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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Pa. Ruling Gives Insurers Breathing Room On Coverage Suits

By **Matt Fair**

Law360, Philadelphia (July 17, 2015, 1:11 PM ET) -- A recent Pennsylvania ruling redefining when the clock begins ticking for insurance companies to file suits aimed at denying coverage provides new flexibility to insurers, attorneys say, and will encourage more thorough inquiries into potential coverage disputes.

The en banc **Superior Court ruling** handed down last Tuesday rejected the idea that the statute of limitations for declaratory judgment actions by insurance companies begins to run when a policyholder is hit with a claim, and instead found that the clock begins ticking when insurers first learn they might have grounds for avoiding coverage.

Fineman Krekstein & Harris PC attorney Lee Applebaum told Law360 that the new standard adopted by the Superior Court in its published ruling would discourage insurance companies from filing declaratory judgment actions simply to beat the clock.

"It encourages the insurance company to evaluate its position on the actual facts and says, 'We're promoting the idea that you should really sit down and look at all the facts and weigh whether or not you should seek to deny a duty of defend or indemnify here,'" he said. "The message here is that if you're an insurance company and you're going to make that decision, you should make it on a reasonable assessment of the facts. Whenever that's done, that's a good thing."

The Superior Court's 7-2 decision overturned a trial judge's finding that a four-year statute of limitations barred Selective Way Insurance Co. from proceeding with a declaratory judgment action it launched in 2012 aimed at avoiding coverage for a 2007 negligence suit filed against the operator of a Ramada Inn in Westmoreland County over the death of a 17-year-old worker who was killed in a car crash after drinking on the job.

"The statute of limitations for the filing of a declaratory judgment action brought by an insurance company regarding its duty to defend and indemnify begins to run when a cause of action for a declaratory judgment arises," the court ruled in an opinion penned by Judge Christine L. Donohue. "This requires a determination by the trial court of when the insurance company had a sufficient factual basis to support its contentions."

The negligence suit against hotel operator Hospitality Group Services Inc. stemmed from a February 2006 car crash that killed 17-year-old employee Sean Nemcheck. According the opinion, the suit claimed that Nemcheck had been negligently allowed to consume alcohol during a 16-hour shift in the hotel's kitchen and banquet facility.

According to court records, Selective Way became aware that it had grounds for a declaratory judgment action to disclaim coverage following the deposition of one of Nemcheck's co-workers who testified that the deceased boy had obtained alcohol from the hotel while unsupervised and without the knowledge or permission of any of his bosses.

While the new standard may encourage insurers to take their time conducting a thorough review with coverage counsel about their grounds for a possible declaratory judgment action, Cozen O'Connor attorney Richard Bennett said that having a fact-based rule rather than a bright-line rule for when the clock begins to run would bring with it some uncertainty.

"It imposes an extra burden on insurance companies because the question becomes when do they have enough information? That is a very spongy test," he said. "You could ask six lawyers what that date given the same set of facts and they'll give you six separate answers."

Applebaum admitted that moving to a fact-based standard for determining when the statute of limitations begins to run did make things more complicated than if the court had opted for a rule based on the filing of claims against a policyholder.

"It's not an easy rule in the sense that it's not black-and-white being defined by a specific date, so it's going to depend on the circumstances of each case," Applebaum said.

However, he added that judges were used to making sometimes complicated factual determinations.

"Courts have to do that all the time," he said, adding that future cases employing the new standard would help create a body of law to guide decision-making. "They have to look at the totality of the circumstances and, as these cases evolve, I'm sure there will be factors they'll start to look at."

One additional area of concern identified by Robert Cosgrove, resident partner of Wade Clark Mulcahy's Philadelphia office, was whether the statute of limitations would begin to run in situations where an insurer had grounds to disclaim coverage but no suit had been filed against a policyholder.

"If the four years begin to run when the claim comes in and a claims investigation is done and that gives rise to facts that suggest there's no coverage, then you've now cut off significantly the time to file a declaratory judgment after a suit is filed," he said. "You might then have to start taking the position of commencing all these presuit declaratory judgment actions in order to protect your rights down the road."

He suggested that the uncertainty could prompt individuals with potential claims against a policyholder to delay filing suit in an effort to run out the clock on an insurer’s right to file a declaratory judgment action.

"If you have to backdate the statute of limitations to before a complaint comes in, that can make it a much shorter window," he said. "You could see plaintiffs wait to plead it into coverage and try to muddy the waters for as long as possible."

Cosgrove said that other jurisdictions, such as New York, differentiate between what an insurance company must do when faced with a complaint versus a notice of claim tendered to a policyholder.

"In New York, you have this distinction between what you have to do on claims and what you have to do on lawsuits," he said. "In Pennsylvania, an insurance company has to analyze the four

corners of the complaint to determine whether or not there's a duty to defend, but many times what's in the complaint might differ from what the insurance company knows from its own investigation."

In that case, he said that insurance companies might be forced to file declaratory judgment actions even before a complaint was filed against a policyholder.

"If that's the case, you're going to have an onrush of lawsuits you're going to have to file some two years before a complaint comes in," he added.

Applebaum, however, said that the two-year statute of limitations on most tort claims in Pennsylvania meant that insurance companies would still have at least two years to investigate even if a plaintiff waited until the last possible moment to file a complaint.

"The lawsuit is going to come within two years for some kind of tort, so you're going to have within your four years plenty of time to bring a declaratory judgment action," he said.

Selective is represented by Jeffrey H. Quinn and Melissa B. Catello of Dickie McCamey & Chilcote PC.

The defendants are represented by Christopher Hildebrandt and Todd Berkey of Edgar Snyder & Associates LLC and Ronald Bergman.

The case is Selective Way Insurance Co. v. Hospitality Group Services Inc. et al., case number 1430 WDA 2013, in the Superior Court of the State of Pennsylvania.

--Editing by Katherine Rautenberg and Kelly Duncan.