Insurance Cases To Watch In The 2nd Half Of 2017

Law360

Courts around the country will have their hands full with key insurance issues over the next six months, with the California Supreme Court considering whether a company's negligent supervision of an employee is an accidental occurrence and the New York high court weighing the scope of a reinsurer's coverage obligations. Here, Law360 takes a look at five major insurance disputes to watch in the second half of the year. Liberty v. Ledesma & Meyer Construction Co. In response to a certified question from the Ninth Circuit, the California Supreme Court is poised to decide whether a company's negligent hiring and supervision of a worker who later commits a wrongful act is an accidental occurrence for which coverage is available under a commercial general liability insurance policy. Ledesma & Meyer Construction Co., which contracted with San Bernardino County Unified School District in April 2002 to complete work on Cesar E. Chavez Middle School, is arguing that its policy with Liberty Surplus Insurance Corp. should cover claims that its former employee sexually abused a student at the school during the course of the project. A California federal judge had ruled in 2014 that L&M's alleged negligence in hiring the worker was too far removed from the sexual assault victim's alleged injuries to be considered an occurrence within the terms of the Liberty Surplus policy. On appeal, a panel of the Ninth Circuit determined that it needed the California justices' input on the issues. Briefing in the case is scheduled to be completed this summer, and the state high court will hear arguments on an as-yet-undetermined date. According to attorneys, the dispute gives the California high court the chance to address critical questions that frequently arise in coverage disputes. While L&M's case revolves around sexual assault allegations, the issues here are commonly implicated in cases involving claims of all sorts of misconduct by companies' employees. Pillsbury Winthrop Shaw Pittman LLP partner Robert Wallan said that, if the California high court accepts Liberty's positions, there could be a "tidal wave" of coverage denials in cases where employers are alleged to have been negligent in hiring or supervising workers. According to Blank Rome LLP associate Omid Safa, a decision in the insurer's favor could sharply limit coverage available to abuse victims. "If the lower court's interpretations stand, the biggest losers will be victims of abuse," Safa said.

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“Such a decision would likely limit the funds available to compensate victims, because many times, the rogue actors have few assets and their employers have insufficient funds to pay a settlement or judgment without help from insurance.” The case is Liberty Surplus Insurance Corp. et al. v. Ledesma and Meyer Construction et al., case number S236765, in the California Supreme Court. Global Re v. Century Indemnity Co. New York’s highest court is set to weigh in on whether a reinsurer must cover defense costs paid out by an insurance carrier in excess of a total liability limit, in a case that could have huge financial implications for participants in the reinsurance market. The case came to the New York high court, known as the Court of Appeals, via a certified question from the Second Circuit in Century Indemnity Co.’s challenge of a federal court ruling capping Global Reinsurance Co.’s share of the more than $60 million Century has paid to cover Caterpillar Tractor Co.’s legal bills in scores of asbestos injury claims. The parties are currently briefing the issues. U.S. District Judge Lorna G. Schofield had concluded that the limits in Global’s reinsurance certificates capped the reinsurer’s liabilities for both settlement and damages payments made by Century, or “losses,” and the insurer’s defense costs, or “expenses,” citing the Second Circuit’s 1990 decision in Bellefonte Reinsurance Co. v. Aetna Casualty & Surety Co. and its 1993 opinion in Unigard Security Insurance Co. Inc. v. North River Insurance Co. On appeal, the Second Circuit questioned whether the Court of Appeals’ 2004 ruling in Excess Insurance Co. Ltd. v. Factory Mutual Insurance Co. — which expanded on the Bellefonte and Unigard — imposed a general rule, or strong presumption, that a per-occurrence liability cap in a reinsurance contract limits the reinsurance available to that amount, regardless of whether the underlying policy covers expenses like defense costs. The appellate court ultimately sought the Court of Appeals’ input last December. According to attorneys, if the New York high court rules in Global’s favor, insurance carriers will be left holding the bag for potentially enormous defense bills. “This is a very important case involving a lot of money,” said Hunton & Williams LLP partner Walter Andrews. “If Global Re gets its way, it gets a huge windfall as far as saving on defense costs that everyone thought it owed. Custom and practice is clear: reinsurers pay not just indemnity but also defense costs.” The case is Global Reinsurance Corp. of America v. Century Indemnity Co., case number CTQ-2016-00005, in the Court of Appeals of the State of New York. Hartford Fire Insurance Co. v. Tempur-Sealy International Hartford Fire Insurance Co. has asked the Ninth Circuit to reverse a California federal judge’s holding that it has to defend Tempur-Sealy International in a proposed class action alleging that Tempur-Sealy made false statements about a chemical odor in its mattresses that purportedly made some customers sick. The case raises the hotly contested question of whether insurers must defend policyholders in so-called no injury class actions, in which plaintiffs don’t claim damages due to bodily injury or property damage. A group of consumers led by Alvin and Melody Todd sued Tempur-Sealy in California federal court in October 2013, claiming that

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the company had misrepresented in marketing materials that its foam mattresses and pillows have an odor that is allergen-free and will dissipate over time. In reality, the customers claimed, that chemical odor has made them sick. A federal judge denied the Todds' motion for class certification last fall. Several months after the Todds filed their complaint, Hartford sought a declaration that a series of comprehensive general liability policies it had issued to Tempur-Sealy don't cover the underlying claims. In January 2016, U.S. District Judge Haywood S. Gilliam Jr. ruled in the mattress company's favor, finding that, although the underlying plaintiffs disclaimed damages due to bodily injury, their complaint could potentially be amended to state such claims. Hartford appealed to the Ninth Circuit. A pair of insurance industry trade groups, the American Insurance Association and the Complex Insurance Claims Litigation Association, filed an amicus brief in March in support of Hartford, contending that allowing coverage for strictly economic losses would expand the scope of liability policies beyond what was intended, which would make it impossible for insurers to accurately price and underwrite such policies. "Specifically, expanding coverage under the subject liability policy to include claims other than those seeking to impose liability because of bodily injury or property damage — such as the consumer economic injury claims at issue here — would undermine the risk-for-premium exchange," the insurance groups argued in their brief. On the other hand, Pillsbury's Wallan opined that Judge Gilliam's decision is consistent with California law establishing that the breadth of an insurer's duty to defend. "It is not just reasonably foreseeable but expected in the event of a denied class certification motion that bodily injury claims will be added," Wallan said. "It is easy for me to see a situation where that disclaimer goes away, and the carrier doesn't get to assume that, because the disclaimer is there in the putative class action complaint, it gets to duck its coverage obligations." The case has been fully briefed and is awaiting an oral argument date. The case is Hartford Fire Insurance Co. v. Tempur-Sealy International Inc., case number 16-16056, in the U.S. Court of Appeals for the Ninth Circuit. Continental Insurance Co. v. Honeywell International The New Jersey Supreme Court is expected to hear arguments later this year in its review of a state Appellate Division decision that Honeywell International Inc. doesn't have to help cover costs tied to certain asbestos-related injury suits filed after insurers started excluding asbestos coverage. Insurers St. Paul Fire and Marine Insurance Co. and parent Travelers Casualty and Surety Co. have been locked in a long-running battle with Honeywell regarding coverage for product liability claims over injuries allegedly caused by asbestos-containing brake and clutch pads made by Honeywell predecessor Bendix Corp. In an opinion last July, an Appellate Division panel affirmed a trial court's holdings that New Jersey law applies to the case and that Honeywell did not have to contribute to settlements or judgments related to claims alleging asbestos-related injuries manifested after 1987, when asbestos exclusions became commonplace, though the claimants' first exposure to Bendix's products occurred prior to 1987. The

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panel said that Honeywell didn't have to share liability for the settlements and judgments because it was unable to acquire insurance for asbestos risks after 1987, applying the so-called unavailability exception established in the New Jersey Supreme Court's precedential 1994 ruling in the case of Owens-Illinois Inc. v. United Insurance Co. The Travelers companies filed a petition for review with the New Jersey Supreme Court, challenging the lower courts' rulings on both the choice of law and the unavailability exception, and the state high court agreed to hear the case in December. Attorneys have told Law360 that a decision in Travelers' favor could force policyholders to foot the bill for claims of asbestos injuries occurring during periods when asbestos coverage could not be purchased. According to Hunton & Williams' Andrews, the New Jersey high court's decision on which state's law applies to the case could be a critical factor in the analysis. "Issues of choice of law are incredibly important for insurance litigation matters and disputes, and this is a perfect example of why these things matter and why insurance litigation is unique," Andrews said. "In many practice areas, such as antitrust and intellectual property, federal statutes tell you what the law is. In insurance, different states have different substantive law and different choice-of-law rules. The choice of law can often be outcome-determinative." 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. Rancosky v. Washington National Insurance Co. After hearing arguments in early April, the Pennsylvania Supreme Court is primed to issue a decision clarifying the proper standard to impose bad faith penalties against insurance companies. Read Law360's comprehensive breakdown of the Rancosky case here. The case is Rancosky v. Washington National Insurance Co., case number 28 WAP 2016, in the Supreme Court of Pennsylvania. –Editing by Rebecca Flanagan and Emily Kokoll. SPECIAL NOTE: United Policyholders weighed in as a friend of the court in Liberty v. Ledesma and Meyer, Continental v. Honeywell, Hartford v. Tempur-Sealy, and Rancosky v. Washington National.

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