

Release of Past Fraud, Negligence, Breach of Contract & Violation of Law Allowed by California Court

Credit to Tyson & Mendes, San Diego, CA

Introduction

A recent court decision involving claims of alleged defective construction provides guidance for parties entering into all manner of contracts under which they provide a release to the other party of its potential liability for negligence, breach of contract or statutory violations. In short, although releasing another party from liability for potential intentional or negligent conduct is prohibited under California law as against public policy, the prohibition applies only to current or future actions, and not to past conduct, absent appropriate contract language.

Facts and Trial Court Litigation

California Civil Code §1668 provides:

All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his [or her] own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law. *SI 59 LLC v. Variel Warner Ventures, LLC*, a November 2018 decision from the Second District Court of Appeal in California, involved the sale of an 85-unit apartment complex. Variel Warner contracted with Verdugo Management & Investment, Inc. to construct the building.

Variel Warner later sold the building to another company. Following a series of ownership transfers, the building was owned by SI 59. The terms of sale to SI 59's predecessor called for escrow not to close until "final completion" of the building which, among other things, was defined as "all improvements have been constructed in substantial accordance with all plans and specifications and other applicable provisions of the general construction contract." The purchase agreement also contained a general release stating that the buyer should rely solely on its own knowledge of the property based on its investigation of the property, as well as its inspections. Except as to the general contractor's warranty, the buyer released all claims that it may have had against the seller, including claims for breach of representations, warranties and covenants for fraud.

Upon assuming ownership of the apartment building, SI 59 found that the concrete pool and podium decks were leaking into the parking garage. It alleged that the building was improperly waterproofed and flashed. SI 59 sued, alleging that general contractor Verdugo negligently constructed or inspected the structural concrete slab and slab waterproofing, and that original owner Variel Warner negligently managed, inspected and developed the property.

At the trial court, Verdugo and Variel Warner filed demurrers, arguing that SI 59's claim was barred by the terms of the release agreed by the predecessor owner. The trial court sustained the demurrers throwing out SI 59's claim, and SI 59 appealed.

The Decision on Appeal

The Court of Appeal held that §1668 "prohibits exculpation (protection) from future torts," and found that "multiple cases state that the statute applies only if a future tort is involved." The Court continued its analysis, writing "[w]hether section 1668 might apply to past torts is a slippery question."

The Court ultimately concluded that §1668 could be used to deem purported releases of some claims void, when fraudulent representations induced a party to provide the full release. In this case, however, the Court determined that the terms of the sale to SI 59's

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President's Message

"March is the month God created to show people that don't drink what a hangover is like."

Garrison Keillor

I have nothing this month... No, really, I've been trying to come up with some inspirational words while trying not to be too preachy, as I have a feeling my last few president's messages have been leaning that way...

Hmmm...I was thinking about my father the other day and remembering the stories that he and his friends used to tell me about how they would settle claims "back in the day".

My father started his career in claims in 1959 at Continental Casualty as a casualty adjuster (these days a general liability adjuster) in the San Francisco office. He would tell stories about how he and the other adjusters used to carry checkbooks out to the loss site and settle claims on the spot in exchange for a release (one that would probably never hold up in court today). The other half of my father's work involved settling claims at the local watering hole (... of which there were quite a few in San Francisco -- Schrodgers, Sam's, Ginos). It seems that many claims were settled in a dark smoky bar where adjusters and lawyers hashed out the claim in a booth while drinking their livers away. When I was a kid my father would come home from work and tell these stories at the dinner table -- we would hear about the claims, who was "really" at fault, and how Dad gloriously settled the claim getting the better of the other guy -- "you can't believe the money that guy left on the table!". I loved how he told those stories and now that I look back, that is probably how I got hooked on claims. The next several years my dad worked at other insurance companies, started his own independent adjusting firm and managed several others. The good old days of claims adjusting did change over those years.



John Ratto

CAIIA President

After I graduated from college, I mulled around for a few years not knowing what I wanted to do. Finally, a friend of my father's heard about a job opening at Fireman's Fund and mentioned the job to my dad, asking him, "What about John?" and my father in his own loving way said "John who?".

After 13 years of working for "The Fund" and then two independent adjusting firms, I decided to strike out on my own (with of course a world of help from my wife who left her law practice to help me get started). My dad never said much about our opening the firm, other than occasionally asking about how things were going and whether we had enough work. I think he felt he did not have much advice to offer because the way he had learned, to just "take your checkbook and buy the nice pregnant lady a hat to make her feel better after tripping in the insured's grocery store" just does not get the claim settled in modern times. Today's claims adjuster must be fair, informed about the statutes and regulations and stick to strict timelines. We operate in a professional manner which may not generate as many fun stories but which result in better claims practices. Keep it up!

The midterm is going to be held on April 5 at the Courtyard by Marriott Los Angeles Burbank Airport. The previous night we hope to see you for dinner at the Granville Café in Glendale - Look for details to follow.

Oh and Happy St. Patrick's Day!

John Ratto President

CAIIA President



NEWS OF AND FOR OUR MEMBERS**SAVE THE DATE**

The CAIIA is proud to be exhibiting at or sponsoring the following upcoming event:

March 5 & 6, 2019 Combined Claims Conference, Hyatt Regency, Orange County

April 4 & 5 CAIIA Midterm Meeting, location TBD

August 27-29, 2019 Claims Conference of Northern California, Lake Tahoe, CA

Attn: CAIIA Members

We are looking for volunteers to represent us in our booth at the Combined Claims Conference in Orange County on March 5 & 6.. If you are available, please contact **Sterrett Harper** (harperclaims@hotmail.com). It is a good opportunity to meet some new industry people and to catch up with old friends!

DOI Announcement**New Disaster Insurance Bill**

SACRAMENTO, Calif. -- California has seen the cost of fighting wildfires grow to record highs over the past decade. Today Senator Bill Dodd (D-Napa), Insurance Commissioner Ricardo Lara, and Treasurer Fiona Ma proposed a new model to reduce wildfire risk with California Disaster Insurance (SB 290).

SB 290 authorizes the Governor, Insurance Commissioner, and Treasurer to enter into an insurance policy that pays out when California has unexpected costs for disaster response.

California Disaster Insurance would function like home insurance, but for our state – allowing the state to pay a premium using a portion of existing emergency funds that would trigger a payment to the state in the event of a disaster.

“Rising wildfire suppression costs can strain California’s financial resources and threaten cuts to critical programs,” said Sen. Bill Dodd, D-Napa. “As climate change continues to contribute to devastating infernos, we need a strategy to reduce the pressure on state and community coffers. This bill would do just that, allowing the state to invest in an insurance policy to ensure budget predictability and reduce taxpayers’ exposure to increasing costs associated with disasters, especially wildfires.”

“In seven of the last ten years, our firefighting costs have exceeded our budget projections – by more than \$450 million in 2017 alone,” said Insurance Commissioner Ricardo Lara. “California Disaster Insurance is a better solution that gives taxpayers the benefit of predictable costs, so we can invest in a safer future. As we confront destructive climate-drive events, we need to be open to new models that reduce risk to our communities and budgets. California Disaster Insurance is our first response.”

“This policy makes annual wildfire suppression costs more predictable, protecting the taxpayers from the volatility that has been seen over the past several years and creating budget stability and preserving other investments,” said State Treasurer Fiona Ma. “It is time for California to be proactive and not reactive.”

California spent \$947 million in 2017-18 through the emergency fund for firefighting – more than \$450 million more than budgeted, according to Cal Fire. The costs of fighting wildfires have overrun Cal Fire’s emergency budget in seven of the last 10 years. Since 2007, California has experienced 11 of the top 20 most destructive fires in its history.

The federal government, the World Bank, and the state of Oregon have all used insurance to reduce the risk to taxpayers following disasters.

The State of Oregon has purchased insurance protection against ever-changing wildfire costs for nearly 40 years – spending \$61 million on premiums and receiving \$102 million in insurance payments.

California currently pays for wildfire disasters with available funds, and California Disaster Insurance will come from those same sources.

Giving California greater budget predictability can empower the state to invest to reduce future risks.

SB 290 must be in print for 30 days before it can be scheduled for a committee hearing.

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processor prevented SI 59 from taking advantage of potential exceptions to enforcement of the statute as to past negligence, such as that allegedly committed by the building's general contractor and original owner. The Court of Appeal concluded that the negligent construction claim against Verdugo and the negligent management, inspection and development claim against Variel Warner both involved past events. Furthermore, the claim against Variel Warner did not involve breach of a statute, therefore, both were subject to dismissal.

The Court further held that SI 50's breach of contract claim was also barred by the release, because the purchase agreement merely provided that the building's purchaser was not obligated to close escrow until "Final Completion," and that while "Final Completion" was defined as "all Improvements hav[ing] been constructed in substantial accordance with all plans and specifications and other applicable provisions of the General Construction Contract," the argument that "Final Completion" had not occurred as defined "was not itself a negligent misrepresentation" triggering Civil Code §1668.

Takeaway

The SI 59 decision is important because it shows that, when entering into a contract or when advising someone entering into one, you must take care in negotiating the scope of the release. Providing a general release of known and unknown claims could leave a party vulnerable to significant liability, if the potential fraud, negligence, breach of contract or breach of statute which is released occurred prior to the contract's formation. If the release involves past conduct and if the party providing the release has a full and fair opportunity to investigate the matters which potentially give rise to liability, Civil Code §1668 cannot be used to void the release and to allow the party which provided the release to pursue claims.



**May your blessings outnumber the shamrocks that grow,
And may trouble avoid you, wherever you go.
~Irish Blessing**



DOI Press Release

Inland Empire medical office employees arrested for alleged \$540,000 insurance fraud scheme

Suspects attempted to scam over \$4 million from insurer

INLAND EMPIRE, Calif. — Three medical office employees were arrested Wednesday for allegedly filing over \$4 million in false insurance claims for treatments they claimed they received from their employer. The victim insurer paid out over \$540,000 of these fraudulent claims.

The California Department of Insurance found that three employees of Diamond Bar ENT Medical Specialty Group, Isabel Guizar, 45, Erika Lopez, 40, and Susie Quezada, 50, allegedly submitted false claims to the insurance company for treatments they claimed they received from their employer. Treatments included nasal surgeries, laryngoscopy biopsies, impaction removals, swallowing dysfunction, nystagmus tests, nasal injections and therapeutic vocal cord injections. The employees provided the insurance company with handwritten receipts and altered claim forms and were reimbursed directly for the treatments.

"These arrests send a clear message that we will aggressively pursue apprehension and prosecution of anyone who falsifies insurance claims," said Insurance Commissioner Ricardo Lara. "These are not victimless crimes. This type of fraud drives up the cost of health insurance when insurers pass the losses along to consumers in the form of higher premiums."

From 2010 to 2016 the three employees submitted over \$4 million in false claims to the insurance company. The insurer paid out approximately \$540,311 directly to the three employees, which the employees allegedly pocketed for themselves. One of the suspects, Quezada, has also been charged for embezzling approximately \$700,000 from Diamond Bar ENT Medical Specialty Group and filing a false tax return.

Guizar and Lopez were booked into West Valley Jail. Quezada was booked into the Los Angeles Sheriff's Department Century Station. This case is being prosecuted by the Los Angeles District Attorney's Office.

CAIIA REGISTRATION FORM
California Association of Independent Insurance Adjusters
MID-TERM BUSINESS MEETING - April 4-5, 2019



Courtyard by Marriott Los Angeles Burbank Airport 2100 W Empire Ave,
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EVENT	COST	#TICKETS	TOTAL PRICE
MEMBER CONVENTION Package (*) (Includes Reception dinner <u>April 4-5</u> , Continental Breakfast, CE Class/Lunch/Meeting)	\$ 150.00	# _____	\$ _____
Non-Member Convention Package (Includes Reception dinner, Continental Breakfast, CE Class/ Lunch) <u>April 4-5</u>	\$ 175.00	# _____	\$ _____
Spouse/Guest fee Name _____ (Reception dinner, breakfast)	\$ 50.00	# _____	\$ _____
3 Hour CE Class Only (Includes Continental Breakfast, Presentation, Lunch)	\$ 100.00	# _____	\$ _____
<i>Grand Total payable</i>			\$ _____

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04/04 – 6:30 P.M. Welcome/Dinner (Granville Café 121 N. San Fernando Blvd, Glendale, CA 91502)	[]	[]
04/05 – 8:00 A.M. Registration/Breakfast for hotel guests	[]	[]
04/05 – 9:00 A.M. Seminar (3 CE credits-Ethics)	[]	[]
04/05 – 12:00 P.M. Lunch	[]	[]
04/05 – 1:00 P.M. (Approximate) Business Meeting	[]	[]

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On the Lighter Side... Random Musings and Quotes

