GOLDBERG SEGALLA

CaseWatch: Insurance

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ACTIONS AND PROCEEDINGS

Court Stays Declaratory Judgment Proceeding to Allow Facts of Underlying Incident to be Resolved

Admiral Ins. Co. v. Shah & Associates
(S.D. Ca., July 23, 2013)

Admiral issued a professional liability policy which contained a condition that the policyholder had no knowledge of prior incidents that could result in a claim. The insurer alleged that the policyholder knew its prior actions could lead to a claim. The court found that the coverage questions turn on facts to be litigated in the underlying action, and therefore instituted a stay.

ADDITIONAL INSURED

Additional Insured Excess Language Applies Only Where Policyholder is Additional Insured

Commonwealth Edison Co. v. Arch Ins. Co.
(N.D. Ill., July 19, 2013)

A utility company subcontracted with a firm to do repair work on the utility company's electrical equipment. The subcontractor agreed to name the utility company as an additional insured on its policy on a primary basis. After an employee of a sub-subcontractor was injured and sued the utility company, the company tendered its defense and indemnity to the subcontractor's insurer. The court held that the subcontractor's insurer was obligated to provide primary coverage to the utility company. In so ruling, the court held that the policy's "Other Insurance" provision rendered coverage excess only where the policyholder was listed as an additional insured on another's policy.

Additional Insured Not Required to Provide Notice of Occurrence

Mt. Hawley Ins. Co. v. Robinette Demolition, Inc.
(Ill. App., July 26, 2013)

In a declaratory judgment action brought by an insurer against a potential additional insured, the court held that only a policyholder (and not additional insured) is required

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to provide timely notice of an occurrence and claim. Furthermore, in a matter of first impression, the court found that the notice provision (a standard one in CGL policies) did not make coverage for an additional insured contingent upon the policyholder's compliance with its duty to notify. Because the general contractor complied with its obligation to forward suit papers in a timely manner, the court held that it was entitled to coverage under the policy.

Employee Exclusion Strikes Again: No Coverage for Additional Insured for Employee of "Any" Insureds

Soho Plaza Corp. v. Birnbaum
(N.Y. A.D., July 3, 2013)

A contractor's insurer issued a special insurance policy to the contractor. The contractor had entered into a contract with the developers to renovate a cooperative apartment. The plaintiffs owned and managed the building in which that apartment was located. The plaintiffs and the developers were named as additional insureds under the contractor's insurer's policy. An employee of the contractor commenced an action against the plaintiffs to recover damages for personal injuries he allegedly sustained while working in the apartment. The court held that the contractor's insurer was not obligated to defend or indemnify the plaintiffs in the underlying action because the policy expressly barred coverage for injury to an employee of any insured.

Employee Exclusion Applies to Additional Insureds

Szeles Real Estate Dev. Co., L.P. v. Hartford Cas. Ins. Co.
(E.D. Pa., July 25, 2013)

The named policyholder leased commercial real estate and named the property owner as additional insured. An employee of the named policyholder was injured while on the leased premises and sued the property owner. The property owner tendered its defense to the tenant's insurer as an additional insured under the policy. The court held that the policy's employee exclusion barred coverage even though the policyholder's employee was injured, not an employee of the tendering additional insured.

CGL EXCLUSIONS

Contaminated Oil Not Considered a "Pollutant" Under Pollution Exclusion

Colonial Oil Industries, Inc. v. Indian Harbor Insurance Co.
(2d Cir. (N.Y.), June 25, 2013)

A company in the business of transporting, storing, and selling fuel oil sought coverage for the receipt of contaminated fuel oil, resulting in lost oil and decontamination and remediation costs. The relevant policy provided coverage for "any pollution condition." Using New York authority related to the pollution exclusion and the "reasonable expectations of a businessperson," the court found no coverage because there was no environmental harm.

Automobile Exclusion Precludes Coverage Under CGL Policy

First Specialty Insurance Corporation v. Pilgrim Insurance Company
(Ma. Ct. App., June 26, 2013)

An automobile insurer failed to secure contribution and subrogation against a policyholder's CGL carrier in light of the automobile exclusion. The exclusion explicitly prohibited coverage for any damage arising out of the use of an "auto." The court found in favor of the CGL carrier despite the policy containing a "severability of interests" clause.

Related Claim Provisions Ambiguous

Gastar Exploration Ltd. v. U.S. Specialty Insurance Company, et al.
(Tex. Ct. App., July 16, 2013)

Insurers failed to exclude coverage for securities fraud claims as the provision was deemed ambiguous by a Texas appeals court. The policyholder was engaged in a mare-leasing scheme which permitted the leasing of thoroughbred mares and conversion of their interests into stock, an option which the policyholder later dishonored. Numerous lawsuits ensued. The relevant policy contained a "claim interrelationship" exclusion which aggregates all related claims back to the date of filing of the first related lawsuit. Insurers argued that the claims against the insured were factually similar to the pre-policy suit and so, no coverage should be afforded. The court disagreed, finding the provision ambiguous in light of the entirety of the policy.

Community Space Still Considered Part of a Mixed-Use Building

RSUI Indemnity Company v. RCG Group, et al.
(2d Cir. (N.Y.), June 10, 2013)

The Second Circuit affirmed a decision to exclude coverage for a construction company related to a crane collapse in Manhattan, New York. In doing so, the court noted that the policy's "residential project" exclusion barred coverage for residential buildings and "mixed-use buildings." The insured argued that community space within the building rendered the exclusion inapplicable. The court disagreed and further turned down the applicability of the exceptions to the exclusion.

DUTY TO DEFEND

Insurer Owes Coverage for Claims of Negligent Misrepresentation

Automax Hyundai South, L.L.C. v. Zurich Am. Ins. Co.
(Ok. Ct. App., June 26, 2013)

The policyholder car dealership was sued by customers alleging that a car they bought had been misrepresented as new and had undisclosed damage. The insurer denied coverage. The jury in the underlying case was instructed on fraud and negligence and awarded damages, but did not specify the theory of liability, although they found that the policyholder had acted intentionally. The court found that negligent failure to detect damage in a car constituted an accident and that the insurer was wrong to deny coverage. The court also found that the insurer owed defense costs and the case was remanded for allocation and bad faith claims.

Insurer Owes No Coverage for Incidents Occurring Prior to Coverage Period

City of San Buenaventura v. Ins. Co.
(Cal. Ct. App., June 26, 2013)

The city contracted with a developer to build condo units for low-income families. In 2004, a number of buyers sued the city alleging that they bought low-income condos in 2001 without being told their condos were subject to low-income ceilings and sought to have the ceilings revoked. The insurance policies at issue covered the city from 2002 to 2004. The court found that there was no duty to defend as no occurrence took place within the policy period as the complaints arose from the buyers' claims that they were harmed in 2001.

Intentional Acts Exclusion Precludes Coverage for District Representative

State Auto Prop. & Cas. Ins. Co. v. Lagrotta
(Pa. Ct. App., June 26, 2013)

A potential purchaser and a county had a deal in place whereby the purchaser would purchase a nursing home from the county. The deal fell through, allegedly because of the actions of a district representative. The potential purchaser alleged that the district representative took actions to intentionally thwart a deal between the purchaser and the county. The court found that the intentional acts exclusion applied to bar coverage for the insured.

ENVIRONMENTAL

Injury-in-Fact Trigger Applied in Alabama Manufactured Gas Contamination Suit

Alabama Gas Corp. v. Travelers Cas. & Surety Co.
(N.D. Al., July 16, 2013)

The policyholder sought to recover sums it agreed to pay the EPA in 2008 for damage which was sustained years prior. In holding for the insurer and dismissing the policyholder's indemnity claims, the court held that based on the leading Alabama precedent, the foregoing facts, and the relevant policy language, Alabama applied an injury-in-fact requirement for indemnity under a policy of insurance. Thus, as any injury to land occurred prior to 1949, the fact that the landscape was altered approximately 20 years later did not change this finding.

Pollution Policy's Late Notice Requirement in Buy-Back Provision Upheld Regardless of Prejudice

Starr Indemnity & Liability Co. v. SGS Petroleum Service Corp.
(5th Cir. (Tex.), June 18, 2013)

An excess coverage policy contained an absolute pollution exclusion clause, however, the parties negotiated a buy-back provision which deleted the original pollution exclusion and replaced it with a new provision providing coverage under certain specific conditions. One was that any discharge or escape of pollutants must have been reported within 30 days after having been known to the insured. The insured did not report the triggering incident to the insurer until 59 days after it learned of the chemical release. The court found that the insurer was justified in denying coverage under the specific terms of the buy-back provision regardless of whether the insurer was prejudiced.

LIFE, HEALTH, DISABILITY, & ERISA

California Cuts to Rural Healthcare Services Violate Medicaid Act

California Ass'n of Rural Health Clinica; Avenal Community Health Center v. Douglas
(9th Cir. (Ca.), July 5, 2013)

California recently enacted legislation that eliminates coverage for certain healthcare services in underserved rural areas to help curb the state's budgetary woes. Specifically, the legislation cut coverage for adult dental, podiatry, optometry, and chiropractic services in rural areas. The court found that the services being cut were covered under the Medicaid Act and therefore the law was invalid.

Under HITECH, HIPAA Violations Costly

In the Matter of Dept. of HHS v. Wellpoint, Inc.
(July 8, 2013)

The U.S. Department of Health and Human Services (HHS) announced it reached a settlement agreement with Wellpoint, Inc. resulting in a payment of $1.7 million for Wellpoint's potential privacy violations of the personal data of more than 600,000. The HIPAA violation stems from an alleged improperly secured online database. According to the Health Information Technology for Economic and Clinical Health Act (HITECH) Wellpoint was obligated to submit a breach report when any HIPAA covered company discovered a potential breach in the security of protected information. Upon receiving notice of the potential breach, the Department of HHS conducted an investigation. The investigation revealed that a software upgrade had left beneficiary electronic protected health information open for unauthorized access.

ERISA-Collection of Discretionary Fees to Cover State Obligation is Self-Dealing

Local 636 Insurance Fund v. Blue Cross & Blue Shield of Michigan
(6th Cir. (Mich.), July 18, 2013)

In the underlying case, the plaintiffs claimed that the defendant collected a discretionary other than group fee in order to cover its Medigap obligation to the State of Michigan. In Michigan, the Medigap obligation is set by the insurance commissioner at the statutory maximum of 1 percent of earned subscription income. The commissioner does not prescribe the manner by which the obligation must be fulfilled. In this situation, the defendant chose to collect the funds necessary by assessing the fee to its customers, through the process of shaving a small amount off of a provider's discount, rather than passing on the whole discount to the customer. The court found that the defendant was a fiduciary because it had discretion in setting the fee it charged to its customers, and also discretion in determining what customers were charged the fee. The court went on to find that the defendant had engaged in self-dealing by assessing the fee solely to satisfy its own obligation, thereby breaching its fiduciary duty.

MetLife CEO Says Company Is Not a Systemically Important Financial Institution

July 16, 2013

MetLife was notified by the Financial Stability Oversight Council (FSOC) that it had reached "Stage 3" in the process to determine whether the insurer would be named a non-bank Systemically Important Financial Institution (SIFI). Dodd-Frank gave the regulatory council the power to identify potentially risky non-bank firms and regulate them more like banks after a number of non-bank firms struggled during the 2007–2009 financial crisis. The FSOC has recently given SIFI designations to American International Group and GE Capital. MetLife's CEO claims that such a designation on an insurer would lead to higher premiums and would also reduce an insurers' ability to take on risks and could stop them from offering certain products.

FRAUD

Insurer Awarded Treble Damages for Insurance Fraud

Allstate Ins. Co. v. Nassiri
(D. Nev., July 15, 2013)

The plaintiff brought an insurance fraud case brought against a chiropractic doctor arising out of 158 auto accident claims that the defendants fraudulently "treated" between 2001 and 2007. In June 2013, the jury awarded compensatory damages of $1,198,748.82 and the plaintiffs requested treble damages. The plaintiff argued that treble damages were mandatory and the court agreed, bringing the judgment up over $3.5 million.

Coverage Voided Over Misrepresentation of Material Facts

Essex Ins. Co. v. Hartford Fire Ins. Co.
(C.D. Ca., July 8, 2013)

The plaintiff was the assignee of all rights and choses in action under a cargo liability insurance policy issued by the defendant insurer to a trucking company. The insurer moved for judgment based on the fraud exclusion claiming that the policyholder misrepresented the date which it obtained the covered property and the nature of the property. The court held that, as a matter of law, the misrepresentation was material, and voided coverage.

Fraud Claim Against Insurer Preempted by State Law

Irish v. Allied Prop. & Cas. Ins. Co.
(W.D. Mo., July 18, 2013)

The insurer argued that a policyholder's claims for fraud were preempted under Missouri law, which states that an insurance company's denial of coverage itself is actionable only as a breach of contract and, where appropriate, a claim for "vexatious refusal to pay." Because the fraud claim action was dependent on the elements of a contract claim and it would not be possible for the insurance company to commit the alleged fraud in a situation where it had decided to pay the claim, the plaintiff was not allowed to pursue a fraud claim.

A Photo Finish? Not This Time

Mali v. Fed. Ins. Co.
(2d Cir. (Ct.), June 13, 2013)

After a fire destroyed their barn, the defendant-insurer stopped making indemnification payments, claiming fraud. At trial, a jury agreed, finding that the policyholders forfeited coverage by submitting fraudulent

claims relating to the value of the barn and its contents in that they claimed no photos of the barn or its contents existed, despite giving photos to their antiques appraiser. The plaintiff appealed, contending that the court abused its discretion in authorizing the jury to draw an adverse inference against them by reason of their failure to make disclosures demanded by the defendant during the pre-trial discovery proceedings relating to the contents of the barn. The appellate court determined that the district court did not err by giving an adverse inference jury instruction because it was not a sanction and did not require findings since the district court left the jury in full control of all fact finding.

PERSONAL AND ADVERTISING INJURY

Court Considers Defamation a Business Pursuit

Hardenbergh v. Patrons Oxford Ins. Co.
(Maine, July 16, 2013)

The Maine Supreme Court held that an insurer had no duty to defend the policyholder homeowner against a defamation lawsuit because the alleged activities took place as part of the insured's business pursuits. In this case, the insured was the "editor, publisher, owner, and principal" of a widely-read trade newsletter. Because the alleged defamation took place in that newsletter, it was considered a business pursuit and therefore not covered.

PRIORITY OF COVERAGE

Supplemental Liability Insurance Considered Excess to Rental Car Center's Primary Policy

Aleman v. Ace Am. Ins. Co.,
(D. Fl., July 19, 2013)

The plaintiff renter rented a car pursuant to a written rental agreement, and obtained supplemental liability insurance (SLI) coverage from the defendant insurer. While driving the car the renter's son struck a pedestrian. The rent-a-car company, on behalf of the insurer, denied coverage in the subsequent personal injury action, because the son was not an authorized driver. In the ensuing declaratory judgment action, the plaintiff sought coverage alleging that the insurer's policy was a primary policy. The court found that the insurer's SLI coverage supplements coverage to authorized drivers under an excess policy separate from the rental center's primary coverage.

Plain Reading of Policy Indicated Insurer's Policy Not a True Excess Policy

Colony Nat'l v. Sorenson
(E.D. Ky., July 25, 2013)

The defendants' insurer in this case sought summary judgment dismissal upon a finding that its policy was excess over all other insurance available to the policyholders in the underlying matter. The court found that the insurer's policy was not true excess insurance because there was no requirement that the policyholders have a primary policy. Moreover, the insurer's policy plainly indicated that the insurance "is primary except when it is excess over any other insurance." Thus, the court found that the insurer's policy was not a true excess policy, but rather a primary policy that attempts to set priorities with respect to other primary policies.

Court Finds Plaintiff Is Entitled To Primary Coverage as AI Under Insurer's Policy

Commonwealth Edison Co. v. Arch Ins. Co
(N.D. Ill., July 19, 2013)

In this insurance coverage dispute, the plaintiff and its insurer argued that the defendant insurer had a primary obligation to defend the plaintiff in an underlying personal injury action. The defendant argued that it did not have a primary, non-contributory duty to defend the plaintiff because its policy was excess to the one provided by the plaintiff's insurer. The court disagreed, finding that the defendant's policy named the plaintiff as an additional insured, entitling it to primary coverage under the policy.

Excess Carrier Required to Defend and Indemnify When Primary Policy Excluded Claims in Underlying Action

Encore Receivable Mgmt. v. Ace Prop. & Cas. Ins. Co.,
(S.D. Oh., July 3, 2013)

The plaintiffs commenced this action seeking coverage for two lawsuits under four different primary, umbrella, and excess policies issued by the defendant. The plaintiffs contended that the underlying lawsuits were excluded by endorsement to the primary policies, and that they were therefore entitled to summary judgment, holding that the defendant insurer had an immediate duty to defend under its umbrella policies. The court agreed and granted summary judgment, finding that there was no just cause for delay, and ordered final judgment, establishing that the defendant had an immediate duty to defend the plaintiffs.

Plaintiff Not Entitled to Umbrella Coverage for Claim Not Covered by Primary Policy

Pioneer Exploration, LLC v. Steadfast Ins. Co.
(W.D. La., July 8, 2013)

In this insurance coverage dispute between an oil and gas company and its insurer, the plaintiffs sought coverage for costs after an oil blowout under both a primary policy and umbrella policy. The plaintiffs' counsel since conceded that coverage did not exist under the primary policy, and thus the dispute in this motion was whether the umbrella policy covered the plaintiffs' claims. The court found that the clear terms of the policy excluded coverage for the costs incurred after the blowout. Accordingly, the court granted summary judgment in favor of the defendant insurer.

PROFESSIONAL LINES INSURANCE

Insurer Has Duty to Defend Malpractice Action Against Law Firm Who Provided Free Services as Settlement for Previous Malpractice

Admiral Insurance Company v. Marsh
(E.D. Va., June 25, 2013)

The policyholder law firm in this case had previously committed malpractice in the defense of three legal actions against a client. In order to settle any malpractice claims, the policyholder provided free services to defend the client in an unrelated defamation action. The policyholder's handling of the defamation action, in turn, gave rise to another malpractice action against it by the client. The insurer sought a declaration that it had no duty to defend the policyholder in the malpractice action, asserting that: (1) the past acts exclusion applied because the malpractice in the defamation action was a related wrongful act to the malpractice in the prior lawsuits; (2) the unauthorized settlement exclusion was triggered by the unauthorized settlement of the prior malpractice claims; (3) the claim was first made before the policy period when the Virginia State Bar ruled that professional misconduct took place; and (4) the action fell outside the scope of coverage because the professional services were not provided for remuneration, as required by the policy's definition of professional services. The court rejected each of the insurer's arguments and found that a duty to defend existed, finding that: (1) the past acts exclusion did not apply because no common set of facts connected the defamation action to the prior lawsuits; (2) only an unauthorized settlement of the current malpractice action would preclude coverage for the malpractice action, the settlement of the prior claims thus did not trigger the exclusion; (3) the state licensing proceedings did not constitute a "claim" as defined by the policy, thus a claim had not first been made at the time of the bar ruling; and (4) the agreement to release claims against the policyholder constituted compensation or remuneration for the professional services provided by the policyholder as required by the policy's definition of professional services.

Exclusion Precludes Coverage for Funds Misappropriated by a Third-Party

Liability Protection Society, Inc. v. Whittington Law Associates, PLLC
(D.N.H., June 28, 2013)

The policyholder law firm was a victim of the "Nigerian Check Scam," wherein it was duped into believing it was being retained by a foreign corporate client and induced to accept and deposit a check into the law firm's client trust account on behalf of the foreign "client." The firm wired the proceeds to Japan before realizing the check was counterfeit. The policyholder sought coverage under its professional liability insurance policy for an underlying action by the policyholder's bank to recover the bank's lost funds. The policyholder argued that coverage was available because this was a claim arising from "an act, error, or omission in professional services," given there had been a good faith belief that it had entered into an attorney-client relationship. The court declined to address this interesting argument, concluding that even if professional services had been rendered, the policy exclusion for claims arising from the misappropriation of funds controlled by the policyholder applied broadly to include the misappropriation of bank funds, not just the insured's clients' funds, and to misappropriation by a third party, not just misappropriation by the insured.

Failure to Notify Insurer of Claims in Application Rendered Policy Void

Prosperity Mortgage Company v. Certain Underwriters at Lloyd's, London
(D. Md., July 15, 2013)

The policyholder of a Mortgage Bankers Professional Liability Policy and a Mortgage Bankers Fidelity Bond filed declaratory suit against the insurer, alleging failure to defend and indemnify against claims in a class action lawsuit asserting mortgage-related claims. The insurer counterclaimed for rescission of the policy. The plaintiffs' counsel in the underlying class action had previously represented a different set of plaintiffs in a suit against the policyholder alleging faulty appraisals and high loan values. During settlement of the earlier action, the plaintiffs' counsel identified new clients who also had claims related to the purchase and sale of their homes and attempted to settle those claims prior to filing a formal complaint. The policyholder declined to settle the new claims and subsequently failed to list those claims in the insurance application. The plaintiffs' counsel later instituted the class action on behalf of the new clients he had identified in settlement discussions, as well as others. The court held that as a matter of law the policyholder had knowledge of acts that could reasonably be expected to be the basis of a claim against it and that the failure to identify the claims in the insurance application constituted a material misrepresentation, omission, or concealment that rendered the policy void.

"Sexual and/or Physical Abuse Exclusion" Precludes Coverage for Negligence Claims Against Adoption/Foster Care Agency

Scottsdale Insurance Company v. Children's Home Society of North Carolina, Inc., et al.
(E.D. N.C., July 3, 2013)

A general liability insurer filed a declaratory action against a not-for-profit private adoption and foster care agency policyholder defending an underlying personal injury and wrongful death action alleging that the policyholder's negligent failure to prevent the boy's adoption by a couple who physically and mentally abused him proximately caused his injuries and death. The U.S. District Court held that the policy's exclusion for injuries arising out of "sexual or physical injury or abuse, including but not limited to assault and battery, negligent or deliberate touching, corporal punishment, and mental abuse" precluded coverage under the Errors & Omissions coverage part for the negligence claims because the alleged harm arose from the abuse, not the policyholder's negligence, and applied broadly to include all non-contact emotional and verbal abuse, not just mental abuse flowing from sexual or physical abuse.

Claims Alleging Unlawful Schemes and Agreements to Deny Coverage Are Not Deemed to Arise Solely Out of the Rendering or Failure to Render Professional Services

Wellpoint, Inc. v. National Union Fire Insurance Company, Inc.
(Ind. App. June 19, 2013)

The policyholder insurance company sued reinsurers seeking coverage for its settlement of lawsuits alleging it participated in an unlawful scheme to improperly delay or deny reimbursement for medical services. The policy's professional liability coverage part covered loss resulting from claims against the insured for any wrongful act of the insured "but only if such Wrongful Act … occurs solely in the rendering of or failure to render Professional Services." The court found that the underlying complaints alleged not only that the policyholder improperly denied claims, but that it participated in a common scheme to systematically deny, delay, and diminish the payments due to doctors, and had entered into an unlawful agreement with other managed care companies to unlawfully reduce payments to providers. Even if some professional services were implicated, the underlying actions did not arise "solely" out of such services.

REINSURANCE

Reinsurance Fraud Class Action Not Time-Barred, Another Pennsylvania Federal Court Judge Says

Ba v. HSBC USA, Inc.
(E.D. Pa., June 26, 2013)

In June, Judge Paul S. Diamond of the Eastern District of Pennsylvania refused to dismiss a proposed reinsurance fraud class action, finding that the plaintiffs' claims were not time time-barred because the plaintiffs could not have discovered the alleged reinsurance scheme until after the statute of limitations expired. The plaintiffs alleged that the mortgageholder required customers who put less than 20 percent down on their home mortgage loan to acquire private mortgage insurance from a company selected by the bank. A mortgageholder subsidiary, in turn, reinsured the policies issued by the insurers. However, the plaintiffs claim that the reinsurance services were illusory and merely served as a pretext for the insurers to pay kickbacks in exchange for the bank referring its borrowers to them. In their complaint, the plaintiffs claimed that the defendants' actions made it virtually impossible to uncover the true nature of the reinsurance arrangements. Thus, Judge Diamond concluded that the plaintiffs sufficiently pled the principle of equitable tolling and their claims were barred.

Judge Approves Reinsurance Arbitration Decision

Platinum Underwriters Berm., Ltd. v. Excalibur Reinsurance Corp.
(E.D. Pa., July 15, 2013)

Arbitrators did not exceed their powers when they allowed Platinum Underwriters Bermuda Ltd. to keep certain premiums it collected from an Excalibur Reinsurance Corp. predecessor under a 2003 reinsurance contract containing a "deficit carry-forward" provision, U.S. District Court Judge Paul S. Diamond held last month. Excalibur claimed that the arbitrators had misinterpreted the 2003 contract; interpreting some provisions too literally and some not literally enough. "To state these contradictory contentions is to refute them," wrote the judge. "I may vacate the Final Award only for irrationality not for over or under 'literality.'"

Class Action Alleging Fraudulent Reinsurance Scheme Untimely, Pennsylvania Federal Judge Says

Menichino v. Citibank, N.A.
(W.D. Pa., July 19, 2013)

Two punitive class actions alleging mortgage reinsurance fraud were dismissed last month on the basis that the claims were untimely and could not be equitably tolled. According to U.S. District Court Judge Mark R. Hornak:

> [T]he accepted-as true facts presented in the complaint do not show, and in fact raise doubts about, whether discovery might produce evidence that the plaintiffs' untimely claims should be equitably tolled … this factual deficiency, especially when viewed in light of the long-established principle that courts should be wary of invoking equitable tolling at all, necessitates the conclusion that the complaint in its current form must be dismissed.

Suit Alleging Captive Reinsurance Scheme Not Timely Filed

White v. PNC Fin. Servs. Group
(E.D. Pa., June 20, 2013)

Pennsylvania U.S. District Court Judge Lawrence F. Stengel dismissed a proposed class last month on the basis that claims were not timely filed. The plaintiffs alleged that PNC Financial Services Group, Inc. and several insurers created a captive reinsurance scheme where the lender received kickbacks for referring mortgage customers to the insurers. The defendants moved to dismiss the suit — which was filed under the Real Estate Settlement Procedures Act of 1974 — on the basis that the plaintiffs missed the one-year limitations period proscribed by the statute. The plaintiffs countered that the suit should survive because the companies fraudulently concealed their alleged scheme. Judge Stengel determined that the plaintiffs failed to meet the three-part test necessary to prove fraudulent concealment and dismissed their amended complaint without prejudice.

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Professional Liability Monthly provides the latest information regarding news in the professional liability industry. For more information, contact Brian R. Biggie at bbiggie@goldbergsegalla.com.

Reinsurance Review

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