CAIIA Status Report
NOVEMBER 2010

Insurance Law News

Submitted by Smith, Smith & Feeley, LLP - Irvine, CA

Where Insured Contends Insurer Fraudulently Induced Settlement Agreement, Insured Cannot Affirm Agreement and Sue for Damages, But Instead Must Seek Rescission

Where an insured contends an insurer fraudulently induced the insured into entering into a settlement agreement, the insured cannot affirm the agreement, keep the money and sue for damages but, instead, must seek to rescind the settlement agreement in accordance with California's rescission statutes. (*Village Northridge Homeowners Association v. State Farm Fire and Casualty Company* (2010) 50 Cal.4th 913)

Facts

An earthquake caused damage to property that Village Northridge Homeowners Association (Village Northridge) owned. Village Northridge made a claim to its insurer, State Farm Fire and Casualty Company (State Farm).

State Farm represented that the policy limit for earthquake damage was $4,979,900, with a 10 percent deductible. State Farm made several payments, totaling about $2,068,000, to Village Northridge for the earthquake loss.

Later, Village Northridge located documents indicating the limits were different than State Farm had represented. In addition, Village Northridge discovered additional damages allegedly caused by the earthquake. State Farm re-inspected the property and concluded that some of the additional damage was earthquake-related, while other damage was not. State Farm paid Village Northridge about $7,466 for the additional damage.

Still later, although they continued to dispute the policy limits and the amount of money owed, Village Northridge and State Farm negotiated a written settlement agreement by which State Farm paid an additional $1.5 million. Pursuant to the settlement, Village Northridge released State Farm from all known or unknown claims related in any way to Village Northridge's earthquake claim. More specifically, Village Northridge specifically agreed to "refrain and forbear from commencing, instituting, or prosecuting any lawsuit, action, or any other proceeding against [State Farm] based on, arising out of, or in connection with any claims, actions, causes of action, charges, demands, contracts, covenants, liabilities, obligations, expenses...and damages that are released and discharged."

After entering into the settlement agreement and accepting the $1.5 million settlement payment, Village Northridge sued State Farm. In its complaint, Village Northridge alleged that State Farm had misrepresented that the policy limit for earthquake damage was only $4,979,900, and that the actual limit was much higher. Village Northridge also alleged that the $1.5

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PRESIDENT'S MESSAGE

"I am a success today because I had a friend who believed in me an I didn't have the heart to let him down . . . " ***Abraham Lincoln***

It's September 21, the first day of the fall season. In exactly 31 days, if not impeached first, I will be installed as the 64th President of this organization. As such, I will be changed with the important task of overseeing this prestigious organization which for over 63 years has promoted and nurtured professionalism and excellence amongst independent adjusters practicing in the great state of California. As a solo adjuster, with no employees, and never having served in a leadership position before, I must confess tat I am somewhat daunted by the prospect of presiding over a group of my colleagues and superiors. However, in many ways, the task seems relatively simple as the hard work involved in designing and building this fine machine is already complete. To successfully serve my term, maintenance is all that is required. Affirmative improvement, if I am capable, will simply be a bonus achievement.

It is to my predecessors that I owe the advantage of begin able to stand on their firm shoulders to man the helm of this fine ship. I would here like to congratulate Sam Hooper for his presidency and the years of exemplary service he devoted to reach and complete his recent term. As is Sam's outstanding example is not enough, this group has the good fortune of several other active past presidents on whom I can continue to rely for sagely advice.

Along with this changing of the guard, we have newly composed officers, directors and committee heads. Take a look at the column on the left of this page and you'll see the recognizable names of individuals who possess great experience and refined talents. Take a further look at the list of individuals forming our committees, (www.caiia.com). With the support of dedicated professionals such as these, how can I possible disappoint? Ah the pressure!

So, here I sit, contemplating the purpose and mission of what must be the premier statewide Claims Association of the country. What can I do to ensure that the Association continues its fine legacy of promoting professionalism and excellence amongst its members and claims professionals at large? For this is a purpose higher and larger than any one of us. Although I have some ideas of my own, I want to implore you, whether or not you are a member of the CAIIA, to contact me with any suggestions. We in the claims business are continually confronted with new situations, requiring creative solutions and I would expect there to be a number of independent thinkers amongst our readership who could submit some valuable ideas. Even constructive criticism. Don't worry about being direct. We in the CAIIA are all claims people – we can take it.

Up to this point, I can positively claim that my involvement with the CAIIA has enhanced my capabilities as a claims professional. I have paid a price in so far as committing my time, and in certain instances, stepping outside my comfort zone to accept the challenges. But persevering through the challenges has instilled in me new found confidence and giving me a new perspective.

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PRESIDENT'S MESSAGE

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That new perspective is this, (trite as it may sound); IN ORDER TO MAKE THE MOST OF YOUR MEMBESHIP IN THIS ORGANIZATION, YOU MUST APPLY YOURSELF! Please consider attending your CAIIA functions. Our board meetings are open to all members. Your association needs your input as well as your help. Believe it or not, the only reason you are reading my pontification today is because in 2005, after having been in business for myself for little over a year, I joined, began showing up to meetings, and never said no when propositioned for volunteer opportunities. I would be lying to you if I told you that my blind acceptance of these commitments was painless. However, even during these past few months, when the weight of these commitments has been most severe, I have not regretted my decision. To the contrary, I feel a profound fulfillment. The relationships that have manifested for my involvement in this group and the personal gratification attained only be accepting and conquering the commitments and challenges are priceless. I have no doubt that my active experience with CAIIA these past five years has improved me personally, professionally and financially.

If you have a copy of our CAIIA directory, take a look at the list of 63 past presidents appearing in the first few pages. Chances are you know several of these distinguished individuals and will instantly perceive that they are, or were, all very well respected, successful Independent Insurance Adjusters. I firmly believe that their success, reputation and the soundness of character they project is no coincidence, they earned it in part by devoting themselves to this fine group. I hope I can live up to their example and urge you, as a member, or prospective member of the CAIIA, to consider doing the same someday. If I can, (and I still have my work cut out for me), you can.

PHIL BARRETT
President - CAIIA 2010-11

Insurance Law News

Submitted by Smith, Smith & Feeley, LLP - Irvine, CA

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million additional settlement State Farm paid was grossly deficient and represented only a partial payment for the actual damage. In addition, Village Northridge alleged that it had signed the settlement agreement "under compulsion" in order "secure partial benefits owed."

Significantly, Village Northridge insisted throughout the litigation that it did *not* seek to rescind the settlement agreement and that it did *not* intend to refund the $1.5 million that State Farm had paid. Instead, Village Northridge asserted that it wanted to affirm the release and to sue for additional damages.

The trial court ruled in favor of State Farm, and concluded that Village Northridge "could not affirm the settlement agreement and simultaneously assert claims that were explicitly released in it." The case went to the Court of Appeal and, eventually, to the California Supreme Court.

Holding

The Supreme Court ruled in favor of State Farm, and concluded that Village Northridge could not affirm the settlement agreement and simultaneously assert claims that were explicitly released in the settlement agreement. The Court noted that California statutes and California case law specify the rules under which a party can seek to set aside a settlement agreement.

Village Northridge alleged State Farm committed fraud in the inducement in the settlement process by misrepresenting policy limits. Generally, when one party contends he entered into a contract because he was induced to do so by fraud, that party must rescind the agreement.

Civil Code section 1691 requires the party seeking rescission to give notice to the other party "as to whom he rescinds," and to restore all consideration or "everything of value which he has received" under the contract. A related statute, Civil Code section 1693, provides that a party who files an action for rescission "shall not be denied relief because of a delay in restoring or in tendering restoration of such benefits before judgment unless such delay has been substantially prejudicial to the other party; but the court may make a tender of restoration a condition of its judgment."

Although California has rejected the "affirm and sue" principle adopted by several states, Civil Code section

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1693 permits a plaintiff who is unable to restore the consideration received through a settlement agreement to delay the restoration of consideration until final judgment consistent with equitable principles, including that the defendant not be substantially prejudiced by the delay. Had Village Northridge sued for rescission of its release under the statutory scheme governing rescission, it might have had the opportunity to delay restoration of the consideration it received in settling the property damage matter. Again, however, Village Park never attempted to rescind the settlement agreement.

Comment

To allow an insured to settle with an insurer and sign a release, keep the money, and then sue the insurer for alleged fraud without rescinding the release under California's statutory scheme would violate the terms of the bargain and frustrate its purpose. It would also likely inhibit insurance companies' practice of using a release to settle disputed claims. The Legislature has created a fair and equitable remedy to address the alleged fraud problem: rescission of the release, followed by suit. When restoration is impossible because the settlement monies have been spent, the financially constrained parties can turn to Civil Code section 1693 to delay restoration until judgment, unless the defendants can show substantial prejudice.

Pursuant to "Going and Coming" Rule's "Required Vehicle" Exception, Employee Is "Insured" For Accident While Driving to Work, and Employer's Liability Thus Falls Within "Auto" Exclusion of CGL Policy

In light of the "going and coming" rule's "required vehicle" exception, an employee was an "insured" for an auto accident while driving to work, with the result that his employer's liability was barred from coverage by an "auto" exclusion in a CGL policy. (*Sprinkles v. Associated Indemnity Corp.* (2010) 188 Cal.App.4th 69)

Facts

Sinco Co., Inc. (Sinco) was a property management company which required its employee, Juan Babinz (Babinz), to use his own vehicle to transport himself to various job sites each day. While Babinz was driving to work in the vehicle which he used to visit job sites, he caused an automobile accident which resulted in the death of Michael Sprinkles (Sprinkles).

Sprinkles' heirs filed a wrongful death action against Sinco and Babinz, alleging that Sinco was vicariously liable for the acts of its employee Babinz, and that Sinco had negligently hired Babinz. Sinco and Babinz sought defense and indemnity under various policies issued to Sinco, including a $1 million commercial general liability policy issued by Fireman's Fund Insurance Company (Fireman's Fund). However, Fireman's Fund declined to participate in defending or indemnifying Sinco and Babinz under the CGL policy, citing that policy's exclusion for injuries "arising out of the ownership, maintenance, use or entrustment to others of any … auto … owned or operated by or rented or loaned to any *insured*." The policy defined an "insured" so as to include "your [Sinco's] employees, but only with respect to *acts* within *the scope of their employment by you while performing duties related to the conduct of your business*."

Sprinkles' heirs entered into a settlement with Sinco and Babinz. Among other things the settlement agreement provided that Sprinkles' heirs would receive $2 million under two other policies issued to Sinco; that Sprinkles' heirs would submit their claims against Sinco and Babinz to arbitration; and that Sinco and Babinz would give Sprinkles' heirs an assignment of any rights against Fireman's Fund in exchange for Sprinkles' heirs' agreement not to enforce any judgment against Sinco's and Babinz's personal assets.

Thereafter, an arbitrator issued an award of over $27 million in favor of Sprinkles' heirs and against Sinco and Babinz. The award included a finding that at the time of the accident, Babinz was acting within the course and scope of his employment with Sinco pursuant to the "required vehicle" exception to the "going and coming" rule. The superior court confirmed the award as a judgment.

Sprinkles' heirs, as assignees of Sinco and Babinz, then filed a bad faith action against Fireman's Fund. In the bad faith action, Sprinkles' heirs argued that the Fireman's Fund CGL policy's "auto" exclusion only applied to the use of an auto by an "insured," and that at the time of the accident Babinz was *not* an "insured." Specifically,

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Sprinkles' heirs argued that under the particular wording of the Fireman's Fund policy, an employee was an "insured" only if the employee was both acting "within the scope of [his or her] employment" by [Sinco]" *and* "performing duties related to the conduct of [Sinco's] business." According to Sprinkles' heirs, at the time of Babinz's accident while driving to work, Babinz may have been acting "within the scope of [his] employment by [Sinco]," but he was *not* "performing duties related to the conduct of [Sinco's] business." Sprinkles' heirs thus asserted that since Babinz was not an "insured," the CGL policy's "auto" exclusion did not bar coverage for Sinco's liability arising out of Babinz's use of his car.

The trial court concluded that Babinz was an "insured" under the Fireman's Fund CGL policy, and that the policy's "auto" exclusion thus barred coverage for any liability Sinco had in the underlying wrongful death action. The trial court thus entered judgment in favor of Fireman's Fund. Sprinkles' heirs appealed.

Holding

The Court of Appeal affirmed the judgment in favor of Fireman's Fund. The appellate court noted that under the so-called "going and coming rule," an employee is not deemed to be acting within the scope of his employment while going or coming from his place of work. However, the "going and coming" rule is subject to the "required vehicle" exception, which applies when an employer requires an employee to use his or her own vehicle for transportation on the job.

Here, pursuant to the "going and coming" rule's "required vehicle" exception, Babinz's act of driving to work was deemed to be an "act within the scope [his] employment by [Sinco]." Further, because the accident occurred while Babinz was on the way to work, Babinz was "performing duties related to the conduct of [Sinco's] business." Under such circumstances, Babinz was an "insured" under the Fireman's Fund CGL policy, and that policy's "auto" exclusion thus barred coverage for any liability Sinco had to Sprinkles' heirs in the underlying wrongful death action.

Comment

A standard CGL policy defines an "insured" so as to include the named insured's employees "for acts within the scope of their employment by you *or* while performing duties related to the conduct of your business." In contrast, the Fireman's Fund CGL policy's definition of "insured" dropped the disjunctive word "or," so that an "insured" included the named insured's employees "for acts within the scope of their employment by you while performing duties related to the conduct of your business." However, according to the appellate court, this slight difference in wording did not affect coverage under the Fireman's Fund CGL policy. According to the court, it is difficult to conceive of "acts within the scope of employment" that would not also constitute "duties related to the conduct of the business."

"Evidence of Insurance" Was Binder and, Despite Terms of Written Producer's Agreement, Producer Issuing Binder Was Insurer's Agent

An "Evidence of Insurance" form was a binder and, despite the express terms of a written agreement between a producer and an insurer, the producer who issued the binder was the insurer's agent. (*Chicago Title Insurance Company v. AMZ Insurance Services, Inc.* (2010) 2010 WL 3506365)

Facts

Thomas Mustain and Cheryl Mustain (the Mustains) sought to refinance an existing home loan. They hired a loan broker who, in turn, contacted New Century Mortgage (New Century), the proposed lender. New Century instructed Chicago Title Insurance Company (Chicago Title) to open an escrow for the transaction.

New Century would not fund the loan without evidence the Mustains had purchased an insurance policy for the property. As such, the loan broker contacted an insurance producer, AMZ Insurance Services, Inc. (AMZ), and requested that AMZ obtain insurance and provide Chicago Title with evidence of insurance. The initial premium was supposed to be paid through escrow.

AMZ transacted business with Pacific Specialty Insurance Company (PSIC) on a regular basis, but PSIC had never filed a notice of agency appointment filed with the Department of Insurance (an action which clearly

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would have made AMZ an agent of PSIC). Although PSIC never appointed AMZ as an agent, PSIC did have a written producer's agreement with AMZ. The producer's agreement stated that AMZ was not PSIC's agent, and that AMZ did not have authority to bind coverage until AMZ had first transmitted a signed application and collected at least a partial premium payment, and until PSIC had received written approval to bind from PSIC.

Despite the express terms of the producer's agreement, PSIC knew that, on at least 30 prior occasions, AMZ had issued a form entitled "Evidence of Insurance" (EOI) without first obtaining a written application or collecting at least a partial premium payment. In other words, PSIC and AMZ engaged in a course of conduct over time that was inconsistent with the terms of the written producer's agreement.

AMZ provided Chicago Title with an EOI form that stated on its face that "[t]his is evidence that insurance as identified below has been issued, is in force, and conveys all the rights and privileges afforded under the policy." The EOI identified the insurer as PSIC, the insureds as the Mustains, the address of the Mustains' property, the nature and limits of coverage, the amount of the deductible, the amount of the annual premium, and the effective date of coverage.

After AMZ issued the EOI, New Century funded the loan and escrow closed. However, although the premium was supposed to be paid from the escrow account, Chicago Title failed to remit the premium. Shortly after the close of escrow, a fire destroyed the house and killed Mr. Mustain.

PSIC refused to pay Ms. Mustain's property insurance claim, asserting that the EOI was not a binder, that no one had paid the premium payment, and that AMZ was not PSIC's agent. Chicago Title paid Ms. Mustain $270,200 (the full amount she would have been entitled to recover if PSIC had issued the policy described on the EOI), and she assigned to Chicago Title all of her rights against PSIC, AMZ and others.

A jury found PSIC liable to Chicago Title for breach of contract and bad faith. The court entered judgment in favor of Chicago Title for $270,200 as contract damages and approximately $210,000 in bad faith damages for the attorney fees that Chicago Title incurred. Thereafter, PSIC appealed.

Holding

The Court of Appeal affirmed. The EOI form that AMZ issued qualified as a binder, which is a contract that temporarily obligates the insurer to provide insurance coverage pending issuance of the insurance policy for which the applicant has applied. Per Insurance Code section 382.5, a binder is a writing that includes, among other things, the name and address of the insured (and any additional named insureds, mortgagees, or lienholders), a description of the property insured, a description of the nature and amount of coverage, any special exclusions not contained in a standard policy, the identity of the insurer and the agent executing the binder, the effective date of coverage.

Although AMZ did not adhere to the terms of the written producer's agreement, the evidence established that, through a pattern of dealing in prior escrow transactions, PSIC had authorized AMZ to bind coverage by issuing an EOI before receiving a signed application and collecting any premium.

Although PSIC had not filed a notice appointing AMZ as an agent, and despite the terms of the written producer's agreement, there was substantial evidence to support the jury's determination that AMZ had actual authority to bind PSIC by issuing EOI forms for escrow transactions.

Comment

In this instance, it appears that PSIC put form over substance on several different occasions. For example, PSIC insisted that the EOI form was not a binder, even though the EOI form contained all of the statutory elements of a binder. In addition, PSIC steadfastly maintained that AMZ was not PSIC's agent, even though the evidence established that, through a course of conduct, PSIC had allowed AMZ to deviate from the terms of the written producer's agreement and that PSIC effectively had made AMZ an agent for the purpose of binding coverage in connection with escrow transactions.

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In retrospect, it might have been more cost-effective for PSIC to pay the insurance claim under a reservation of rights and to then seek to recoup the money from Chicago Title and/or AMZ. Instead, PSIC denied coverage outright, and exposed itself not only to a contract claim but to a bad faith claim. Because Ms. Mustain assigned her contractual and extra-contractual claims to Chicago Title, PSIC ultimately had to pay the contract claim and Chicago Title's attorney fees (per the *Brandt* case).

Weekly Law Resume

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

Government Liability - Recreational Immunity Statute Does Not Shield Landowner From Liability Caused By Negligent Driving of Employee

Klein v. United States of America California Supreme Court (July 26, 2010)

California Civil Code section 846 provides immunity to California landowners for injuries sustained by recreational users of the property. The issue in this case involves whether section 846 applies to acts of vehicular negligence committed by a landowners's employee that cause personal injury to a recreational user of the land.

In 2004, Plaintiff Richard Klein was riding his bicycle on a public, two-lane, paved road in Angeles National Forest. The park is owned by the U.S. Government. Klein was struck by an automobile driven by a volunteer for the U.S. Fish and Wildlife Service, and suffered serious injuries. Klein brought suit against the United States and the volunteer in U.S. District Court alleging that the United States was vicariously liable for the vehicular negligence of the volunteer.

The United States filed a summary judgment motion asserting that section 846 provided immunity from accidents occurring on its' land to recreational users. The district court granted the motion and Plaintiff appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit requested that the California Supreme Court provide clarification as to whether section 846 applies to vehicular accidents. The Supreme Court concluded that section 846's liability shield does not extend to acts of vehicular negligence by a landowner or the landowner's employee.

The United States contended that section 846 should be interpreted broadly and that landowners should not have a duty to protect recreational users. The Supreme Court held that such an interpretation of the statute was inconsistent with the language of section 846 and the Legislature's intent. Section 846 sets forth that: "an owner of any estate or any interest in real property ... owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose...." The Court interpreted the phrase "keep the premises safe" to infer a premises liability duty, a liability category that does not include vehicular negligence. The Court reasoned that if the Legislature had intended to provide complete immunity for recreational injuries, it would have simply included language that landowners owe no duty of care to avoid injuries to person using their land for recreation. Instead, the Legislature selected language implying a narrower immunity. The Court's research of the Legislative intent of the statute was consistent with its' conclusion. The Court also commented that from a public policy standpoint, the State has a strong interest in promoting safe driving - especially on the millions of acres of National Park and National Forest land owned by the U.S. Government. With this clarification of section 846, the case was referred back to the Ninth Circuit for further disposition.

COMMENT

This decision places a restriction on public or private landowners' reliance on recreational immunity, pursuant to Civil Code section 846. This decision may also place a similar restriction on the scope of California Government Code section 831.7, which immunizes public entities for injuries sustained during a hazardous recreational activity.

Wisdom From Training Manuals

'If the enemy is in range, so are you.' - *Infantry Journal* -

'It is generally inadvisable to eject directly over the area you just bombed.' - *US Air Force Manual* -

'Whoever said "The pen is mightier than the sword" obviously never encountered automatic weapons.' - *General MacArthur* -

'Tracers work both ways.' - *Army Ordnance Manual* -

'Five second fuses last about three seconds.' - *Infantry Journal* -

'Any ship can be a minesweeper. Once.' - *Naval Ops Manual* -

'Never tell the Platoon Sergeant you have nothing to do.'
- Unknown Infantry Recruit -

'If you see a bomb technician running, try to keep up to him.'
- Infantry Journal -

'Yea, though I fly through the Valley of the Shadow of Death, I shall fear no evil, for I am at 50,000 feet and climbing.'
- Sign over SR71 Wing Op -

'You've never been lost until you've been lost at Mach 3.'
- Paul F. Crickmore (SR71 test pilot) -

'The only time you have too much fuel is when you're on fire.'
- Author unknown -

'If the wings are traveling faster than the fuselage it has to be a helicopter – and therefore, unsafe.' - *Fixed Wing Pilot* -

'When one engine fails on a twin-engine airplane, you always have enough power left to get you to the scene of the crash.'
- Multi-Engine training Manual -

'Without ammunition, the Air Force is just an expensive flying club.' - *Author unknown* -

'If you hear me yell; "Eject! Eject! Eject!", the last two will be echoes. If you stop to ask "Why?", you'll be talking to yourself, because by then you'll be the pilot.'
- Pre-flight Briefing from a Canadian F104 Pilot -

'What is the similarity between air traffic controllers and pilots? If a pilot screws up, the pilot dies; but if ATC screws up, . . . the pilot dies.' - *Sign over Control Tower door* -

'Never trade luck for skill.' - *Author unknown* -

The three most common expressions (or famous last words) in military aviation are: "Did you feel that?", "What's that noise?", and "Oh s ---!" - *Authors unknown* -

'Airspeed, altitude and brains. Two are always needed to successfully complete the flight.' - *Basic Flight Training Manual* -

'Flying the airplane is more important than radioing your plight to a person on the ground incapable of understanding or doing anything about it.' - *Emergency Checklist* -

'Piper Cub is the safest airplane in the world; it can just barely kill you.' - *Attributed to Max Stanley (Northrop Test Pilot)* -

'There is no reason to fly through a thunderstorm in peacetime.' -
Sign over Squadroom Ops Desk at Davis-Montham AFB, AZ -

'You know that your landing gear is up and locked when it takes full power to taxi to the terminal.'
- Lead-in Fighter Training Manual -

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