CAIIA

Status Report

August 2012

Editor's Corner

Over the last several months, your editor has been bringing several items to your attention that may make your re-think the axiom that California is a difficult place to do business, especially for insurance companies handling property and casualty claims. Here is another example.

Have you thought why adjusters should take lots of statements? Here are some thoughts on statements.

If you are handling a liability claim, the statements you take from your insured seem to be immune from discovery by a third party claimant. This writer has had his files subpoenaed three different times for statements of the insured by a third party. The first time was in 1980 while he was working for the Kemper Insurance Group. All three times defense counsel was able to have the subpoena quashed. Elsewhere in this issue of the *Status Report,* you will find recent case law that helps to make witness statements much more difficult to be discovered by the adverse party.

If you are handling a first party claim, the carrier has a right to rely upon what the insured tells the carrier in order for the carrier to handle the claim within the language of the policy.

The rule of thumb in a liability claim is that the investigation is done in anticipation of litigation and the rules of attorney-client privilege apply to the underlying investigation. To make sure that those rules apply to the highest extent possible, be sure to involve defense counsel at the beginning of the investigation. This probably is most practicable when the exposure is known to be high at the onset of the claim. However, all carriers should be aware that it is always a good practice to involve defense counsel early in the handling of any liability case. *(continued on page 2)*

New Supreme Court Case on Witness Statements

Credit to: Anthony Ellrod, Ellrod, Ramirez, Trester

Los Angeles, CA

The California Supreme Court recently issued an opinion which, in a nutshell, provides that recorded witness statements are entitled as a matter of law to at least be qualified work product protection, and are entitled to absolute protection if the party can show that disclosure would reveal its attorney's impressions, conclusions, opinions, or legal research or theories. The Court also held that the identity of witnesses from whom a party's counsel has obtained statements is not automatically entitled as a matter of law to absolute or qualified work product protection, but may be protected if the party can persuade the trial court that disclosure would reveal the attorney's tactics, impressions, or evaluation of the case (absolute privilege) or would result in the opposing counsel taking undue advantage of the attorney's industry or efforts (qualified privilege).

This is a significant decision which clears up what has for decades been a gray area of the law. In the event that you intend to interview witnesses pre-litigation, I strongly recommend that you consult counsel in order to posture for the most protection possible for the information and evidence obtained.

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An Employer Organization of Independent Insurance Adjusters

Inside this issue…..

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To add other insurance professionals

CAIIA Newsletter

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President's Message

August, 2012
This July we have wrapped up our planned education for this year. Some times we do not really understand what the CAIIA has accomplished over the years.

In 1994 the Los Angeles area was hit with a 6.8 magnitude earthquake. As a result of that earthquake several new regulations came into effect. The one that most effects us as adjusters is that we are required to, every three years, attend a qualifying earthquake seminar. At the completion of that seminar attendees are qualified to handle earthquake claims for the next three years.

Jeff Caulkins
CAIIA President

In 2004 the board and members of the CAIIA put together a seminar in compliance with the department of insurance regulations. Today many have copied those classes. However; it is the CAIIA who first put together the seminar that is still the preeminent and most comprehensive class being taught each year. Most other SEED want-to-be classes fall short of meeting the requirements set forth by the state of California.

I have had the privilege for the last several years to assist in the Seminar for the Evaluation of Earthquake Damages (SEED) classes; however there are many who take time off from their busy schedules to make sure these classes are taught. I would like to thank Tim Waters who worked to make sure all the licensees received their CE credits for their classes. I would also like to thank each of the members who assisted and taught either the SEED or FCSPR/SIU.

Also I want to thank Dan Dyce who took the time to explain the CEA policy and Exponent Engineering for their expertise. Finally Kevin Hanson who always is ready to assist us with the Mediation portion of the SEED.

For those who I have not thanked by name I want you to know on behalf of the Board of the CAIIA we do appreciate your participation and leadership.

Jeff S Caulkins AMIM AIC RPA
President
California Association of Independent Insurance Adjusters.

(Editor's Corner, continued from page 1) Although most property adjusters do not take very many statements from their insureds, it should be considered anytime there is a question of how the policy may be able to respond. That statement can be used by the carrier's defense counsel when defending a bad faith claim. If the insured changes his or her story, the original statement taken by the adjuster can do wonders in helping the carrier's defense counsel. Also, it shows that the insured was given the opportunity to explain the facts of the claim to the carrier.

The bottom line is "don't be afraid to take statements when you are handling claims in California." The more concrete information the carrier has, the better prepared the carrier can be.

In Memoriam...

Dave Elsebusch

Dave Elsebusch, age 77, died at his home in McKinleyville, CA on June 28th. The adjusting community lost a great investigator. He was a good husband, and a good friend to many.

Dave worked in the insurance industry for many years and for many different companies, including CAIIA member firm SGD, Inc., and AIMS. He could handle any claim that was thrown his way. He was passionate about the claims he handled, and about people being responsible for their actions.

Dave was born in Southern California, where he went to school and worked for several major insurance companies. He also served in the United States Marines. After moving to Humboldt County over 20 years ago he was very active in the community, challenging the local government officials, and running for office. Dave was married to Penny for 52 years. She was right by his side all the time.

Among other pursuits, Dave ran his vintage race car. Penny also drove race cars and was a great wife, companion, and friend to Dave. Even over 70 years old at the time, Dave would jump into his fire suit, helmet, and race, head down and good to go in his red #14 Lotus.

Dave will be missed!

ATTENTION CAIIA Members: Volunteers are needed to man the CAIIA booth at the CCNC on August 16 & 17. Please email Sterrett (harperclaims@hotmail.com) to volunteer.

CAIIA Nominations for 2012– 2013

The following message is being submitted to all members as per the requirements of the Bylaws of the California Association of Independent Insurance Adjusters.
Your nominating committee has nominated the following people for the offices listed for 2012 to 2013.

President:	William McKenzie, Walsh Adjusting, San Diego, CA
President Elect:	Tonya Gonder, Casualty Claims Consultants, Oakland, CA
Vice President:	Kearson Strong, Malmgren and Strong, Fresno, CA
Secretary/Tres.	Kim Hickey, SGD, Inc., Northridge, CA
Directors:	Tim Waters, Buxbaum Loggia & Associates, Inc., Fullerton, CA
	Doug Steig, DKS Claims Service, Lake Elsinore, CA
	Charles Deen, CD Claims, Inc., Carlsbad, CA

If any member in good standing wishes to nominate someone to the Board, that person may do so at anytime 30 days prior to the Annual Meeting by submitting the nomination to the Executive Office at harperclaims@hotmail.com or by snail mail to P.O. Box 168, Burbank, CA 91503-0168.

The nomination committee this year consists of :
Phil Barrett, Barrett Claims Service Ukiah, CA,
Doug Jackson, SGD, Inc., Northridge, CA
Sam Hooper, Sam Hooper and Associates, Inc.

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INSURANCE COMMISSIONER DAVE JONES ANNOUNCES ARREST OF BAY AREA BUSINESS OWNERS FOR WORKERS' COMPENSATION INSURANCE FRAUD

Husband and Wife allegedly defraud deceased workers family out of $650,000 benefit

Insurance Commissioner Dave Jones today announced that Allan Pacheco, 57, and his wife Carolina Pacheco, 47, both of Redwood City have been arrested on felony charges related to the failure to pay workers' compensation insurance premiums. Allan Pacheco's bail has been set at $50,000 and Carolina Pacheco's bail has been set at $20,000.

"This is a very tragic case in which a work-related accident claimed the life of an employee," said Commissioner Jones. "Now, due to the alleged fraud committed by the company owners, his family has suffered not only a great loss of a loved one but also the insurance benefit they should have received and were entitled to."

According to Detectives of the California Department of Insurance (CDI) Fraud Division, Silicon Valley Regional Office, the Pacheco's were co-owners of A & F Engineering in San Mateo and were contracted with Redwood City to perform street light repairs. On December 22, 2009, an employee, Jose Villanueva, was run over by a company truck at the intersection of Marine Parkway and Twin Dolphin Drive in Redwood City and subsequently passed away en route to the hospital.

Upon Villanueva's death, a workers' compensation claim for the death benefit was submitted to A & F's carrier. During an investigation by the carrier into the facts of the loss, it was discovered that Allan Pacheco allegedly lied as to the true nature of work his employees were conducting; stating they only did inside electrical work. This was done in an effort to obtain a workers' compensation policy at a cheaper rate. Upon policy inception, the insurer did not cover road, height or depth exposure. Due to Pacheco's misrepresentation, the workers' compensation policy was rescinded and thus no death benefit was paid to Villanueva's widow and three children.

CDI's investigation revealed that approximately four months prior to the death claim another employee of A & F Engineering was injured on the job while lifting a utility box on the street. This employee was driven to the hospital and allegedly told by his employer to report that the injury occurred at home rather than on the job. Additionally, Allan and Carolina Pacheco, upon notice of this injury also failed to report the injury to the insurer and instead reimbursed the employee for his private medical insurance deductible. Had this injury been accurately reported the policy would have been rescinded prior to the death claim and a new policy would have been purchased, thus possibly providing the death benefit to Villanueva's family.

Due to the misrepresentation on the application for workers' compensation insurance, A & F Engineering failed to pay the correct amount of premium to their carrier. It was determined that had A & F Engineering accurately reported the type of work their employees were doing when securing workers' compensation insurance, they would have owed an additional $11,496 in premium for the policy periods between 2007 and 2009. In addition, due to this misrepresentation, the death benefits were not paid which would have been approximately $650,000 plus burial benefits.

Allan Pacheco and Carolina Pacheco were each charged with one felony count for violating Penal Code Section 550 (b)(3). Additionally, Allan Pacheco was charged with one felony count for violating Insurance Code Section 11760(a), and one felony count for violating Insurance Code Section 1871.4 (a)(4). This case is being prosecuted by the San Mateo County District Attorney's Office. If convicted, Carolina Pacheco faces up to five years in state prison and a $50,000 fine and her husband, Allan Pacheco, faces up to five years in state prison and approximately $660,000 in restitution.

Court Upholds Full Reimbursement of Uncovered Settlement From Jointly and Severally Liable Insureds

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

In *Axis Surplus Insurance Co. v. Reinoso* (No. B228332, filed 6/26/12), the appeals court affirmed a judgment for complete reimbursement of uncovered settlement payments, rejecting an argument by one coinsured that she was innocent of the intentional and non-accidental conduct that voided coverage, and, therefore, entitled to an allocation for part of the settlement as covered damages.

The insureds were husband and wife co-owners of numerous rental properties in the Palmdale area, which they held as community property. The tenants of one complex brought a habitability action against the owners and their management company, alleging claims for breach of contract; breach of implied warranty of habitability; negligence; nuisance; negligent and intentional infliction of emotional distress; and violation of Business and Professions Code section 17200.

Axis had issued general liability insurance covering the property, and the insurer agreed to defend the owners under a reservation of rights. The insurer ultimately settled the case for several million dollars and sued the insureds for reimbursement, on a theory that the slum conditions at the property were caused by intentional and nonaccidental conduct on the part of the insureds.

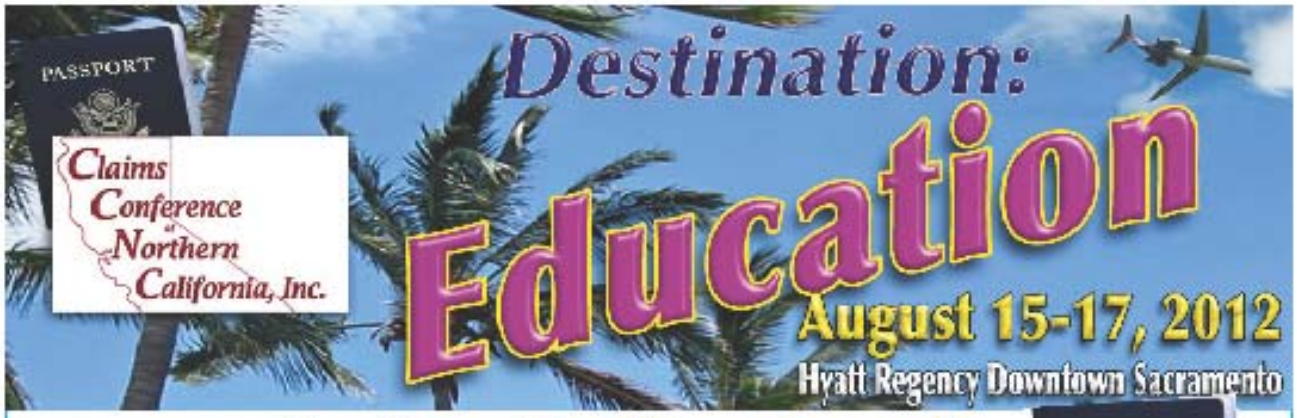
At trial of the coverage action, extensive evidence showed that the management of the property was based on a purposeful business model of performing maintenance and repairs cheaply, even if that resulted in substandard living conditions at the property. Among other things, this included a plan to rent to new illegal immigrants from Central America because they were not aware of their rights and could be threatened with deportation if they complained about conditions.

The trial court found that the insurer failed to carry its burden of showing that the claims were not potentially covered, as required for recovery of defense costs under *Buss v. Superior Court* (1997) 16 Cal.4th 35. However, the court noted that a potential for covered damages does not obligate the insurer to indemnify for settlements or damages, and found that there was no coverage, citing *Johansen v. California State Auto. Assn. Inter-Ins. Bureau* (1975) 15 Cal.3d 9. Accordingly, the court entered judgment for reimbursement of the full settlement paid by the insurer.

On appeal, the wife contended that the trial judge should have allocated the amount of the settlement as between individual insureds, arguing that she was not involved in day-to-day operations at the property and, therefore, an innocent coinsured entitled to coverage for a share of the settlement. The appeals court disagreed, finding that although the judgment was silent on the issue, it could be implied that the trial court had rejected an innocent coinsured defense. The appeals court found substantial evidence in the record that the wife was intimately involved in the rental operations, including knowledge of her husband's repeated criminal citations on habitability charges. According to the appeals court, the fact that the judgment was entered reflected the trial court's conclusion that the wife was not entitled to coverage.

The *Axis* court distinguished *LA Sound USA, Inc. v. St. Paul Fire & Marine Ins. Co.* (2007) 156 Cal.App.4th 1259, which had allocated between insureds in a reimbursement action on the principle that the right to reimbursement only runs against the person who benefits from unjust enrichment "to the extent the person actually benefits." But the *Axis* court said that the *LA Sound* court had found it "implausible" that the insureds all shared identical liability. By contrast, the appeals court pointed out that as a co-owner of the property, along with her active participation in management, the wife in *Axis* was jointly and severally liable for all of the causes of action alleged by the tenants.

Thus, the *Axis* court found no error in the judgment for reimbursement of the entirety of the settlement paid by Axis.



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Afternoon Session kicks it off

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Scott Friedman

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General Contractor Protected from Claims by Independemt Contractors Employee

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

This case is the latest decision limiting the liability of a general contractor for jobsite injuries suffered by an employee of a subcontractor.

Plaintiff Brian Brannan ("Plaintiff") was a journeyman bricklayer, working for Bratton Masonery ("Bratton") at the El Cerrito High School construction site. Defendant Lathrop Construction Associates, Inc. ("Lathrop") was the general contractor for the project, and hired Bratton to perform masonry work at the site.

Lathrop hired another subcontractor, M. Perez Company, Inc. dba Henley & Company ("Henley"), to perform plaster work on the site. Lathrop's subcontract agreements required each of the subcontractors (Bratton and Henley) to comply with all federal and state safety requirements, to comply with Lathrop's safety procedures, and to maintain a safety program on the construction site. Lathrop was in charge of coordination of the work on the site, and had the authority to stop any subcontractor's work for a safety issue. Each subcontractor also had the authority to stop its own work for a safety issue.

In coordinating and sequencing the subcontractor work, Lathrop determined that Henley would perform the plastering work and then remove its scaffold before Bratton started the masonry work. However, Henley left a portion of the scaffold in place at the request of a third subcontractor. On the day of the incident, Bratton's employees, including Plaintiff, were working in an area where the scaffolding was located, and it was raining. Bratton's foreman did not have safety concerns about the rain on the day of the incident, or about Bratton employees working around the scaffold.

Plaintiff slipped on the wet scaffolding and sustained injuries. At the time, he was trying to gain access to the area underneath the scaffold to lay a brick veneer. Plaintiff sued Lathrop, alleging causes of action for negligence and premises liability.

Lathrop successfully moved for summary judgment. The trial court ruled that while Lathrop was responsible for scheduling and coordination and had authority to order the scaffolding removed, no issue of fact was presented to establish that Lathrop exercised control "in a way that affirmatively contributed to Plaintiff's injuries."

On appeal, Plaintiff argued that Lathrop (1) scheduled the work, (2) permitted the scaffold to remain in place, and (3) did not stop the work because of rain. According to Plaintiff, each of these raised triable issues of fact as to whether Lathrop "affirmatively contributed" to Plaintiff's injuries.

The Court of Appeal affirmed the trial court's ruling. Under the *Privette-Toland* Doctrine, an employee of an independent contractor cannot recover from the party that hired the independent contractor. As the Supreme Court has noted, when a party hires an independent contractor, it delegates tort liability owed to the independent contractor's employee to the independent contractor.

The doctrine is underscored by the workers' compensation system. If an employee of an independent contractor is injured on the job, workers' compensation is available to remedy the injury. No additional remedy against the party that hired the independent contractor is necessary. Workers' compensation also protects the independent contractor from liability to the injured employee. Therefore, it would be illogical and unfair to subject the hiring party to greater liability than the independent contractor, as the independent contractor has greater control over the injured employee.

An exception to this general rule was described in *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, where the general contractor affirmatively contributed to the injuries of an independent contractor's employee. The court in *Hooker* held that retaining control over safety conditions was not a sufficient basis for liability on its own. Liability is only appropriate when the hirer is *directly* liable for the injury *as a result of its own affirmative behavior*, and not merely vicariously liable for the acts of the independent contractor. (continued on page 8)

(continued from page 7)
Applying the *Privette-Toland* Doctrine and the holding in *Hooker* to the present case, the Appellate Court found that Lathrop's scheduling of the work and permitting the scaffold to remain raised no triable issue of fact. Lathrop did not direct Bratton or Plaintiff, and Bratton never requested that the scaffold be removed. Merely failing to exercise the power to compel safer procedures does not, without more, constitute an affirmative act supporting liability. Furthermore, Lathrop did not have knowledge of the specific safety issue causing injury to Plaintiff. The failure to call a rain day is also insufficient. Lathrop's authority to stop work was not exclusive, and Bratton had authority to call a rain day on its own.

COMMENT

This case clarifies the general rule of non-liability for the hirer of an independent contractor and gives much needed guidance in determining what constitutes "affirmative contribution" to establish liability. The Appellate Court strengthened the doctrine's protection of general contractors by limiting the scope of its exception: artful pleading cannot transform authority to act into an affirmative act causing injury. Retaining control over safety conditions, without more, does not subject a general contractor to liability, as long as it is not exclusive control.

Once Liability is Clear, Insured has a Duty to Settle

Smith,Smith & Feeley, Irvine, CA

After an insured's liability has become reasonably clear, an insurer has a duty to attempt to effectuate settlement on behalf of the insured, even in the absence of a settlement demand from the claimant. (*Du v. Allstate Ins. Co.* (9th Cir. 2012) __ F.3d __)

Facts

In June 2005, Joon Hak Kim caused a car accident in which Yang Feng Du and three other persons were injured. At the time of the accident, Kim was insured under a Deerbrook Insurance Company automobile policy with bodily injury liability limits of $100,000 each person / $300,000 each accident.

In the months following the accident, Deerbrook unsuccessfully tried to obtain a statement from Kim as well as medical documentation from Du and the other three injured parties. Notwithstanding the lack of cooperation by Kim and Du, by mid-February 2006, Deerbrook personnel knew that Kim was liable for the accident and knew that Du was claiming a serious injury.

In June 2006, Du and the other three injured persons, through their attorney, wrote to Deerbrook and made a global demand to settle all four claims against Kim for the policy's "each accident" limit of $300,000. The attorney simultaneously provided Deerbrook with copies of medical bills for Du totaling almost $109,000, and indicated that the other three claimants had medical bills of approximately $6,700, $13,300 and $13,800, respectively. Deerbrook's adjuster responded that Deerbrook did not have sufficient information about the other three claimants, but suggested settling Du's claim separately for the policy's "each person" limit of $100,000. The attorney rejected that suggestion and indicated that Deerbrook had to pay the full $300,000 to settle all the claims.

Shortly thereafter, in July 2006, Deerbrook offered to pay $100,000 in settlement of Kim's alleged liability to Du. In August 2006, Du, through her attorney, rejected Deerbrook's settlement offer to Du as "too little, too late."

Du later filed a personal injury action against Kim, and Du eventually obtained a $4.1 million judgment against Kim. Deerbrook paid the $100,000 available under Kim's policy in partial satisfaction of the judgment. Kim then assigned his bad faith claim to Du in exchange for Du's agreement not to execute on Kim's personal assets.

Later, Du, as Kim's assignee, filed suit against Deerbrook in federal district court in an attempt to collect the portion of the judgment in excess of the policy limit. Du essentially alleged that Deerbrook had acted in bad faith by failing to attempt settlement of Kim's liability to Du even after Kim's liability for a judgment in excess of the policy limits became reasonably clear in February 2006.

The jury returned a defense verdict in favor of Deerbrook. Du appealed, claiming that the district court had erred in refusing Du's jury instruction on an insurer's duty to settle. (continued on page 9)

(continued from page 8)

At trial of the bad faith case, Du offered a jury instruction which stated that in determining whether Deerbrook had acted unreasonably toward Kim, the jury could consider whether Deerbrook failed to attempt settlement of Kim's liability after Kim's liability had become reasonably clear. The district court refused the proffered instruction on the grounds that (1) an insurer has no duty to initiate settlement discussions absent a settlement demand from the claimant, and (2) in any event, there was no evidentiary basis for such an instruction in this particular case. The district court instead instructed the jury that it could find that Deerbrook had acted in bad faith toward Kim only if Deerbrook had *failed to accept a reasonable settlement demand by Du.*

HOLDING

The Ninth Circuit Court of Appeals affirmed the defense judgment in favor of Deerbrook.

However, in affirming the judgment, the Ninth Circuit, purporting to apply California law, held that once an insured's liability becomes reasonably clear, *an insurer has an affirmative duty to attempt to settle on behalf of the insured within the policy limits – even absent a settlement demand by the claimant.* The Ninth Circuit reasoned that there is a conflict of interest between the insurer and the insured whenever there is a significant risk of an excess judgment against the insured, and this conflict exists "regardless of whether a settlement demand is made by the injured party." Further, while the California state courts have never specifically addressed the question, the Ninth Circuit has previously interpreted California law as imposing an affirmative duty on an insurer to attempt settlement even without a settlement demand by the claimant. Last, California Insurance Code section 790.03(h) specifically defines "unfair claims settlement practices" as including "not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear." Thus, the Ninth Circuit agreed that Du's proposed jury instruction accurately stated California law, i.e., once an insured's liability becomes clear, an insurer has an obligation to attempt settlement on behalf of an insured, even without a demand by the claimant.

The federal appellate court then concluded that, while Du's proposed jury instruction accurately stated California law, there was *no evidentiary support for the instruction in this particular case*. The appellate court emphasized that while Deerbrook had repeatedly asked Du's counsel for documentation regarding Du's injuries and medical expenses, Du's counsel did not provide Deerbrook with any such documentation until June 2006. Very shortly thereafter, in June and July 2006, Deerbrook offered the $100,000 policy limit to Du, which Du rejected. The appellate court thus concluded that, while Deerbrook did have a duty to initiate settlement talks with Du, Deerbrook did so in a timely fashion. Accordingly, since there was no evidence supporting Du's proposed instruction, the district court did not abuse its discretion in refusing to give the instruction.

Comment

California courts have commonly dealt with "duty to settle" issues in situations in which the insurer has allegedly *rejected a reasonable settlement offer* within policy limits. At issue in this case was whether the duty to settle more broadly requires an insurer to *attempt settlement when liability is reasonably clear, even in the absence of a settlement demand*. The federal appellate court here held that the duty to settle includes a duty to *proactively attempt settlement* so as to avoid exposing the insured to a judgment in excess of the policy limits.

The Ninth Circuit's decision in this case is technically not binding on California state courts, which have previously made statements suggesting that a settlement demand within policy limits is a requirement in order to impose liability on an insurer for a judgment in excess of the policy limits. (See, e.g., *Coe v. State Farm Mutual Automobile Ins. Co*. (1977) 66 Cal.App.3d 981, 989 and *Merritt v. Reserve Ins. Co*. (1973) 34 Cal.App.3d 858, 873.) In its ruling in this case, the Ninth Circuit dismissed these prior statements by the California courts as mere "*dicta.*" Whether California state courts ultimately agree with the Ninth Circuit on this issue remains to be seen. In the meantime, in cases where the insured's liability is reasonably clear and there is a risk of a judgment in excess of the policy limits, a cautious insurer may want to consider affirmatively attempting settlement, even if the claimant has not made any settlement demand. Failure to do so may result in a subsequent claim that the insurer is liable for the full amount of any judgment entered against the insured – including amounts in excess of the policy limit.

On the Lighter Side...