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PROFESSIONAL LIABILITY BLOG

Illinois' Statute of Limitations for a negligent procurement claim runs from date insured received the policy, not when a claim is denied.

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In *American Family Mutual Insurance Company v. Krop*, 2018 IL 122556, – N.E.3d – (2018), the Illinois Supreme Court addressed whether a claim brought by Walter and Lisa Krop, the insureds, against their insurance agent for failing to procure the level of insurance coverage the insureds requested and would have covered a third-party claim, was time barred. Central to the dispute was when the Krops' claim against the agent accrued.

In 2012, the Krops asked their agent, a captive insurance agent of American Family Mutual Insurance Company ("American Family"), to provide homeowners insurance with coverage equal to their old policy issued by another insurer. *Id*. at ¶ 4. The agent allegedly promised to provide an American Family policy with equal or better coverage for the same price as their old policy. *Id*. American Family issued a homeowners policy to the Krops on March 21, 2012, which was renewed annually for the next three years. *Id*.

In 2014, the Krops were sued for claims of defamation, invasion of privacy, and infliction of emotional distress, and tendered the claim to American Family under their homeowners policy. *Id*. at ¶ 5. In August 2014, American Family denied coverage because the claims against the Krops did not seek damages for any covered "bodily injury" or "property damage" and was not caused by a covered "occurrence." *Id*. at ¶ 7. American Family filed an action against the Krops seeking a declaration of no coverage. In September 2015, the Krops filed a third-party complaint against the agent, alleging he negligently failed to provide them with an insurance policy equal to their old policy, as they had requested, and a counterclaim against American Family on a theory of vicarious liability. *Id*. at ¶ 8. The old policy had covered liability for "personal injury" caused by a covered offense, such as defamation and invasion of privacy, in addition to bodily and property injuries caused by an occurrence. *Id*.

American Family and the agent moved to dismiss the Krops' claims on the basis they were barred by the two-year statute of limitations for claims against insurance producers, i.e., agents and brokers, set out in 735 ILCS 5/13-214.4 ("All causes of action brought…against an insurance producer,…concerning the …failure to procure any policy of insurance shall be brought within 2 years of the date the cause of action accrues.") (emphasis added). *Id*. at ¶ 9. The trial court agreed with American Family and the agent that the date of accrual began when the Krops first received their policy in March 2012, and not when their request for coverage was denied in August 2014, as argued by the Krops, and dismissed the Krops' claims. *Id*. at ¶ 10.

The Illinois Appellate Court reversed, siding with the Krops, and relying on the "discovery rule" to delay the start of the statute of limitations until the date the Krops' learned of their injury, i.e., the declination of coverage. *Id*. at ¶ 11. The Illinois Supreme Court, however, agreed with the trial court and reversed the Appellate Court's decision. In support, the Supreme Court relied on Illinois courts' treatment of negligence claims in relation to insurance policies as torts arising out of contractual relationships, where causes of action ordinarily accrue at the time of the breach of contract, not when a party sustains damages. *Id*. at ¶ 17. Traditional tort claims, in comparison, usually accrue when the plaintiff suffers injury. *Id*.

Additionally, the Supreme Court reasoned "many Illinois cases have found that insurance customers should know the specifics of their policy as soon as they purchase it," and thus have "imposed on insurance customers an obligation to read their policies and understand the terms." *Id*. at ¶ 22. Insurance agents, on the other hand, do not owe a fiduciary duty by operation of 735 ILCS 5/2-2201(b) (absent limited circumstances). *Id*. at ¶ 28. The Supreme Court concluded "[b]ecause a claim for negligent failure to procure insurance does not involve a fiduciary duty, insurance customers' obligation to read their policies controls." *Id*. at ¶ 29. The Supreme Court further explained because "insurance customers frequently maintain the same insurance policy for years, perhaps decades, at a time," if a cause of action did not accrue until the insurance producer notified the customer of an insured liability, "insurance customers would benefit from their policy throughout the intervening period, while evidence potentially relevant to the insurer's defense would be at risk of deterioration." *Id*. Thus, the duty placed on insureds to read their policies and identify any defects prevents any delay for negligent failure to procure insurance claims resulting from the discovery rule. *Id*.

However, the Supreme Court set forth a "narrow" exception in which the insured "reasonably could not be expected to learn the extent of coverage simply by reading the policy," such as a policy with "contradictory provisions," a failure to define key terms, or circumstances "so unexpected that the typical customer should not be expected to anticipate how the policy applies." *Id*. at ¶ 36. Specific to the Krops' claim, no exceptional circumstances were present, as there were no allegations showing the Krops could not have read or understood their American Family policy, or never received the policy. *Id*. at ¶ 37. Because their claim for negligent failure to procure insurance accrued on March 21, 2012 (the date of their receipt of the policy), the two-year limitations period expired more than a year and a half before they filed their suit, and the claim was time-barred. *Id*. at ¶ 38.

The Illinois Supreme Court also noted other state supreme courts have reached the same conclusion, such as Rhode Island, Indiana, Mississippi, Delaware, and Maine. *Id*. at ¶ 30. Though acknowledging other jurisdictions are not unanimous in determining when a claim against an insurance producer accrues, the Krops' position is recognized in only a minority of jurisdictions. *Id*. at ¶¶ 31, 32. A dissenting opinion was filed by Justice Theis on the basis the Krops' action should have been characterized as an ordinary negligence action, rather than negligent performance of a contractual duty, such that their claim accrued at the time of injury, i.e., the date American Family denied coverage. *Id*. at ¶¶ 45-54.

The majority opinion issued by the Illinois Supreme Court in the *Krop* case provides much needed clarification on the accrual of claims against an insurance producer under Illinois law. Litigation may be expected regarding the scope and application of "exceptional circumstances" as a means of saving an insured's otherwise time-barred claim.