2018 ACLI Annual Conference

Litigation and Regulatory Update 2018

Proper evaluation of bad faith cases, plus recent decisions you should know about

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Bad Faith

- *Harper v. Nationwide Life Ins. Co*. (C.D. Cal. 2017)
  - $1.5 million policy
  - Elderly insured had cancer and couldn't afford rapidly rising premiums
  - Agents allegedly told him he could let policy lapse and then apply for reinstatement
  - His reinstatement application was denied due to his medical condition
  - **Jury awarded $21.3 million, including $7.3 million in non-economic damages and $12.5 million in punitive damages**

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Bad Faith

- *McClure v. Country Life Ins. Co.* (Dist. Ariz. 2017)
  - Insured walked into a pole, causing TBI and subsequent depression due to his disability
  - Insurer discontinued LTD benefits ($1500/month)
  - Plaintiff contended insurer engaged in bad faith in handling the claim, causing emotional distress
  - Jury returned verdict for $1.29 million in compensatory damages and $5 million in punitive damages

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Bad Faith

- *Lindenberg v. Jackson Nat'l Life Ins. Co*. (W.D. Tenn. 2014)
  - $350,000 term life policy
  - Insurer was concerned about competing claims
  - Requested waivers from contingent beneficiaries and a sibling who was not a beneficiary
  - Jury awarded $3.44 million, including $3 million in punitive damages (reduced to $700k under Ten. Punitive damages cap)

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Bad Faith

- Typical considerations in evaluating exposure are often insurer-centric:
  - Amount of policy benefits
  - Terms of policy
  - Whether company made the right decision
  - Defense costs

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Bad Faith

- Often overlooked factors that can lead to surprise verdicts:
  - How sympathetic is the plaintiff?
  - How has plaintiff changed his/her position as a result of the company's conduct?
  - What type of policy is it?
  - How badly did the plaintiff need the benefits?
  - How prompt and clear were the company's communications (i.e., given the run-around)?
  - Does the company's defense resonate with an average person?

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Long-Term Care Plaintiff

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USAA Texas Lloyds Co. v. Menchaca, 2018 WL 1866041 (April 13, 2018)

- Dispute over Hurricane damage from Hurricane Ike.
- Jury found:
  - insurer did not breach the contract
  - insurer was liable under UDTPA, including for failing to conduct reasonable investigation of claim
- Jury awarded $11,350 in damages as difference between what was paid and what should have been paid.
- Court remanded the case for a new trial in accordance with its clarification of the law

USAA Texas Lloyds Co. v. Menchaca, 2018 WL 1866041 (April 13, 2018)

- Rule 1: "The General Rule"
  - "The general rule is that an insured cannot recover policy benefits for an insurer's statutory violation if the insured does not have a right to those benefits under the policy."
- But an insurer can be liable if its statutory violation caused independent damages not predicated on denial of benefits, or if the insurer's conduct caused the insured to lose its contractual right to benefits.

Bad Faith

- Follow the three “R”s to reduce risk of bad faith:
  - Responsive
  - Respectful
  - Reasonable

Divorce Revocation

- *Sveen v. Melin*, 138 S. Ct. 1815 (2018)
  - Issue: Retroactive application of divorce revocation statute
  - Circuit split existed regarding whether such application violated the Contracts Clause
  - Court held that retroactive application was constitutional because it did not operate as a "substantial impairment" of a contractual relationship
  - Gorsuch dissent: changing beneficiary is a "substantial impairment"

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Divorce Statutes: Notice

- Some states require only that the insurer receive "written notice" of the parties' divorce. *See e.g.*, Texas, Alabama, Michigan, Nebraska, Ohio.
  - In these states, what constitutes "written notice" is not further defined.
- In other states, the insurer's liability is premised on "actual knowledge" as opposed to "notice." *See e.g.*, Washington.

Divorce Statutes: Notice

- Protection to insurers is high in some states.
  - In Colorado, Montana, North Dakota, and New York, a prerequisite to liability is that the insurer received "written notice" by "certified mail" to its "home office."
    - Further, "written notice" must include "the name of the decedent, the name of the person asserting an interest, the nature of the payment or item of property…and a statement that a divorce [or] annulment" has occurred.
  - In some states, an insurer can only be liable "for actions taken two or more business days" after the insurer receives notice. *See e.g.*, Colorado, Montana, North Dakota.

Prompt Payment Statutes

- Often overlooked protection for insurers
- Insurer is discharged from liability for paying claim:
  - Pursuant to beneficiary designation of record
  - Without “written notice” of competing claim
  - Notice must be received at “Home Office”
- Statutory language varies, so review carefully
- Similar common law principles exist in some states that have not enacted the statute

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Insurer Not ERISA Fiduciary

- *Santomenno v. Transamerica Life Ins. Co.*, 883 F.3d 833 (9th Cir. 2018)
  - Plaintiff alleged that Transamerica breached its fiduciary duties in administering 401k plan
  - Trial court denied Transamerica's motion to dismiss and certified three classes
  - Ninth Circuit reversed, holding that Transamerica was not acting as a fiduciary in negotiating its compensation or collecting predetermined fees

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ALSTON & BIRD

RECENT COST OF INSURANCE CASES, RULINGS AND DISPOSITIONS

Bo Phillips
Alston & Bird

October 8, 2018

ACLI Annual Conference
Washington, D.C.

THE EARLY CASES

- "Cost of insurance rates will be determined by the Company based on its expectations as to future mortality experience"

- Focus on COI rate increases.

- Conseco litigation before Judge Matz in C.D. California.

  (Yue v. Conseco – injunction granted)

THE NOREM AND THAO RULINGS

- Norem v. Lincoln Benefit, 737 F.3d 1145 (7th Cir. 2013)
- Thao v. Midland National (companion case) 549 F. Appx. 534 (7th Cir. 2013)
- "based on" does not limit factors to be considered in COI rate adjustments
- Permissible to consider other expenses and profitability

POST-NOREM/THAO CASES

- Fleisher v. Phoenix Home Life – 18 F. Supp. 3d 456 (S.D.N.Y. 2014)
  - Restrictive interpretation of "based on"
  - "expectations of future mortality, persistency, investment earnings, expense experience, capital and reserve requirements and tax assumptions."
- Case settled after motion practice
- Small class of investors (750+ policyholders)
- High relative value (approx. $130 Million)

POST NOREM/THAO CASES

- Lincoln National Life v. Bezich, 33 N. E. 3d 1160 (Ind.Ct. App. 2015)
  - distinguished and disagreed with Norem and Thao
  - "based on expectations as to future mortality experience"
  - precluded use of factors not specifically enumerated in policy provisions

THE JOHN HANCOCK CASES - SETTLEMENTS

- Larson v. John Hancock (Alameda Co. California)
  - alleged duty to REDUCE rates due to improved mortality
  - policy provided for periodic review and adjustment of rates
  - class certified in March 2017
  - settled in early 2018 for just under $60 million

- 37 Besen Parkway LLC v. John Hancock (S.D.N.Y)
  - alleged duty to REDUCE rates
  - settlement reached ($91.5 million)
  - approval pending

RECENT RULINGS (2017-2018)

- Kalodner v. Genworth (E.D. Pa. 2017)
  - No duty to decrease rates
  - Stipulated dismissal in September, 2017

- Feller v. Transamerica Life (C.D. Cal. 2017)
  - class certified
  - COI increases
  - potential duty to decrease rates
  - 23(f) appeal granted in March 2018

RECENT TRIALS

- Vogt v. State Farm (2018)
  - rates “based on the Insured’s age…sex, and applicable rates class…such rates can be adjusted for projected changes in mortality but cannot exceed the maximum monthly cost of insurance rates.”
  - list of factors held to be “exclusive”
  - summary judgment for plaintiff on liability
  - jury trial on damages - $35 million in damages
  - 43,603 policies, 18,270 in force

RECENT TRIALS

- DCD Partners v. Transamerica (C.D. Cal. 2018)
  - jury trial on contract claims
  - $5.6 million verdict (2300 policies); list of factors held to be “exclusive”
  - no additional relief granted on unfair competition claims tried to the court

THE CURRENT LANDSCAPE

- new emphasis on alleged duty to decrease rates based upon expectations of improved mortality experience
- mixed results in trials and dispositive motions
- plaintiffs' focus on basic contract claims for Rule 23 purposes
- limited utility of past favorable rulings (Norem/Thao)

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California's Consumer Privacy Act – New Challenges in Data Privacy

ACLI Annual Meeting
Washington, D.C.

Bo Phillips
Gillian Clow

October 8, 2018

California Consumer Privacy Act of 2018

- Signed into law by Gov. Jerry Brown on June 28, 2018 and SB 1121 on September 23, 2018, making technical revisions to the Act.
- Swiftly devised and passed as part of a deal to avoid a similarly named ballot initiative from appearing on the November ballot by Californians for Consumer Privacy.
- Sweeping new law establishing an array of new rights for California residents regarding the collection, use and disclosure of personal information.
- Beginning January 1, 2020, businesses both in and outside of California that fall under the law will need to develop policies to ensure compliance.

The CCPA Expands Californians' Personal Information Rights

The CCPA does the following:

(1) Gives California residents the right to know what categories of personal information a business has collected about them;

(2) Gives California residents the right to know whether a business has sold or disclosed their personal information and to whom;

(3) Requires businesses to stop selling a Californian's personal information upon request;

(4) Gives California residents the right to access their personal information;

(5) Prevents businesses from denying equal service and price based on the exercise of the above;

(6) Establishes a private right of action.

The CCPA's Private Right of Action

- The CCPA does not provide the same private right of action as the ballot measure it replaced, which essentially deemed any violation of the act an injury-in-fact.
- Instead, the CCPA's private right of action focuses on holding businesses accountable directly to California residents for security breaches resulting from a business's failure to implement and maintain reasonable security measures.
- A California resident wishing to sue under the private right of action must follow certain procedures, including notifying the business in question and allowing it 30 days to cure the noticed violation.
- Potential for claims to be asserted under Section 17200's unlawful prong (restitution and injunctive relief).

Final Form of the CCPA Remains Uncertain

- On August 22, 2018, Attorney General Xavier Becerra sent a letter to the CCPA's sponsors, setting out various issues he has with the CCPA in its current form.
- Becerra thinks the private right of action should allow consumers to seek legal remedies for themselves to protect their own privacy, instead of the "limited" right to sue they are afforded only if they become a victim of a data breach.
- Becerra cautions that the limited private right of action will increase his office's need for enforcement resources.
- SB 1121 does not reflect these certain changes Becerra asks for, but the Legislature may continue to revise.
- Where the line is ultimately drawn will be informative as businesses and employers prepare to respond to the enactment of the CCPA and begin to understand the parameters of lawsuits brought by individuals.

Key Initial Takeaways

As initial takeaways, life insurers and affiliated entities should consider the following:

- Review existing privacy disclosures to evaluate potential updates mandated by the CCPA.
- Commence planning to implement the "do not sell" requirement, including cataloguing data sales and reviewing vendor agreements for other types of data sharing that will amount to a sale under the expanded definition in the statute.
- Initial planning for an inventory of data concerning California employees, customers, contractors, mobile app users, website visitors, and other residents to start feasibility planning for fulfillment of access, deletion, and do not sell requests.
- Update vendor privacy language to implement flow-down terms for the new California privacy rights.
- Identify key vendor contracts and evaluate for compliance with California standards.