CAIIA Status Report

JANUARY 2008

Coverage Alert

Submitted by McCormick, Barstow, Fresno, CA

Schmitt v. NIC Insurance Co., F.Supp., (N.D.Cal.2007).

BACKGROUND FACTS Richard Schmitt dba Schmitt Construction, a general contractor, applied for insurance from Navigators Insurance Company ("NIC"). When applying for the insurance, Schmitt represented that it always obtained written contracts with hold harmless provisions from its subcontractors, it always obtained certificates of insurance from each of its subcontractors certifying that they have commercial general liability insurance of at least $1 million, and it always made sure that it was named as an additional insured on all of its subcontractors' insurance policies. Based on those representations, NIC issued successive policies to Schmitt that included an independent contractor endorsement making compliance with each of those liability-limiting practices an ongoing requirement. The endorsement provided that NIC's duties of defense and indemnification for work done by or on behalf of the insured would be in excess of the $1 million policy limits provided for under the subcontractors' policies.

Schmitt entered into a building construction contract with Gidha. It hired independent subcontractors River City (for erection of the building and installation of a metal roof), Madsen Plastering (to install exterior stucco), and National Garage (to furnish and install a steel garage door). Schmitt did not require the subcontractors to execute written contracts with hold harmless provisions nor did it require that it be listed as an additional insured on the subcontractors' policies. Gidha subsequently sued Schmitt for various construction-related deficiencies, including mold damage. NIC refused to defend and indemnify based upon the policies' mold exclusion and Schmitt's failure to fulfill its liability-limiting obligations. Schmitt filed suit and NIC sought summary judgment.

THE COURT'S RULING The District Court noted that NIC first claimed that the policies were rendered void because of Schmitt's misrepresentations regarding its liability-limiting practices. However, NIC failed to present any evidence that Schmitt misrepresented its adherence to liability-limiting practices as of the time it applied for the policies. As such, NIC failed to show any misrepresentation on Schmitt's part and the policies could not be voided on this ground. Second, NIC contended that there was no potential for coverage because Schmitt had neglected to always engage in the liability-limiting practices after issuance of the policies and as such, the relevant policy was only applicable to claims in excess of $1 million. However, as the court noted, the insured risk included liability against Schmitt both for its own wrongdoings and for the wrongdoings of its subcontractors. Li-

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An Employer Organization of Independent Insurance Adjusters

Inside This Issue

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PRESIDENT'S MESSAGE

Many of you who read the Status Report each month may not know the architect is longtime member and Past-President Sterrett Harper of Harper Claims Service of Burbank, CA. If you have a chance, please thank Sterrett for his tremendous efforts.

The CAIIA remains an all volunteer organization. If not for the efforts of individuals such as Sterrett, we would be lost.

Thanks to Phil Barrett, our members have some new opportunities for discounted education, both to fulfill CE opportunties and to assist in obtaining designations. Please visit the CAIIA website, www.caiia.com for details.

Kim Hickey and Helene Dalcin have assisted in completion of the Steven Tilghman Scholarship fund application, which is now on the CAIIA website.

If you know of a California insurance professional who could use some financial assistance in furthering their career please direct them to the site. Paul Camacho and John Ratto are working on the 2008 Internal Management survey. Members should anticipate receiving the survey in February, so we can provide the results by the time of the Midterm Convention.

Jeff Stone is busily working to get the 2008 Directory to print. If you have any last minute changes, please contact Jeff.

Doug Jackson is updating the website continuously. If you haven't taken a tour lately stop by and look for past Status Reports, photographs from the Fall Convention and contact information for all of our members.

If you are a California independent adjuster and not yet a member, please contact our New Membership committee chair, Sam Hooper and let him tell you why you should be. If you know a California IA who isn't a member, please tell them to contact me or Sam.

It turns out March will be a busy month for the CAIIA:

The CAIIA booth will be at the CCC in Industry Hills on March 11th and 12th. If you can volunteer a couple of hours at the booth and haven't yet advised Sterrett, please contact him.

Pete Vaughan has scheduled the first 2008 SEED Seminar for March 20, 2008, the location to be confirmed. The Registration form is on the CAIIA website. There will be additional earthquake certification seminars at different locations throughout the year.

We have rescheduled the Midterm Convention for March 27-28 at the Sahara Hotel in Las Vegas as many of our members had a commitment on the initial dates. The Registration form is on the website.

If you have any suggestions, questions or just want to say hello, please don't hesitate to call or email me.

PETER SCHIFRIN
President - CAIIA 2007-2008

Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law, San Francisco, CA

Coverage - Insurer Reimbursement

LA Sound USA, Inc. v. St. Paul Fire and Marine Insurance Company, (November 14, 2007), Court of Appeal, Fourth District

Since the California Supreme Court recognized an insurer's right to reimbursement of defense and indemnity expenses it paid for non-covered claims, there have been few reported cases on the procedure to be followed in order for an insurer to assert this right. This case examines that issue in the context of a rescission.Ancle Hsu and David Ji were officers, directors and shareholders of LA Sound USA, Inc. LA Sound and Hollywood Sound entered into a written agreement to form a joint venture. After the joint venture was formed, LA Sound obtained an insurance policy from St. Paul Fire and Marine Insurance Company. In the application, LA Sound denied that it had been involved in any joint ventures. The policy was issued and included coverage for personal injury and advertising injury.When problems arose in the joint venture, Hollywood Sound sued LA Sound. In response, LA Sound, Mr. Hsu and Mr. Ji filed a cross-complaint. LA Sound tendered defense of the complaint to St. Paul. St. Paul assumed the defense under a full reservation of rights. Hollywood Sound filed a cross-complaint against LA Sound, Mr. Hsu and Mr. Ji. Defense of this cross-complaint was also tendered to St. Paul, which accepted the defense. Eventually St. Paul negotiated a partial settlement of the Hollywood Sound litigation. LA Sound, Mr. Hsu and Mr. Ji continued their litigation against Hollywood Sound.

After the underlying case was resolved, LA Sound, Mr. Hsu and Mr. Ji filed a breach of contract action against St. Paul and also alleged bad faith. They alleged they incurred costs and expenses beyond that paid by St. Paul. St. Paul cross-complained for rescission due to misrepresentation. The trial court concluded there had been a misrepresentation in the failure to disclose the joint venture and rescinded the policy and awarded St. Paul reimbursement of the sums it incurred in defending and settling the Hollywood Sound action. The judgment was joint and several against LA Sound, Mr. Hsu and Mr. Ji. LA Sound, Mr. Hsu and Mr. Ji appealed.

The Court of Appeal affirmed in part and reversed in part. It affirmed the finding that the policy was void due to material misrepresentations in the application. LA Sound concealed and misrepresented its involvement with Hollywood Sound on the application. St. Paul produced evidence that the misrepresentations were material, affected the evaluation of the risk, and the amount of premium charged. The Court held St. Paul did not need to prove the misrepresentations and concealments were intentional. Finally, St. Paul did not waive its right to rescission by defending the Hollywood Sound litigation. St. Paul accepted the defense pursuant to a reservation of rights and thus preserved their right to rescind upon discovery of the true facts.

However, the Court indicated that the liability for reimbursement was not joint and several. Insurers seeking reimbursement bear the burden of proof of the

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Submitted by McCormick, Barstow, Fresno, CA

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ability for Schmitt's own wrongdoings did not depend upon any of the three liability-limiting practices in question. As such, NIC could not refuse a defense on this ground. Finally, with respect to the mold exclusion, NIC argued that this exclusion applied to all allegations in the underlying case. However, the court noted that although the mold exclusion would preclude any obligation to indemnify, as all damages ultimately awarded were for mold damage, the claim had encompassed both mold growth and water damages, thereby triggering a duty to defend.

THE EFFECT OF THE COURT'S RULING An independent contractor endorsement pursuant to which an insured represents and warrants that it will require certain language in its subcontracts will not preclude a duty to defend where an insured fails to comply with the representations and warranties if the insured is being sued both for its own negligent acts and vicariously for the conduct of a subcontractor.

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proper amount of reimbursement. Part of that burden is proving the costs incurred as a result of the defense and indemnification of each individual party. In the trial court, St. Paul did not attempt to allocate its defense and indemnity costs among the parties. To carry the burden of providing a right to reimbursement, St. Paul had to allocate policy benefits between the three parties, as well as defense costs. The Court stated that insurers are in the best position to monitor underlying litigation, track expenses and allocate policy benefits among insureds. The Court stated that it would be improper to place that burden upon insureds.

The matter was remanded to the trial court for a new trial on St. Paul's cross-complaint, limited to the issue of the amount owed by LA Sound, Mr. Hsu and Mr. Ji.

COMMENT

The Court recognized that this decision placed a heavy burden on St. Paul and that St. Paul might not be able to meet its burden. However, the court stated it felt its interpretation of the right to reimbursement was consistent with *Buss v. Superior Court* (1997) 16 Cal.4th 35, the California Supreme Court decision which recognized this right.

Torts - General Contractor Held To Have No Duty to Injured Worker

Millard v. Biosources, Inc., (November 15, 2007)Court of Appeal, Fourth District

Under the peculiar risk doctrine, a person who hires an independent contractor to perform inherently dangerous work can be held liable for tort damages when the contractor's negligent performance of the job causes injury to others. In *Privette v. Superior Court* (1993) 5 Cal. 4th 689, the California Supreme Court reconsidered the applicability of the peculiar risk doctrine and concluded that an injured employee of a negligent subcontractor could not sue the non-negligent hirer under that doctrine. This case involves a further interpretation of Privette.

Plaintiff Richard Millard, a HVAC technician employed by a subcontractor, was injured when he was working in the attic of a commercial building that was being remodeled by Defendant Biosources, Inc, the general contractor. On the morning of the accident, a Biosources electrician inadvertently turned out the light in the attic where Plaintiff was working when he tripped on a circuit breaker. The problem was corrected. In the afternoon, Millard was working alone in the attic space. Millard alleged that as he was traversing a catwalk, the lights went out again and he fell and was injured. Immediately after the accident, the lights were found to be on. At the time, there were no Biosources employees at the job site. Co-workers of Millard recalled that the lights may have only flickered - not gone out.

Millard filed suit against Biosources. Biosources filed a motion for summary judgment contending that Millard's action was barred by the Privette doctrine. The trial court granted Biosources motion. Millard appealed. The Fourth District Court of Appeal affirmed.

On appeal, Millard contended that Biosources was directly negligent, and therefore, not entitled to the protections of Privette. Specifically, Millard argued that Biosources maintained control of the job-site and affirmatively contributed to the accident. Looking to the case of *Elsner v. Uveges* (2005) 34 Cal. 4th 915, Millard alleged that Biosources breached a duty to Millard by failing to follow OSHA safety regulations. The Court of Appeal disagreed, finding that Biosources did not assert control over how Millard did his work. The Court also held that Millard did not present sufficient evidence connecting the events of the morning (tripping the circuit breaker) to the accident in the afternoon. It was significant to the court that no Biosphere employees were present when the accident occurred.

The Court of Appeal also held that OSHA safety regulations would only be admissible in actions where it is

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found that the general contractor retained control of the job-site and affirmatively contributed to the employees injuries. Here, Millard did not meet that burden and OSHA regulations were not to be considered. The Fourth District held that the Privette doctrine applied and that the judgment should be affirmed.

COMMENT

The Court of Appeal held that under Privette, a general contractor has no duty to an injured worker on a job-site unless the general contractor retains control of the job-site and affirmatively contributes to the accident. The Court also ruled that because the general contractor in this case had no duty, OSHA safety regulations could not be admissible.

Coverage - Pollution Exclusion - Odors, Dust and Noise

Cold Creek Compost, Inc. v. State Farm Fire and Casualty Co., (November 20, 2007) Court of Appeal, First District

The scope of the pollution exclusion has been defined in several recent decisions. This case dealt with the issue of whether it applies to offensive and injurious odors.

Cold Creek Compost, Inc. operated a facility that composted organic materials. State Farm Fire and Casualty Company insured it under a business liability and commercial liability umbrella policy. In 1995, people living within two miles of the facility filed a petition for writ of mandate and complained for injunctive relief to require the County of Mendocino to void the use permit for the facility. The court declined to enjoin the operations but required the preparation of an Environmental Impact Report ("EIR"). A second lawsuit was filed in 1998, challenging the EIR and use permit and a complaint for damages was filed based on nuisance. Damages were sought for foul odors, disruptive noises and excessive dust that emanated from the facility.

Cold Creek tendered defense and indemnification to State Farm. State Farm provided a defense under a reservation of rights. The reservation was based upon an absolute pollution exclusion that excluded coverage for the discharge of pollutants from a site owned by the insured. Pollutants were defined as ". . . gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes . . . ."

A trial of the nuisance claim resulted in an award of $125,000 to the plaintiffs. The jury found the damages to be the result of a condition that was found offensive to the senses and an interference with the free use of the property. State Farm refused to provide indemnification or any further defense after the verdict.

Cold Creek sued State Farm for breach of contract and breach of the covenant of good faith and fair dealing. On cross-motions for summary judgment, the trial court granted State Farm's motion. Cold Creek appealed.

The Court of Appeal affirmed. The Court noted that California law interprets the pollution exclusion to apply only to traditional environmental pollution into the air, water and the soil. The Court found that the odors emanating from the Cold Creek facility fell within the exclusion. It was environmental pollution and was excluded from the policy. The Court further found dust and noise to likewise fall within the scope of the exclusion. Thus, State Farm had no duty under the policy to defend or indemnify Cold Creek for damages. Since there was no coverage, there likewise was no bad faith. The judgment was therefore affirmed.

COMMENT

This case follows the rationale of *MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, limiting the pollution to environmental pollution. This case extends that ruling to include odors, dust and noise.

Bad Faith - Contractual and Tort Statute of Limitations

Cheryl Archdale v. American International Specialty Lines Insurance Company, (August 2, 2007), Court of Appeal, Second District

A claim for insurance bad faith may be brought in either contract or tort. This case discusses the applicable statute of limitations and the application in such cases.

Cheryl Archdale was injured when her vehicle was struck by an 18-wheel truck driven by George Godinez.

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She and her husband Donald Archdale sued Godinez and his employer for damages. American International Specialty Lines Insurance Company ("AIS") provided $500,000 in coverage for Godinez. AIS defended the action. A judgment was entered in favor of the Archdales on May 3, 1999 in the sum of $1,269,000. An appeal was taken which resulted in an affirmance. A remittitur was issued on November 27, 2001.

On September 12, 2003, the Archdales and Godinez sued AIS for breach of contract and breach of the implied covenant of good faith and fair dealing. While AIS had paid their policy limit after the remittitur, the Archdales and Godinez claimed AIS had rejected offers to settle within policy limits during the pendency of the underlying action. AIS moved for summary judgment arguing that the complaint was barred by the applicable statute of limitations. It argued that the time ran from entry of the original judgment, May 3, 1999 and since four years had expired before plaintiffs filed their complaint it was time barred. Further, they argued that Godinez had assigned the claim to recovery of the excess amount of the judgment to the Archdales a year after the underlying action had been filed. The trial court granted the summary judgment and concluded the statute of limitations had run when the complaint was filed and that Godinez could not retroactively ratify the assignment. Judgment was entered in favor of AIS. The Archdales and Godinez appealed.

The Court of Appeal reversed in part and affirmed in part. The court noted that a failure to accept a reasonable settlement offer by a liability insurer gives rise to both a tort and contractual claim. Both may be assigned. The first cause of action contended that AIS failed to perform its express promises. However, AIS defended and indemnified to the extent of its policy limits. Thus, there was no factual or legal basis for this breach of contract claim and the summary judgment was affirmed as to that respect.

The second cause of action alleged breach of the implied covenant of good faith and fair dealing. The Archdale claim was a contractual claim based upon the assignment from Godinez. The amount recoverable under such a claim was the consequential damages sustained by the breach of contract, or the amount of the excess verdict. Relevant time period for such a claim was four years.

As to any tort claim for breach of the covenant of good faith and fair dealing, the only additional recovery the Archdales could have obtained was recovery of so called "Brandt" attorney fees. Godinez, could seek recovery of emotional distress and punitive damages. However, such an action must be brought within two years. Thus, any tort claim of Archdales and Godinez was barred by the statute of limitations.

In computing the statute of limitations, the court determined the claim accrued upon entry of judgment in excess of the policy limits. The judgment did not become final until after the remittitur was issued following the appeal. Further, the limitations period applicably tolled while the appeal was in process. The four-year statutory limitation period for the contract action presented by the Archdales meant the period began to run November 27, 2001 when the remittitur was issued. Since the complaint was filed September 12, 2003, the contract claim was not barred by the four-year limitation period.

Finally, the court held that Godinez's retroactive ratification to filing of the complaint and the assignment of rights was effective and was not prohibited by any provision of law. Since the statute of limitations had not run at the time of the assignment, it did not prejudice AIS.

The court affirmed judgment as to the tort cause of action, affirming the dismissal of the action as to plaintiff Godinez in its entirety. However, it was reversed as to the contract cause of action and the matter was allowed to proceed with the Archdales proceeding on it.

COMMENT

This is another decision by Justice Croskey, the author of a California Insurance Litigation book. His decision is worthy of review by those who practice in this area.

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Conference Registration Form

March 11-12, 2008 * Pacific Palms Conference Center * Industry Hills, California
Questions, please call: 888.811.6930 or email: info@combinedclaims.com

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Please fill out this registration form completely. One registration form per person. Photocopies accepted

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Conference registrations include parking at the conference center, continental breakfast, breaks and lunch on the day(s) you are attending as well as admission to all sessions, any handouts provided, and a conference program.

Conference Fees:

Conference registration is discounted for certain fields in the insurance and claims industry. The nature of my work is:

❑ Claims ❑ Insurance Carrier ❑ Risk Management
❑ Attorney ❑ Private Investigation

Yes, I work in the fields checked above. Please register me for the following rate:

❑ Two Day Conference Registration	$190.00
❑ One Day (Tuesday, March 11, 2008)	$95.00
❑ One Day (Wednesday, March 12, 2008)	$95.00

No, I do not work in the fields listed above. Please register me for the following rate:

❑ Two Day Conference Registration	$400.00
❑ One Day(Tuesday, March 11, 2008)	$200.00
❑ One Day (Wednesday, March 12, 2008)	$200.00

Session Sign-Up:

For purposes of seating/handouts, please select the sessions and events you plan on attending.

Tuesday, March 11, 2008

9-10:15am

❑ GENERAL SESSION - Claims Professionals Have Emotions Too

11-Noon

❑ Track 1 (Liability) Liability Claims Lifecycle/Performance Measurement
❑ Track 2 (Property) Property Subrogation in an Hour
❑ Track 3 (ISC) Dispelling Myths and Folklore in Chiropractic Care

Noon-1:30pm

❑ Lunch - CA Insurance Commissioner Steve Poizner (Invited Speaker)
Dessert in the Exhibit Hall

1:30-2:30pm

❑ Track 1 (Liability) Jury Verdicts
❑ Track 2 (Property) Resolving "Problem" Property Claims
❑ Track 3 (ISC) Identity Theft – Its Causes and Cures

3:15-4:15pm

❑ Track 1 (Liability) How Litigation is Affected by Technology
❑ Track 2 (Property) Restoring Sunken Treasures
❑ Track 3 (ISC) The Anatomy of a Medical Mill

Wednesday, March 12, 2008

9-10:15am

❑ GENERAL SESSION - If You Can Drive a Car You Can Change Your Life

11-Noon

❑ Track 1 (Liability) Reflex Sympathetic Dystrophy/Pain Syndromes
❑ Track 2 (Property) Handling Property Claims, Avoiding Bad Faith
❑ Track 3 (ISC) Injury Causation Analysis

Noon-2

❑ Lunch and Awards - Dessert in the Exhibit Hall

2-3pm

❑ Track 1 (Liability) Changing the Claims Game
❑ Track 2 (Property) Event Data Recorders – What They Do For You
❑ Track 3 (ISC) The Anatomy of Staged Collisions

3-4:15pm

❑ CLOSING SESSION - The Reality of Minor Impact Collision Dynamics

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Personification of The American Heart

Little Melissa comes home from 1st grade and tells her father that they learned about the history of Valentine's Day.

"Since Valentine's Day is for a Christian saint, and we're Jewish," she asks, "Will God get mad at me for giving someone a valentine?

Melissa's father thinks a bit, then says: "No, I don't think God would get mad. To whom do you want to give a valentine?"

"Osama Bin Laden," she says.

"Why Osama Bin Laden?" her father asks in shock.

"Well," she says, "I thought that if a little, American, Jewish girl could have enough love to give Osama a valentine, he might start to think that maybe we're not all bad, and maybe start loving people a little bit.

And if other kids saw what I did and sent valentines to Osama, he'd love everyone a lot. And then he'd start going all over the place to tell everyone how much he loved them,, and how he didn't hate anyone anymore."

Her father's heart swells and he looks at his daughter with new found pride. "Melissa, that's the most wonderful thing I have ever heard."

"I know," Melissa says, "and once that gets him in the open, the Marines could shoot the bastard."