Insurance Litigation

BULLETIN

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A NEW MEDICARE LAW COULD MAKE IT MORE DIFFICULT FOR PARTIES TO SETTLE PERSONAL INJURY CLAIMS

In December 2007, former President George W. Bush signed into law the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA) which institutes mandatory reporting requirements for group health, liability (including self-insurers), no-fault insurers and workers' compensation insurers/plans. The MMSEA protects Medicare's interests in personal injury actions when the plaintiff is a Medicare beneficiary. In order to accomplish this goal, Section 111 of the Act requires all insurers to determine whether a claimant is entitled to Medicare benefits and report certain information about those claims to the Secretary of Health and Human Services. This requires the Responsible Reporting Entity (RRE) to continually check to determine if a claimant is a Medicare beneficiary until the claim is closed.

Additionally, the MMSEA requires RREs to electronically report any settlement, award, judgment or other payment to the Center for Medicare & Medicaid Services (CMS). The penalty for non-compliance is $1,000 per day for each day the insurer is out of compliance.

MMSEA will apply to settlements on or after January 1, 2010 and those insurance companies who are responsible for reporting must register on CMS' website between May 1 and September 20, 2009. Starting July 1, 2009, all RREs must track and report claims to determine whether an injured claimant is a Medicare beneficiary.

NEW POST-JUDGMENT INTEREST STATUTE

Minnesota Statute § 549.09, subd. 1, has been amended to increase post-judgment interest to 10% per annum on judgments over $50,000 and applies to judgments finally entered after August 1, 2009.

HOUSE FILE 417 BECOMES LAW

This past April, the Minnesota House of Representatives passed House File 417, which will require an insurer that loses in court to pay – in addition to any monetary damages awarded – attorneys' fees and costs, plus a 10% per annum interest rate on amounts due under the insurance policy, calculated from the date the request for payment of those benefits was made to the insurer. The bill is now set to be codified at Minnesota Statute § 60A.0811.

The new statute has the potential of negatively impacting the insurance market by raising insurance litigation costs because it does not contain any offsetting provision for insurers to recover attorneys' fees and costs caused by often frivolous lawsuits. Critics warn that it will unjustly impact countless lawsuits and could force insurers to prematurely pay suspect or fraudulent claims to avoid the risk of extremely high financial awards which could be levied against them under the bill.

Minn. Stat. § 60A.0811 will be effective August 1, 2009 and applies to causes of action existing on and arising on or after that date.

CONSTRUCTIVE LOAN RECEIPT AGREEMENT

In Cargill, Inc. v. Ace American Ins. Co., et al., 766 N.W.2d 58, (Minn. Ct. App. 2009), the Minnesota Court of Appeals rejected the targeted tender doctrine.

Cargill was the subject of a series of lawsuits in 2005 for damages arising out of Cargill's waste disposal practices at poultry operations and related pollution claims. Cargill tendered its defense to its primary and umbrella-level insurers and Liberty Mutual Insurance agreed to defend as long as Cargill executed a customary and neutral loan receipt agreement allowing Liberty Mutual to recover its defense costs from the 50-plus other insurers.

Cargill then sought a declaratory judgment against the other insurers who allegedly had an obligation to defend and indemnify Cargill in the underlying lawsuits, asking the court to declare that each insurer had an individual duty to defend and indemnify. Liberty Mutual filed cross claims against several insurers seeking a declaration that it would have a right to subrogation or contribution from them if Liberty Mutual solely incurred Cargill's defense costs. The district court found that it would be inequitable to require Liberty Mutual to assume the multi-million dollar defense without any right to contribution.

The case went to the Court of Appeals for resolution of two issues. The first was whether a loan receipt agreement is presumptively necessary to equally apportion defense costs among the insurers. Relying on a previous decision, the Court ruled "no" because no privity of contract or joint liability exists between insurers. *See Iowa Nat'l Mut. Ins. Co. v. Universal Underwriters Ins. Co.*, 150 N.W.2d 233 (Minn. 1967). Thus, Liberty Mutual had no right to contribution absent a loan receipt agreement.

The second issued addressed by the Court of Appeals was whether a primary insurer with a duty to defend can condition its tender of defense on the insured's execution of a neutral loan receipt agreement. This time, the answer was yes. The Court found that even though each insurer has a separate and distinct duty to defend, when multiple primary insurers have offered to tender a defense in exchange for a loan receipt agreement, the principles of good

faith and fair dealing impose an affirmative obligation on the insured to cooperate by entering into a neutral loan receipt agreement that equitably apportions liability between primary insurers. When an insured is unwilling to enter such an agreement, Minnesota courts may protect an insurer by imposing a constructive loan agreement.

This past June, Cargill petitioned the Minnesota Supreme Court for review of this decision.

COVERAGE FOR CONSTRUCTION DEFECT CLAIMS CLARIFIED

In early 2009, in *Donnelly Brothers Const. Co. v. State Auto Prop. & Cas. Ins. Co.*, 759 N.W.2d 651 (Minn. Ct. App. 2009), the Minnesota Court of Appeals considered the prevalent question of what constitutes a water-intrusion "occurrence" triggering an insurer's duty to defend.

Donnelly Brothers was sued by several homeowners and general contractors under contribution and indemnity claims that stemmed from allegations that improper stucco application caused damage to homes. The various insurers who insured Donnelly Brothers during the relevant time periods attempted to avoid liability by arguing that they had no duty to defend since the "occurrence" triggering liability under the policies was the application of the stucco. In this way, only the insurer who was on the risk at the time of the stucco application was responsible for water-intrusion damages even if the damage did not occur or become discovered until later.

To resolve the issue, the Court of Appeals applied the "actual injury" or "injury-in-fact" rule in determining whether the insurance was triggered by an occurrence within the policy period. The Court found that to trigger the policy, the insured must show that some damage occurred during the policy period. "Property damage does not necessarily occur when defective stucco work is performed; rather, the insurer's duties depend on when the defective work causes damage to the property." The Court reasoned that an insurer's duty to defend arises when the policy arguably provides coverage for claims made against the insured and recognized that in those cases where the triggering event may be impossible to discern, allocation among insurers may be appropriate.

The Supreme Court denied review of the decision.

INSURANCE MANDATE INCLUDED IN WISCONSIN BUDGET

With the recent passing of the Wisconsin state budget, all drivers will soon be required to have auto insurance. Currently, the minimum amount of coverage for drivers is $25,000 per person. The new budget raises those rates to $100,000. These changes have been criticized by those claiming rising rates will only increase the amount of people driving without coverage. "These increases on top of the economy that people are facing today will have a dramatic impact on household budgets and potentially the amount of uninsured drivers on the road," says Andy Franken, President of the Wisconsin Insurance Alliance. Proponents argue that increasing rates helps guarantee insurance works in the event of an accident.

The new auto insurance requirements begin in 2010 and levels will be adjusted again after five years.

This Insurance Litigation Bulletin is designed to keep our clients generally informed about developments in the law relating to this firm's practice and should not be construed as legal advice or a legal opinion concerning any factual situation. Specific facts may alter any legal result. Nor is this Bulletin intended to create an attorney-client relationship.

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