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Pa. Ruling Not The Last Word On 3rd-Party Claims By Insurers

By **Matt Fair**

Law360, Philadelphia (May 01, 2015, 5:22 PM ET) -- A recent Pennsylvania Supreme Court decision finding that employers and insurers can't independently sue third parties to recoup payouts made to injured workers will not completely foreclose recovery for the cost of workers' compensation claims in the state, attorneys say.

On April 27, the **court ruled 3-2** that state law barred Liberty Mutual Insurance Co. from independently suing a third party responsible for injuries suffered by a policyholder's employee without the worker's direct participation in the suit.

Subrogation attorneys, however, have characterized the decision as critiquing form more than substance, and say that properly structured claims brought on behalf of injured workers should still be able to proceed in Pennsylvania.

"I think it's a warning to insurance companies that they have to be careful in terms of how they pursue their subrogation rights, because the procedural violations are easy to commit and hard to remedy," Wade Clark Mulcahy partner Robert Cosgrove told Law360.

Liberty Mutual filed suit against National Retail Properties Inc. and Commercial Net Lease Realty Services Inc. in 2011 seeking to recoup some \$35,000 it had paid out to an injured trucker following a fall in a parking lot leased by Domtar Paper Co. in December 2009.

The insurer claimed that the three third parties should ultimately be held responsible for the workers' compensation benefits due to their negligent maintenance of the property.

George Lawrence, the trucker injured in the incident, did not pursue his own claims against any of the third parties and was not included as a party in the suit launched by Liberty Mutual.

A judge in the Court of Common Pleas of Elk County granted preliminary objections and dismissed the suit after agreeing that the Pennsylvania Workers' Compensation Act did not recognize an independent cause of action against a third party for recovery of workers' compensation payouts when the injured employee had not sued in his or her own right or was not a party to the suit.

A three-judge Superior Court panel upheld the ruling in September 2013, and the **Supreme Court announced** the following May that it would hear arguments in the case.

Both appellate courts upheld the ruling despite language in a 1930 decision by the Supreme Court, *Scalise v. F.M. Venzie & Co.*, which said that an employer "is not to be denied his right of

suit because the employee does not sue."

The language was cited again in the court's 2012 decision in *Frazier v. Workers' Compensation Appeal Board*.

Both the Superior Court and the Supreme Court ultimately found Scalise and Frazier unavailing after noting that the cases dealt with situations where employees had filed suit directly against third-party tortfeasors.

Instead, the majority said there was a valid interest in ensuring that third parties did not face the prospect of multiple lawsuits over the same underlying tort.

"Preventing the employer/insurer from asserting an independent cause of action against the tortfeasor eliminates the possibility that the third-party tortfeasor could be exposed to multiple suits filed by both the employer and the injured employee, and will preserve the preferred rights of the injured employee who retains a beneficial interest in the cause of action against the tortfeasor," Justice Max Baer said in the court's majority opinion, which was joined by Justices Correale Stevens and J. Michael Eakin.

While the majority upheld the dismissal of Liberty Mutual's claims, their opinion suggested that employers could still pursue claims if they joined injured employees as so-called use-plaintiffs in the suit.

"In this case, Liberty Mutual did not file the action against appellees in the name of Lawrence, as required, but rather sued appellees in its own right simply noting its status as a subrogee," the opinion said. "The employer/insurer's right of subrogation ... must be achieved through a single action brought in the name of the injured employee or joined by the injured employee," the opinion said.

In a pair of dissents, Chief Justice Thomas Saylor and Justice Deborah Todd both pushed for recognition of a clear avenue that would allow employers and insurers to recoup their workers' compensation payouts from third parties.

Justice Todd went so far as to suggest that the majority opinion had done so.

"I agree with the majority, to the extent it preserves the right of an employer or its insurance company, as subrogee of an injured employee, to bring suit in the name of the injured employee in the capacity of a 'use-plaintiff,'" she said. "This procedure affords the employer/insurer a means to vindicate its right to recovery of payments made because of injuries caused by a third-party tortfeasor in situations where the injured employee elects not to bring suit in his or her own capacity."

Laura Schmidt, an attorney with Downs Stanford PC, told Law360 that it appeared Liberty Mutual's claim would have survived if the insurer had correctly listed Lawrence in the suit.

"I hate to say that this was a form over substance issue, but in a way, that is what it looks like," she said. "It looks like if they had styled the case kind of different, they would have been able to go forward."

Schmidt serves as amicus committee co-chair for the National Association of Subrogation Professionals, which filed a brief as part of the appeal to the Supreme Court.

However, Needle Law PC attorney Timothy Kelly warned that the process for joining an employee

in a lawsuit without their cooperation was unclear.

"Assuming that's a viable option for the employer or the insurer, what are the mechanics of that?" he asked.

Kelly, who penned an amicus brief in the case on behalf of the Pennsylvania Association for Justice, said that dealing with potentially uncooperative employees added another layer of complication for employers and insurers looking to bring claims on behalf of a subrogee.

"If the employee says, 'I don't want to participate in the suit,' then it's unclear how to force them to do it," he said. "If the plaintiff doesn't cooperate, I'm not sure how that claim is going to be carried by the insurance company and I'm not sure how the employee testifies or participates in the suit."

In her dissent, Justice Todd noted that there was a "dearth of guidance in the case law and under our rules of civil procedure regarding the proper captioning of these suits."

She suggested that the matter be referred to the court's Civil Procedure Rules Committee for study and recommendations.

Liberty Mutual is represented by Robert F. Horn of ConnorsLaw LLP.

Domtar is represented by Patricia Antezana of Reed Smith LLP.

National Retail Properties Trust is represented by Nadia Lazo and Joseph Weimer of the Law Office of Joseph S. Weimer.

Commercial Net Lease Realty Services is represented by in-house counsel.

The case is Liberty Mutual Insurance Co. v. Domtar Paper Co., case number 19 WAP 2014, before the Supreme Court of the State of Pennsylvania.

--Additional reporting by Y. Peter Kang and Dan Packel. Editing by Katherine Rautenberg and Mark Lebetkin.

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