TENNESSEE INSURANCE **LEGAL**NEWS

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6TH CIRCUIT HOLDS MCCARRAN-FERGUSON ACT BARS ANTITRUST CLAIMS AGAINST TITLE INSURERS

by James M. Burns, a Member in Dickinson Wright's Washington D.C. Office

On July 17, the Sixth Circuit Court of Appeals issued its long awaited decision in *Katz v. Fidelity National Title Insurance Company*, a class action proceeding in which the plaintiffs alleged that a collection of title insurers had unlawfully conspired to set unreasonably high title insurance premiums. In ruling for the defendants and affirming the dismissal of plaintiffs' claims, the court joins a host of other courts around the country that have found similar allegations defective as a matter of law. Unlike in those other cases, however, in which the courts found that plaintiffs' claims failed based upon the Filed Rate Doctrine (most prominently the Third Circuit's recent decisions in *In re New Jersey Title Insurance Antitrust Litigation* and *McCray v. Fidelity National Title Insurance*), in Katz the Sixth Circuit held that the claims failed based upon the McCarran-Ferguson Act.

Specifically, the plaintiffs in *Katz* alleged that title insurance rates that had been filed and approved by the Ohio Department of Insurance were still subject to challenge because it was "impossible for the Department of Insurance to review, regulate or supervise the reasonableness of the rates collectively set by defendants," given that they were "principally based on undisclosed costs." At the trial court level, the court held that plaintiffs' claims failed under both the Filed Rate Doctrine and the McCarran-Ferguson Act. Plaintiffs appealed.

Unlike the Third Circuit, which chose to focus on the Filed Rate Doctrine issue, the Sixth Circuit focused on whether the McCarran-Ferguson Act provided a complete defense to plaintiffs' claims. After acknowledging the three prong test for McCarran's applicability – (1) is the conduct at issue "the business of insurance;" (2) is the conduct "regulated by state law;" and (3) is the conduct not an act of "boycott, coercion or intimidation" - - the Sixth Circuit waded into the parties' arguments.

Plaintiffs' principal contention on appeal was that McCarran did not apply to the alleged conduct because the "business of insurance" requirement of the Act was not satisfied. Specifically, the maintained that title insurance policies typically result in "at most, 3.4% premium loss," and argued, therefore, that title insurance involved an insufficient amount of real "risk spreading" to constitute insurance. Citing the Supreme Court's 1959 decision in *SEC v. Variable Annuity Life Insurance*, in which the court held that the business of insurance requirement was not met where the conduct at issue included no risk spreading, plaintiffs argued that the court should similarly find that title insurance failed to meet the requirements of McCarran. The court, however, rejected plaintiffs' argument, holding that it is not the *amount* of risk spreading that is important, but whether *any* risk spreading occurs in the context of the challenged conduct. Because plaintiffs conceded that title insurance contains at least some amount of risk spreading, the business of insurance requirement had been met. With plaintiffs unable to mount much of an argument on the second and third prongs of McCarran, the court held that plaintiffs' federal antitrust claims were barred.

Turning next to plaintiffs' claims under state law, the Sixth Circuit first noted that McCarran only provides an exemption from the federal antitrust laws, and does not bar state antitrust claims. Those claims, however, were also barred, the court held, because "the Ohio Insurance Code acts as an exception to the Valentine Act (Ohio's antitrust law)" and "Section 3935.06 of the Insurance Code permits appellees' allegedly collusive behavior." Accordingly, the court affirmed the district court's dismissal of these claims as well, concluding that "The McCarran-Ferguson Act and Title XXXIX of the Ohio Revised Code are complete bars to appellants' federal and state antitrust claims," and that "in light of this holding, we need not consider whether the filed rate doctrine applies in this case.".

INSURANCE WEB SITES OF INTEREST

National Association of Insurance Commissioners
http://www.naic.org

Tennessee Department of Commerce and Insurance
http://tn.gov/commerce/

Dickinson Wright PLLC also publishes a separate informational newsletter with emphasis on Michigan insurance regulation, case law, and legislation. For further information and to subscribe to Dickinson Wright PLLC's Michigan *Insurance Legal News*, please contact Joseph A. Fink (jfink@dickinsonwright.com) or Ryan M. Shannon (rshannon@dickinsonwright.com).

HOT TOPICS

FARM BUREAU CHANGES POLICY ON ROOF AND HAIL DAMAGE CLAIMS

by Autumn L. Gentry, a Member in Dickinson Wright's Nashville office

Effective October 1, 2012, Tennessee Famers Mutual Insurance Company (Farm Bureau) will settle all roof claims for actual cash value rather than full replacement value for all new and renewal business. In addition, Farm Bureau will now require that all hail losses be reported within one year from the date the hail damage occurred for all property policies.

Farm Bureau will add the new endorsement to all policies regardless of the age or condition of the roof. Previously, Farm Bureau had only been adding ACV endorsements to policies on an individual basis where it was determined that the roof's condition was such that the policy would be cancelled or not renewed without the ACV endorsement.

This change has been a topic of interest for several years in the General Assembly as a result of roofing companies offering consumers a "free roof" in aggressive marketing campaigns. However, the change likely resulted from hail and wind losses Farm Bureau has suffered in recent years.

UPCOMING

GOV. HASLAM TO DECIDE ESSENTIAL HEALTH BENEFIT PACKAGE

by John E. Anderson, a Member in Dickinson Wright's Nashville office

Gov. Haslam must make a decision about the health conditions that should be covered in an essential health benefit (EHB) package under the federal Affordable Care Act on or before September 30. We will have a full review of Gov. Haslam's decision in future publications.

RECENT CASE LAW SUMMARIES

MISREPRESENTATION: IS IT AS EASY AS YOU MAY THINK TO ESTABLISH?

by Kelly M. Telfeyan, an Associate in Dickinson Wright's Nashville office

Two recent decisions from the Tennessee Court of Appeals indicate that an insurer will face an uphill battle in attempting to establish the elements of a material misrepresentation defence effective to void coverage. At the very least, the following two decisions should give you pause before denying an insured's claim based on perceived misrepresentations in the application for insurance.

Williams v. Tennessee Farmers Life Reassurance Co., No. M2011-01946-COA-R3-CV (Tenn. Ct. App. July 31, 2012), arose from the denial of death benefits under a term life insurance policy issued by Tennessee Farmers Life Reassurance Company ("Tennessee Farmers") to the decedent, Barbara Williams ("Ms. Williams"). Tony Williams and Angela Williams ("Plaintiffs") were the named beneficiaries under the policy of insurance. The relevant facts in *Williams* were as follows.

Ms. Williams applied for a term life insurance policy with Tennessee Farmers on May 26, 2005. In August 2005, Tennessee Farmers offered Ms. Williams a term life insurance policy. In May 2006, Ms. Williams died of acute methadone intoxication. When Mr. Williams submitted a claim on the life insurance policy, Tennessee Farmers denied the claim, asserting that Ms. Williams failed to make certain disclosures in her application for insurance pertaining to methadone.

Plaintiffs subsequently filed a complaint seeking to enforce the insurance policy and recover the death benefit. Following a bench trial, the trial court found in Plaintiffs' favor and ordered Tennessee Farmers to pay the death benefit under the policy. Tennessee Farmers appealed, arguing that Ms. Williams made material misrepresentations in her application and that these misrepresentations increased its risk of loss.

In evaluating Tennessee Farmers' arguments, the Court of Appeals noted that, pursuant to Tennessee Code Annotated § 56-7-103, an insurer may deny a claim for benefits if the insurer can demonstrate that a material misrepresentation was made in the application for insurance and that the misrepresentation was intentional or that the misrepresentation increased the insurer's risk of loss.

Tennessee Farmers first argued that Ms. Williams' failure to state that she was taking methadone in response to a question that asked if she was, at that time, taking medication and that Ms. Williams' failure to respond in the affirmative to a question that asked if she had ever been treated for alcohol or drug related problems constituted material misrepresentations that voided the policy. The Court of Appeals disagreed.

Noting that the trial court's findings of fact (*i.e.*, that there was no proof that Ms. Williams was taking methadone at the time she submitted her application for insurance and that there was no proof that Ms. Williams was ever treated for alcohol or drug related problems) were to be reviewed with the presumption that they were correct, unless the preponderance of the evidence was otherwise, the Court of Appeals affirmed the trial court's determination that Ms. Williams' answers to the subject questions were truthful and complete.

Tennessee Farmers next argued that Ms. Williams' failure to list Dr. Vanveen, Dr. Griner, and Dr. Sidberry among her treating physicians constituted a material misrepresentation. Stated briefly, Tennessee Farmers argued that Ms. Williams' failure to disclose these three providers increased its risk of loss because it did not know to review their medical records. Again, the Court of Appeals disagreed.

Specifically, the Court of Appeals determined that Ms. Williams' failure to disclose Dr. Vanveen and Dr. Griner was of no consequence because there was no reference to methadone use in either set of records. The Court of Appeals further concluded that Ms. Williams' failure to disclose Dr. Sidberry did not increase Tennessee Farmers' risk of loss because Ms. Williams' prior use of methadone was detailed, perhaps more thoroughly, in the medical records of two providers Ms. Williams had disclosed and whose records were available to Tennessee Farmers.

In light of the foregoing, the Court of Appeals affirmed the trial court's finding that Ms. Williams did not make material misrepresentations in her application for life insurance and, hence, that the policy was enforceable.

Meanwhile, on a slightly different note, *Rochelle v. Grange Mutual Casualty Co.*, No. M2011-02697-COA-R3-CV (Tenn. Ct. App. July 31, 2012), arose from Grange Mutual Casualty Company's ("Grange Mutual's") denial of Mr. Rochelle's ("Plaintiff's") claim for a fire loss. The relevant facts in *Rochelle* were as follows.

In October 2008, Plaintiff contacted his insurance agent, Charles Burnette, for the purpose of obtaining insurance coverage on a modular building which Plaintiff planned to use as a restaurant. On or about October 28, 2008, Mr. Burnette visited the property to perform a walk-through inspection of the building. After Mr. Burnette's inspection, a complete application with Plaintiff's signature was submitted to Grange Mutual. Among other things, the application stated that no deep fat fryer was used on the premises and that Plaintiff had no prior insurance losses. Grange Mutual subsequently issued a commercial liability insurance policy insuring Plaintiff's restaurant.

On November 29, 2008, a fire damaged Plaintiff's restaurant. Thereafter, Plaintiff made a claim under the insurance policy. Grange Mutual then began its investigation of the loss. The investigation included a request that Plaintiff submit to an examination under oath.

During the examination, Plaintiff admitted this his restaurant did use a deep fat fryer and that he had previously claimed a fire loss on his personal residence. By a letter dated May 15, 2009, Grange Mutual informed Plaintiff that it was rescinding the insurance policy to the date of its inception so as to void the policy completely and, accordingly, that it would not pay his claim.

As the ground for its denial of the claim, Grange Mutual relied upon the "concealment, misrepresentation or fraud" section of the insurance policy, which stated that coverage is void if the insured "intentionally conceal[s] or misrepresent[s] a material fact . . . ." Relying on this provision, Grange Mutual claimed that Plaintiff had made material misrepresentations in the application for insurance and in the post-loss investigation. Specifically, Grange Mutual claimed that Plaintiff failed to disclose his previous fire loss and that his restaurant used a deep fat fryer. Grange Mutual asserted that these material misrepresentations increased its risk of loss.

On July 20, 2009, Plaintiff filed suit against Grange Mutual based upon its denial of coverage following the restaurant's fire loss. The trial court granted Grange Mutual's motion for summary judgment which argued that Plaintiff's application for insurance contained material misrepresentations that increased its risk of loss. Plaintiff appealed. The Court of Appeals noted that in order to void coverage under the "concealment, misrepresentation or fraud" section of the policy, Grange Mutual would be required to prove not only that the answers in the application were false but also that the false answers were given with the intent to deceive it or that the false answers increased its risk of loss. In light of these principles, the Court of Appeals stated that the salient question was whether Plaintiff *intentionally* misrepresented anything in his application for insurance so as to allow Grange Mutual to void the policy.

In evaluating whether Plaintiff intended to deceive Grange Mutual with his application, the Court of Appeals noted that Plaintiff maintained throughout the proceedings that he either signed a blank application, which was later filled in by Mr. Burnette, or that he signed an application that Mr. Burnette had previously filled out before presenting it to Plaintiff for his signature. Under either factual scenario, the Court of Appeals stated that a question of fact existed as to whether Plaintiff made intentional misrepresentations in his application or whether he may be charged with intent for signing a form that Mr. Burnette completed.

Based on its conclusion that a dispute of material fact existed in the case, the Court of Appeals held that the trial court erred in granting Grange Mutual's motion for summary judgment.

The foregoing two decisions reflect the challenge insurers will encounter in attempting to establish a material misrepresentation defense and the need to determine in advance whether a purported misrepresentation in an insurance application is effective to void coverage pursuant to Tennessee law.

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