The Biggest Insurance Rulings Of 2017: Midyear Report

Law360

The first half of 2017 was rife with major insurance law rulings, with the Texas Supreme Court issuing key guidance on the requirements for maintaining statutory claims against insurers for deceptive practices, and with Washington's high court limiting policyholders' ability to sue for bad faith and curtailing carriers' capacity to rely on policy exclusions. Here, Law360 examines five significant insurance decisions that have attracted widespread attention so far this year. USAA Texas Lloyd's Co. v. Menchaca Ruling in a homeowner's dispute with USAA Texas Lloyd's Co. over coverage for hurricane damage, the Texas Supreme Court on April 7 issued an opinion setting out five new rules governing the intersection between claims for a breach of an insurance policy and claims of wrongdoing under the Texas Insurance Code. The state justices acknowledged that prior rulings on the subject had caused "substantial confusion" among lower courts. According to attorneys, the ruling provides a framework for a nuanced, case-by-case analysis of insurance battles in the Lone Star State. "Prior decisions in this area had created a bit of a mess and some confusion," said Hunton & Williams LLP partner Syed S. Ahmad. "While the ruling does not resolve all of the uncertainty and may have created new areas for legal disputes, it does clear up some of the prior confusion by, for example, making clear that policyholders may recover for bad faith in the absence of coverage under the policy." By more clearly setting out the prerequisites for claims under the Insurance Code, the Texas high court's ruling could have the effect of bringing insurers to the negotiating table earlier on in some cases, attorneys say. "This ruling will ensure that insurer can't get around the protections established by the Texas Insurance Code by making a settlement payment on the eve of trial," said Blank Rome LLP associate Omid Safa. Read more about the Texas high court's five new rules here. The case is USAA Texas Lloyd's Co. v. Gail Menchaca, case number 14-0721, in the Supreme Court of the State of Texas. Perez-Crisantos v. State Farm In another ruling dealing with extracontractual claims against insurance carriers, Washington state's Supreme Court refused on Feb. 2 to allow a policyholder to directly sue an insurer for bad faith under the state Insurance Fair Conduct Act based solely on procedural violations of insurance regulations. The Washington justices held that State Farm

Fire and Casualty Co. couldn't be held liable under the IFCA solely on account of the company's alleged unfair conduct in handling a policyholder's claim for coverage of medical bills following a car accident. According to the state justices, the IFCA doesn't create an independent cause of action for regulatory violations, and allows claims only when an insurer unreasonably denies coverage or benefits. Attorneys representing insurers have applauded the decision in interviews with Law360, but policyholder lawyers have said the ruling leaves open key questions pertaining to liability under the statute, such as what insurer conduct should be considered reasonable. "This decision has the potential to cause more litigation over what constitutes unreasonable conduct by an insurance company and how to prove such conduct," Foreman Sturm & Thede LLP partner Kyle Sturm said in a Feb. 3 interview. The case is Isidoro Perez-Crisantos v. State Farm Fire and Casualty Co. et al., case number 92267-5, in the Supreme Court of the State of Washington. Xia v. ProBuilders Specialty Insurance Co. The Washington high court again turned heads on April 27 when it held that a pollution exclusion doesn't negate liability coverage where negligence is the primary cause of a loss, a ruling that could drastically curtail insurers' ability to wield such exclusions to deny policyholders' requests for defense coverage in suits alleging negligent conduct. In a split opinion, the Washington justices reversed a lower court ruling in favor of ProBuilders Specialty Insurance Co. in its coverage battle with homeowner Zhaoyun Xia, who had sued ProBuilders' policyholder over injuries stemming from toxic levels of carbon monoxide released from a hot water heater. The majority found that although carbon monoxide clearly falls within the absolute pollution exclusion in a liability policy that ProBuilders issued to a construction company, coverage is still available for Xia's suit because the predominant cause of her injury was the builder's negligent installation of the water heater. To reach its conclusion, the majority applied the "efficient proximate cause" rule, which states that coverage exists if a covered risk sets in motion a chain of events leading to an injury, even if an excluded risk is part of that chain. The rule has traditionally been applied to disputes over first-party property insurance, rather than third-party liability policies. The state justices' ruling immediately set off alarm bells among insurers, and ProBuilders has filed a petition for rehearing at the Washington Supreme Court with the support of several insurance industry groups. "The Washington Supreme Court extended the efficient proximate cause doctrine to where it has not, for good reason, traditionally been extended," said Goldberg Segalla LLP partner Lou Kozloff, who represents insurers. "The concept of the EPC doctrine and the court's application here undermine [commercial general liability] policies and go against how they are meant to be interpreted." Meanwhile, Carl Salisbury, leader of Bramnick Rodriguez Grabas Arnold & Mangan LLC's insurance recovery and commercial litigation group, said that the Xia decision is representative of a nationwide trend of courts narrowly interpreting pollution exclusions. "This shows that the days when insurance companies could apply absolute pollution exclusions to harm caused by any

exposure to a chemical could be numbered," Salisbury said. R.T. Vanderbilt Co. v. Hartford A panel of the Connecticut Appellate Court gave insurance lawyers a lot of food for thought in early March when rolling out a massive, 161-page opinion in Vanderbilt Minerals LLC's dispute with insurers for coverage of asbestos injury claims, touching on a number of issues of first impression both in the state and nationally. In one critical holding, the appellate panel determined that state law permits an "unavailability of insurance" rule, which establishes that a policyholder is not liable for a prorated share of defense and indemnity costs for periods when insurance for a certain risk was unavailable in the marketplace. Here, the panel opted to apply that rule because Vanderbilt, despite its efforts, was unable to obtain coverage after 1985 for individuals' claims for asbestos injuries allegedly caused by exposure to the company's industrial talc. "The ruling prevents insurers from demanding that the policyholder essentially act as an insurer during policy periods in which the policyholder could not obtain insurance," Ahmad said. "The decision makes clear that the policyholder should not be on the hook for those amounts." In another first for a Connecticut appeals court, the panel ruled that asbestos injury claims are governed by a "continuous" trigger theory, wherein every policy in effect is triggered from the date a claimant is first exposed all the way through to the actual manifestation of asbestos-related disease. As a general matter, that finding will make it easier for policyholders to obtain coverage for asbestos claims, attorneys say. "In the ordinary circumstance, the continuous trigger will allow a policyholder to access more insurance policies, more limits, and more options when evaluating the strategy for the coverage claim," Ahmad said. Another aspect of the panel's ruling that is sure to stimulate further litigation is the holding, as a matter of national first impression, that the "occupational disease" exclusions in some of Vanderbilt's policies preclude coverage both for claims brought by the company's own workers and claims by workers at other companies in Vanderbilt's supply chain, according to attorneys. "The decision on the occupational disease exclusion is pretty surprising," Safa said. "This is an issue we can expect to hear more about from the Connecticut Supreme Court." The case is R.T. Vanderbilt Co. Inc. v. Hartford Accident and Indemnity Co. et al., case numbers 36749, 37140, 37141, 37142, 37143, 37144, 37145, 37146, 37147, 37148, 37149, 37150 and 37151, in the Connecticut Appellate Court. General Refractories Co. v. First State Insurance Co. Insurance companies breathed a sigh of relief in late April when a Third Circuit panel ruled that a common policy exclusion for asbestos-related claims applies to claims arising out of asbestos in any form. General Refractories Co. had convinced a Pennsylvania federal judge that an exclusion in the company's policy with Travelers Surety & Casualty Co. for claims "arising out of" asbestos is ambiguous and can be read to preclude coverage only for claims resulting from exposure to asbestos in its raw mineral form, and not to GRC's products containing the carcinogen. But the Third Circuit panel disagreed with the lower court, holding that the phrase "arising out of" is governed by the

broad “but for” causation standard, which doesn’t require a showing that a product proximately caused an injury. When the but-for standard is applied, the losses in the underlying suits against GRC fall within Travelers’ asbestos exclusion, regardless of whether the exclusion is interpreted to apply to asbestos in any form or solely the raw mineral, the panel said. The circuit panel emphasized that a decision applying a broad interpretation of the “arising out of” language was necessary to promote consistency among insurance contracts in Pennsylvania, noting the prevalence of the exclusionary language at issue. According to attorneys, the decision protects insurers whose policies contain identical or similar exclusions from liability for up to hundreds of millions of dollars in asbestos injury claims. Kozloff said the ruling was unsurprising, given the substantial body of Pennsylvania case law on how the phrase “arising out of” should be interpreted. “I think it is a very thoughtful, well-reasoned decision that applies well-established Pennsylvania case law to an exclusion that is important to the industry, given the huge levels of exposure to asbestos-related claims out there,” Kozloff said. However, Ahmad said that while insurers will likely wield the Third Circuit opinion to argue for broad applications of exclusions, particularly asbestos and pollution exclusions, the foundations of the panel’s reasoning could limit broader applications. “The Third Circuit expressly based its decision on the meaning of ‘arising out of,’ the understanding of which it said was ‘entrenched in Pennsylvania jurisprudence’ and did not rule based on the meaning of ‘asbestos,'” Ahmad said. “These caveats and limitations are significant for policyholders fighting a broad reading of the ruling. The case is General Refractories Co. v. First State Insurance Co., case number 15-3409, in the U.S. Court of Appeals for the Third Circuit. –Additional reporting by Jess Krochtengel. Editing by Rebecca Flanagan and Edrienne Su. *** Special Note: United Policyholders weighed in as a friend of the court in USAA Texas Lloyds v. Menchaca, R.T. Vanderbilt v. Hartford, and General Refractories v. First State Ins. Co.