FEDERAL DISTRICT COURT
Gallagher Sharp February 2019 Insurance Newsletter

Insurer may deny coverage for medical payments it deems unreasonable when compared to the charges of other providers in the same geographic area.

Johnson was injured in a motor vehicle accident and sought treatment at the Cleveland Clinic. Johnson then submitted his bills to Geico for payment under the medical payments provision in his policy. That provision states Geico will pay "all reasonable expenses actually incurred." Geico paid some of Johnson's medical bills but did not pay $665.00 for technical services and/or a portion of services provided by Dr. Hochman. The denial was based on Geico's determination that the charges were not "reasonable when compared to the charges of other providers in the same geographic area." Johnson filed a class action and asserted a breach of contract claim and a claim for bad faith against Geico. Geico filed a motion to dismiss.

The court held that an insurer may deny coverage for charges that exceed local averages as "unreasonable." However, Johnson alleged that Geico paid the exact same charge for the same service dozens of times before this case. Therefore, the court found that Johnson's claim could be based on the allegation that Geico wrongfully denied coverage based on the specific facts of his case and denied the motion to dismiss. The court did grant Geico's motion to strike the class allegations on the grounds that an analysis of each class member's claim would require an individual inquiry into the reasonableness of that specific member's medical expenses. *Johnson v. Geico Choice Ins. Co.*, N.D. Ohio No. 1:18 CV 1353 (Dec. 10, 2018).

A party cannot claim to have been defrauded when the act of reading the insurance policy would have revealed the information at issue.

Richelson suffered property damage to the roof of his home during a windstorm. At the time, the house was insured by Liberty. A liberty adjuster submitted an estimate for the actual cash value of the roof which was half the cost to replace the roof. Richelson was not happy with the estimate and filed suit. The policy contained a roof actual cash value endorsement that limits coverage for roof damage so that the insured only receives the depreciated value of the damaged roof rather than the replacement cost. Richelson alleged that he received less than half the cost of the roof repairs because of the roof ACV endorsement which Richelson believed Liberty falsely characterized as "Additional Coverage." Richelson said this was misleading because the endorsement actually excluded parts of the roof from replacement cost. Richelson filed a breach of contract claim and a fraud claim. Liberty moved to dismiss.

The court held that a party cannot claim to have been defrauded when the act of reading the contract would have revealed the information at issue. Richelson also claimed that he had been insured by Liberty since 1986 on a replacement cost basis. He claimed that Liberty was required to provide him specific notice of the change to actual cost value. The court found that Richelson offered no evidence that he had been continually insured on a replacement cost basis since 1986 or that he had the same policy, renewing annually, since 1986. *Richelson v. Liberty Ins. Corp.*, N.D. Ohio No. 1:18 CV 1801 (Dec. 11, 2018).

Subrogee insurer must be joined as necessary party to the suit.

Boulware crashed into an 18-wheel semi-tractor owned by DHT Leasing and operated by DH Trucking. Cherokee Insurance Company is the insurance carrier for and a subrogee of DH Trucking. After the accident, Cherokee issued a notice of subrogation claim to Boulware's insurance carrier, demanding payment in the amount of $98,316.67 for damages allegedly caused by Boulware. DHT Leasing and DH Trucking filed a complaint against Bouleware. Bouleware filed a motion to join Cherokee as a necessary party in the suit.

The court granted the motion finding Cherokee is a necessary party under Fed. Civ. R. 19(a). As a partial subrogee, Cherokee is a necessary party because its absence may impede its ability to protect its interest and also may leave Bouleware subject to a risk of incurring double, multiple, or inconsistent obligations. Cherokee is also domiciled in a different state than Bouleware and would not destroy diversity jurisdiction. *Danny Herman Trucking, Inc. v. Boulware*, S.D. Ohio No. 2:18-cv-644 (Dec. 21, 2018).

Policy exclusion excluding damage to home caused by vandalism or malicious mischief does not by its plain meaning exclude arson.

The Whittakers' unoccupied home was destroyed by a fire deemed to have been arson. The Whittakers' insurer, Allstate, denied their insurance claim based on a policy exclusion for "vandalism and malicious mischief" done to a dwelling. "Fire," "vandalism," and "malicious mischief" are not defined in the policy. The Whittakers filed suit and moved for summary judgment arguing that arson is not an enumerated type of damage under the "vandalism or malicious mischief" exclusion. The Whittakers also pointed to another section of the policy which offered a $5000 reward for information leading to an "arson" conviction in connection with a "fire loss." Allstate argued that arson, by its plain meaning, is a type of "vandalism or malicious mischief."

The court disagreed and granted the Whittakers summary judgment finding that arson is a type of fire and not necessarily a type of vandalism. The court also noted that the policy writers understood arson to be a type of "fire loss" in the section regarding the "arson" award. In support of its decision, the court applied a decision from the Northern District of Ohio—*Wells Fargo Bank, N.A. v. Allstate Ins. Co.*, 290 F. Supp. 3d 715, 716 (N.D. Ohio 2007). The court in *Wells Fargo* interpreted a nearly identical Allstate policy and found that the policy language did not specifically exclude coverage in cases of arson. *Whittaker v. Allstate Property & Ins. Co.*, S.D. Ohio No. 1:18 CV 1353 (Dec. 10 2018).

Commercial automobile insurance policy does not extend coverage to employee while driving home from work.

Rebecca Sarantou is an employee of the Girl Scouts of Western Ohio. Travelers issued a commercial automobile policy to the Girls Scouts. While on her drive home from work, Sarantou's vehicle collided with Michael Bayes who was on a motorcycle. Bayes filed a claim with Sarantou's insurance carrier, Liberty, and a claim under the underinsured-motorist provision of his policy with Home-Owners. Bayes and Home-Owners then initiated an action against

Travelers for coverage which exceeded their policy limits. The Travelers policy states: "Any 'employee' of yours is an 'insured' while using a covered 'auto' you don't own, hire or borrow in your business or personal affairs." Travelers argued that this provision of the policy only covers employees while furthering the business interests of the Girls Scouts. The plaintiffs argued that the provision extends coverage to employees any time the employee drives the employee's personal vehicle.

The court granted Travelers summary judgment. Sarantou was driving home at the time of the accident and was not acting within the scope of her employment. The court held that if an insurance contract contains an ambiguity, the ambiguity is to be construed in favor of the policyholder, not the claimant. *Home-Owners Ins. Co., v. Travelers Indemnity Co.*, N.D. Ohio No. 3:17-cv-105, 2019 WL 65295536 (Jan. 3, 2019).