

Insurance

A Statistical Analysis Of Insurance Law Decisions By New York's Highest Court

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Commentary

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[Editor's Note: Evan H. Krinick, the managing partner of Rivkin Radler LLP, has represented insurance carriers in many significant cases. Mr. Krinick, who served for two years as a law clerk to the Hon. Fritz W. Alexander II of the New York Court of Appeals before joining Rivkin Radler, may be contacted at evan.krinick@rivkin.com. Catalina E. De La Hoz, an associate in the firm's Commercial Litigation Practice Group who previously served as a senior court attorney at the New York Court of Appeals, assisted in the preparation of this article. Summer associates Jeffrey Ehrhardt and Nadia Udeshi assisted in the research for this article. Any commentary or opinions do not reflect the opinions of Rivkin Radler LLP or LexisNexis®, Mealey Publications™. Copyright © 2021 by Rivkin Radler LLP. Responses are welcome.]

New York's highest court, the New York Court of Appeals, is one of the preeminent state courts in the country. It is widely – and justifiably – acclaimed for its well-reasoned, thoughtful, and leading decisions in numerous areas of the law. Its many significant contributions to American jurisprudence include its opinions on insurance law.

The high regard in which the insurance industry and insurance counsel hold the New York Court of Appeals certainly reflects the Court's reputation as a strong venue for insurance carriers in disputes with policyholders. Indeed, carriers often insist on New York law as the selected law in policies, arbitration agreements, and settlement agreements, and there have been many choice-of-law battles waged in courts across the country where insurance carriers have sought the application of New York law.

But as much as the perceived inclination of the Court to view the insurance industry favorably may influence the attitude insurers hold toward the Court, perhaps just as important is the Court's reputation for fairness, understanding, and thoroughness in insurance cases. Those characteristics, carriers recognize, apply even to the Court's rulings against the insurance industry.

Starting in October 1995, I have written an annual column for the *New York Law Journal* discussing the most significant insurance law decisions issued by the New York Court of Appeals in the preceding term, which generally begins in September and runs through June. These columns provide a comprehensive list of the seminal insurance law decisions issued by the Court of Appeals since September 1994 and a substantial foundation to study the Court's jurisprudence over that time frame.

As will be seen below, these decisions demonstrate that the New York Court of Appeals is now, and for at least the past 25 years has been, a preeminent insurance law court in the United States.

The Basic Information

There were 187 insurance cases decided by the Court of Appeals throughout this 25 year timeframe. Out of the 187 cases, 161 involved disputes between insurance carriers and policyholders. Grouping the 161 cases into five-year periods, one finds that each five-year period typically included 20 to 40 cases, with the most being 42 cases in the five-year period from the 2000-2001 term through the 2004-2005 term.

The 25-year period included the partial tenure of Chief Judge Judith Kaye, the complete tenure of Chief Judge Jonathan Lippman, and the beginning of the tenure of Chief Judge Janet DiFiore. There have been 17 associate judges who served on the Court during this period, for various periods of time, and with overlapping tenures.

The overwhelming majority of the cases that reached the Court of Appeals came from the four intermediate appellate courts in New York known as the Appellate Divisions – 170 of the 187 total cases were from the Appellate Divisions. Just 17 cases came from either federal courts or from other state supreme courts pursuant to the Court's certification authority and procedures.

As to be expected, the types of insurance products that were reviewed were varied and comprehensive. By far, the two most prevalent insurance policies considered by the Court were automobile insurance policies (including the mandatory no-fault and supplementary underinsurance provisions) (50 cases) and the commercial general liability ("CGL") insurance policy (40 cases). Other coverages addressed to a far lesser extent included life (13 cases), disability (nine cases), homeowners (nine cases), professional liability (nine cases), excess (seven cases), and property (six cases).

The areas of dispute were predominately coverage issues (insuring agreements and exclusions) (94 cases), with a lesser focus on statutory claims (49 cases) and notice requirements (14 cases), among other things.

The New York Court of Appeals has long had a history as a court of consensus, and the statistics bear this out. Consider that, as noted above, the majority of the insurance cases over the past 25 years involved a dispute between insurer and policyholder, and that the majority of those were decided unanimously – 86 of 161, or approximately 54 percent. Three judge dissents were relatively rare and occurred just 10 times. Two judge dissents happened 27 times. In addition, a dissent by one judge happened 38 times. Taken together, about 46 percent of the cases were decided without unanimity.

The Results

Percentage of Cases Affirmed

Almost half the cases (80 cases) were from the Appellate Division, First Department, and a sizeable

number (46 cases) were from the Appellate Division, Second Department. Far fewer cases were reviewed from the Appellate Division, Third Department (21 cases), and the Appellate Division, Fourth Department (23 cases).

The First Department had a somewhat higher percentage of cases affirmed than the Second Department. The First Department came in at 53.3 percent and the Second Department came in at 45.7 percent. The Third Department had the highest affirmance percentage, at 61.9 percent, and the Fourth Department had the lowest affirmance percentage, at 39.1 percent.

Overall, the Court affirmed well over 50 percent of the coverage cases it heard. Broken down by insurance product, CGL cases had among the highest affirmance rate, at 64.5 percent, while auto policy disputes had an affirmance rate of 51.1 percent. The volume of cases from other products was too small to draw any conclusions, although the Court affirmed all of the excess policy cases it reviewed.

Carrier versus Policyholder

Out of the 161 cases surveyed where the dispute was between a carrier and a policyholder, where there was a clear dispute between a carrier and a policyholder, and where there was a clear winner, carriers won 55 percent of the cases and policyholders won 45 percent of the cases. Thus, carriers prevailed in a clear majority of the cases, although perhaps not at quite the rate that a court with a pro-insurance industry reputation might suggest.

The results were largely consistent through the years, with carriers winning 54 percent of the time during Chief Judge Kaye's tenure and 56 percent of the time during Chief Judge Lippman's tenure. To date, carriers have prevailed in 65 percent of the cases under the recent tenure of Chief Judge DiFiore, but the number of insurance cases is still relatively small.

The New York Court of Appeals is a certiorari court, and disputes reach the Court only if it grants permission to appeal (or, in limited cases, when an Appellate Division allows an appeal). Thus, the cases that get to the Court of Appeals typically involve difficult issues of law – yet, at the Court of Appeals, carriers have won a clear majority of the lawsuits between

carriers and policyholders, as noted above. Still, it is important to recognize the key role that the Appellate Divisions play in establishing insurance law as the final appellate court in most instances. An analysis of Appellate Division insurance cases is beyond the scope of this article.

Individual Judges

Unlike the U.S. Supreme Court, where commentators seem to have little difficulty labeling justices as “liberal” or “conservative,” such distinctions have little applicability to the New York Court of Appeals. So too, there is little empirical evidence to label any judge on the Court of Appeals as “pro-carrier” or “pro-policyholder.”

The data does reveal limited statistical evidence regarding individual judges. For example, in divided cases won by carriers from 2009 to 2015, Chief Judge Lippman and Judge Eugene F. Pigott, Jr., had the most dissenting votes. During the same time period, in divided cases won by policyholders, Judge Susan Phillips Read and Judge Robert S. Smith had the most dissenting votes. Regular observers of the Court would not be surprised by the inference that Judges Read and Smith were more likely to favor carriers and that Chief Judge Lippman and Judge Pigott were more likely to favor policyholders.

A similar analysis for the time period since 2016 presents a very small sample of divided cases. In cases won by policyholders, Judge Michael Garcia and Chief Judge DiFiore had the most dissenting votes while in cases won by carriers, Judge Leslie E. Stein (who recently announced that she is retiring in April) had the most dissenting votes. Because of the small sample size, the analysis will need to be updated as the present Court continues to hear and decide insurance law cases. Continuing analysis of the Court’s insurance law decisions also will be affected by Judge Stein’s impending retirement and Judge Eugene M. Fahey’s retirement at the end of 2021, which will result in two new judges being named to the Court over the next year.

Conclusion

By any measure – number of cases per year, number of cases over a five-year period, number of cases in total, breadth of legal issues in dispute, variety of insurance lines involved, results, uniformity of the

Court’s decisions, etc. – the New York Court of Appeals has demonstrated that it is a premier insurance court. Insurance carriers, therefore, would do well to continue to seek out the Court, and New York law, to resolve questions of insurance law today and in the years to come.

Endnotes

1. The New York Court of Appeals has seven judges: the chief judge and six associate judges, all of whom are appointed by the governor and confirmed by the New York State Senate to 14 year terms.
2. No article was written for the 2009-2010 term as there were insufficient cases. However, two cases from that term have been included in the database that forms the information for this article.
3. In 1983, Chief Judge Judith Kaye became the first woman appointed to the New York Court of Appeals. In 1993, she became the first woman to be appointed chief judge of the Court and, by the time she retired in 2008, she was the longest serving chief judge in the Court’s history. Chief Judge Judith Kaye passed away in 2016.
4. Chief Judge Jonathan Lippman was nominated to the position of chief judge of the Court by New York Governor David A. Paterson in January 2009 and was confirmed by the New York State Senate in February 2009. He served as chief judge through December 2015.
5. On December 1, 2015, New York Governor Andrew Cuomo nominated Chief Judge Janet DiFiore to the position of chief judge of the Court. On January 21, 2016, her nomination was confirmed by the New York State Senate.
6. There are two counties in the First Department: The Bronx and New York County (i.e., Manhattan).
7. Dutchess, Orange, Richmond, Kings, Putnam, Rockland, Nassau, Queens, Suffolk,

- and Westchester Counties are in the Second Department.
8. The 28 counties in the Third Department range from Albany County to Washington County.
 9. The 22 counties in the Fourth Department range from Allegheny County to Yates County.
 10. For purposes of this analysis, any case where the Court modified an Appellate Division decision in favor of a carrier that still resulted in a favorable decision for the carrier is counted as a pro-carrier decision, and any case where the Court modified an Appellate Division decision in favor of a policyholder that still resulted in a favorable decision for the policyholder is counted as a pro-policyholder decision. Similarly, where the Court modified a pro-carrier decision in favor of a policyholder, the case is counted as a pro-policyholder decision, and vice versa.
 11. Disputes between or among carriers and disputes between insurance companies and regulators are not part of this analysis. ■

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