PROPERTY INSURANCE SECTION NEWSLETTER

FDCC
DEFENSE LAWYERS. DEFENSE LEADERS.

Winter 2015

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UPCOMING EVENTS

- 3/4/2015: **2015 Winter Meeting at The Ritz Carlton**
- 4/16/2015: **Deposition Boot Camp in Denver**
- 6/8/2015: **Deposition Boot Camp in New Orleans**

Message from the Chair

I would like to start this message by acknowledging and offering appreciation to Phil Reeves of Gallivan White Boyd PA in Greenville, South Carolina, who took the time and effort to author this newsletter (Great job, Phil!).

As you know, our Winter Meeting is right around the corner, and the Property Insurance Section, in partnership with the Professional Liability Section, is planning a fascinating program regarding a troubling and cutting edge trend that is developing around the country, i.e., "Aiding and Abetting Claims against Attorneys." Thus, coverage attorneys are increasingly being sued for aiding and abetting insurance bad faith. These claims pose some real difficulties for both the insurer and the attorney, ranging from coverage disputes between the attorney and his/her own errors and omissions insurance company (since aiding and abetting is an intentional tort, coverage may be in question), attorney-client privilege concerns, and strategic difficulties for the insurer who is trying to defend itself against a bad faith claim while simultaneously preserving a malpractice claim against the attorney whose legal advice may (or may not) have been flawed.

Rebecca Levy-Sachs from the Property Insurance Section and Gena Sluga, Chair of the Professional Liability Section, will serve as the presenters to examine this new exposure and to provide insight to the attendees regarding these new type of claims. The program will take place on Saturday, March 7, 2015 from 7:30 a.m. – 8:30 a.m. So, please plan to be there…this is not to be missed!

Looking forward to our Annual Meeting later this year in Banff. Stay tuned for more information regarding an exciting program that is in the works by the Property Insurance Section in partnership with the Extra-Contractual and Insurance Coverage Sections concerning "Insurance Implications Arising from Cutting Edge Technologies." Thus, technology is advancing at a dizzying pace, and new devices change how risks are insured. Moreover, liability and insurance principles must develop for self-driving cars, commercial drones, 3-D printers, and a cyber-world that holds nearly everyone's personal, medical, and financial information.

So on that note, Phil Reeves from the Property Insurance Section, along with Alan Rutkin, David Godwin, and Jane North from the Extra-Contractual and Insurance Coverage Sections will serve as the presenters and examine how lawyers, courts, and insurers will respond to these technological advances.

Finally, please contact me or Phil Reeves if you hear of an interesting case or information that is newsworthy, and that would be of interest or importance to the members of the Property Insurance Section.

Warm Regards,

Rick

News & Notes

Save the Date – 2015 Winter Meeting
The Ritz Carlton – Amelia Island, Florida
March 4 – March 7, 2015

The Winter Meeting will be held at the Ritz Carlton on Amelia Island in Florida. Convention Chairs Walter and Elaine Dukes and Program Chair Mike Glascott are planning a great meeting at the spectacular venue. More information is provided in the fall edition of the Federation Flyer, which you should have received in the mail. It is also posted at the FDCC website.

Deposition Boot Camp

The FDCC is hosting a series of 2-day seminars offering advanced instruction of taking and defending depositions. The "boot camps" are a terrific educational tool for young lawyers. The registration fee is $795 for FDCC member firms and $845 for other registrants. You can register through the FDCC website. We encourage you to take advantage of this opportunity in order to invest in the future of your firm with the ability to market associate expertise to clients. The upcoming boot camps are as follows:

- Denver April 16-17, 2015
- New Orleans June 8-9, 2015

Fifth Circuit Holds that Excess Insurer Can Maintain Subrogation Claim Against Primary Insurer Based on Primary Insurer's Bad Faith In Absence of Excess Judgment

In *RSI Indem. Co. v. American States Ins. Co.*, No. 14-30033 (5th Cir. Sept. 25, 2014), the Fifth Circuit was presented with a dispute among primary and excess insurers. The underlying dispute arose out of a motor vehicle accident which resulted in significant injuries. The injured party filed suit against the insured and the primary insurer undertook the defense, but did not notify the excess insurer until two weeks prior to the expiration of the discovery deadline. After notifying the excess insurer, the primary insurer retained new defense counsel. New counsel opined that the case not only exceeded the liability limits of the primary policy but also the limits of the excess policy. A few weeks prior to the trial, the primary insurer tendered its policy limits. Rather than intervene on the eve of trial, the excess carrier negotiated a settlement with the injured party. Thereafter, the excess carrier, as subrogee of the insured, filed suit against the primary carrier based on the primary insurer's bad faith failure to defend the insured properly. Its theory was that the primary insurer's failure to investigate and take appropriate defensive actions drove up the settlement value of the case, exposed the insured to additional liability, and left the excess insurer with no choice but to reach a settlement with the injured party on the eve of trial.

The primary carrier moved for and was granted summary judgment based on Louisiana precedent establishing that in the absence of an adjudicated excess judgment, there can be no claim for an insurer's bad faith failure to settle. On appeal, the Fifth Circuit reversed. It held that the precedents relied upon by the district court were distinguishable in that they lacked a nexus between the primary's insurers' alleged bad faith breach of their duty to the insured and resulting exposure to excess liability. According to the Court, allowing the excess insurer to pursue a claim for reimbursement of monies paid to settle excess claims that would not have otherwise occurred is consistent with the principle that a primary insurer must act in good faith with the best interests of the insured in mind. In doing so, the Court held that:

[U]nder the circumstances of this case, where an excess carrier alleges that a primary insurer in bad faith breached its duty to defend a common insured properly and caused exposure of the insured to an increase in the settlement value of the case above the primary policy limit, which the excess insurer must satisfy on the insured's behalf, the excess insurer has a subrogated cause of action against the primary insurer for any payment above what it otherwise would have been required to pay.

Click here for a copy of the decision.

South Carolina Supreme Court Holds That Family Step-Down Provisions Violate Public Policy

In *Williams v. GEICO,* No. 2011-196449 (S.C. Aug. 20, 2014), the South Carolina Supreme Court held, in a 3-2 decision, that a family step-down provision contained in an auto policy violates public policy. The appellants in *Williams* were husband and wife and died when their vehicle collided with a train. It is unknown which appellant was driving the vehicle at the time of the accident. The appellants were the named insureds on an auto policy issued by GEICO. As stated on the declarations page, the policy provided liability limits of $100,000 per person. However, the policy contained a step-down provision which reduced the amount of coverage to the statutory minimum limits for bodily injury to an insured. Following the accident, the appellants filed suit against GEICO seeking a judicial declaration as to the amount of liability coverage available under the policy. The appellants contended that the policy was ambiguous because the application of the step-down provision did not provide the liability limits stated on the declarations page. The appellants also argued that the provision violated the state's public policy, particularly S.C. Code § 38-77-142. After a bench trial, the circuit court rejected both arguments and concluded that the step-down provision applied to limit coverage to the minimum limits provided by South Carolina law.

On appeal, the South Carolina Supreme Court held that the GEICO policy was not ambiguous. The Court indicated that insurance policies are to be read as a whole. When all of the provisions of the policy are read together, the Court found that the policy unambiguously provided that liability coverage to an insured is limited to the minimum limits.

While the Court found that the provision was unambiguous, it held that the limitation violated public policy pursuant to S.C. Code § 38-77-142 (c) of the Motor Vehicle Financial Responsibility Act. Section 38-77-142 requires every policy issued in South Carolina to insure the named insured and permissive users against liability for death or injury "within" the coverage of the policy. Specifically, subsection (c) of the statute provides that "[a]ny . . . provision . . . included in any policy of insurance which purports or seeks to limit or reduce the coverage . . . is void." Based on this language, the Court held that an insurer is prevented from reducing the amount of coverage contained on the policy's declarations page. Because the statute provides that insurers must provide liability coverage "within the coverage of the policy," the Court found that the statute was concerned with the face amount of the coverage and not the statutory minimum limits of coverage set forth in S.C. Code § 38-77-140.

Click here for a copy of the decision.