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February 2017

Pyrolysis as an Occurrence Credit to Low, Ball & Lynch, San Francisco, CA

Tidwell Enterprises, Inc., et al. v. Financial Pacific Ins. Co., Inc.

Court of Appeal, Third Appellate District (December 20, 2016)

According to Merriam-Webster’s Collegiate Dictionary, Pyrolysis is a “chemical change brought about by the action of heat.” In this case, the Court was asked to consider whether repeated exposure of wood framing members in a chimney chase to high temperatures over several years before an actual fire broke out could potentially result in a continuous trigger of coverage to successive insurance policies.

Greg Tidwell (“Tidwell”) was a subcontractor who participated in the construction of a house in Copperopolis in 2006 or 2007 by installing a fireplace. At the time of the original construction, and through 2010, Tidwell and two of his related construction companies, Tidwell Enterprises, Inc. and Tidwell Enterprises Fireplace Division, were insured with a comprehensive general liability policy issued by Financial Pacific Insurance Company (“Financial Pacific”). In November of 2011, twenty months after the end of the last policy period for Financial Pacific, the house was damaged by fire. State Farm insured Kendall Fox (“Fox”), the owner of the home. State Farm’s attorney sent a letter to Tidwell notifying him of the fire, and noted that the cause of the fire might be related to the work Tidwell did in the chimney. Tidwell tendered the claim to Financial Pacific.

Financial Pacific began its investigation, and subsequently received a report from State Farm’s expert, Dale Feb (“Feb”), which concluded that the fire was caused by the installation of the “unlisted shroud located at the top of the chimney chase.” Feb opined that the shroud prevented the fireplace from drafting properly, which resulted in overheating of the fireplace and heat transfer to the surrounding wood members.

State Farm filed suit against Tidwell for negligence, seeking subrogation losses it incurred pursuant to its policy with Fox. Financial Pacific, which was still investigating the claim, retained an expert to inspect the fire scene. The expert provided Financial Pacific with a report concluding that the termination top fabricated by Tidwell posed a fire hazard because it restricted the air flow in the chimney, which “would result in increased operating temperature of the flue vent sections and fireplace.” The expert could not rule out the installation of the custom terminal top as a cause of the fire. Despite this, Financial Pacific denied Tidwell’s tender of defense, claiming that the actual property damage occurred at the time of the 2011 fire, long after the expiration of its policies.

In response, Tidwell provided Financial Pacific with a report from Tidwell’s expert, Randy Brooks (“Brooks”). Brooks had opined that repeated exposures to higher temperatures each time the fireplace was used over the years had resulted in “pyrolysis,” or a chemical change in the framing members, lowering their ignition temperature to 250 degrees or below, such that after successive fires over the years, this was enough to cause ignition. Thus, it was Tidwell’s position that each fire caused damage to the chimney system, lowering the point of combustion eventually resulting in the main fire damage to the Fox home. Financial Pacific confirmed denial of the tender, arguing that there had been no “property damage” caused by an “occurrence” during its policy period.

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CAIIA Newsletter
CAIIA Office
PO Box 168
Burbank, CA 91503-0168
Website: www.caiaa.com
Email: info@caiaa.com
Tel: (818) 953-9200

Editor: Sterrett Harper
Harper Claims Service, Inc.
(818) 953-9200
harperclaims@hotmail.com
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California Association
of Independent Insurance
Adjusters, Inc.

President's Office

PO Box 28148

Anaheim, CA 92809-0138

Email: steve.washington@sbcglobal.net

Immediate Past President

Paul Camacho, RPA, ARM, Mission Adjusters, So. Lake Tahoe, CA

mail@missionadjusters.com

President

Steve Washington - Washington & Finnegan, Inc., Anaheim, CA

steve.washington@sbcglobal.net

Vice President

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pat@reviewandconsulting.com

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mail@reliantclaims.com

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EJSieberco@gmail.com

OF COUNSEL

Mark S. Hall Esq., HALL LAW FIRM
24881 Alicia Parkway, Suite E-500
Laguna Hills, CA 92653
T. 949.297.8444
F. 949.855.6531

mark@halllawfirm.org

President's Message

Three People in history you want to have dinner with.

This topic comes up every now and then; dinner, cars, places... with family and friends.

I like this topic because depending on your mood or your interests at any given time, the three people could change quite a bit. If you wanted a night full of laughs, maybe you pick Rodney Dangerfield, Chris Farley and John Belushi or maybe the Three Stooges. It is a very tough choice. Of course, when throwing a dinner party, people of varying interests and personalities is always a good thing. The back and forth banter becomes fascinating and can get wild. How about Stalin, a Pope (any Pope) and Charles Manson. Here's a good threesome, Marilyn Monroe, John Wayne and Frank Sinatra. Well, you get the idea. If you're looking for an intelligent conversation maybe Einstein and Socrates would be included. Scientists might pick scientists. Adjusters could pick a famous adjuster if they knew who that person was.

Other potential candidates for the dinner might include; George Washington, Abe Lincoln, Genghis Khan, Julius Caesar, John Lennon, Alexander the Great, Muhammed Ali, Winston Churchill, Nelson Mandela, Cleopatra, Napoleon, Mick Jagger/Keith Richards and Kid Charlemagne. The list is endless.

In deciding the people I would pick I tried to simplify....not too much heavy lifting. Some laughs, stories and a few drinks. I certainly no longer have the stamina to party with Mick Jagger, although at his age maybe. And, some of the above don't speak English so that could potentially be a barrier. Also needless to say, I probably wouldn't know what Einstein was talking about anyway.

So here are my three dinner guests;

Bob Hope - Cool. Funny. He knew everybody. Stories in the war zones would be unbelievable.

Mickey Mantle - Baseball during its heyday. You might not be a Yankee fan but it is the Mick and I love baseball.

Robert E. Lee - I am just very interested in the civil war right now. The book *Killer Angels*, about the battle of Gettysburg I must have read five times and I highly recommend.

Mr. Lee can also keep us out of trouble, which is good, because I know the Mick (Mantle) could drink. Based on my readings, I don't think Lee drank at all. Although, we would have steaks of course and whiskeys.

I leave you with this to discuss next; "The only true wisdom is in knowing you know nothing" - *Socrates*



Steve Washington

CAIIA President



Steve Washington

CAIIA President 2016-2017

Washington & Finnegan, Inc.

steve.washington@sbcglobal.net

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[CAIIA Midterm Registration form on last page!](#)

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Tidwell filed suit against Financial Pacific for breach of contract, bad faith and declaratory relief. Tidwell's position was that it was possible that there was a "continuing occurrence of property damage" caused by repeated exposure to higher than normal temperatures which led inexorably and inextricably to the eventual fire. Financial Pacific successfully moved for summary judgment that it had no duty to defend or indemnify Tidwell for State Farm's claim, which was based on a fire that occurred after its policies had expired. Tidwell appealed.

The Court of Appeal reversed. The Court concluded that a straightforward application of the applicable policy provisions meant that there was a potential for coverage under the Financial Pacific policies, and there was thus a duty to defend Tidwell in the State Farm action. While the 2011 fire was after expiration of the policy, the pyrolysis theory, if true, meant that each time the fire place was used during the years when Financial Pacific's policies were in effect, there was "damage" to the framing members. This damage in turn may have been a cause of the subsequent fire.

Financial Pacific had argued that State Farm had not made an argument for pyrolysis, and that this was raised by Tidwell. According to Financial Pacific, State Farm sued for damage caused by the fire, but not for damage to wood framing prior to the 2011 fire. The Court agreed that this may have been the basis of State Farm's claim, but that the facts known to Financial Pacific, both from its investigation as well as from Tidwell's reports, meant that it was possible that the repeated earlier exposures to excessive heat (within the policy period) were part of the chain of causation on the fire that ultimately occurred after the policy period.

The Court held that to prevail on summary judgment, Financial Pacific would have to establish as a matter of law on undisputed facts that pyrolysis was not a valid scientific theory, and that it could not be used to establish that physical injury to tangible property occurred during a policy period. Without eliminating all possibility that the repeated exposure of wood to excessive temperatures chemically altered the wood in such a way it could be deemed physically injured (i.e., "damaged"), Financial Pacific failed to eliminate all possibility of coverage.

The Court of Appeal reversed, and remanded with instructions to the trial court to vacate its order granting summary judgment and enter a new order denying summary judgment.



Insurance Considerations for a Minor's Claim

Credit to: Tyson & Mendes, La Jolla, CA

I. WHEN COURT APPROVAL IS REQUIRED

The short answer technically is “always.” A minor’s claim can only be extinguished by court approval of a settlement or a judgment. No one, whether the minor or parent or guardian ad litem, may sign a release which is binding as to the minor. A signed release of a minor’s claim is not enforceable by a defendant or insurer, regardless of the amount, unless the settlement is first approved by the court. On the other hand, the minor, after turning 18 years of age,ⁱ or the minor’s guardian prior thereto, can repudiate a settlement that is not court approved.

Nonetheless, in the name of expediency, insurance carriers generally have chosen \$5,000 as the threshold above which they will seek court approval of a settlement with a minor. The choice of \$5,000 derives from Probate Code § 3413(d) which states the court may pay to a parent of the minor the money

belonging to the minor if it does not exceed five thousand dollars (\$5,000). It is also found at Probate Code §§3400-3402 which state money of \$5,000 or less belonging to a minor may be delivered to the parent “to be held in trust for the minor.”

The practice of seeking court approval of settlements with minors only where the settlement exceeds \$5,000 without further scrutiny is risky. For example, settlements of head injury claims without court approval, especially with infants, can be problematic especially where the minor later is diagnosed with cognitive issues. Settlement with multiple claimants where there are policy limits issues can be problematic if there is the slightest chance the settlement with the minor will be repudiated.

II. PROCEDURE FOR OBTAINING COURT APPROVAL

Whether the claim is settled prelitigation or after a lawsuit has been filed, it is required that Judicial Council Form, MC 350, “Petition to Approve Compromise of Disputed Claim or Pending Action or Disposition of Proceeds of Judgment for Minor or Person With A Disability (Miscellaneous)” be used to obtain court approval of a settlement. Where the minor claimant is represented by an attorney, that attorney will prepare the Petition, appear with the clients at the court hearing and obtain

court approval. The minor’s attorney also can, under enumerated circumstances,ⁱⁱ seek expedited court approval by using Judicial Council Form, MC 350EX.

III. CONSIDERATIONS WHEN THE MINOR IS UNREPRESENTED

A. Selection of a Person to act as the Petitioner

Where the minor is unrepresented, the carrier typically will retain an attorney or utilize staff counsel to prepare the Petition on behalf of the parent or guardian of the minor. Local county rules should be reviewed to determine whether they require the petitioner to also be appointed as guardian ad litem. The petitioner is typically a parent with custody of the minor unless the parent also has a claim arising out of the same accident. If a parent is not available, a guardian of the estate of the minor can act as a petitioner if one has already appointed by the Probate Court. If not, Judicial Council Form, GC-210 can be utilized to have one appointed.

B. Information Required for the Petition

The information required for the Petition can be extensive. The cooperation of the minor’s guardian or parent in obtaining the information is almost always necessary. The claims representative can avoid incurring unnecessary fees by obtaining the information and medical records required for the petition before send the file to counsel. Often, most of the information and documents will already be in the claim file. If not, it should be sought from the adult with whom the settlement was negotiated.

The information and documents the attorney will need includes:

Name and date of birth of the minor; Name and address of parent/relative and contact number; Date, time, location and of the accident; Identities of all persons or entities at fault for the accident; The total amount of the settlement including the amount to the minor; The identities of each claimant, other than the minor, and the amounts paid or offered to each; Description of the injuries sustained by minor; Identities of all treating healthcare practitioners and description of the medical care and treatment; Whether the minor has completely recovered, and if not, a description of each temporary and permanent injury from which the minor has not recovered; A copy of the latest medical record(s) or report(s) identifying the injuries, their status and prognosis. The minor may need to return to a provider to obtain a “discharge” from treatment if the records do not reflect a full recovery and indicate a recent prognosis; Bills reflecting medical expenses incurred by minor; Bills reflecting medical expenses paid by an ERISA insured plan; Negotiated reduction of reimbursement to the plan, if reimbursement required; The amount paid by Medicare, less statutory reduction and amount of total reimbursement to Medicare (copy of Medicare demand letter or letter agreement); The amount of any MediCal payments and copy of notice of lien or letter agreement; List of medical expenses to be paid from the settlement proceeds; The amount of any bills for which there is a statutory or contractual lien including the amount charged, the amount paid, negotiated reduction (if any) and the amount to be paid from the settlement; and The description and amount of any expenses paid or owed by the parent for which the parent seeks reimbursement from the settlement proceeds.

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C. Medical Lien Considerations

Most guardians are not legally sophisticated when it comes to issues related to medical bills, their payment, and liens. If these issues are not addressed when the claim is settled, the guardian may not understand that a portion of the settlement will have to be reimbursed to their health insurer, to Med-Cal, or to satisfy an outstanding bill. This can lead to the guardian seeking to repudiate the settlement or asking for an additional amount after the file is sent to the attorney to prepare the petition. There is also the risk with regard to hospital liens, including Medi-Cal liens etc., the insurer will be sued directly by the lien claimant if the liens are not identified and accounted for in the Petition.

Consequently, as part of the settlement process, the guardian should be carefully questioned about their insurance coverage and payment of all medical bills. The attorney preparing the petition should also discuss these issues with the guardian while drafting the petition and address them directly in a cover letter when the Petition is sent to the guardian for review and signature. In many cases, it may be necessary to have the guardian execute a HIPAA release in order to speak to a hospital or medical office administrator directly to ascertain the balance owed, if any, and the identity of the payor.

D. Court Hearing & Order Approving Compromise

If there is no lawsuit pending, the petition must be filed in the county where the minor resides or where suit on the claim properly could be brought. See Code of Civil Procedure § 372; Probate Code § 3500(b). Once the petition is filed and accepted the court will set a hearing date. The attorney, guardian and minor typically are required to appear as the court will want to hear testimony as to the nature of the injuries, recovery and that the guardian understands the consequences of the approval of the settlement.

If the petition is granted, there will be an order specifying disbursement of the settlement proceeds. The checks issued by the carrier should be made out exactly as indicated in the order. The typical check for the proceeds to be paid into the minor's blocked account should be payable to: (Petitioner's name) as Trustee for (Minor's name) and (Bank name). There should also be a notation on the front or reverse side of the check stating "For deposit into a Blocked Account." After the order is signed the guardian will be directed by Paragraph 9 of the Order to sign a Release after receipt and deposit of the funds.

IV. CONCLUSION

Any settlement with a minor is not a settlement until court approved. Careful consideration should be given to each such settlement in deciding not to seek court approval. Making the decision by rote based on whether the amount is over or under \$5,000 can be problematic. Where the injury is not clearly identified or where policy limit issues are involved, careful thought should be given before settling with court approval.

- i The statute of limitations begins to run on the minor's eighteenth birthday.
- ii Rules of Court, Rule 7.950.5

Court finds no Occurrence for Installation of Defective Flooring

Credit to: Haight, Brown & Bonesteel, Los Angeles, CA

In *Navigators Specialty Ins. Co. v. Moorefield Const.* (No.G050759, filed 12/27/16), a California appeals court held that the knowing installation of flooring over a vapor-emitting slab was not an accident or occurrence, entitling the insurer to reimbursement of money paid as damages to settle a construction defect suit. But the court further held that there was no right of reimbursement for the portion of money payable under the policy's supplementary payments coverage as costs for contractual prevailing party attorney's fees.

Navigators insured Moorefield, the general contractor for a Best Buy store. Testing in construction revealed a vapor emission rate from the concrete slab above the approved standard for the flooring. The contractor's personnel testified that it was normal to install the flooring regardless. Notwithstanding, the contractor's personnel testified that they consulted the owner and were directed to proceed. In doing so, the contractor also expressly released the flooring subcontractor from any warranty claims.

The flooring began to fail in the first year, and continued for another six years. The subsequent owner of the building sued the original owner, resulting in cross-complaints among the various parties. Navigators defended the contractor under a reservation of rights and the case was ultimately settled, with Navigators paying its \$1 million policy limit, with a further \$310,000 coming from other sources.

Navigators then sued for declaratory relief, alleging it had no duty to defend or indemnify the contractor. The trial court agreed that there was no duty to indemnify, because the knowing installation of flooring when vapor rates were above specification was not an accident or occurrence. Further, the trial court ruled that Navigators had no obligation for any part of the settlement attributable to contractual prevailing party attorney's fees, because the contractor's "potential liability arose from a non-covered claim."

The appeals court agreed that there was no accident or occurrence, but held that Navigators was nonetheless obligated for supplementary payments. The appeals court pointed out that the trial court had denied Navigators' summary judgment motion, thus signaling unanswered fact questions and a duty to defend.

The appeals court cited *Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302; *Fire Ins. Exchange v. Superior Court* (2010) 181 Cal.App.4th 388; *Merced Mutual Ins. Co. v. Mendez* (1989) 213 Cal.App.3d 41; and *State Farm General Ins. Co. v. Frake* (2011) 197 Cal.App.4th 568, on the occurrence issue stating:

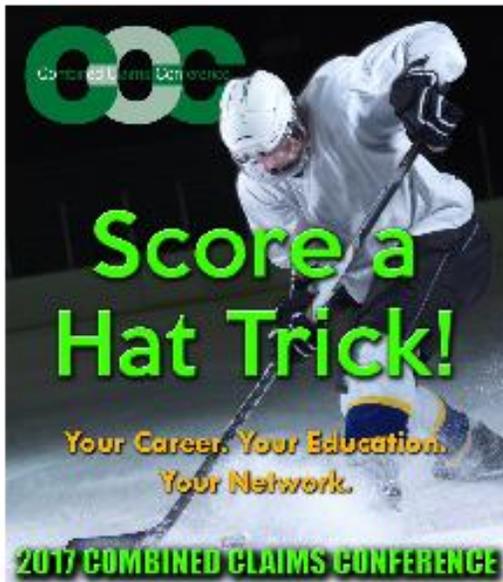
"The evidence at trial established that Moorefield knew at the time that two separate tests had shown the moisture vapor emission rate from the concrete slab exceeded specifications. Cote discussed the moisture vapor emission rate results with representatives of DBO and Best Buy and the decision was made, based on a cost benefit analysis, to install the flooring. Because Moorefield, the insured, performed a deliberate act, there was no accident unless 'some additional, unexpected, independent, and unforeseen happening occurs that produces the damage.' [] Such was not the case. After installation of the flooring, nothing else happened that might have caused the flooring to fail... We conclude Moorefield's conduct was not an accident because it was a deliberate decision made with knowledge that the moisture vapor emission rate from the concrete slab exceeded specifications. The damage was not produced by an additional, unexpected, independent, and unforeseen happening."

Consequently, Navigators was entitled to reimbursement for any moneys paid as damages for property damage. However, the *Moorefield* court nonetheless held that the supplementary payments provision applied to some portion of the \$1 million paid by Navigators toward settlement. Specifically, the court noted that the original construction contract had an attorney fee provision and, when authorized by contract, fees are allowable as costs of suit. (Code Civ. Proc., § 1033.5(a)(10).) Thus, attorney fees incurred by the owner would have been an item of costs falling within the supplementary payments provision of the Policy. And because supplementary payments coverage for costs is a function of the duty to defend (*State Farm General Ins. Co. v. Mintarsib* (2009) 175 Cal.App.4th 274), Navigators would have been obligated to the extent that the settlement included a component for attorney's fees.

In reaching that conclusion, the *Moorefield* court rejected a claim that any attorney's fees would have been "damages" not "costs" (and therefore also within the policy limits). The court cited *Golden Eagle Ins. Co. v. Insurance Co. of the West* (2002) 99 Cal.App.4th 837, for the distinction between attorney's fees awarded as damages pursuant to an indemnity or hold-harmless provision and those awarded as costs of suit by virtue of a prevailing party fee clause. The *Moorefield* court noted that in contrast to contractual attorney's fees coming within the supplementary payments coverage for costs, fees awarded under indemnity agreements typically fall within CGL coverage for insured contracts, and stated:

"*Golden Eagle* dealt with a situation in which the contractor/indemnitee sought indemnity from the subcontractor/indemnitor for the damages the contractor incurred as a result of a third party lawsuit. If an indemnitor fails to defend an indemnitee against a third party, the indemnitee may recover, as damages, its attorney fees and costs incurred in defending the third party claim. [] In that situation, the damages incurred by the indemnitee include the attorney fees and costs it incurred defending the third party lawsuit. That is because, as the *Golden Eagle* court noted, 'it is established that the indemnitee's attorney fees constitute an 'item of damages' for the indemnitor's breach of its indemnity obligation.' ... In this case, however, Moorefield did not seek indemnification from its concrete and flooring subcontractors [] for damages Moorefield had to pay to [the owner]. Moorefield was sued by [the owner] for breach of the Construction Contract, negligence, and breach of implied warranty to recover damages [the owner] incurred for construction defects. [The owner] sought attorney fees from Moorefield based on the attorney fees provision in the Construction Contract.... Moorefield's liability to [the owner] for attorney fees therefore would be as a cost of suit, not as damages."

Having reached those determinations, the *Moorefield* court concluded by ruling that on remand, the burden was on Navigators, not the insured, to establish the proper allocation: "The insurer, not the insured, has the burden of proving by a preponderance of the evidence that 'the settlement payments were allocable to claims not actually covered, and the defense costs were allocable to claims not even potentially covered.'"



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On the Lighter Side... (or How to Stay out of the Doghouse this Valentine's Day)

Valentine's Day Gifts for All Stages of a Relationship

Credit to: Teleflora

Finding the perfect gift for your significant other can be tough, especially when it comes to Valentine's Day. When shopping for someone's birthday or Christmas present, you can go for practical things that you know he or she needs. However, **Valentine's Day gifts** are expected to be more personal or romantic, depending on how long you've been together. This can be stressful at any point in someone's relationship, new or old! Here are a few guidelines that will help you shop for your significant other this February:

Valentine's Day Gifts for a New Relationship

You're not alone if you're panicking at the idea of having to pick out a present for someone you've only gone on a few awesome dates with. Even if you guys aren't "official," you would probably still like to let him or her know that you're thinking of him or her on Valentine's Day. This can typically be done with a sweet card that errs on the side of simple or funny, rather than the romantic one, and a small present, like a candle or bottle of his or her liquor or wine of choice. These gifts are thoughtful without being too intense for a budding romance.

Valentine's Day Gift for a Serious Relationship

Now that you're in an established relationship, you have more than an entry-level knowledge of each other. Rather than opting for thoughtful, yet generic presents, you can find something that you truly know your significant other will love. For example, if your girlfriend is a huge baseball fan, get seats for a game and plan a date around the event. If you know your boyfriend's favorite band will be in town soon, spring for a pair of tickets – even if they're not your favorite band! This is also a great opportunity to choose personalized or engraved items, especially if the two of you have an inside joke you share.

Valentine's Day Gifts for a Long Term Relationship

Chances are, by this point in your relationship you've traded lavish date nights for cozy Fridays on the couch together. While there is certainly a level of contentedness that you strive for in any relationship, you want to make sure all romance hasn't gone out the window! Valentine's Day is the perfect excuse to splurge a bit on your significant other with a gift like jewelry or a watch. If these things don't strike your partner's fancy, you can always spring for an item that you know your significant other has had his or her eye on, but thinks is too pricey or lavish to buy for his or her self. Use this day each year to let the person who's been with you through thick or thin know how much you appreciate him or her.

Valentine's Day Gifts for Any Relationship

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