckl & Farnham LLP.

The case is Interactive Communications International Inc. et al. v. Great American Insurance Co., case number 17-11712, in the U.S. Court of Appeals for the Eleventh Circuit.

Continental Insurance Co. v. Honeywell International

The New Jersey Supreme Court is expected to soon render its long-awaited decision in a dispute over whether Honeywell International Inc. has to help cover costs tied to certain asbestos-related injury suits filed after its insurers started excluding asbestos coverage. The state justices' ruling could have enormous financial consequences for policyholders and insurers, given that asbestos injury litigation and settlement costs frequently rise into the tens of millions of dollars.

Insurance carriers St. Paul Fire and Marine Insurance Co. and parent Travelers Casualty have urged the New Jersey justices to overturn a state appellate panel's July 2016 decision that Honeywell needn't foot the bill for a slew of asbestos product liability suits filed against it after exclusions for claims tied to the carcinogen became standard in general liability policies in 1987.

The panel's ruling was based on its application of the so-called unavailability exception established in the

New Jersey high court's landmark 1994 ruling in Owens-Illinois Inc. v. United Insurance Co., which states that a policyholder doesn't have to assume a chunk of liability for costs associated with risks for which it cannot buy insurance.

During oral arguments on Oct. 25, Travelers' counsel, Andrew T. Frankel of Simpson Thacher & Bartlett LLP, told the high court that the unavailability exception shouldn't apply because Honeywell's predecessor continued to manufacture asbestos-containing brake and clutch pads long after asbestos coverage was cut off in 1987.

"We don't believe the Owens-Illinois unavailability exception should continue to apply," Frankel said. "It is inconsistent with the policy language and sometimes has perverse effects, and it has been rejected by other courts that have looked at it more closely than the passing reference made here."

But Honeywell attorney Michael J. Lynch of K&L Gates LLP countered at the hearing that, for starters, Travelers' argument that the unavailability exception should be thrown out was not raised before the lower courts and should therefore be disregarded. In any event, Lynch said, the only thing that matters for the Owens-Illinois analysis is the fact that Honeywell's predecessor couldn't obtain asbestos coverage after 1987, not any of the company's post-1987 conduct.

"I would submit to the court that this fact ends the analysis this court needs to do as to whether or not any of the costs can be allocated to Honeywell," Lynch said. "Under Owens-Illinois, so long as the policyholder does not purchase available insurance, then the coverage block ends when insurance is no longer available."

St. Paul and Travelers are represented by Stefano V. Calogero and Tanya M. Mascarich of Windels Marx Lane & Mittendorf LLP and Andrew T. Frankel of Simpson Thacher & Bartlett LLP.

Honeywell is represented by Michael J. Lynch, Donald W. Kiel, Donald E. Seymour and John T. Waldron III of K&L Gates LLP.

The case is Continental Insurance Co. et al. v. Honeywell International Inc. et al., case number 078152, in the Supreme Court of the State of New Jersey.

–Editing by Rebecca Flanagan and Kelly Duncan.