CAIIA Status Report

February 2015

Denial of Summary Judgment Does Not Automatically Establish Duty to Defend

Credit to Haight, Brown and Bonesteel, Los Angeles, CA

In *McMillan Companies v. American Safety Indemnity* (No. D063586, filed 1/20/15), a California appeals court ruled that an insurer's loss of a summary judgment motion on the duty to defend does not necessarily establish that a duty to defend existed.

McMillan was the general contractor for a series of residential construction projects, sued in a construction defect action brought by 117 homeowners. McMillan tendered its defense to its subcontractors' insurers, including American Safety (ASIC), claiming status as an additional insured (AI). ASIC denied the tender.

McMillan sued ASIC and other insurers alleging breach of contract and bad faith for the failure to defend McMillan as an additional insured. Eventually, all of the other insurers settled, leaving ASIC as the sole defendant. ASIC moved for summary judgment, but the trial court denied the motion, ruling that ASIC had failed to carry its burden of disproving coverage under a blanket additional insured endorsement in the policy.

At trial, McMillan argued that the denial of summary judgment established the duty to defend, citing *Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, for the proposition that if coverage depends on an unresolved dispute over a factual question, the very existence of that dispute would not only result in a denial of a summary judgment motion, but also establish a possibility of coverage and thus a duty to defend. The trial court agreed, and ruled that ASIC could not present any further evidence to refute the duty to defend at trial.

However, the appeals court saw a distinction, noting that in denying summary judgment, the trial court had ruled that with regard to four allegedly undisputed issues, "ASIC has not met its initial burden of proof." The court noted that ASIC had moved for summary judgment on the grounds that the underlying case did not involve liability from ongoing operations of the named insured; liability from the named insured's sole negligence; and that exclusions j(5) and j(6) barred coverage. But according to the appeals court, "[the] summary judgment ruling did not find a factual dispute that necessarily established a possibility of coverage. Rather, the ruling established only that ASIC did not meet its initial burden of production to make a prima facie showing that there are no triable issues of material fact."

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President's Message

Kim Hickey

CAIIA President

I am pleased to announce that the Standing and Special Committees have been confirmed:

Standing Committees (mandated by the By-laws) :

Membership: Steve Weitzner (Chair), Phil Barrett
Legislative: Paul Camacho (Chair), Peter Schifrin
Public Relations: Kimberley Hickey (Chair), Chuck Deen, Peter Kofoed
Grievance: Sterrett Harper, Kimberley Hickey, Mark Hall, Esq.
By-Laws: Kimberley Hickey, Sterrett Harper, Mark Hall, Esq.
Nominating: Tanya Gonder, Phil Barrett, Peter Schifrin
Executive: Kimberley Hickey (Chair), Sterrett Harper
Internal Management: Jeff Caulkins, Phil Barrett
Education: Steve Washington (Chair), Rick Kern

Special Committees:

CCC/CCNC: Sterrett Harper, Steve Weitzner, Tanya Gonder (CCC)
Directory: Phil Barrett, Doug Jackson
Fall Convention: Paul Camacho, Kimberly Hickey
Finances & Budget: Jeff Caulkins
Midterm Convention: Kimberley Hickey, Paul Camacho
Social Networks: Phil Barrett, Tanya Gonder
Scholarship Fund: Steve Einhaus, Tanya Gonder
Status Report: Sterrett Harper
Website & IT: Doug Jackson

If you have any questions or concerns in any area covered by one of these committees, please contact them directly. Each committee will be busy preparing reports for the CAIIA midterm meeting April 24, 2015. Our midterm meeting is going to be in Las Vegas, so mark your calendars if you would like to attend an ethics class with us!

At this time, this year's membership has been completed, and sponsors confirmed, and the CAIIA directory is being printed and mailed out to the sponsors and member companies. It will also be posted on the CAIIA website for download.

The Education committee is in the process of assembling instructors and locations for our annual DOI Recertification Seminars around the state.

It seems like the calendar for the first quarter of 2015 is filling up quickly. Plan on attending the Combined Claim Conference March 10th, and 11th, 2015. Please stop by our booth to say hello! If you would like to spend time at the booth, please let me know. It is a great place to see everyone. We will have directories to hand out, luggage tags to make, and compasses, so that you do not get lost.

Thank you for your interest in the CAIIA.

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The appeals court pointed out that what the *Horace Mann* opinion specifically states is that: "[If] factual issues exist precluding summary judgment in the insurer's favor...the duty to defend is then established, absent additional evidence bearing on the issue." And according to the appeals court, "Denying a summary judgment motion because the moving party failed to meet its initial burden of production is not the same as denying the motion based on an unresolved factual dispute." Thus, it had been an error to preclude ASIC from providing additional evidence at trial showing that there was no duty to defend.

Beside the effect of a summary judgment denial, the *McMillan* court also addressed the impact of the other insurers' agreement to defend and settle with McMillan, based on ASIC's contention that even if it had been in breach of the duty to defend, McMillan could prove no damages since it had been defended by others, negating breach of contract or bad faith under *Emerald Bay Community Assn. v. Golden Eagle Ins. Corp.* (2005) 130 Cal.App.4th 1078.

The appeals court saw a distinction here as well, based on the fact that no other insurer had actually been providing McMillan a full and contemporaneous defense, but that ASIC's argument hinged on the fact that the other insurers had settled with McMillan after the fact, for both defense and indemnity, in amounts greater than McMillan's defense costs.

The appeals court framed the issue as one of equitable offset, saying that the only way for ASIC to prove McMillan had no damages was to prove that each dollar of settlement proceeds offset each dollar of defense fees. But "the fact that the 11 other insurer defendants settled with McMillan should not, and does not, affect whether ASIC breached the duty to defend or the implied covenant of good faith and fair dealing. At best, the Settlement proceeds from the other 11 insurers may reduce (by way of offset) the amount ASIC ultimately owes McMillan for contract or tort damages." Thus, the trial court had erred in granting a nonsuit on the issue, and remanded the whole case for further trial.

Happy Valentines Day

Just When You Thought the Statute was about to Expire, the Claimant dies...

Credit to Tyson and Mendes, La Jolla, CA

If a victim dies as the result of a personal injury action, his or her estate can bring a wrongful death lawsuit or a survival action. But what is the difference between these two lawsuits? The wrongful death laws allow the estate to receive damages for the *beneficiaries of the deceased*. The survival laws allow the estate to receive damages the *decedent could have recovered* if he had not died (i.e. pain and suffering and lost earnings).

Specifically, what happens if a victim files a personal injury action but dies before final adjudication of the claim? If the victim dies before the claim is adjudicated, his or her injury cause of action generally "survives" to the estate and may be prosecuted by a duly appointed executor or administrator for the estate. If there is no executor or administrator, the action may be prosecuted directly by the victim's "successor in interest," meaning the beneficiary of the victim's estate or other person who succeeds to the cause of action. (*C.C.P.* §§ 377.11, 377.30; see *Adams v. Super.Ct.* (*Centinella Freeman Regional Med. Ctr.*) (2011) 196 Cal.App.4th 71, 78-79.)

The "survival" statute applies to any cause of action the decedent had at the time of his death, including contract claims, property damage claims, and claims against the decedent's liability insurer for breach of the implied covenant of good faith and fair dealing. (C.C.P. § 377.20(a).) The survival claims are subject to the applicable statute of limitations period. (*Id.*) For example, the decedent's injury or wrongful death claims which survive to the estate are normally governed by the *C.C.P.* § 335.1 two-year limitations period. However, if the plaintiff dies before expiration of the applicable limitations period, the statute of limitations starts running on the date the claim actually arose to the decedent or six months after the person's death. (C.C.P. § 366.1.)

A "survival" claim brought by the estate does not have the same value if the decedent had lived. All decedent's pecuniary damages incurred *prior to death*, including medical expenses, lost earnings, and punitive damages, are recoverable. The estate cannot recover "post-death" damages. However, the estate is not entitled to an award for decedent's pain or suffering. (C.C.P. § 377.34; *see County of Los Angeles v. Super.Ct. (Schonert)* (1999) 21 Cal.4th 292, 295-296.) Similarly, the estate cannot recover emotional distress damages. This precludes the decedent's estate from bringing an action for negligent or intentional infliction of emotional distress. (*Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 530.)

COMBINED CLAIMS CONFERENCE

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Property Owner May Owe Duty of Care for Failure to Warn of Risk

Credit to Tyson and Mendes, La Jolla. CA

The Second District Court of Appeal recently reversed a demurrer sustained in favor of a restaurant owner for injuries occurring on a public highway beyond the restaurant premises. In *Annocki v. Peterson Enterprises, LLC* (2014) 180 Cal.Rptr.3d 474, a motorcyclist died after colliding with a vehicle exiting the restaurant parking lot. The motorcyclist's family sued the restaurant owner, among other defendants. The trial court sustained the restaurant owner's demurrer without leave to amend. On appeal, the court reversed.

Background Facts

Defendant operates "Geoffrey's" restaurant in Malibu, California. On the date of the incident, the decedent was driving a motorcycle on Pacific Coast Highway when he collided with a motorist exiting the adjacent Geoffrey's parking lot. Plaintiffs alleged the motorist had attempted to make an illegal left hand turn when exiting the parking lot. The highway was lined with temporary traffic dividers along the median, making a left turn from the lot impossible.

Plaintiffs' Allegations/Demurrer

Plaintiffs complaint alleged (i) Defendant knew or should have known that its parking lot and driveway were designed in such a way as to create a danger of decreased visibility of the highway, (ii) Defendant knew its patrons had difficulty exiting the lot, and (iii) Defendant failed to provide adequate signage directing patrons that only right turns could be made onto the highway.

Defendant demurred to the complaint on the grounds Plaintiffs failed to allege any facts showing they had a duty to warn of conditions on the highway or that the accident was foreseeable. The trial court sustained the demurrer without leave to amend, finding the highway was inherently dangerous and the business had no duty to warn.

A Landowner Generally Owes No Duty to Prevent Injury on Adjacent Property

At the outset, the *Annocki* court noted as a general rule "where there is no control over the premises, there is no duty to exercise reasonable care to prevent injury." (*Annocki v. Peterson Enterprises, LLC*, *supra*, 180 Cal.Rptr.3d 474, 477.) However, the court cited *Barnes v. Black* (1999) 71 Cal.App.4th 1473 for the principle that "a landowner's duty of care to avoid exposing others to a risk of injury is not limited to injuries that occur on premises owned or controlled by the landowner. Rather, the duty of care encompasses a duty to avoid exposing persons to risks of injury that occur offsite if the landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of injury offsite." (*Id.* at p. 478, quoting *Barnes v. Black*, *supra*, 71 Cal.App.4th at p. 1478.)

Holding

The *Annocki* court agreed with Defendant that it owed no duty to place signs on the public roadway to indicate only right turns were permitted. However, the court found the property was configured in such a way to permit patrons to exit in an unsafe manner, as the traffic dividers made a left turn impossible but there was no signage in the lot to indicate only right turns were permitted. The court noted it was foreseeable that patrons exiting the premises at night could be unaware of the divider and attempt to make an unsafe left turn. The court concluded additional facts could be alleged to establish Defendants had a duty to warn patrons exiting the premises that "only a right turn could safely be made from the restaurant's exits." (*Id.* at p. 480.)

Pleading the Fifth: How it Could Harm Your Civil Case

Credit to Tyson and Mendes, La Jolla. CA

The Fifth Amendment of the United States Constitution and *Evidence Code* §940 both provide a privilege against self-incrimination. Often, personal injury matters involve a civil matter as well as an on-going criminal matter. The courts recognize this close relationship and how testimony in one may be used in the other. How then does counsel protect a defendant's testimony in a civil matter pending a criminal matter? There are pitfalls to pleading the fifth in a civil matter. It should therefore be asserted with caution and calculation.

Once a Fifth Amendment privilege is asserted at a deposition, it cannot be waived at trial. In *A&M Records, Inc. v. Heilman* (1977) 75 Cal. App.3d 554, 566, a litigant asserted his Fifth Amendment right against self-incrimination at deposition and then attempted to testify as to those matters at the time of trial. On the one hand, the court cannot force a litigant to incriminate himself, but on the other, the Discovery Act was enacted to take the gamesmanship out of trial preparation. The court ruled the litigant was appropriately precluded from testifying on the matters he asserted the privilege to avoid unfair surprise at trial. "A litigant cannot be permitted to blow hot and cold in this matter." (*Id.* at 566.)

Consequently, the privilege may become a sword rather than a shield protecting testimony. It is critical to determine if the testimony you seek to maintain privileged is not testimony you need at trial. Avoid making an aggressive and blanket assertion that could harm you and your client at trial. Additionally, be specific to the parameters of any deposition where the privilege will be asserted.

DOI PRESS RELEASE

Mercury Insurance ordered to pay $27.5 million fine

Consumers were charged unapproved "broker fees" in 180,000 sales of Mercury auto policies.

SACRAMENTO, Calif. - Insurance Commissioner Dave Jones ordered Mercury Insurance to pay a fine of $27,593,562 million because Mercury auto insurance consumers were charged unapproved "broker fees." Mercury did not obtain the commissioner's approval for the "broker fees" and so consumers paid more than the rates approved by the commissioner. Proposition 103, passed by the voters in 1988, prevents auto insurers from charging excessive rates and requires that rates be approved by the commissioner.

Despite being advised against doing so by the Department of Insurance, from 1999 through 2004, Mercury's insurance agents charged and collected unapproved "broker fees" on more than 180,000 transactions, improperly collecting $27,593,562 million from consumers.

"Mercury auto insurance consumers paid $27.5 million in unapproved fees," said Commissioner Jones. "While the $27.5 million fine against Mercury is significant, it is commensurate with the amount of money that was unlawfully collected from Mercury policyholders."

The commissioner's decision comes after an exhaustive process that included a full evidentiary hearing conducted by an administrative law judge. The hearing included 15 days of testimony, extensive exhibits and legal briefs. The administrative law judge found that there were at least 180,000 transactions in which Mercury auto policyholders were charged fees that had not been approved. After all of the evidence and legal arguments were considered, the administrative law judge recommended the commissioner impose the $27.5 million fine on Mercury.

Media Notes: "broker fees": Brokers are allowed to charge fees. But in this case, those who were identified as brokers were actually functioning as agents, and therefore, their fees had to be filed as part of Mercury's rate filing and approved by the commissioner, which Mercury failed to do.

On the Lighter Side...

"Lexophile" is a word used to describe those that have a love for words, such as "you can tune a piano, but you can't tuna fish", or "to write with a broken pencil is pointless." A competition to see who can come up with the best lexophiles is held every year. This year's winning submission is posted at the very end.

.. When fish are in schools, they sometimes take debate.

.. A thief who stole a calendar got twelve months.

.. When the smog lifts in Los Angeles U.C.L.A.

.. The batteries were given out free of charge.

.. A dentist and a manicurist married. They fought tooth and nail.

.. A will is a dead giveaway.

.. With her marriage, she got a new name and a dress.

.. A boiled egg is hard to beat.

.. When you've seen one shopping center you've seen a mall.

.. Police were summoned to a daycare center where a three-year-old was resisting a rest.

.. Did you hear about the fellow whose entire left side was cut off? He's all right now.

.. A bicycle can't stand alone; it's just two tired.

.. When a clock is hungry it goes back four seconds.

.. The guy who fell onto an upholstery machine is now fully recovered.

.. He had a photographic memory which was never developed.

.. Acupuncture is a jab well done. That's the point of it.

The winner is:

.. Those who get too big for their pants will be totally exposed in the end.

ALWAYS LAUGH WHEN YOU CAN...IT IS CHEAP MEDICINE.