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Biggest Insurance Decisions Of 2018: Midyear Report

By **Jeff Sistrunk**

Law360 (June 15, 2018, 11:59 AM EDT) -- The first six months of the year yielded rulings on many critical insurance issues, including the New York high court's holding that an insurer cannot be held liable for a policyholder's cleanup costs for years in which no pollution insurance was available and a Washington appeals court's decision that insurance adjusters can be sued for bad faith.

Here, Law360 looks at five of the biggest insurance decisions from the first half of 2018.

KeySpan Gas East Corp. v. Munich Re

In late March, New York's high court, the Court of Appeals, turned heads when it held that a National Grid PLC unit must pick up the tab for its own costs to clean up contamination at manufactured gas plants attributed to years when no pollution liability insurance was available in the marketplace.

The unanimous Court of Appeals affirmed a state appellate panel's ruling rejecting National Grid subsidiary KeySpan Gas East Corp.'s call to apply a so-called unavailability exception to the pro rata insurance allocation formula, which is often used to sort out coverage for environmental contamination and other "long-tail" claims implicating many policy periods.

Under a pro rata scheme, a policyholder must generally pay a share of its own long-tail liability costs for years when it had no policies in place. But if an unavailability exception is applied, the policyholder doesn't have to cover costs incurred during periods when it was unable to buy a specific type of insurance in the marketplace; instead, those costs are spread among the company's insurers.

The New York justices agreed with KeySpan's insurer, Chubb Ltd. unit Century Indemnity Co., that the unavailability exception is incompatible with insurance policy terms mandating pro rata allocation — namely, language limiting the insurer's liability to losses and occurrences happening "during the policy period."

"Ultimately, because 'the very essence of pro rata allocation is that the insurance policy language limits indemnification to losses and occurrences during the policy period,' the unavailability rule cannot be reconciled with the pro rata approach," Associate Judge Leslie E. Stein wrote in the March 27 ruling. "We, therefore, reject application of the unavailability rule for time-on-the-risk pro rata allocation."

Clark & Fox partner Michael Savett, who represents insurers, said the Court of Appeals' ruling was important because it gave effect to the relevant policy language and respected insurance carriers' business decision to stop offering coverage for pollution risks.

"The court acknowledged that the insurance industry chose not to underwrite a particular risk after a certain period of time, and determined that there is no reason to hold insurers responsible in the absence of coverage without having collected premiums," Savett said.

KeySpan is represented by Robert A. Long, William F. Greaney, Jay T. Smith, Michael Lechliter, David M. Zionts and Christopher Yeung of Covington & Burling LLP.

Century is represented by Jonathan D. Hacker, Jonathan Rosenberg, Anton Metlitsky and Leah Godesky of O'Melveny & Myers LLP and John L. Altieri of Boutin & Altieri PLLC.

The case is KeySpan Gas East Corp. v. Munich Reinsurance America Inc. et al., case number APL-2016-00236, in the Court of Appeals of the State of New York.

Keodalah v. Allstate Insurance Co.

A Washington appeals court set new state precedent when it ruled in March that insurance adjusters can be found individually liable for bad faith and breaches of consumer protection laws.

The appellate panel overruled a trial court decision and found on March 27 that Allstate Insurance Co. policyholder Moun Keodalah could file an individual bad-faith claim against Allstate adjuster Tracey Smith in a dispute over coverage for an auto accident, saying that the relevant state law makes no distinction between corporations and individuals.

"Nothing in the statute limits the duty of good faith to corporate insurance adjusters or relieves individual insurance adjusters from this duty," Judge J. Robert Leach wrote for the panel.

According to Foreman Sturm & Thede LLP partner Kyle Sturm, who represents policyholders, the panel's ruling conveys multiple litigation advantages on insureds in coverage disputes.

For one, if the policyholder and adjuster are citizens of the same state, the adjuster's insurance company won't be able to remove the case to federal court on diversity jurisdiction grounds. Insurers tend to favor federal courts for a number of reasons, including a broader jury pool and more resources to resolve complex disputes.

"With the ability to name an adjuster personally, policyholders have another tool to defeat insurance company attempts to remove cases to federal court," Sturm said.

Furthermore, when an adjuster is named as a defendant, the insurance company cannot shield him or her from having to testify at trial, Sturm added.

"As a result, juries will undoubtedly have an opportunity to personally evaluate the adjuster's credibility," he said. "I'd expect particularly problematic adjusters to make earlier settlements of litigated cases that much more likely."

Keodalah is represented by C. Steven Fury and Scott David Smith of Fury Duarte and Vonda Michell Sargent of the Law Offices of Vonda M. Sargent.

Smith is represented by Gavin W. Skok and Daniel Joseph Gunter of Fox Rothschild LLP.

The case is Moun Keodalah et. al. v. Allstate Insurance Co. et. al., case number 75731-8-I, in the Court of Appeals for the State of Washington, Division 1.

Emmis Communications v. Illinois National Insurance Co.

An Indiana federal judge garnered the policyholder bar's attention when he refused to apply a common exclusion found in directors and officers liability policies and held that an AIG unit owes Emmis Communications Corp. coverage for its costs to defend a suit by preferred stockholders accusing the company's board of attempting to strip investors of their rights.

On March 22, U.S. District Judge William T. Lawrence rejected AIG subsidiary Illinois National Insurance Co.'s argument that coverage was precluded for the suit accusing Emmis and the company's board of amassing preferred stock in order to amend the terms of ownership, finding it was tied to a separate event from other shareholder suits over a scuttled 2010 attempt to take the company private and thus is not subject to a policy exclusion for connected suits.

Illinois National had attempted to rely on a blanket clause excluding coverage for "any claim alleging, arising out of, based upon, attributable to or in any way related directly or indirectly, in part or in whole, to an interrelated wrongful act," which the insurer argued would include the suits filed after Emmis' failed go-private bid.

But Judge Lawrence said a literal interpretation of that exclusion, while it would indeed bar coverage, would be nonsensical because of its breadth. Instead, that exclusion should preclude only claims that share the same causes of action as the previous suits, the judge wrote, finding the preferred shareholder suit did not.

Jenner & Block LLP partner Matt Jacobs said the court's decision is noteworthy because of insurers' widespread use of "interrelated wrongful acts" exclusions to deny coverage for a broad array of claims.

"The exclusion was not intended to bar coverage for any lawsuit brought against a company that in any way, shape or form overlaps with a prior lawsuit brought against the company," Jacobs said.

Emmis is represented by Richard A. Kempf and Thomas F. O'Gara of Taft Stettinius & Hollister LLP.

Illinois National is represented by Kari H. Halbrook, Josh M. Kantrow and Bryan G. Schumann of Lewis Brisbois Bisgaard & Smith LLP.

The suit is Emmis Communications Corp. v. Illinois National Insurance Co., case number 1:16-cv-00089, in the U.S. District Court for the Southern District of Indiana.

Gilbane/TDX v. St. Paul

On the same day it issued the KeySpan decision, the New York Court of Appeals compounded uncertainty among builders about the requirements to secure additional insured coverage when it ruled that a construction manager doesn't qualify for coverage under a contractor's policy because the two companies don't have a direct contract.

In a 5-2 opinion, the New York high court upheld an appellate decision and ruled that the construction manager, a joint venture between Gilbane Building Co. and TDX Construction Corp., is not an additional insured under prime contractor Samson Construction Co.'s commercial general liability policy with Liberty Insurance Underwriters. The joint venture had sought coverage from LIU for underlying litigation over issues with a hospital project.

According to court documents, Samson agreed in a contract with the project's financier, the Dormitory Authority of the State of New York, to acquire additional-insured coverage for a number of entities, including the construction manager. Gilbane has argued that this pact rendered it an additional insured under an LIU policy endorsement.

But the five-judge majority of the Court of Appeals disagreed, finding that the endorsement clearly required the joint venture to enter into a direct written contract with Samson to qualify for additional-insured coverage, which didn't happen. In so ruling, the majority rejected Gilbane's assertions that the key language is ambiguous at best and must therefore be interpreted in favor of coverage.

"Gilbane JV is incorrect; the endorsement is facially clear and does not provide for coverage unless Gilbane JV is an organization 'with whom' Samson has a written contract," Associate Judge Rowan D. Wilson wrote.

Attorneys who represent policyholders have previously told Law360 that the state high court's decision could effectively strip coverage from construction companies that reasonably believed they had been added as insureds on others' policies, while lawyers who counsel insurers have asserted the ruling merely applied the policy language as written.

The decision has already made waves in similar coverage disputes in the construction industry. In May, a New York appellate panel cited Gilbane to support its conclusion that Turner Construction Co. and an architecture firm cannot claim additional insured coverage under a contractor’s policy for a suit over a construction site accident.

Liberty is represented by George R. Hardin of Hardin Kundla McKeon & Poletto PA.

The joint venture is represented by Richard W. Brown of Saxe Doernberger & Vita PC.

The case is Gilbane Building Co./TDX Construction Corp. et al. v. St. Paul Fire and Marine Insurance Co. et al., case number APL-2017-00001, in the Court of Appeals of the State of New York.

Liberty Surplus v. Ledesma & Meyer Construction

In a welcome decision for California employers, the state Supreme Court ruled on June 4 that an insurer’s defense obligation can be triggered by claims that a company failed to properly vet or supervise a worker who then intentionally hurts someone.

The California Supreme Court issued the ruling in response to a certified question from the Ninth Circuit in Ledesma & Meyer Construction Co. Inc.'s coverage dispute with Liberty Surplus Insurance Corp. The state high court found that claims that an employer is negligent in hiring, retaining or supervising a worker who intentionally injured a third party trigger a general liability policy's coverage for an accident, or "occurrence." Under state law, an accident is "an unexpected, unforeseen or undesigned happening or consequence from either a known or an unknown cause."

The justices accepted L&M's position that its negligent failure to properly screen or monitor former employee Darold Hecht, who was later convicted of sexually assaulting a 13-year-old student at a San Bernardino County middle school where the company was working, was an accident because L&M didn't anticipate that Hecht would commit the crime when it hired him.

"Absent an applicable exclusion, employers may legitimately expect coverage for such claims under comprehensive general liability insurance policies, just as they do for other claims of negligence," Associate Justice Carol Corrigan wrote for the court.

Covington & Burling LLP partner Gretchen Hoff Varner, who represents policyholders, said the state high court injected more certainty into liability coverage litigation by making clear that the question of whether an accident has occurred must be viewed through the lens of the policyholder. As such, the decision will be helpful to companies that make decisions that, "through a subsequent chain of events, result in unintended harm — even when there are intentional acts within that chain of events," she said.

"The practical consequence of the Supreme Court's decision is that the insurer does not get to go in and reconstruct the accident from its own perspective to determine if there is some element of volition that would void coverage," Hoff Varner said. "The decision aligns tort principles with coverage principles. This should create predictability and stability in the coverage analysis."

Going forward, California courts will grapple with Ledesma's key holdings in cases involving different scenarios, attorneys say.

"The decision clearly states what California law is, but I would not be surprised if we saw another round of cases, particularly in the [California] Court of Appeal, that attempt to put flesh on the bones of Ledesma," Hoff Varner said.

Hoff Varner's colleague, Covington of counsel Michael S. Greenberg, said policyholders should contest any efforts by insurers to limit the Ledesma ruling to its specific facts.

"Policyholders shouldn't accept any arguments by insurers that the decision is limited to negligent hiring and supervision claims brought against employers whose employees are accused of sexual molestation or other intentionally caused harm," Greenberg said. "Its principles should apply more broadly."

L&M is represented by Michael J. Bidart, Ricardo Echeverria and Steven Schuetze of Shernoff Bidart Echeverria LLP and Jeffrey Isaac Ehrlich of Ehrlich Law Firm.

Liberty is represented by Patrick Fredette and Christopher Ryan of McCormick Barstow Sheppard Wayte & Carruth LLP.

The case is Liberty Surplus Insurance Corp. et al. v. Ledesma & Meyer Construction Co. Inc. et al., case number S236765 in the Supreme Court of the State of California, and case number 14-56120 in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Rebecca Flanagan and Emily Kokoll.