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Recent Case Developments

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IN POLLUTION LIABILITY CASE, NEW JERSEY SUPREME COURT CLARIFIES ITS VIEWS ON ALLOCATION OF INSURER AND POLICYHOLDER RESPONSIBILITY FOR MULTIYEAR, MULTIPOLICY OCCURRENCES

Carter-Wallace, Inc. v. Admiral Insurance Company, 154 N.J. 312, 712 A.2d 1116 (1998).

In *Owens-Illinois, Inc. v. United Insurance Co.*,[1] the New Jersey Supreme Court adopted the so-called "continuous" trigger of coverage where a product or polluting activity causes injury over multiple policy periods. Under the continuous trigger approach as applied in the approximately 20 states that have utilized it for at least some types of liability insurance claims, the insurance policy on the risk at the time of initial injury due to an occurrence is triggered and so are all subsequent policies for the time period during which injurious activity continues, with the trigger terminating at the time the activity ceases, is discovered, becomes an expected or intended injury by the policyholder, or when some other fact or equitable consideration requires a secession of the continuous trigger.

In claims such as asbestos injury or groundwater pollution, the continuous trigger (or, for that matter, application of an exposure or actual

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1. 138 N.J. 437, 650 A.2d 974 (1994).

injury trigger) frequently implicates many years and policies because of the long-term insidious development of the damage alleged. In *Owens-Illinois*, the New Jersey Supreme Court expressed a preference for precision and remanded the matter to the trial court with instructions that it appoint a master or use experts to attempt to develop direct evidence or a model of the quantum of injury taking place in different policy periods so that insurer responsibility could be apportioned according to the amount of damage and liability accruing in each policy period. The Court recognized that in many cases such attempted precision would prove impossible to achieve[2] and established a default method of allocating insurer responsibility across multiple policy periods—proration of insurer liability by the insurer's respective policy limits multiplied by the time on the risk.

Owens-Illinois also held that proration of responsibility included assigning a share of responsibility to the policyholder for time periods where the policyholder was uninsured or self-insured. But *Owens-Illinois* specifically did not address the question of apportionment of coverage responsibility to excess insurers. Also unclear was the manner in which the allocation formula would be applied in light of the "layering" of liability insurance coverage typically found in insurance programs of commercial policyholders, which usually includes primary insurance, a significant self-insured retention ("SIR") and several layers of excess liability insurance coverage, which may involve several insurers at each excess level.

In *Carter-Wallace, Inc. v. Admiral Insurance Company*, decided by the New Jersey Supreme Court on July 8, 1998, the New Jersey high court clarified these questions in applying the allocation methodology of *Owens-Illinois*, an asbestos case, to environmental pollution and site cleanup. Specifically, the Court held that the first step in allocating the responsibilities of successively triggered insurers for coverage of multiyear occurrences was to calculate the amount of coverage responsibility for each of the triggered years by determining that year's allocations by the ratio of the year to other triggered periods in terms of the total amount of coverage (both primary and all levels of excess insurance). For this first step in the calculation, each policy period was to be treated as one segment of insurance without regard to the designation of the insurers as "primary" or "excess". Rather, each year's

2. This was a point made by critics of the decision, who labeled the entire exercise one of futility, cost, and delay. At this writing, the *Owens-Illinois* coverage dispute continues at the trial level nearly four years after the Supreme Court decision remanding the case, a fact perhaps giving credence to the criticism.

insurance is to be treated as a whole and entered into the "limits by time" proration policy.

For example, if there are 10 triggered years with $1 million of liability insurance in the first year and a $1 million increase in the policy limits each year,[3] this would result in ratios of allocation in which the insurer in Year 1 was responsible for 1/55th (slightly less than two percent) of the coverage if there were claims triggering all ten years of applicable liability insurance. The insurer in Year 10 would be responsible for 10/55ths (more than 20 percent of the coverage) even though both the Year 1 insurer and the Year 10 insurer were on the risk for an equivalent amount of time because of the higher policy limits of the Year 10 insurer. If Years 1 through 5 were all insured by the Acme Indemnity Company and Years 6 through 10 were all insured by the Becme Assurance Company, Acme would be responsible for 15/55ths (between a quarter and a third) of the coverage while Becme would be have 40/55ths (nearly three-fourths) of the coverage allocated to it.

Under the *Owens-Illinois/Carter-Wallace* approach and New Jersey law, if all ten years of policies are triggered but the amount of liability is less than $55 million dollars, each insurer's share of the coverage responsibility is determined by multiplying the fractions set forth above by the amount of total coverage responsibility for the triggered claims. Thus, if there were $30 million of coverage responsibility, the Year 1 insurer would be responsible for 1/55th of $30 million, the Year 2 insurer would be responsible for 2/55ths, and so on. In the two-insurer example above, Acme Indemnity would be responsible for 15/55ths of $30 million while Becme Assurance would have 40/55ths of the $30 million responsibility apportioned to it.

Under this approach, the respective policy limits of the insurers in question are most important although the time on the risk is also significant. Other courts favoring proration have restricted the allocation formula to time on the risk alone and have refused to consider respective policy limits.[4]

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3. Thus, there would be $1 million of liability insurance in Year 1, $2 million in Year 2, $3 million in Year 3, and so on until the policyholder has $10 million of coverage in Year 10, giving the policyholder $55 million in potentially applicable liability coverage over the 10-year period.

4. *See, e.g.*, Northern States Power Co. v. Fidelity & Casualty Co. of N.Y., 521 N.W.2d 28 (Minn. 1994)(adopting rule of allocation by time each insurer is on the risk and not attempting to have parties demonstrate quantum of damage taking place in different policy periods).

Thus, in the examples above, each year's insurer would be responsible for one-tenth of the coverage responsibility.

From 1966 to 1979, pharmaceutical manufacturer Carter-Wallace through a licensed waste hauler disposed of waste byproduct from its Cranbury, New Jersey plant in the Lone Pine Landfill. Lone Pine was closed by the New Jersey Department of Environmental Protection in 1979. In 1982, the United States Environmental Protection Agency ("EPA") commenced an investigation and proceedings that ultimately resulted in a consent degree between Carter-Wallace and the EPA to clean up the Lone Pine facility, a cleanup that was apparently successfully accomplished. In 1989, Carter-Wallace filed suit against more than 20 of its insurers, attempting to obtain a court decree that the insurers were responsible for the cleanup costs at Lone Pine, which eventually exceeded $9 million. Carter-Wallace settled with all but one insurer, Commercial Union ("CU"), resulting in the coverage litigation culminating in the recent Supreme Court decision.

Commercial Union issued a second-layer excess insurance policy to Carter-Wallace for a policy period of April 30, 1969 to April 30, 1972. The CU policy contributed $1 million to a $10 million second level of excess/umbrella coverage that was in excess of a $5 million first level package of excess policies that was excess of a $100,000 level of primary coverage. In addition to arguing that Carter-Wallace had expected or intended the pollution damage (an argument rejected by the trial court),[5] CU argued that it's coverage responsibility did not attach until all primary and first level excess insurance for the years in question (1996 through 1979) had been exhausted.

The Court rejected the CU argument that "horizontal" exhaustion was required at each layer in each policy period triggered before a subsequent layer in a given year could be considered triggered for purposes of applying the "limits and time" allocation formula of *Owens-Illinois*. Instead, the Court declared that the *Owens-Illinois* methodology should be used to calculate the coverage responsibility to be allocated to each policy year. Once the dollar amount of coverage apportionment had been decided for

5. As a general matter, the Supreme Court in *Carter-Wallace* found that it is the insurer's burden to prove by a preponderance of evidence that the policyholder subjectively expected or intended the resulting injury if the insurer is to avoid coverage.

each policy period, triggered policies for that year should be tapped in their respective orders of priority. For example:

> [a]ssume that primary coverage for one year was $100,000, first-level excess coverage was $450,000. If the loss allocated to that specific year was $325,000, the primary insurer would pay $100,000, the first-level excess policy would be responsible for $200,000, and the second-level excess policy would pay $25,000.

Carter-Wallace, 712 A.2d at 1124.

For example, in the 10-year/$55 million of coverage example used above, if the policyholder held $500,000 of primary insurance in each year, the excess layers in each policy period would be tapped in vertical order until the amount of coverage allocated to a given year was exhausted.

The Carter-Wallace Court approvingly cited the federal district court opinion in *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Co.*, 978 F. Supp. 589 (D.N.J. 1997) and expressly endorsed its interpretation and application of *Owens-Illinois* and New Jersey allocation law regarding the respective coverage responsibilities of successively triggered liability insurers.

The *Carter-Wallace* Court stated that it was adopting what might be termed its "vertical exhaustion within policy period share" method as the presumptive rule for allocating multiyear coverage responsibility unless exceptional circumstances dictate application of a different standard.

NEW JERSEY VOIDS SEXUAL HARASSMENT EXCLUSION IN EMPLOYER'S LIABILITY POLICY AS AGAINST PUBLIC POLICY

Schmidt v. Smith, 155 N.J. 44, 713 A.2d 1014 (1998).

Linda Schmidt filed a complaint against her employer Personalized Audio Visual, Inc. ("PAV") and its president, Dennis Smith, alleging hostile work environment sexual harassment as well as violation of the New Jersey Law Against Discrimination ("LAD"), assault, battery, invasion of privacy, and intentional infliction of emotional distress. In an amended complaint,

she also alleged liability for negligent infliction of emotional distress against Smith and negligent failure to train supervisors against PAV as her employer.

PAV and Smith sought defense and indemnity coverage from United States Fidelity & Guaranty ("USF&G") under a comprehensive general liability (CGL) policy and also under an Employer's Liability ("EL") Policy. USF&G denied coverage under both policies. Trial of the discrimination action preceded trial of the coverage dispute; USF&G had the opportunity to participate in the defense but refused. At trial, Smith was found liable by the jury for hostile work environment sexual harassment, assault, assault and battery, and intentional infliction of emotional distress. PAV was found liable for only hostile work environment sexual harassment. The verdict form did not ask whether the employer's liability was direct or vicarious or whether the employer might be vicariously liable for the intentional torts found by the jury to have been committed by Smith.

After the jury verdict, the trial court found that USF&G was responsible for coverage. The intermediate appellate court (the "Appellate Division" in New Jersey) affirmed the trial court verdict and found that the EL policy provided coverage even though the CGL did not. The New Jersey Supreme Court affirmed this result in its June 15, 1998 decision.

The EL policy in question stated that it covered damages accruing to the employer for occurrences of "bodily injury by accident or bodily injury by disease" that arise "out of and in the course of the injured employee's employment" by the insured. The EL policy also contained an exclusion for damages

> arising out of coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination against or termination of any employee, or any personnel practices, policies, acts or omissions.

The Court found the broad language of this exclusion was textually applicable in the *Schmidt* claim because liability was premised on several legal theories but the different legal violations arose from sexual harassment behavior. However, the Court also found that the exclusion could not be enforced against the PAV or Smith because the exclusion was inconsistent with New Jersey law that requires employers to "make sufficient provision for the complete payment of any obligation [the employer] may incur to an injured employee."

Specifically, the Court held that because the *Schmidt* claim in part was based on a finding of negligence by the employer and supervisor,[6] the *Schmidt* jury award was part of the type of bodily injury coverage for workplace mishaps that was mandated by state statute. Consequently, application of the harassment exclusion in the EL policy to injuries resulting from negligence violated New Jersey law and was unenforceable even if the negligent injury was related to or resulted in claims of harassment.

However, according to the Court, the harassment exclusion would be enforceable to bar coverage for claims not falling within the statutorily mandated coverage for accidental bodily injury. For example, state law does not require the employer to provide coverage for claims that do not result in "bodily injury". Thus, an insurer's use of the exclusion to bar coverage for the financial or reputational injury usually associated with "criticism, demotion, evaluation, and defamation", would normally be enforceable and a policyholder "would not expect to be covered" in such case, making the exclusion "valid as long as the liability arising from those discomforts is not related to bodily injury." *Schmidt*, 713 A.2d at 1018.

But in the *Schmidt* case, the employer's liability was "primarily related to the personal injuries [the employee plaintiff] suffered as a result of [the supervisor's] conduct." *Id.* New Jersey law regards emotional injury accompanied by physical manifestation as "bodily injury" under liability insurance policies. *See Voorhees v. Preferred Mut. Ins. Co.*, 607 A.2d 1255 (N.J. 1992).

The Supreme Court did not disturb the intermediate appellate holding that the employer's CGL, which included an employment-related injury exclusion, did not provide coverage. In a case decided the same day as *Schmidt*, the New Jersey Supreme Court also generally upheld the employee claims exclusion of the standard CGL as effectively excluding coverage for sexual harassment in the workplace claims. *See American Motorists Insurance Co. v. L-C-A Sales Co.*, 713 A.2d 1007 (N.J. 1998) (discussed below).

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6. Although the jury did not specifically make a finding of negligence or vicarious liability against the employer, neither did it foreclose negligence, which was pleaded by the plaintiff and on which evidence was presumably presented at trial. Although the Court does not elaborate on the point, it was implicitly concluding that the jury verdict must be viewed in the light most favorable to the employer policyholder, which argued that the verdict, although arguably ambiguous, was one based on negligence rather than intentional wrongdoing.

NEW JERSEY JOINS JURISDICTIONS APPLYING EMPLOYMENT EXCLUSION IN CGL POLICY TO BAR CGL COVERAGE FOR DISCRIMINATION AND HARASSMENT CLAIMS

American Motorists Insurance Co. v. L-C-A Sales Co., 155 N.J. 29, 713 A.2d 1007 (1998).

The *American Motorists* decision makes clear that the *Schmidt* decision discussed above was based not on the language of the Employers Liability policy at issue in *Schmidt* but on state law and public policy mandating minimum insurance coverage for bodily injury to workers. In a case not presenting these statutory and public policy considerations, the New Jersey Supreme Court read the language of the employment exclusion contained in the standard commercial general liability policy ("CGL") to bar coverage for an age discrimination and harassment claim made by a former employee of the policyholder.

John Piccialo worked as a salesman for L-C-A Sales ("LCA") for more than thirty years until his termination in 1991 at age 67. He sued charging that he had been harassed because of his age into involuntary retirement. LCA sought coverage for the Piccialo suit under its CGL. The CGL contained the typical insuring agreement covering bodily injury claims against the policyholder and also contained the typical exclusionary language of the time that there would be no coverage for bodily injury to "[a]n employee of the insured arising out of and in the course of employment by the insured."

The court found this exclusion broad, clear, and enforceable despite the general rule that it is the insurer's burden to demonstrate the applicability of the exclusion. This burden was met according to the unanimous Court because the exclusion was "clear and unambiguous", particularly given its location in the policy adjacent to an exclusion for workers compensation claims. The plain language of the employment exclusion and its placement in the policy

> demonstrates that the objective of the CGL policy was to exclude from coverage all claims—whether falling within or beyond the workers' compensation systems—"arising out of an in the course of" Picciallo's employment. Were the

> employee exclusion interpreted only to bar coverage for workers' compensation claims, the workers' compensation exclusion in LCA's CGL policy would be redundant."

American Motorists, 713 A.2d at 1012-13.

In addition, the Court applied an expansive meaning to the exclusion's words "arising out of" and equated the term with "originating from", "growing out of" or "having a `substantial nexus' with the activity for which coverage is provided." *Id.* at 1010. Consequently, Picciallo's claim that he was harassed by telephone calls at home, as well as by actions at work, did not bring the claim by this former employee within the CGL coverage.

CARBON MONOXIDE POISONING IN TRAILER ATTACHED TO CAR DOES NOT "ARISE" FROM USE OF MOTOR VEHICLE WITHIN THE MEANING OF STATE NO-FAULT AUTOMOBILE INSURANCE LAW AND POLICY

McKenzie v. Auto Club Insurance Association, 458 Mich. 214, 580 N.W.2d 424 (1998).

On a hunting trip, Francis and Hughie McKenzie slept in a camper/trailer attached to the back of Francis McKenzie's pickup truck. The truck was not in operation at the time. The camper/trailer's propane-powered forced-air heater malfunctioned, leaking carbon monoxide fumes into the camper. Fortunately, they were rescued and survived even though overcome by the fumes, injured, and hospitalized. As a result, Francis McKenzie sought coverage under this no-fault automobile policy for personal injury protection (PIP) benefits. The insurer resisted, arguing that the injury did not arise from the use of a motor vehicle within the meaning of the policy and state law. The trial court rejected the defense and found for the policyholder on the basis of past precedent and the intermediate appellate court affirmed. The Supreme Court reversed, finding no coverage.

The Court noted that under existing law, injury taking place in a parked or stationary vehicle is not necessarily excluded from coverage merely because the vehicle is not in motion at the moment damage takes place. However, the vehicle must be in use "as a motor vehicle" even if it is not in

motion. In addition, there must be a causal relationship between the vehicle and the injury that "is more than incidental, fortuitous, or but for".[7]

Applying this standard, the Court found against coverage because the use of the trailer had insufficient linkage to the transportation function most commonly associated with automobile use. According to the Court:

> As a matter of English syntax, the phrase "use of a motor vehicle as a motor vehicle" would appear to invite contrasts with situations in which a motor vehicle is not used "as a motor vehicle." This is simply to say that the modifier "as a motor vehicle" assumes the existence of other possible uses and requires distinguishing use "as a motor vehicle" from any other uses. While it is easily understood from all our experiences that most often a vehicle is used "as a motor vehicle," i.e. to get from one place to another, it is also clear from the phrase used that the Legislature wanted to except those other occasions, rare as they may be, when a motor vehicle is used for other purposes, e.g., as a housing facility of sorts, as an advertising display (such as at a car dealership, as a foundation for construction equipment, as a mobile public library, or perhaps even when a car is on display in a museum). On those occasions, the use of the motor vehicle would not be "as a motor vehicle," but as a housing facility, advertising display, construction equipment base, public library, or museum display, as it were. It seems then that when we are applying the statute, the phrase "as a

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7. *See McKenzie*, 580 N.W.2d at 425 (quoting Putkamer v. Transamerica Ins. Corp. of America), 563 N.W.2d 683 (Mich. 1997). By "but for" causation, the Court means what is often referred to as "cause-in-fact". For example, it can be said that one cause of a plaintiff's injury in an auto accident was that she was driving to work at 8 a.m. Had the driver not been going to work at that time, she by definition could not have been in that particular accident. However, this mere cause-in-fact (which may be mere correlation rather than even irrelevant "cause") is normally insufficient to establish tort liability or similar legal responsibility. Rather, a cause-in-fact of an injury must also be a "proximate cause", one that is legally sufficient as well as factually contributory. For example, it would be a proximate and legally sufficient cause of the accident that the defendant ran a red light and smashed into the plaintiff on her way to work.

> motor vehicle" invites us to determine if the vehicle is being used for transportational purposes.
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> * * *
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> Accordingly, we are convinced that the clear meaning of this part of the no-fault act is that the Legislature intended coverage of injuries resulting from the use of motor vehicles when closely related to their transportational function and only when engaged in that function.

American Motorists, 580 N.W.2d at 426 (footnotes omitted).

Three judges dissented, contending that the majority was not merely following precedent regarding the "use as a motor vehicle" requirement but was overruling it by taking a more narrow view of the term. The dissenters saw the camper/trailer as essentially a part of a motor vehicle at rest with a mechanical malfunction causing injury similar in type to that which can take place when the vehicle is actively in motion or engaged in transportation.

ERISA PRE-EMPTION DOES NOT APPLY TO BAR APPLICATION OF STATE COMMUNITY PROPERTY LAW TO FORCE REDISTRIBUTION OF LIFE INSURANCE PROCEEDS DESPITE BENEFICIARY DESIGNATION ON FACE OF POLICY

Emard v. Hughes Aircraft Company, 153 F.3d 949 (9th Cir. 1998) (applying California law and federal law of ERISA pre-emption).

Ginger Emard was an employee at Hughes Aircraft Company at the time of her death. When she began work at Hughes in 1981, she became eligible for the company's life insurance policy and designated her then-husband Alex Stencel as the beneficiary. She and Stencel divorced in 1985 and she remarried to Gary Emard in 1986 but did not change the beneficiary designation. In 1988, she purchased an optional term life insurance policy but failed to fill out a new designation of beneficiary form. Ms. Emard died intestate in 1995. The 1981 form designating Stencel as life insurance beneficiary remained the "only document directing the distribution of the insurance proceeds". Mr. Emard filed suit to obtain policy proceeds but lost in the trial court.

Under California's community property law, a current spouse is entitled to a decedent spouse's life insurance benefits as a matter of law. But under the Employee Retirement Income Security Act ("ERISA"), the documentary designation of a beneficiary is controlling unless it can be set aside under the federal common law of contract applicable in ERISA disputes. On appeal, the United States Court of Appeals for the Ninth Circuit reversed the trial court and awarded the policy benefits to Mr. Emard as current husband.

The Ninth Circuit reasoned that ERISA was not controlling even though ERISA has a broad preemption clause that makes it applicable when in conflict with most state laws regulating benefits. However, in this case, the Court found no pre-emption because rigid application of the designation-of-beneficiary rule over important state policies that did not interfere with the federal statutory scheme was deemed by the Court to be too inequitable and insufficiently sensitive to the federal-state division of authority.

The Court utilized a two-step analysis drawn from Supreme Court precedent asking (1) whether California law conflicts with any specific provision of ERISA and (2) whether application of California law would frustrate Congress' purposes in enacting ERISA. If no conflict of this sort is found and there is no indication that Congress sought to occupy this field completely through federal law, preemption is not required.

State law traditionally has been the realm in which both the distribution of estates and the resolution of family law matters has taken place. According to the Court:

> ERISA is designed to ensure that benefits are paid out. It is silent as to the disposition of those funds after their receipt by the beneficiary. ERISA does not preempt California law permitting the imposition of a constructive trust on insurance proceeds after their distribution to the designated beneficiary.

Emard, 153 F.3d at 955. The Court further concluded:

> In enacting ERISA, Congress intended to safeguard the rights of plan participants and beneficiaries as against employers, insurers and administrators of employee benefit plans. *See* 29 U.S.C. § 1001 (setting forth Congress' findings and declaration of policy). ERISA therefore

> preempts state law that concern those matters. But we see no indication that Congress intended to safeguard an individual beneficiary's rights to the proceeds of an ERISA insurance plan as against another person claiming superior rights, under state law, to those proceeds. Absent specific contrary provisions in ERISA, an action intended only to enforce such individual rights against a beneficiary does not fall within the scope of [the preemption provisions of the statute] and state laws on which such an action relies are not barred by ERISA preemption.

Id. at 958.

The Court felt sufficiently strongly about the strength of the state interest in equitable distribution of marital assets that it analogized the California community property interest to a state's interest in enforcing a "slayer statute", a frequently found law forbidding persons to receive insurance proceeds or distribution of an estate where that person has murdered the insured person or testator. If ERISA were as broadly preemptive as sought by Mr. Stencel, reasoned the Court, it would also require that ERISA insurance benefits go to even a murdering designated beneficiary, a result the Court suggested was absurd. This same rationale made it nearly as absurd to the Court to require that insurance money be paid to a former husband rather than the current husband simply because of a probable failure to update the designation of beneficiary.

Consequently, Mr. Emard would not be barred by ERISA from seeking a constructive trust upon Mr. Stencel's receipt of the Ginger Stencil insurance policy if Mr. Emard could persuade the trial court that under either California property law or equity he was entitled to the proceeds.

STATE INSURANCE CODE DOES NOT DISPLACE APPLICATION OF UNFAIR COMPETITION LAW TO TITLE INSURERS; PLAINTIFF MAY SUE UNDER UNFAIR COMPETITION LAW FOR PURPORTED HARM FROM ALLEGED CONSPIRACY BY TITLE INSURERS

Quelimane Company, Inc. v. Stewart Title Guaranty Company, 19 Cal. 4th 26, 960 P.2d 513 (1998).

A group of plaintiffs purchasing real estate at tax sales sued title insurers for refusing to write title insurance on such property, alleging that this constituted an unfair business practice under the California Unfair Competition Law (Business and Professional Code §§ 17200-17209)("UCL"). The title insurers defended on the ground that since they were insurers, the state Insurance Code was the exclusive statute subjecting them to state regulation. The Court rejected the insurer's contention and permitted the suit to proceed.

Specifically, the Court concluded that the Insurance Code precluded application of the UCL only to the extent that the plaintiff's assertion of the UCL attacked title insurer activities regarding rate setting, a core aspect of state insurance regulation. The Supreme Court reasoned that the state's Insurance Code and insurance regulation should displace other generally applicable laws only to the extent that this is required because of an unavoidable clash between the laws. In the instant case, the Court found no such conflict because (except for the rate-setting issue), both the Insurance Code and the UCL could be applied to the title insurers without creating inconsistent demands or standards of conduct.

FEDERAL COURT INTERPRETS WYOMING LAW AS NOT INCORPORATING LIFE INSURANCE SALES ILLUSTRATIONS INTO THE INSURANCE CONTRACT ITSELF; POLICY LANGUAGE CONTROLS OVER CONTRARY ILLUSTRATIONS AND INSURER NOT ESTOPPED FROM INVOKING POLICY LANGUAGE DESPITE POLICYHOLDER ASSERTION OF HAVING BEEN MISLED BY ILLUSTRATION

Brown v. Royal Maccabees Life Insurance Company, 137 F.3d 1236 (10th Cir. 1998) (applying Wyoming Law).

A group of plaintiffs sought to bring a class action complaint against the insurer for allegedly misrepresenting the terms of life insurance policies through illustrations of coverage, cash value, and operation that were unrealistic and misleading. Apparently, an error in the program did not take into a account surrender charges if the policy was terminated at any time during the first ten years. In particular, the illustrations were alleged to create the impression a policyholder could make one $8,000 premium payment on a $1 million face value policy, cease making premium payments, but continue to enjoy $50,000 of life insurance coverage and a $14,000 cash surrender value after 14 years. The policy language itself made no such guarantees and included disclosure of the prorated surrender charge for early cancellation of the policy.

The *Brown* plaintiffs wanted to receive the benefit of the policy illustration. Even if the policy language itself is to the contrary, plaintiffs argued that the illustration becomes part of the application process and the policy itself. They also argued that the insurer is estopped to give the class plaintiffs the benefit of the insurance as outlined in the illustrations even if the use of the illustrations does not formally become the contract between the parties.

The United States Court of Appeals for the Tenth Circuit, applying Wyoming law, rejected the *Brown* plaintiffs' theory of the case. Specifically, the Court held that insurance policy itself controls in any cases of conflict with an illustration of the operation of the policy. Also, the illustration is more in the nature of a brochure about the coverage and is not the equivalent of the policy itself or the application form, which is often specifically made a part of the policy by state law or provisions of the life insurance policy. Despite the appeal to equity and fairness advanced by the

plaintiffs, the Court found no basis for estoppel against the insurer. Specifically, the Court assessed the matter as one of promissory estoppel and found insufficient evidence of a representation by the insurer and binding reliance by the policyholder. The Court did not expressly consider whether the insurer might be "equitably" estopped due to any possible unfairness from refusing to honor the insurance product outlined in the illustrations even if the program calculating the illustration was in error.

CONNECTICUT SUPREME COURT ENFORCES 1-YEAR LIMIT ON ACTION UNDER POLICY SET FORTH IN POLICY AND REJECTS ARGUMENT THAT GENERAL STATE STATUTE OF LIMITATIONS LAW COUNTERMANDS STATUTE

Bocchino v. Nationwide Mutual Fire Ins. Co., 246 Conn. 378, 716 A.2d 883 (1998).

The insurance policy in question provided a one-year time limit for commencing actions under the policy. A coverage suit was initially filed within this one-year period and then dismissed for lack of prosecution. The policyholder sought to reinstate the action under the state's general statutory provisions regarding the limitation of actions and revival of dismissed actions. The Supreme Court held that even if the plaintiff would be entitled to revive the action under the law if it were an ordinary tort claim or contract action on a contract that did not establish a time limit for actions on the contract, plaintiff was barred in the instant case. Where an insurance policy (and, presumably, any contract) establishes a reasonable time period for actions involving disputes under the instrument, these contractual agreements take precedence over general law and are controlling.