CETRULO & CAPONE LLP

INSURANCE INDICATOR

VOLUME VI, No. 6 JUNE 2012

RI: SUPREME COURT UPHOLDS POLICIES AS READ IN ENTIRETY

The Rhode Island Supreme Court affirmed a ruling awarding excess liability insurer, Empire Fire & Marine Insurance, complete reimbursement from Citizens Insurance Co. for attorney's fees spent defending Empire's client, BMW Financial, owner of a leased car involved in an accident caused by lessee.

Citizens attempted to argue that, by the plain terms of its policy, it was the excess liability insurer since the car was leased not to named insureds but their company. Thus, under its "other insurance" provision, Citizens owed no duty "for a vehicle not owned by the named insureds is excess over any other collectible insurance."

Yet the court agreed with Empire that a policy is to be read in its entirety giving words their plain, ordinary, and usual meaning. Reasoning that an ordinary person would understand Citizen's policy terms to cover BMW since the lease required the naming of BMW as an additional insured, and it did, the court held Citizens to be the primary insurer and there was no conflict between the two policies' other insurance provisions.

And so, Citizens, as the primary insurer, maintained the primary duty to defend BMW for the underlying action and all defense costs expended by the secondary insurer. Empire Fire & Marine Ins. Companies v. Citizens Ins. Co. of Am./ Hanover Ins., 2011-33-APPEAL, 2012 WL 1592963 (R.I. May 7, 2012).

MA: COSTS & INTEREST ACCRUAL DEPENDS ON ENACTMENT DATE

The Supreme Judicial Court held that the November 1, 2009 amendment to the Massachusetts Tort Claims Act, declaring the Massachusetts Bay Transportation Authority (MBTA) a "public employee," was to apply prospectively and thus the MBTA was not entitled to any retroactive liability protection, including limited liability for interests and costs.

Attempting to limit its liability for a judgment rendered for a plaintiff involved in a motor vehicle accident with a negligently operated MBTA bus, the agency claimed that as a public employer under the Act it was immune from the interests and costs of a lawsuit.

Although the underlying action was under appeal at the time of the amendment, the decision was rendered one month earlier. Because the amendment narrowed the scope of the State's consent to suit in tort actions, thereby substantively affecting a plaintiff's right to be made whole, the SJC held that without clear legislative intent for retroactive application, it shall instead apply prospectively from the statute's effective date.

Yet, the SJC also held that the statutory rate applies each day after the amendment passed since interest accrues only upon the actual occurrence of the delay and accrual is daily. As such, the MBTA was a public employer after November 1, 2009 subject to an interest rate of zero. Thus, the plaintiff had no right to accrual of any interest after November 1, 2009, only interest up to that date.

Smith v. Massachusetts Bay Transp. Auth., 462 Mass. 370 (2012).

Cetrulo & Capone LLP, an AV rated law firm, has a regional practice with lawyers admitted across New England and in New York. We defend insureds and represent their insurers in areas of general liability, municipal liability, construction, toxic torts, environmental, employment, product liability, personal injury, and insurance coverage in state and federal trials and appeals, arbitration, mediation and ADR. The best solutions require the best representation.

BOSTON OFFICE

Two Seaport Lane
Boston, MA 02210
617.217.5500
617.217.5200 Fax

NEW YORK OFFICE

14 Wall Street
New York, NY 10005
212.635.2230
212.635.2239 Fax

PROVIDENCE OFFICE

321 South Main Street
Providence, RI 02903
401.274.7850
401.274.9670 Fax

CONNECTICUT OFFICE

195 Church Street
New Haven, CT 06150
203.909.6498
203.909.6499 Fax

Cetrulo & Capone LLP congratulates Bert J. Capone who was named a 2011 Massachusetts Super Lawyer and James E. Carroll who was named a 2011 Massachusetts and New York Super Lawyer

PRACTICE TIP

A perfect summer day is when the sun is shining, the breeze is blowing, the birds are singing, and the lawn mower is broken.

~James Dent

FOR FURTHER INFORMATION, PLEASE CONTACT
JAMES E. CARROLL, ESQ.
617.217.5203
OR
BERT J. CAPONE, ESQ.
617.217.5201

CT: NO INDEMNITY WHEN FAILURE TO TIMELY FILE CLAIM

Failing to find even a whiff of smoke that would lend credence to Plaintiffs' claim that their policy was a fire insurance policy and not a marine policy, the Superior Court granted summary judgment dismissing Plaintiffs' claim against their insurer for failure to indemnify the loss of their watercraft that had sunk in Long Island Sound.

Under Connecticut state law, a claim must be brought within a year for indemnification under a marine insurance policy, which plaintiffs failed to do. Yet plaintiffs attempted to buoy their argument stating theirs was a fire policy, providing an 18-month window, not a year.

The state had enacted a standard form with which all fire insurance policies issued must conform. On the other hand, the state's laws do not definitively describe what constitutes marine insurance. Thus the court used federal law analysis of yacht and ocean marine insurance, and that those policies derive from risks related to vessels, to factually analyze Plaintiffs' policy.

Plaintiffs' hopes for a favorable outcome were sunk when the court held theirs bore "little resemblance" to a fire policy and its requirements but rather, under court analysis, did fall within the marine policy description.

In particular, the policy covered watercrafts within certain navigation limits, plus property, liability, medical payments and uninsured watercrafts. Further, the policy agreed to "cover the insured watercraft and tender while they are afloat, on shore or being transported on a land conveyance."

Thus, because Plaintiffs did not comply with the statute of limitations requirement for marine policies, the court held that the insurer was not required to indemnify.

Simeone v. Middlesex Mut. Assur. Co., NNHCV116018985S, 2012 WL 1662519 (Conn. Super. Ct. Apr. 24, 2012)

NY: STATE ADOPTS FEDERAL E-DISCOVERY STANDARD

A New York Appellate Court recently adopted the federal *Zubulake* "Reasonable Anticipation" Standard for e-discovery and document retention, requiring any reasonable anticipation of litigation to trigger a "litigation hold" and a suspension of routine document destruction policies, including automatic deletion features that purge electronic documents.

"To adopt a rule requiring actual litigation or notice of a specific claim ignores the reality of how business relationships disintegrate…[EchoStar's] approach would encourage parties who actually anticipate litigation, but do not yet have notice of a "specific claim" to destroy their documents with impunity."

The court held that Defendant EchoStar was grossly negligent and subject to spoliation sanctions for failure to suspend its computers' automatic erasure of data, including emails, potentially relevant to its contract dispute with plaintiff, Voom.

Although EchoStar attempted to argue a different standard to trigger suspension (i.e. upon notice of claim or its filing), the court was not persuaded. Indeed, it was not until four months after the lawsuit began, and nearly one year after EchoStar was on notice of the anticipated litigation, that it suspended the automatic deletion of relevant emails. Also, its reliance on employees to preserve evidence was insufficient. Thus EchoStar's flagrant conduct essentially erased an evidentiary trail.

And so, in addition to sanctions, at trial the jury would be allowed the inference that any destroyed e-mails would have been favorable towards EchoStar's opponent Voom. VOOM HD Holdings LLC v. EchoStar Satellite L.L.C., 93 A.D.3d 33 (N.Y.S.2d 2012).