CAIIA Status Report

March 2015

Does an Insurer Have an Obligation to Pay Treble damages in CA?

Credit to Tyson & Mendes

Treble damages are a concept provided for by law in certain types of lawsuits. The court has discretion to award treble damages, but there must be a legally acceptable reason for the award. The individual sued must not only be guilty of some wrongdoing, but he must have committed the act deliberately, knowing it was wrong. Treble damages, by statute, permit the court to triple the amount of the actual or compensatory damages awarded to a prevailing plaintiff. When a plaintiff is awarded treble damages in California, the question is whether an insurance company is required to pay those damages. Insurance Code § 533 excludes coverage of those "willful" acts committed with the specific intent to injure. However, an insurer is not exonerated by the negligence of the insured, or of the insured's agent or others. Furthermore, Insurance Code § 533 does not exclude coverage for non-malicious acts committed with the sole intent to do the act that caused the harm. (California Shoppers, Inc. v. Royal Globe Ins. Co. (1985) 175 Cal. App. 3d 1, 32.)

There is a clear line of authority in California which holds even an act which is "intentional" or "willful" within the meaning of traditional tort principles will not exonerate the insurer from liability under Insurance Code § 533 unless it is done with a "preconceived design to inflict injury." (Clemmer v. Hartford Insurance Co. (1978) 22 Cal.3d 865, 887.) More specifically, as the court in Capachi v. Glens Falls Ins. Co. (1963) 215 Cal.App.2d, pointed out, "the word 'willful' as used in Insurance Code § 533 may be said to connote an act done with malevolence." Other courts have suggested the culpability contemplated within the term "willful tort" as used in Insurance Code section 533 is synonymous with "malice in fact," i.e., a wish to vex, annoy, or injure another person. (See, e.g. City Products Corp. v. Globe Indemnity Co. (1979) 88 Cal.App.3d 31, 36, fn. 3.)

Where treble damages may be awarded under a statute without establishing malice or a "preconceived design to inflict injury," Insurance Code § 533 does not exclude coverage. Furthermore, where "the primary purpose of multiplying damages is to provide additional compensation to the victim rather than to punish the offender, it can hardly be maintained that extending insurance coverage to such multiple damages undermines the theoretical purpose of exemplary damages or offends public policy." (California Shoppers, Inc. v. Royal Globe Ins. Co. supra, 175 Cal. App. 3d 1, 34.)

When addressing treble damages, the relevant analysis is on whether the defendant acted "with the specific intent to injure" the plaintiff when committing the act. This is a case specific analysis, focusing on the factual allegations alleged in the complaint.

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Inside this issue…..

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President's Message

Kim Hickey
CAIIA President

This year is moving too quickly. In the wake of tragedies that have been happening all over the world, I would like to say that I am very thankful to live in the United States. Thank you to the soldiers that are always in danger's way to keep us safe. And thank you to any of our members who have served our country.

SAVE THE DATE – please mark your calendars for Friday, April 24, 2015, for the 2015 CAIIA Mid-Term Business Meeting. We are meeting at the MGM Grand Hotel in Las Vegas. There will be a reception on Thursday, April 23, 2015 at 6:30pm. Registration and Breakfast will start at 8:00am on Friday. We will be sending out the Registration Form very soon, along with the information for making reservations at the hotel at a group rate.

Mark Hall will be presenting a 3 Hour CE Class on Ethics beginning at 9:00am. After lunch, we will have a Business Meeting, open to all members.

As a reminder, the Combined Claim Conference (CCC) is March 10th, and 11th, 2015. If you are interested in spending time at the CAIIA booth, please let me or Sterrett Harper know. As mentioned before, it is a great place to see everyone and to mingle with insurance professionals. The theme this year is "Master Our Careers" and there are classes for Property, Liability, Workers' Compensation, and SIU adjusters. If you have not registered for the CCC, check out this year's program as there are some interesting classes being offered.

We are in the process of planning the DOI Recertification Seminars around the state. At this time, we are only planning to have the SEED/Earthquake Training in Southern California. I will be calling around to our Northern California members to see if there is an interest to have SEED/Earthquake training at a location in Northern California. Since the recertification is required every three years, we may want to plan on having a class in Northern California in 2016.

I hope to see you all at the CCC!

Thank you for your interest in the CAIIA.

Kimberley Hickey, President – CAIIA 2014
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News from our Members

DOI Curriculum Board Update

I attended the California Department of Insurance Curriculum Board Meeting on February 12th.

The highlight of the meeting was a stop in by the insurance commissioner, Dave Jones. He said that all independent adjusters are consummate professionals and should be paid like lawyers. I may not have heard him clearly. He is the only celebrity I have shaken hands with this year.

The year of 2014 pass rates for the independent adjuster examination were 30% for first time test takers and 31% for repeat test takers. These are very low rates as compared to other licenses and it speaks to the difficulty of the test.

Momentum for individual and reciprocal licensing continues and I will report as I hear more. I am also on a committee that is creating commercial earthquake risk management curriculum. It is great that the CAIIA has a presence in Sacramento.

If anyone has a question, please call or email me.

Peter Schifrin CAIIA – Past President
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DOI Commissioner and Curriculum Board

Front row left to right:
Neil Granger
Deanna Dooley
Anthony Steuer

Second row left to right:
Scott Dunn
Max Herr
Peter Schifrin
Commissioner Jones
Yanping Dong
Neil Bordenave
Gregory Padilla

Construction Defects – Right to Jury Trial on Factual Issues Necessary to Determine Whether a Construction Defect Cause of Action Accrued to Plaintiff

Credit to Low, Ball & Lynch, San Francisco, CA

During the lifetime of a home, it may have many owners. This case considered a subsequent purchaser's ability to pursue a claim for fraudulent concealment against a developer and, where the facts of notice were in dispute, whether and when causes of action for negligence and strict liability first accrued.

Shapell Industries built a home in San Ramon, California, for Timothy Wright, then Shapell's Assistant General Superintendent and Assistant Vice President of Construction. Wright oversaw the construction of the home in December 2002. Shapell transferred the property without "formal disclosures that would be transmitted in a more conventional transaction." Wright and his wife sold the home to Dr. Laux in 2004. In the Real Estate Transfer Disclosure Statement prepared as part of the sale to Dr. Laux, Wright stated he was unaware of the presence of fill soil on the property. Dr. Laux owned the property from 2004-2008, at which time he sold it to plaintiff Donna Stofer. During the time he owned the home, Dr. Laux submitted multiple warranty repair requests to Shapell for problems ranging from cracked sidewalks, exterior stucco, and issues with the home's windows and doors. At the time he sold the home to plaintiff, Dr. Laux denied any knowledge of any fill or soil subsidence issues.

Two years later, plaintiff sued Shapell for strict liability, negligence, and fraudulent concealment. Plaintiff claimed Shapell built the home on unstable and uncompacted "fill" soil and with an inadequate foundation, causing, "substantial differential movement" and numerous defects such as cracked floors, walls, and ceilings.

The fraudulent concealment cause of action alleged Shapell hired ENGEO Incorporated (Engeo) as a soil engineer and that Engeo advised Shapell of the "highly differential, high plasticity fill soil conditions" on the property in 1995 and 1999 reports. Plaintiff alleged Shapell concealed this information from its structural engineer. As a result, Plaintiff alleged that the engineer "did not take into account these soil conditions when designing the foundations."

Shapell moved for summary judgment, contending it did not conceal any material information and Plaintiff did not have standing to sue because her claims accrued while Dr. Laux owned the home. The trial court granted the motion as to Plaintiff's fraudulent concealment claim. It denied the motion as to Plaintiff's other claims, concluding that the conflicting evidence offered by Shapell and by plaintiff as to what complaints Dr. Laux had and what complaints plaintiff had raised a triable issue of fact as to when the causes of action may have accrued. The court then held a bench trial on the accrual issue, and entered judgment for Shapell, ultimately concluding plaintiff had "no standing to sue" because her claims accrued when Dr. Laux owned the home and he did not pursue them or assign the claims to Plaintiff.

Plaintiff appealed, contending that the order granting summary adjudication of her fraudulent concealment claim must be reversed. Shapell had argued (1) there was no evidence it concealed or suppressed the Engeo reports from the engineer or the original owner, Wright; and (2) the soil conditions were disclosed to Plaintiff before she bought the home through general real estate advisory forms. Plaintiff argued that the general statements in the advisory forms were no substitute for proper disclosure of specific information known to Shapell regarding the property.

The appellate court agreed with plaintiff regarding the fraudulent concealment cause of action. When the Court viewed the evidence and reasonable inferences in a light most favorable to plaintiff, it found there was a triable issue of material fact regarding whether Shapell concealed material information about the property soil conditions.

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COMBINED CLAIMS CONFERENCE

Carl Warren & Company Presents

"MASTER OUR CAREERS"
MARCH 10-11, 2015
HYATT REGENCY
ORANGE COUNTY

The Combined Claims Conference (CCC) is a two-day program offering continuing education for CPCU, RPA, MCLE, CIPI, CALI, WCCP and the California and Texas Departments of Insurance for independent adjusters, attorneys, investigators and brokers.

The conference includes four separate educational tracks: Property, Liability, Special Investigations Unit (SIU) and Workers' Compensation. Our quality speakers address the most pressing topics during the sessions. Included in your registration fee is admittance to all conference sessions, two continental breakfasts, breaks, two luncheons and Tuesday's Casino Night.

REGISTRATION FEES: Register early to take advantage of the lowest registration fee.

Qualified Rate:
Register By January 10:
One-day: $75.00 (either Tuesday or Wednesday)
Two-day: $125.00
Register after January 10 – February 27
One-day: $95.00 (either Tuesday or Wednesday)
Two-day: $175.00
After February 27 or On-site registration:
One-day: $125/day (subject to availability)

All-Others:
One-day: $200 (either Tuesday or Wednesday)
Two-day: $475

Discount Pricing Available:
Pay for five registrations and get one free.
Pay for 10 registrations and get three free.
Pay for 15 registrations and get five free.

You must be employed in the following fields in the insurance and claims industry to qualify for the CCC **"Qualified" rate**: Independent Adjuster, Insurance Carrier, Risk Management, Appraiser, Private Investigator, Workers' Compensation Claims Professional, Attorney or Agent/Broker. All others register at the **"All Others"** rate.

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Plaintiff also contended that the judgment must be reversed because she was entitled to have a jury determine the disputed factual issues of "when and to whom the causes of action accrued." The Court agreed. The Court stated that a trial court may decide whether a Plaintiff has standing to sue for negligent design, engineering or construction of a building where the facts underlying the determination are undisputed. However, when a determination of accrual in the construction defect context turns on disputed facts or require credibility determinations, the jury must make factual findings as to when the cause of action accrued and not make those findings by way of bench trial.

Here, the question of whether certain defects and consequential damages manifested themselves during Dr. Laux's ownership, or whether they manifested themselves during plaintiff's ownership was in dispute. These same questions were central to the substantive merits of plaintiff's tort claims for negligence and strict liability. The court's decision on these factual issues would turn in part on credibility determinations as well. Given these disputed facts, these were questions for a jury to decide, rather than the court. Summary adjudication by the court on the accrual issue was therefore inappropriate.

The Court reversed the summary judgment order in favor of Shapell on the fraudulent concealment issue, as well as the judgment in favor of Shapell following the bench trial on the accrual question.

COMMENT AND EVALUATION

This case confirms that fraudulent concealment causes of action may survive, even if brought by subsequent purchasers down the line who did not deal directly with the developer. In addition, the case confirms that where facts are in dispute (as they usually are), a trial court may not be able to make the determination on when a cause of action accrued.

It is very rare to find a construction defect case where critical issues of material fact are not disputed and a jury must be called upon to decide. However, at the very least, a summary judgment motion may allow you to properly frame critical issues and force the Plaintiff to set forth evidence in support of their case.

Insurance – Equitable Indemnity and Subrogation – Evidence of Liability

Credit to Low, Ball & Lynch, San Francisco, CA

Traditionally, a duty to defend is determined by the information available to an insurer at the time of the tender of defense. This case involved an equitable indemnity and subrogation claim between two insurers, and whether evidence relating to the liability of one of the insureds that was developed after settlement of the underlying lawsuit could be used in the suit between the carriers.

National Union Fire Insurance Company of Pittsburg, Pa. ("National Union") was an excess insurer of Costco Wholesale Corporation ("Costco"). Tokio Marine & Nichido Fire Ins. Co., Ltd ("Tokio Marine") was the primary and excess carrier for the Yokohama Tire Corporation ("Yokohama"). Through a supplier agreement, Yokohama agreed to manufacture tires for distribution and sale by Costco. The agreement included an indemnification provision against defects in design, materials and workmanship of the tires, as well as a requirement that Yokohama maintain products liability insurance coverage naming Costco as an additional insured. Jack Daer ("Daer") had purchased Yokohama tires for his Ford Explorer at Costco in 1997, and continued to have his car regularly serviced there. In February of 2001, he had the car serviced. Five weeks later, the left rear tire failed, causing Daer to lose control. The vehicle rolled, and Daer sustained quadriplegic injuries. Cont. on page 7

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Daer filed suit against Yokohama, Costco, and others. Costco tendered the defense of the action to Yokohama, as well as to Tokio Marine, both of which declined the tender. Costco was defended by National Union, after making payment of its deductible and defense obligations underlying National Union's excess policy. The Daer action settled on the first day of trial, with Costco and National Union paying $5.5 million and Yokohama paying $1.1 million. Thereafter, National Union filed suit against Yokohama and Tokio Marine, seeking recovery under theories of equitable contribution, indemnity and subrogation.

National Union's expert, Troy Cottles, testified in deposition that there were eight discrete defects, all of which caused the tire to fail. His testimony was substantially different from that offered in the Daer action by Daer's tire expert, Robert Ochs, who had opined on three different defects. When the matter proceeded to trial, Yokohama filed a motion in limine to exclude Cottles' theories that had not been raised in the underlying litigation. Yokohama argued that because National Union had settled the case based on the evidence Daer was prepared to present at trial, defect theories asserted by Cottle which were developed post-settlement were not relevant to National Union's indemnity claim. The trial court agreed, holding that National Union could not introduce evidence not offered or prepared to be offered by Daer's expert in the underlying trial at the time of settlement. National Union admitted in its opening statement that it could not produce any evidence of tire defects without Cottles' later-developed theories, and nonsuit in favor of Yokohama was granted. National Union appealed.

The Court of Appeal reversed. It found that the question presented was whether an indemnitee which settles a third party case can present evidence acquired post-settlement, or whether it is limited to the underlying plaintiff's evidence of liability. Yokohama had argued for such a limitation, but had not provided any authority to support it. The Court of Appeal noted that Cottles' testimony would certainly have been relevant to the issue of whether the tire was defective, and thus should have been admitted.

Yokohama argued that National Union settled the Daer case based on Costco's own "obvious and significant tire store negligence" in failing to observe problems with the tire, including its wear and tear and a screw causing an unpatched leak. It argued that National Union was now trying to present new evidence of liability of a tire defect and was "attempting to gain a windfall by recovering for an entirely new case." Thus, Yokohama argued that fairness required that National Union's ability to prove a tire defect should be limited to the state of evidence at the time of the Daer settlement.

The Court of Appeal disagreed with Yokohama. Yokohama's logic would require a business sued for both products liability and negligence to marshal evidence of its own liability to the injured or risk impairing its indemnity rights against the product manufacturer. This would not only place an unfair burden on the litigant, it could also undermine the public policy in favor of settlement. Further, if the tire did in fact contain a defect, the adoption of Yokohama's argument would result in a windfall for Yokohama. National Union was thus entitled to present relevant evidence in support of its claim, including Cottles' evidence of a tire defect, no matter when it was developed.

Because it determined the trial court erroneously excluded Cottles' expert testimony, the Court of Appeal reversed the judgment entered in favor of Yokohama and Tokio.

Comment

A carrier receiving a tender of defense will typically determine whether it has a duty to defend based upon the facts known to it at the time of tender. However, when faced with an indemnity claim from another insurer, it should note that whether one or the other underlying insured ultimately will be found responsible may be determined by later discovered facts not known or developed at the time of settling the underlying action.

Torts – Negligence – Assumption of the Risk
Credit to Low, Ball & Lynch, San Francisco

Primary assumption of the risk completely bars a plaintiff's recovery. However, summary judgment on primary assumption of risk grounds is unavailable unless the defendant disproves the theory that it increased the inherent risks, or establishes a lack of causation between its conduct and the plaintiff's injury. This case considered the same in terms of the construction of and the use of a stage being set up by a performer who was injured in a fall.

Robert Fazio, Jr. ("Plaintiff"), an experienced musician, was hired to perform at Fairbanks Ranch Country Club ("Defendant"). While plaintiff was setting up his equipment on the stage, he stepped off the stage and fell into one of the gaps. In order to fit the stage into the corner of the room, there were gaps at the end of each row between the walls and the risers. Plaintiff sued defendant for negligence.

Defendant filed a motion for summary judgment, arguing it owed no duty to plaintiff because plaintiff assumed the risk, defendant had no duty to configure the stage in a certain way, and the allegedly dangerous condition was obvious and known to plaintiff. Defendant also argued that the stage was not dangerous and the set-up of the stage did not cause plaintiff to fall. Plaintiff opposed the motion, arguing that the doctrine of assumption of risk did not apply. He also raised triable issues of facts by submitting a declaration to show that defendant did not exercise care in the set-up of the stage.

The trial court granted the motion for summary judgment and found the doctrine of primary assumption of the risk barred plaintiff's claim. Plaintiff appealed on the grounds that the doctrine of assumption of the risk does not apply to his occupation and defendant failed to meet its burden on summary judgment to show there are no triable issues of fact.

The Court of Appeal reversed. Although the Court of Appeal agreed with defendant that falling off a stage is an inherent risk for all stage performers, the Court of Appeal agreed with plaintiff that the trial court erred by granting summary judgment.

The Court of Appeal concluded that defendant did not meet its initial burden to make a prima facie showing that there was no triable issue of fact as to each element of the assumption of the risk defense, which included showing that it did not increase the inherent risks plaintiff assumed as a stage performer. Fairbanks made no attempt to show it had not increased the risk of falling and had failed to present any evidence to refute Fazio's claim that its construction of the stage had increased that risk. The Court of Appeal further concluded that even if Fairbanks had met its initial burden the question of whether Fairbanks increased the risk of falling should be decided by the trier-of-fact because the question requires the application of the governing standard of care to the facts of the case. In this case, this was the realm of the jury, and not a judge.

This case follows the decisions in *Huff v. Wilkins* (2006) 138 Cal.App.4th 732; *Shin v. Ahn* (2007) 42 Cal.4th 484; and *Luna v. Vela* (2008) 169 Cal.App.4th 102 where the Court of Appeal and Supreme Court concluded that the trier-of-fact determines whether a defendant has breached its limited duty of care not to increase the risks of an activity to which the assumption of the risk defense applies.

The Court of Appeal rejected defendant's argument that it had no duty to configure the stage differently and that the stage did not constitute a dangerous condition, holding that these were questions of fact for the jury, and not a question of law for the court.

The Court of Appeal reversed the summary judgment.

COMMENT

It is difficult for defendants to prevail on summary judgment based upon the primary assumption of the risk defense because defendants have to show that they did not increase the inherent risk. Furthermore, plaintiffs can often defeat summary judgment by putting forth evidence that defendants increased the risk, because the court will likely determine that there is a question of fact for the jury to decide.

On the Lighter Side...

If you're not familiar with the work of Steven Wright, he's the famous erudite scientist who once said: "I woke up one morning, and all of my stuff had been stolen and replaced by exact duplicates."
His mind sees things differently than most of us do. . .. here are some of his gems:

1 - I'd kill for a Nobel Peace Prize.

2 - Borrow money from pessimists -- they don't expect it back.

3 - Half the people you know are below average.

4 - 99% of lawyers give the rest a bad name.

5 - 82.7% of all statistics are made up on the spot.

7 - A clear conscience is usually the sign of a bad memory.

8 - If you want the rainbow, you got to put up with the rain.

9 - All those who believe in psycho kinesis, raise my hand.

10 - The early bird may get the worm, but the second mouse gets the cheese.

11 - I almost had a psychic girlfriend, ... But she left me before we met.

12 - OK, so what's the speed of dark?

13 - How do you tell when you're out of invisible ink?

14 - If everything seems to be going well, you have obviously overlooked something.

15 - Depression is merely anger without enthusiasm.

16 - When everything is coming your way, you're in the wrong lane.

17 - Ambition is a poor excuse for not having enough sense to be lazy.

18 - Hard work pays off in the future; laziness pays off now.

21 - Eagles may soar, but weasels don't get sucked into jet engines.

22 - What happens if you get scared half to death twice?

23 - My mechanic told me, "I couldn't repair your brakes, so I made your horn louder."

24 - Why do psychics have to ask you for your name.

25 - If at first you don't succeed, destroy all evidence that you tried.

26 - A conclusion is the place where you got tired of thinking.

27 - Experience is something you don't get until just after you need it.

28 - The hardness of the butter is proportional to the softness of the bread.

29 - To steal ideas from one person is plagiarism; to steal from many is research.

31 - The sooner you fall behind, the more time you'll have to catch up.

32 - The colder the x-ray table, the more of your body is required to be on it.

33 - Everyone has a photographic memory; some just don't have film.

34 - If at first you don't succeed, skydiving is not for you.

And the all-time favorite -

35 - If your car could travel at the speed of light, would your headlights work?