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The Biggest Property & Casualty Insurance Decisions Of 2018, *Law360, ft. Michael Zigelman and Daniel Brody*

Michael L. Zigelman, co-managing partner of the Kaufman Dolowich & Voluck New York City office, and Daniel H. Brody, partner in New York City, were quoted in a *Law360 article written by Jeff Sistrunk.*

Law360 (December 14, 2018, 3:03 PM EST) — Insurance attorneys received guidance from courts on a host of critical coverage issues in 2018, including the New York high court's holding that an insurer cannot be held liable for a policyholder's cleanup costs for years in which no pollution insurance was available and two appeals courts' rulings that insurers must cover losses from email-based scams.

Disgorgement Coverage Rulings

In a pair of contrasting decisions, the Delaware Supreme Court and a New York appeals court stoked the ongoing debate over whether policyholders should be permitted to force their insurers to cover losses characterized as disgorgement of wrongfully obtained funds.

On July 30, the Delaware high court — applying New York law — affirmed a lower court's judgment requiring three insurance companies to cover TIAA's costs to defend and settle class actions alleging the retirement services giant profited from funds-transfer delays, rejecting the insurers' assertion that the deals constitute uninsurable disgorgement.

The Delaware justices said a trial judge properly distinguished the Empire State cases cited by the insurers, which all involved U.S. Securities and Exchange Commission orders definitively tying a company's improperly acquired profits to a government-mandated disgorgement payment. Here, by contrast, TIAA settled without any admission of liability, and it doesn't appear that the retirement services provider ever had an opportunity to profit at investors' expense, the Delaware justices found.

Less than two months later, a panel of New York's Appellate Division reversed a trial judge's order requiring a group of insurers to pay J.P. Morgan Securities Inc. $286 million for settlement costs that Bear Stearns shelled out in a deal with the SEC.

The lower court's order directed the insurers to cover a $140 million payment that Bear Stearns made to the SEC as part of a settlement over market-timing and late-trading claims, plus more than $146 million in interest. According to court papers, the $140 million sum purportedly represented improper profits acquired by Bear Stearns' third-party hedge fund customers.

The Appellate Division panel, however, said the trial court's order cannot stand in light of the U.S. Supreme Court's 2017 decision in Kokesh v. SEC , which found that SEC-ordered disgorgement is a penalty. The high court's ruling is fatal to JPMorgan's case, because Bear Stearns' policies exclude "fines or penalties imposed by law" from their definition of covered loss, the panel held.

Michael L. Zigelman, co-managing partner of Kaufman Dolowich Voluck LLP's New York City office, said the JPMorgan decision is likely to have more of a lasting impact than the TIAA ruling, which, according to Zigelman, involved unusual facts that are "easily distinguishable from the vast majority of the disgorgement cases out there."

"We don't believe that the TIAA decision is as far-reaching as some policyholder counsel may believe," said Zigelman, who represents insurers.

According to KD partner Daniel Brody, insurance companies should not let the TIAA ruling dissuade them from contesting coverage for losses that arguably constitute disgorgement.

"[The TIAA and JPMorgan decisions] both seem to at least tacitly recognize that there is public policy in New York that settlements involving disgorgement should be uninsurable," he said. "As a result, insurers can continue to make the argument that they should not have to cover settlements for claims seeking payment for amounts an insured acquired or withheld."

The cases are In re: TIAA-CREF Insurance Appeals, case numbers 478, 2017; 479, 2017; 480, 2017; and 481, 2017, in the Delaware Supreme Court; and J.P. Morgan Securities Inc. et al. v. Vigilant Insurance Co. et al., case number 600979/2009, in the New York Supreme Court Appellate Division, First Department.