CAIIA Status Report
MAY 2010

Coverage Alert

Submitted by McCormick Barstow

A mistaken belief in the legal right to build does not transform the intentional act of construction into an accident

Fire Insurance Exchange v. Superior Court, 181 Cal.App.4th 388 (2010).

BACKGROUND FACTS

The insureds owned property adjoining the Leach property. Leach granted the insureds an access easement over a five-and-one-half-foot-wide portion of her property. Subsequently, the insureds wanted to renovate and expand their residence. They obtained Leach's signature on a "Lot Line Adjustment" application for the five-and-one-half-foot easement. The City approved the application and the insureds proceeded with construction which ultimately encroached on the five-and-one-half-foot strip.

Several years later, the Parsonses negotiated to purchase the Leach property. In doing so, the Parsonses found the Lot Line Adjustment to be a cloud on the title. The Parsonses obtained an assignment from Leach and her two sons of any rights they possessed to contest the validity of the Adjustment. After purchasing the property, the Parsonses disputed the validity of the Adjustment, asserting that Leach had conveyed a one-third interest in the property to her sons, and that they had not signed the Adjustment application. The insureds sued the Parsonses for quiet title and adverse possession of the five-and-one-half-foot strip, and the Parsonses cross-complained. The insureds tendered their defense to Fire Insurance Exchange, which had issued a homeowner insurance policy to them. Fire Insurance refused to defend. The insureds sued, alleging breach of contract and bad faith. Fire Insurance moved for summary judgment, arguing that any losses to the insureds resulted from their intentional act of building over the lot line and, thus, were not the result of an "accident." The trial court denied summary judgment, finding a triable issue of fact. Fire Insurance filed a petition for writ of mandate.

THE COURT'S RULING

In disagreeing with the trial court, the Court of Appeal noted that an intentional act cannot be an "accident." Even though the insureds had acted under a mistaken belief that they had the right to build, the act of construction was intentional and not an accident. As such, the trial court was ordered to set aside its prior order and issue a new order granting the motion for summary judgment.

THE EFFECT OF THE COURT'S RULING

This case supports prior California authority to the effect that intentional conduct will not constitute an accident even when the insured believes his or her act is lawful.

PUBLISHED MONTHLY BY
California Association of
Independent Insurance Adjusters

An Employer Organization of Independent Insurance Adjusters

Inside This Issue

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CAIIA Newsletter
CAIIA Office
P.O. Box 168
Burbank, CA 91503-0168
Web site - http:\\www.caiia.org
Email: info@caiia.org
Tel: (818) 953-9200
(818) 953-9316 FAX

Editor: Sterrett Harper
Harper Claims Service, Inc.
Tel: (818) 953-9200

PRESIDENT'S MESSAGE

MEMBERSHIP ADVANTAGES: NETWORKING THROUGH CAIIA

Since last year's fall convention and golf tournament, I've talked to a number of our members and sponsors who commented that the tournament and convention provided unexpected networking opportunities. We know that the convention, registration reception, continuing education seminar, and the golf tournament resulted in members and guests establishing new relationships, reacquainting with old friends; and actually getting new business.

Putting together disparate individuals into foursomes at the golf tournament further facilitated networking among themselves and sponsors. This event is historically always sold out. Phil Barrett is already putting together this event for the fall. Watch for his announcements.

Compared to last year, many more of our members who have commented to me they are "…buried…" from new claims during the first quarter of this year. Others have said they have "…new accounts…". Certainly we can't contribute this improvement totally to CAIIA; but we know these individuals have participated and/or regularly attended CAIIA events.

SAM HOOPER
President - CAIIA 2009-2010

Announcing the 4th Annual CAIIA Golf Tournament

The 4th Annual CAIIA Golf Tournament will be held at the Foxtail Golf Club in Rohnert Park, CA October 21, 2010!

The tournament will coincide with our Annual Convention and the Golf Course is located across the street from the Convention Facilities.

Part of the proceeds will go to the American Cancer Society.

True to tradition, the tournament will have a Halloween Theme, so costumes and décor are encouraged.

Information, registration forms for sponsorships and/or players can be requested from Phil Barrett, 707-462-5647, or barrettclaims@sbcglobal.net

It will be a "Spooktacular" event! See you there.

Weekly Law Resume

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

Duty to Defend - Bad Faith

Lisa Risely v. Interinsurance Exchange of the Automobile Club, Court of Appeal, Fourth District (March 26, 2010)

If an insurer is defending its insured under one policy, but refuses to defend under a second policy, is it insulated from liability for alleged breach of the duty to defend? This case addresses that issue.

On August 6, 2003, Sean Turner offered Lisa Risely a ride home in his car. Because Turner was driving erratically, Risely asked Turner to take her home several times, but he refused to do so. She filed suit against Turner, alleging she was held against her will and suffered severe and debilitating injuries.

Turner was insured under an automobile policy and a homeowner's policy with the Interinsurance Exchange of the Automobile Club ("Auto Club"). The automobile policy had limits of $50,000, and the homeowner's policy had limits of $300,000. The Auto Club defended Turner. A demand was made to settle with Turner for $300,000, the limits of the homeowner's policy. The Auto Club advised Turner it declined to defend or indemnify under the homeowner's policy and stated that all claims would be defended under the automobile policy. The policy limit demand was refused. Turner then agreed to entry of a stipulated judgment. He assigned to Risely his claims against the Auto Club, and judgment was entered in the sum of $434,000.

Risely sued the Auto Club for breach of its duty to defend and indemnify Turner. She also sued for breach of the covenant of good faith and fair dealing, and as a judgment creditor, pursuant to Insurance Code § 11580.

The Auto Club filed a motion for summary judgment. The trial court granted the motion, holding that since the Auto Club defended its insured, the stipulated judgment would not be given effect. The trial court entered judgment in favor of the Auto Club. Risely appealed.

The Court of Appeal reversed. The Court noted that where an insurer is defending its insured, an insurer is not bound by a stipulated judgment that insulates the insured from actual liability. It is only where the insurer has breached its duty to defend that a reasonable, non-collusive settlement with the third party, may be made without the insurer's consent. Similarly, under Insurance Code § 11580, an insurer who has breached the duty to defend may be bound by a stipulated judgment agreed to by its insured without its consent, notwithstanding the no action clause in the policy.

The key issue is whether there was a breach of the duty to defend. The Court noted the duty to defend is separate and independent from any obligation owed by any other insurer. Where a non-defending insurer's failure to provide a defense potentially increased the insured's exposure to personal liability a suit for breach of the duty to defend may be brought. The Court stated each separate insurance policy carries with it a duty to defend.

The insured may have been able to establish damages stemming from the alleged breach of the duty to defend, notwithstanding a defense was being provided under another policy. The insured was exposed to potential liability beyond that provided by the defending policy. In that situation, the insured could enter into a stipulated judgment that bound the non-

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Application of the Attorney Work Product Privilege to Witness Statements

Submitted by Willis/DePaquale LLP by Scott Blackstone

In the recent case of *Coito v. Superior Court,* (2010) 182 Cal.App.4th 758, the California Court of Appeals for the 5th District held that written and recorded statements including those taken by counsel as well as a list of the names of witnesses interviewed by counsel are not protected by the attorney work product privilege. The Coito decision appears to conflict with the Third Appellate District Court's holding in Nacht & Lewis Architects Inc. v. Superior Court (1996) 47 Cal.App.4th 214, 217-218 in which the court held that attorney notes of witness interviews as well as the names of witnesses interviewed are generally protected by the attorney work product privilege.

In Coito, plaintiff's counsel filed a motion to compel production of witness statements obtained by defendant State of California and also seeking disclosure of the names of witnesses interviewed. The trial court denied plaintiff's motion holding that the attorney work product privilege barred production of the requested information pursuant to the holding in Nacht & Lewis Architects v. Superior Court. Plaintiff's counsel filed a Petition for Writ of Mandate which the Court of Appeals granted, ordering the trial court to issue an order requiring production of the requested witness statements and list of witnesses interviewed.

The Court of Appeals in Coito discussed the attorney work product privilege, noting that CCP Section 2018.030(a) provides absolute protection for writings reflecting the attorney's impressions, conclusions, opinions, or legal research and theories. All other attorney work product falls under qualified work product protection which is generally protected unless the court determines that denial of the requested discovery will unfairly prejudice the party seeking discovery in preparing the party's claim or defense. The Court noted that work product protection extends to derivative material reflecting the attorney's evaluation or interpretation of law or of the facts involved, but does not apply to non derivative material which is only evidentiary in character, such as the identity and location of witnesses.

In its holding the court cited to cases requiring disclosure of witness statements. The Court also criticized the holding in Nacht & Lewis Architects stating that the holding in Nacht was cursory and contained no analysis to support application of the work product privilege under the facts of that case.

In Coito, the Court held that it would be unfair to the requesting party if they were barred from obtaining witness statements because of the prejudice that could potentially result arising from the adversary's possible use of the witness statement at trial as a prior inconsistent statement, a prior consistent statement or as a past recollection recorded without affording other counsel a sufficient opportunity to review the witness statements in advance and to prepare for trial.

The Court also dismissed the notion that qualified work product protection should apply to witness statements obtained by counsel, stating that attorneys and their agents can tailor their questions to avoid disclosing their impressions, conclusions, and theories about the case. The Court noted that if there was something unique about the particular witness interview that invaded the work product privilege, the attorney may request an in camera hearing to seek protection of those portions of the statement believed to be privileged.

The Appellate Court's holding in Coito appears to erode application of the attorney work product privilege regarding witness statements obtained by counsel or counsel's agents, even if those statements are based on questions the attorney has prepared regarding issues of particular importance to the attorney. The decision in Coito also appears to conflict with the fourth Appellate District Court's holding in Nacht & Lewis Architects v. Superior Court 47 Cal.App.4th at 217-218 to the extent that the Nacht held that the attorney work product privileged applied to the list of witnesses interviewed and to witness statements obtained by counsel.

Notwithstanding the Court's decision in Coito, counsel may continue to assert application to the attorney work product privilege regarding witness statements obtained and witnesses interviewed.

Coito is a decision by the Fifth Appellate district, and is not binding on other courts of Appeal or on other divisions of the fifth Appellate district since one district or division may refuse to follow prior decisions of different districts or divisions. (Vol. 9 Witkin, Cal. Procedure, 5th Edition, Appeal, Section 498.)

In cases outside the the Fifth District, Counsel and insurers may continue to rely on the holding in Nacht and on other cases for protection under the attorney work product privilege by pointing out that each case involving issues of work product protection must be evaluated on a case by case basis and that statements that contain an amalgam of the attorney's thoughts and impressions along with evidentiary statements of the witness are protected by the attorney work product privilege. In situations where the attorney is required to ask questions that require disclosure of the attorney's thoughts or impressions, the attorney may also seek in camera review by the Court to prevent disclosure of witness statements.

Insurer's and counsel may also verbally interview a witness without obtaining a statement before determining whether a statement is necessary. However, the holding in Coito indicates that even notes of witness statements taken by the attorney or by the attorney's agent may be discoverable, although it is questionable whether such notes would be discoverable if the attorney's notes solely contained the attorney's analysis of the impact of a witness's statement on the case.

Unless the California Supreme Court provides additional guidance, whether counsel or an insurer may be required to disclose witness statements containing the attorney's thoughts and impressions or regarding the identify of persons interviewed remains uncertain.

Weekly Law Resume

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

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defending insurer, notwithstanding the fact that another insurer was providing a defense to the action.

In this case, there had been no determination as to whether the homeowner's policy provided coverage for this claim. The Auto Club had not established as a matter of law that Turner was not damaged by its failure to provide a defense under that policy. Risely was entitled to show that the wrongful failure to defend Turner under that policy denied Turner the right to have the Auto Club accept a reasonable settlement demand of the claim within the policy limits of the homeowner's policy. This, therefore, exposed Turner to a greater potential for personal liability. Since the Auto Club had not shown as a matter of law that Risely could not establish damages, it was not entitled to summary judgment. The judgment was therefore reversed.

COMMENT

The Court expressly stated it was not deciding whether Risely could establish that Turner suffered damages if the homeowner's policy did not provide coverage for the claims. Since that issue had not been decided in the trial court, the matter was reversed and sent back to the trial court for determination.

Construction Case Alert

Submitted by Haight, Brown & Bonesteel, LLP - Southern CA

APPELLATE COURT CONFIRMS ENGINEER'S DUTY TO DEFEND DEVELOPER ARISES UPON TENDER OF INDEMNITY CLAIM

In the recent case of *UDC-Universal Development, L.P. v. CH2M Hill*, 2010 Cal.App.LEXIS 47 (filed January 15, 2010), the Sixth District Court of Appeal provided a stunning illustration of the far-reaching effects of the California Supreme Court's holding in *Crawford v. Weather Shield Manufacturing Inc.* (2008) 44 Cal.4th 541. In *Crawford*, the Court held the duty to defend under an indemnity agreement arose upon the mere tender of defense of a claim covered by the indemnity.

In the *UDC* case, CH2M Hill provided engineering and environmental planning services to developer UDC on a project that ultimately wound up in a construction defect lawsuit by the homeowners' association ("HOA"). UDC tendered its defense to CH2M Hill, the tender was rejected, and UDC filed a cross-complaint for negligencee, breach of contract and indemnity against CH2M Hill and others. After the HOA's construction defect claims were settled, UDC proceeded to trial against CH2M Hill. The jury found in favor of CH2M Hill on the claims for negligence and breach of contract. At the request of the parties prior to trial, the trial court ruled on the application of the indemnity agreement in light of *Crawford* and , in so doing found that the defense obligation arose upon the tender and that CH2M Hill breached that duty despite the jury finding in favor of CH2M Hill.

The Court of Appeal affirmed, noting that the defense obligation arose "as soon as the defense was tendered and did not depend on the outcome of the litigation," and that the HOA's general description of the defects along with an allegation that "Doe" engineers were negligent triggered the duty to defend.

Although this case did not expand the crushing impact of *Crawford's* holding, it is a reminder that all parties in the construction process can be ensnared by this type of indemnity agreement. While California has put the brakes on subcontractor indemnity requirements for residential construction (*Civil Code* §2782(c)), the defense obligation will still exist to the extent it is embraced by the indemnity agreement. As litigation increases against design professionals, such professionals should consider consulting with counsel to evaluate appropriate limitations on liability prior to the execution of a contract.

Recent Rulings

Submitted by Richard C. Turner, Esq., Thousand Oaks, CA

In *Dominquez v Financial Indemnity Co.* the Court held in a split 2-1 opinion that a drop down provision in Financial Indemnity's auto liability policy, which reduces the liability limits to permissive users to the statutory minimum limit of 15/30/5 from the actual limits, was valid as it met the requirement that it be conspicuous and clear as set out in *Haynes v. Farmers Ins. Exchange* (2004) 32 Cal. 4th 1198, 1204. Obviously, the language of the particular policy must be reviewed to determine if the language meets the requirements of *Haynes*. There was no apparent issue of employment on the part of the owner or other bases to attribute liability on the owner greater than the ownership liability limits also 15/30/5.

Commissioner Poizner Announces La-Based Attorney Surrenders After Being Charged With 28 Felony Counts In Alleged Complex Organized Auto Fraud Ring

Insurance Commissioner Steve Poizner announced today that a Los Angeles attorney surrendered following automobile insurance fraud charges in Alameda County. Susana Ragos Chung, 59, was charged with 28 felony offenses following an investigation known as "Phantom Menace," which was conducted jointly by the Bay Area Auto Fraud Taskforce. The task force is comprised of members from the Department of Insurance, Alameda County District Attorney's Office and the California Highway Patrol.

"Involving yourself in an intricate and illegal fraud ring in the hopes of making an extra buck is one of the worst decisions you can make," said Commissioner Poizner. "No matter how organized or coordinated your fraud operation is, Department of Insurance investigators, CHP and District Attorneys will work tirelessly to catch you and put you behind bars."

It is alleged that Chung acted as the conduit of fraudulent insurance claims associated with a large number of staged accidents in Northern California. The fraud ring included a "capper" who orchestrated the fake accidents by recruiting drivers and passengers willing to say they were in the "accidents," the auto body shop willing to falsify repair records and the medical providers willing to falsify medical records. The capper, Norberto "Chito" Mora, is currently serving an 8 year prison sentence for his role in the fraud ring.

Once the recruitment and information gathering was complete, Chung allegedly submitted the fraudulent insurance claims to multiple companies. Investigators determined that Chung allegedly paid Mora for the cases and then submitted claims on behalf of clients.

Most of the purported "accidents" were not documented in police reports. Investigators determined that some collisions were staged, while other vehicles had claims filed after no collision had taken place at all. Many of the "accidents" were said to have occurred at the same locations, and were said to have involved multiple passengers. Most of the "accidents" led to all participants going to the same chiropractor, not their regular doctor, far away from their homes. There were only a handful of chiropractors repeatedly used in Mora's cases, three of whom have since been convicted of felony insurance fraud.

The Alameda County District Attorney's Office is prosecuting this case. Since the investigation began in 2006, the District Attorney's Office has obtained 94 convictions of individual defendants involved in this ring, including 63 felony convictions.

Commissioner Poizner Announces San Jose Mother and Son Arrested, Face Felony Auto Insurance Fraud and Hit and Run Charges

Insurance Commissioner Steve Poizner announced today the arrests of two suspects for automobile insurance fraud. Maria Valle, 40, and her son, Edgar Valle, 20, both of San Jose, were charged with felony insurance fraud and booked at the Santa Clara County Jail on $35,000 bail each. Edgar Valle was also charged with felony hit and run. Maria was arrested on April 14. Edgar was arrested on April 11.

An investigation conducted by the Urban Organized Insurance Fraud Task Force revealed that on October 11, 2008, a single vehicle traffic accident occurred on Jacklin Rd. in Milpitas. Edgar Valle was allegedly driving a vehicle with several passengers inside, that rolled onto its side. One passenger was injured in the accident. Edgar and the passengers allegedly fled the scene of the accident when the police were called. The injured passenger was later detained and questioned by the police. After the accident, Maria Valle allegedly drove from her East San Jose home to Milpitas to pick up Edgar. The next morning, Maria reported her vehicle stolen to the police and filed a stolen vehicle claim with her insurance carrier.

Maria Valle allegedly made material misrepresentations to the Milpitas Police Officer who was investigating the traffic accident, and to her insurance carrier when she filed an insurance claim, by stating that Edgar was at home with her at the time the vehicle was stolen and during the time that her vehicle was involved in the accident. Edgar was also charged with insurance fraud, as well as felony hit and run.

The case is being prosecuted by the Santa Clara County District Attorney's Office.

CAIIA 2010 Educational Events

As an authorized California DOI education provider (CDI# 198351), the CAIIA will be presenting its annual Seminar on the CA Fair Claim Settlement Practices (FCSPR) and Seminar on Special Investigation Unit Regulations (SIU) and, at two of the locations, we will also be offering SEED (Seminar for the Evaluation of Earthquake Damage) program seminars. The SEED program addresses the training and certification required by CCR, Title 10, Chapter 5, Subchapter 7.5.1, Article 1, Sections 2695.40 through 2695.45. Those regulations set forth the requirements of Insurance Adjuster Training for Evaluating Earthquake Damage. We will also be providing FCSPR and SIU certification at the SEED locations.

At locations in Fresno (6/25/10), Glendale (6/17/10), San Ramon (6/3/10), and San Diego (6/16/10), we will be offering only the FCSPR and SIU seminars.

In Pomona (6/15/10) and Tahoe (6/11/10) we will be offering both the FCSPR and SIU seminars plus the SEED program seminar.

The CAIIA has secured 8 CDI Independent Adjuster CE Hours for the SEED Program and 2 CE Hours for the FCSPR/SIU Program!

Register now for the seminar you wish to attend. Be sure and mark the appropriate location in the box to the right.

Name_____

Co._____

Address_____

City_____ Zip_____

Phone_____

E-mail Address: _____

Fees (circle one): FCSPR/SIU SEED

CAIIA Member fee	$40.00	$100.00
Ins. Co. Employee fee	$50.00	$120.00
Non-Member I/A fee	$60.00	$199.00*

Amount Enclosed - $_____

Credit Card Payment: Amex__Visa__ M/C ___

Ex. Date:_____ Cardholder:_____

Card No:_____

Card Verification Code:_____

Billing Address:_____

_____

Signature:_____

Make checks payable to CAIIA, mail registration and payment to:

CAIIA c/o Peter Schifrin
Schifrin, Gagnon & Dickey, Inc.
9255 Corbin Avenue, Suite 200
Northridge, CA 91324

Questions? Call Peter Schifrin @ (818) 721-4713

Schedule for all locations except San Ramon. San Ramon starts at 9:00 am:

Registration	7:30 a.m. to 8:00 a.m.
FCSPR & SIU Seminar	8:00 a.m. to 10:00 a.m.
SEED Seminar	10:00 a.m. to 5:00 p.m.

FCSPR, SIU & SEED SEMINARS

_____June 15, 2010
Pomona: Shilo Inn
3101 W Temple Ave
Pomona, CA 91768

_____June 11, 2010
Tahoe: Inn at the Lake
3300 Lake Tahoe Blvd.
South Lake Tahoe, CA 96150

FCSPR/SIU ONLY SEMINARS:

_____June 25, 2010
Fresno: Ramada Inn
324 E Shaw Ave
Fresno, CA 93710-7690

_____June 17, 2010
Glendale: Carl Warren Company
500 N Central Ave Ste 400
Glendale, CA 91203-3963

_____June 16, 2010
San Diego: American Technologies
8444 Miralani Dr
San Diego, CA 92126

_____June 3, 2010
San Ramon: San Ramon Community Ctr
12501 Alcosta Rd
San Ramon, CA 94583

Please visit www.caiia.com for more information.

**CAIIA agrees to offset any membership dues for Non-CAIIA Independent Adjusting Firms joining the CAIIA within 30 days, up to $80.00 total for each adjuster attending with a cap of $160.00 per firm.*

Grandchildren

Some truly funny and real situations. Enjoy!

She was in the bathroom, putting on her makeup, under the watchful eyes of her young granddaughter, as she'd done many time before. After she applied her lipstick and started to leave, the little one said, “But Gramma, you forgot to kiss the toilet good-bye!” I will probably never put lipstick on again without thinking about kissing the toilet paper good-bye . . .

My young grandson called the other day to wish me Happy Birthday. He asked me how old I was, and I told him 62. My grandson was quiet for a moment , and then he asked, “Did you start at 1?”

After putting her grandchildren to bed, a grandmother changed into old slacks and a droopy blouse and proceeded to wash her hair. As she heard the children getting more and more rambunctious, her patience grew thin. Finally, she threw a towel around her head and stormed into their room, putting them back to bed with stern warnings. As she left the room, she heard the three-year-old say with a trembling voice, “Who was THAT?”

A Grandmother was telling her little granddaughter what her own childhood was like: “We used to skate outside on a pond. I had a swing made from a tire: it hung from a tree in our front yard. We rode our pony. We picked wild raspberries in the woods.” The little girl was wide-eyed, taking this all in. At last she said, “I sure wish I'd gotten to know you sooner!”

My grandson was visiting one day when he asked, “Grandma, do yo know how you and God are alike?” I mentally polished my halo and I said, “No, how are we alike?” “You're both old,” he replied.

A little girl was diligently pounding away on her grandfather's word processor. She told him she was writing a story. “What's it about?” he asked “I don't know,” she replied, “I can't read.”

I didn't know if my granddaughter had learned her colors yet, so I decided to test her. I would point out something and ask what color it was. She would tell me and was always correct. It was fun for me, so I continued. At last, she headed for the door, saying, “Grandma, I think you should try to figure out some of these, yourself!”

To be continued . . .