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Abstracts of Significant Cases Bearing on the Regulation of Insurance

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United States Court of Appeals

Missouri

Alissa's Flowers, Inc. v. State Farm Fire and Cas Co., 24 F. 4th 1212 (8th Cir. Feb. 3, 2022)

Appellant, a flower shop, purchased a commercial insurance policy from Appellee that was effective from March 5, 2020 to March 5, 2021. Appellant closed its shop on March 16, 2020, due to a state of emergency that was declared in response to the COVID-19 pandemic. Appellant reopened on May 11, 2020, after restrictions in the state were lifted. During the closure, Appellant suffered a loss of $100,000 from a shortage of in-store sales revenue. Appellant filed suit against Appellee alleging that it "'overpaid its premiums to [Appellee]' in light of its 'significantly lower exposure rate due to COVID-19.'" *Id.* at 1214. Appellee moved to dismiss arguing that Missouri law requires that Appellant bring its claim before the Director of the Missouri Department of Commerce and Insurance because Appellant's claim challenged Appellee's rates and rules. The district court granted Appellee's motion to dismiss. Appellant appealed, arguing that it is challenging premium and not rates. Therefore, they did not need to go through the administrative review process. The court of appeals affirmed the district court's decision because Missouri law provides that the administrative review process applies to commercial insurance policies and Appellant's claims are subject to that process. Therefore, the court had no authority to make a decision on the case.

State Courts

Delaware

*Delsure Health Ins. Inc. v. Delaware Dep't of Ins., No. N19A-11-009 VLM, 2022 WL 2643425, at *1 (Del. Super. Ct. July 7, 2022)*

Delsure Health Insurance ("Delsure") was formed for the purpose of providing health insurance. The Delaware Department of Insurance ("Department") issued a certificate of authority to conduct business under Delaware law as a stock insurer, but Delsure was not allowed to "'conduct Delaware transactions until the policies, rate forms, and related

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documents ha[d] been filed . . . and the producers ha[d] been properly licensed.'" *Id.* at *1. Delsure provided financial statements to the Department and failed to meet various capital and surplus requirements. The Department provided a deadline for Delsure to comply with the requirements. Delsure failed to meet state requirements and the Department revoked Delsure's certificate of authority. Delsure requested a hearing. The Hearing Officer issued a proposed order and recommended that the Department revoke Delsure's certificate of authority and the recommendation was accepted by the Commissioner. Delsure filed this appeal arguing that the Commissioner erred when it issued its Final Order and because it was not authorized to sell insurance, that the Department miscalculated how much capital and surplus it had to maintain. Delsure further argued that it never failed to meet the state requirements for capital and surplus. The Department argued that it "possessed the requisite statutory authority to revoke Delsure's [c]ertificate." *Id.* at *3. The Department further argued that "Delsure was authorized to and did transact insurance business in Delaware." *Id.* The Superior Court of Delaware affirmed the Department's Final Order holding that Delsure "engaged in 'solicitation or inducement' defined under [Delaware law] and was transacting insurance in Delaware.'" Therefore, it was required to meet the minimum capital and surplus requirements required by Delaware law, and the Department possessed the legal authority to revoke its certificate of authority. *Id.* at *5.

Idaho

Pena v. Viking Ins. Co. of Wisconsin, 169 Idaho 730 (Idaho Feb. 1, 2022)

The Idaho Supreme Court reversed a district court's ruling granting a motion for summary judgment in favor of Viking Insurance Company. The court held that Viking sold Pena an insurance policy that included "illusory" underinsured motorist coverage. The court deemed the underinsured motorist coverage illusory because the policy had the minimum amount that is legally required for liability insurance in Idaho. Idaho law requires insurers to issue liability limits of $25,000. Therefore, underinsured motorist coverage limits must exceed $25,000 to avoid being illusory. The court held that a policy is illusory if it "'appears that if any actual coverage does exist it is extremely minimal and affords no realistic protection of any group or class of injured persons.'" *Id.* at 737. In its decision, the court repealed two Idaho Supreme Court cases "to the extent they held that an underinsured motorist policy is not illusory if it 'affords realistic protection to any group or class of injured persons.'" *Id.* at 740.

Louisiana

In the Matter of State Farm and Cas. Co. and Dover Bay Specialty Ins. Co., No. 2021-6585-INS (July 7, 2022)

The Louisiana Commissioner of Insurance ("Commissioner") issued Directive 218, requiring all authorized insurers and surplus line insurers to pay claims for expenses incurred by Louisiana policyholders who resided in twenty-five specified parishes that were evacuated or were prohibited from using their insured premises due to Hurricane Ida. In response to Directive 218, Appellants filed an administrative appeal,

contending that Directive 218 improperly requires Appellants to expand language in their homeowner's insurance contracts to extend Prohibited Use benefits to insureds who resided in parishes or municipalities that were not subject to an evacuation order issued by local authorities. The Administrative Law Judge found that none of the authorities cited in Directive 218 or elsewhere empowered the Commissioner with the ability to unilaterally expand the jurisdictional purview of civil authorities for the purpose of creating insurance coverage that would not otherwise exist; and that the Commissioner's interpretation of the Prohibited Use policy language seeks unreasonable expansion of the meaning of an evacuation order. Therefore, Directive 218 was determined to be invalid and unenforceable.

New Jersey

Applied Underwriters Captive Risk Assurance Co. Inc. v. New Jersey Dep't of Banking and Ins., 472 N.J.Super. 26 (N.J. Super. Ct. App. Div. April 27, 2022)

The issue in this appeal is whether the Commissioner of the Department of Bank and Insurance ("Department") "can pursue administrative action against two out-of-state companies and their two New Jersey affiliates for engaging in alleged improper insurance related practices in New Jersey or if they have to rely on the Attorney General to bring a lawsuit against those companies in the Superior Court." *Id.* at 30. A regulatory dispute arose between the Department and Applied Underwriters ("Applied") regarding workers' compensation insurance policies being sold in New Jersey. The Department received complaints from insureds regarding high premiums for the policies that Applied and its subsidiaries were selling in New Jersey. The Department was concerned that those who utilized Applied's products often owed premiums that exceeded the approved rates. Applied contested the Department's determination and argued that the Department does not have jurisdiction over them and that the matter should be litigated in a judicial rather than an administrative forum. The Superior Court of New Jersey, Appellate Division held that the Department has "general regulatory authority over insurance activities in New Jersey" and that it may pursue administrative action against Applied and utilize its administrative jurisdiction. *Id.* at 37. The court further held that Section 20 of the Non-Admitted Insurers Act "does not compel this dispute to be litigated in the Superior Court." *Id.* at 51. Therefore, the Department and the New Jersey Insurance Commissioner do not have to rely on the Attorney General to litigate regulatory matters against out-of-state insurers and their affiliates if the Department believes that New Jersey laws have been violated.

*Caride v. Orloff, No. A-2289-19, 2022 WL 1639234, at *1 (N.J. Super. Ct. App. Div. May 24, 2022)*

Orloff ("Appellant") was employed by a Pennsylvania law firm and while working, he obtained a personal injury settlement for his client and did not provide the client with a settlement statement or advise his client of the total amount of the settlement. Appellant withdrew funds from his client trust account to pay for personal expenses. Appellant was suspended from the practice of law by the Pennsylvania Supreme Court and the New Jersey Supreme Court imposed reciprocal discipline disbarring

Appellant for unethical conduct. *Id.* at *2. After his disbarment, Appellant took the New Jersey insurance producer license examination and applied for a producer license, disclosing his disciplinary history and his efforts at rehabilitation. The Department of Banking and Insurance ("Department") denied Appellant's application stating that the conduct described including the multiple violations of the rules of professional conduct "coupled with 'the removal of [his] name for the New Jersey roll of attorneys combine to result in [their] decision to issue [the] denial.'" *Id.* Appellant appealed and the case was sent to the Office of Administrative Law. Appellant argued that the Department failed to explain its denial in sufficient detail, that the Department should have evaluated his current fitness under the Rehabilitated Convicted Offenders Act under N.J.A.C. 11:17E-1.4, and that the Department denied Appellant due process and equal protection under the United States and New Jersey constitutions. *Id.* The Administrative Law Judge ("ALJ") denied all of Appellant's arguments The Commissioner of Insurance adopted the Administrative Law Judge's findings. Appellant appealed to the Supreme Court of New Jersey, and the court affirmed the ALJ and the Commissioner's findings holding that the Department properly denied Appellant's producer license pursuant to the New Jersey Insurance Producer Licensing Act of 2001, which provides that it must deny a license to "anyone who has committed 'a fraudulent act.'" *Id.* at *1. The court further held that the Rehabilitated Convict Offender Act does not apply because Appellant was never accused of or found guilty of a crime. Finally, the court held that Appellant's due process argument failed because "an insurance producer license is not a property interest deserving of due process protection." *Id.* at *3.

Ohio

EMOI Serv., LLC v, Owners Ins. Co., No. 2021-1529, 2022 WL 17905839, at *1 (Ohio Dec. 27, 2022)

EMOI is a computer-software company that uses software to provide medical offices with service and support for setting appointments, record keeping, and billing. EMOI became the target of a ransomware attack where hackers encrypted files and then asked for a ransom to unencrypt the files. EMOI decided to pay the ransom. At the time of the ransomware attack, EMOI was insured under a businessowners insurance policy issued by Owners Insurance Company ("Owners"). Owners determined that EMOI's policy did not cover the payment of ransom and the "costs associated with investigating and remediating the attack as well as upgrading its security systems" and the claim was denied. *Id.* at *1. EMOI filed a lawsuit against Owners "alleging that Owners breached the insurance policy contract by denying coverage under the electronic-equipment endorsement and that Owners denied coverage in bad faith." *Id.* at *2. The trial court granted Owners' summary judgment motion holding that EMOI's software and database systems were not damaged by the encryption, but that EMOI was prevented from accessing or using the systems because of the encryption, therefore the electronic-equipment endorsement coverage was not applicable. EMOI appealed the trial court's decision and the appellate court held that the language of the electronic-equipment endorsement could provide coverage if EMOI could prove that its software was damaged by the encryption. The appellate court also held that

"Owners did not thoroughly review EMOI's claim that the software was damaged before it denied the claim and held that there were genuine issues of material fact whether owners complied with its duty of good faith in denying EMOI's claim." *Id.* Owners appealed to the Supreme Court of Ohio. The court reversed the appellate court's decision regarding breach of contract and the bad-faith denial of insurance coverage, holding that computer software cannot experience "'direct physical loss or physical damage' because it does not have a physical existence." *Id.* at *4. The court further held that "because the insurance policy at issue did not cover the type of loss EMOI experienced, Owners did not breach its contract with EMOI." *Id.*

South Dakota

Dieter v. XL Specialty Ins. Co., 980 N.W.2d 229 (S.D. Aug. 24, 2022)

The South Dakota Director of Insurance ("Director") filed an order of liquidation of ReliaMax Surety Company on June 12, 2018. ReliaMax obtained two insurance policies for directors and officers liability coverage. The primary policy was with Pioneer Special Risk Insurance Services ("Pioneer") and the excess policy was issued by XL Specialty Insurance Company ("XL Specialty"). The initial policy period for both policies was from July 1, 2017 through July 1, 2018. The Pioneer policy was extended through July 1, 2021. On November 1, 2018, four months after the XL Specialty policy period ended the Director sent Pioneer and XL Specialty notice of a claim. Pioneer did not contest the timeliness of the claim, but XL Specialty denied the claim because "it [did] not appear that this matter constitutes a Claim first made in the [p]olicy [p]eriod." *Id.* at 231. The Director responded stating that pursuant to South Dakota Codified Laws § 58-29B-56 the Director has an additional 180 days from the order of liquidation to give notice of a claim. XL Specialty disagreed, arguing that the statute does not apply because the claim was not made during the policy period. The Supreme Court of South Dakota held in favor of the Director stating that "the provisions of SDCL § 58-29B-56 apply to allow an extension of time to provide notice under a policy fixing period of limitation." *Id.* at 236. The court further held that the intent of the statute was to extend the deadline to "allow the liquidator to mitigate the adverse consequences of an insurer's insolvency by permitting additional time to assert or pursue claims that would otherwise be time-barred." *Id.*

Texas

Stonewater Roofing Ltd. Co. v. Texas Dep't of Ins., 641 S.W.3d 794 (Tx. Ct. App. Feb. 2, 2022)

In 2005, the Texas legislature enacted provisions under the insurance code regulating public insurance adjusting. These provisions provide that any person or entity defined as a contractor is prohibited from adjusting insurance claims for properties at which the contractor will be providing services. Stonewater is a professional roofing company and is not licensed as a public insurance adjuster. Stonewater's website includes multiple statements indicating that it "developed a system which helps [its] customers settle their insurance claims as quickly, painlessly[,] and comprehensively

as possible." *Id.* at 798. One of Stonewater's customers filed suit arguing that this and related statements violated the prohibitions set forth in the legislation regulating public insurance adjusting. In June 2020, Stonewater filed suit against the Texas Department of Insurance ("Department") "challenging the prohibitions as impermissible regulations of commercial speech and alleging the provisions were unconstitutionally vague." *Id.* The Department filed a general denial and filed a motion to dismiss arguing that "Stonewater's constitutional challenges were subject to dismissal because they had no basis in law." *Id.* at 799. The trial court held a hearing on the motion and granted the motion to dismiss. The court of appeals reversed the trial court's dismissal holding that Stonewater's pleadings include factual allegations that satisfy the requirements of bringing its First and Fourteenth Amendment claims and remanded the case for further proceedings.

Utah

Palmer v. Allstate Fire and Cas. Ins. Co., 505 P.3d 517 (Utah Ct. App. Jan. 13, 2022)

Palmer was insured by Allstate and was involved in an accident caused by another driver who was also insured by Allstate. Allstate issued a check to Palmer's attorney. Palmer's attorney deposited the check into his trust account. Eight days later, Palmer signed the release in order for him to recover the funds from Allstate. Palmer then sought to recover underinsured motorist benefits under his own policy. Palmer and Allstate were unable to reach a settlement on Palmer's underinsured motorist benefit, and Palmer sent a letter to Allstate on May 24,2018, demanding arbitration. Allstate denied Palmer's arbitration demand, stating that the statute of limitations barred the demand because Palmer was required to file it "within three years after the inception of the loss." *Id.* at 518. Both parties disputed when the "inception of the loss" began. In response to this dispute, Palmer filed a complaint in district court seeking declaratory relief from the court "that the term 'last policy payment' set forth in Utah Code Ann. 31A-22-305.3(5). . . [was] the date the liability settlement funds were authorized to be paid and disbursed to [Palmer] by Palmer's execution of the liability release[.]" *Id.* Allstate filed a motion to dismiss. The district court granted Allstate's motion to dismiss holding that Palmer's uninsured motorist claim was barred by the statute of limitations holding that the date of the last liability policy payment was when Palmer's attorney deposited the check into the trust account. Palmer appealed this decision. The Utah Court of Appeals identified that the appeal "hinges on a single question: Was the 'date of the last liability policy payment' the date on which Palmer's attorney deposited the check in to the trust account [] or was it the date on which Palmer signed the release [] whereupon his attorney was authorized to disburse the proceeds to Palmer?" The court of appeals reversed the district court's decision holding that the date of the last liability policy payment occurred when Palmer signed the release and not when Palmer's attorney deposited the check in the trust account.

Cases in Which the NAIC Filed as *Amicus Curiae*

In Re: Penn Treaty Network Am. Ins. Co. (In Liquidation) In Re: Am. Network Ins. Co. (In Liquidation) 284 A.3d 153 (Pa. Oct. 19, 2022) The NAIC submitted an amicus brief to the Supreme Court of Pennsylvania on April 26, 2022, supporting the Liquidator in seeking a reversal of the appellate court's order. The NAIC argued that the Liquidator properly exercised discretion found in Pennsylvania's receivership and guaranty association statutes by equitably distributing the insolvent insurer's estate assets in a way that best protects policyholders. The NAIC has an interest in ensuring Pennsylvania's receivership and guaranty association laws are properly interpreted because they are based on the NAIC's model laws, which have been adopted by other states. On October 19, 2022, the Supreme Court of Pennsylvania affirmed the appellate court's decision holding that there is no statutory authority or any standard to implement the Liquidator's proposal of distributing the insolvent insurer's estate. The Supreme Court incorporated the appellate court's order by reference in support of its decision.