CAIIA Status Report

November 2013

No Bad Faith for Failure to Settle Within Limits Absent Clear Evidence of Claimant's Willingness to Settle

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

In *Reid v. Mercury Insurance Company* (No. B241154, filed 10/7/13), a California appeals court held that, in the absence of a settlement demand or any other indication the injured party is interested in settlement, there is no liability for bad faith failure to settle within limits as long as the insurer has done nothing to foreclose the possibility of settlement.

In *Reid*, Mercury's insured was the cause of a multi-car accident that injured the plaintiff and several others. The plaintiff's injuries were significant and Mercury advised that it was accepting liability, but that there might be a limits issue. Mercury's adjuster believed that liability was 100 percent adverse to the insured.

The plaintiff's son requested disclosure of Mercury's limits, but the adjuster said it could not do so without written permission from the insured. The adjuster then wrote to all claimants saying that Mercury needed to take statements and to obtain medical records from the injured parties. The adjuster also told the insured that the claim could exceed the limits and she might wish to consult personal counsel at her own expense.

Although only four weeks had passed and the plaintiff was still in intensive care, her son hired counsel saying they were being "jerked around" by Mercury's failure to disclose policy limits and its claim that it could not determine liability pending investigation.
Internally, Mercury's adjuster concluded that only the plaintiff's claim posed a potential exposure in excess of the $100,000 per person limit, and the others were all estimated to be within the balance of the $300,000 per accident limit. The adjuster recommended tendering the $100,000 limit "as soon as we have enough information available to do so."

Plaintiff's counsel never made a demand for settlement in any amount. In addition to his demand for disclosure of policy limits, he requested confirmation that the insured was not in the course and scope of employment and that there was no umbrella coverage available. Nine months after the accident, Mercury offered the plaintiff the $100,000 per person limit. That offer was rejected and, in a bench trial, a $5.9 million

Published Monthly by
California Association of
Independent Insurance Adjusters

An Employer Organization of Independent Insurance Adjusters

Inside this issue.....

Bad Faith	Pg. 1
President's Message	Pg. 2
News of Members	Pg. 3
Duty to Defend?	Pg. 3
Go Green	Pg. 4
Duty to Indemnify?	Pg. 5
Negligent Supervision	Pg. 6
Violation of Song-Beverly Act	Pg.7

CAIIA Newsletter
CAIIA Office
PO Box 168
Burbank, CA 91503-0168
Website: www.caiia.org
Email: info@caiia.com
Tel: (818) 953-9200

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

Permission to reprint is always extended with appropriate credit to CAIIA Newsletter.

© Copyright 2013

Status Report Available
by Email and Web Only.

To add other insurance professionals to our e-mail list, please go to CAIIA. com or e-mail a request to statusreport@caiia.com.

California Association of Independent Insurance Adjusters, Inc.

President's Office
6114 La Salle Ave #266
Oakland, CA 94611
Email: info@caiia.com

President
Tanya Gonder
Casualty Claims Consultants, Oakland, CA
tanya@casualtyclaimsconsultants.com

Immediate Past President
William "Bill" McKenzie
Walsh Adjusting Company, San Diego, CA
walshadj@sbcglobal.net

President Elect
Kim Hickey
SGD, Inc., Northridge. CA
khickey@sgdinc.com

Vice President
Tim Waters
Buxbaum Loggia & Associates, Inc., Fullerton, CA
tim@tpwclaims.com

Secretary Treasurer
***Paul Camacho, RPA, ARM**, Mission Adjusters, So Lake Tahoe, CA*
mail@missionadjusters.com

ONE YEAR DIRECTORS
Doug Steig
DKS Claims Service, Lake Elsinore, CA
info@dksclaims.com

Charles Deen
CD Claims, Inc., Carlsbad, CA
chuck@cdclaims.net

Steve Weitzner
Buxbaum Loggia & Associates, Inc., Fullerton, CA
sweitzner@buxbaumloggia.com

TWO YEAR DIRECTORS

Steve Einhaus
Einhaus Adjusting Services, San Rafael,Ca
steveeinhaus@gmail.com

Chris Harris
M3K Business Services, Inc., Redlands, CA
charris@m3kbusiness.com

Harry Kazakian
USA Express Claims,Inc., Encio,CA
harry@usaexpressinc.com

OF COUNSEL
Gary Selvin
Selvin Wraith Halman LLP
505 14th Street Suite 1200
Oakland CA 94612
510 874 1811

President's Message

The CAIIA is celebrating 68 years of providing superior service to insurance industry clients. Another year means another president and I am honored to be the CAIIA's 2013-2014 President. As I enter this new path I am optimistic but walking cautiously. I have a tremendously talented group to pull from so I'm certain the cautious walk will become an effortless jog.

Tanya Gonder
CAIIA President

Just who is this new President? I have been in the insurance industry since 1979. I was just entering the full-time job market and had hoped to be a Broadcast Journalist. Well when I learned I'd have to start as an administrative assistant which meant typing and taking coffee orders, my glamorous career aspirations faded. I heard, through my now spouse, a major insurer was hiring claim representatives (I've always blamed him!). I sent in my resume and a claim adjuster was born.

I vividly recall my interview. The claims manager asked me if I was comfortable with negativity. I predictably replied I was. He said every time you answer the phone someone will have a problem and they will expect you to help them. He was right. Fortunately I discovered I had a knack for calming the insured whose home was flooded or the driver who just hit a pedestrian. As I weaved through the corporate claims world I garnered enough knowledge, or so I thought, to hang my own shingle. I continue to calm the caller and so do the distinguished members of the CAIIA. We pride ourselves in staying current and delivering the service our clients expect. In the coming months look for the CAIIA's social media launch!

Now on to the presidency!

Tanya Gonder

CAIIA President 2013-2014

News of our Members:

Orlo R. Hill, 90, of Manson, died Sunday, Aug. 25, 2013.
He had lived in Manson for 28 years and he previously lived in San Francisco and worked as an adjuster.
He was our 73-74 president of the CAIIA
Survivors include his wife, Beverly F. Allen-Hill of Manson; and his children, Matthew Hill of Ben Lomond, Calif., Mary Yee of San Mateo, Calif., Joan Piazza of Reno, Nev., and Patricia Hill of San Francisco, Calif.
A private inurnment service will be held at St. Andrews Espisopal Church in Chelan.
Arrangements are by Precht Rose Chapel, Chelan.

Past Presidents at the CAIIA Convention

Past Presidents at the Annual Convention: l to r Bill McKenzie (Walsh Adjusting), Phil Barrett (Barrett Claims Service), Pete Vaughan (Vaughan and Associates), Doug Jackson (SGD, Inc.), Peter Schifrin (SGD, Inc.), Sterrett Harper (Harper Claims Service, Inc.), Jeff Caulkins (John S. Rickerby Company)

Briefs

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

Mt. Hawley Ins. Co. v Lopez
215 Cal.App.4th 1385

Mt. Hawley declined to defend or indemnify Dr. Richard Lopez against a grand jury indictment by the United States Attorney for criminal conspiracy, false statements and concealment, and falsification of records. The Court of Appeal held that Insurance Code Section 533.5 did not forbid defense of claims by a United States Attorney, even though it does forbid a defense for certain types of criminal or administrative proceedings. The Court reviewed the legislative intent of Section 533.5 and found that the prohibition on the duty to defend is limited to claims enumerated in Section 533.5, but did not extend to federal indictments. In addition, the Court found that while Section 533 prohibits indemnification for losses caused by willful acts, Section 533 did not extinguish the insurer's duty to defend an insured accused but not convicted of those willful acts.

Enter the Young

What will provide the major impetus to enable us to live more sustainably?

The major drivers of necessary change have been always been churches and universities. Universities are currently taking the lead in "green innovation".

Per the Sierra Club magazine, the top 10 schools that have been excelling in categories of Greenness include *four California universities*. These are the *University of California Irvine*, *University of California Davis*, *Stanford University*, and the *University of California Santa Barbara*. The *number one* ranking goes to *University of Connecticut*. Below are a few highlights:

Big plans for Stanford University include a new energy facility that will halve the 8,180 acre campus carbon emissions. (Approximately 40% of CO2 results from energy production, and around 30% of CO2 is emitted from various modes of transportation.)

Next we have last year's winner: The University of California at Davis. Davis has America's *biggest planned zero-net-energy community* and has already cut campus emissions below year-2000 levels.

Equally innovative and enthusiastic is the University of Connecticut which has more than a quarter of its food processed with 100 miles with the ingredients produced on campus including honey, fresh eggs from the Agricultural Department and seasonal produce from a student run farm.

On average, most of our meals have traveled about 1,300 miles before they arrive at the table. Food Miles is the distance our food travels from farm to store. The higher number of Food Miles traveled - the greater amount of energy consumed and fossil fuels burned – both of which contribute to Global Warming.

Organic foods lessen our exposure to toxic substances and use sustainable regenerative farming methods. However, they are only good for the planet if their food miles are minimized.

What can we do? In part we may choose locally grown food, a la our local farmers markets, or grow our own and/or support a community garden.

And one seasonal idea is to avoid vampire power. This is the energy drain from appliances such as televisions, computers, and cell phone chargers that are left in standby mode. The stake in the heart of vampire power is to unplug devices. P.S. Keep some wolfs bane handy to thwart vampires (and werewolves).

"Enthusiasm is the yeast that raises the dough"

Paul J. Meyer

Comments and input sought at steveeinhaus@gmail.com

Steve Einhaus

Self Insured Retention Provision Applies To Duty To Indemnify But Not Duty To Defend

Credit to McCormick Barstow, Fresno, CA

Developer Holding hired Ebensteiner to grade land. Ebensteiner agreed to indemnify Holding against liability for loss caused by Ebensteiner, even if Holding's conduct also contributed to the loss. The grading allegedly caused two landslides resulting in damage to several homes. The homeowners sued Holding and Ebensteiner. Holding was insured by Admiral. Ebensteiner was insured by ASIC, and Holding was an additional insured under the ASIC policy. ASIC filed a declaratory relief action against Admiral, seeking reimbursement of a pro rata share of the amount ASIC spent to defend two entities related to Holding ("the Horton entities") which had no contractual relationship with Ebensteiner and were not included as additional insureds under the ASIC policy. ASIC defended the Horton entities through the same counsel that ASIC retained to defend Holding; the law firm did not segregate its billings. Although the Horton entities were named insureds under the Admiral policy, Admiral argued that the $250,000 SIR in its policy applied not only to indemnity costs but also to defense costs, and thus Admiral had no duty to defend the Horton entities. The trial court found the SIR did not apply to defense costs and that Admiral had a duty to defend, and awarded ASIC $1.9 million of the $2.2 million it spent to defend Holding and the Horton entities jointly.

THE APPELLATE COURT'S RULING

The appellate court affirmed and began its opinion by stating, "In this case, we once again apply the well-established principle that any limitation on the coverage provided by a liability insurance policy must be express and consistent with the reasonable expectations of the insured." Admiral's SIR endorsement stated: "1. *Our total liability for all damages* will not exceed the limits of liability as stated in the Declarations and will apply in excess of the insured's self-insured retention (the 'Retained Limit'). 'Retained Limit' is the amount shown below, which you are obligated to pay, and only includes damages otherwise payable under this policy." (Emphasis in original.) The court noted that the Admiral policy was written on a "Commercial General Liability" form, which states it provides primary coverage to its insureds. The court also noted that the policy made Admiral's coverage excess only when other coverage is available to its insureds by way of other insurance acquired by the insureds or when the insureds are named as additional insureds on another party's policy. The court held the SIR did "not expressly make payment of the SIR a condition of the insurer's broader obligation to provide a defense when an arguably covered claim is tendered." Rather, the SIR clause "expressly applied only as a limitation on the insurer's duty to indemnify the insured for covered damages for which the insured [was] found liable." The court held that under this policy language as a whole, an insured could quite reasonably interpret it as providing a defense to arguably covered claims as soon as such claims are tendered and before any SIR has been paid.

The court recognized that "other liability insurance policies contain SIR clauses that expressly and unambiguously make payment of a SIR obligation a condition of any obligation under the policy, including any duty to defend," and cited *Nabisco, Inc. v. Transport Indemnity Co.* (1983) 143 Cal.App.3d 831, 835 [policy language provided that insurance was excess to SIR]; *General Star Indemnity Co. v. Superior Court* (1996) 47 Cal.App.4th 1586, 1592 [same]; *City of Oxnard v. Twin City Fire Ins. Co.* (1995) 37 Cal.App.4th 1072, 1077-1078 [same]), acknowledging that "those SIR provisions have been enforced according to their terms." However, Admiral policy did not "contain such an express condition on the defendant insurer's duty to defend," and the court likened Admiral's SIR provision to those addressed in *Legacy Vulcan Corp. v. Superior Court* (2010) 185 Cal.App.4th 677, 695-696 [for SIR to apply to defense costs, language must be "conspicuous, plain and clear"] and *Montgomery Ward & Co. v. Imperial Cas. & Indem. Co.* (2000) 81 Cal.App.4th 356, 367-368 [same].

EFFECTS OF THE RULING

The court noted that "the cases that have required satisfaction of a retained limit as a condition of an insurer's duty to defend were, in fact, not primary policies but in excess policies or involved express policy language that made both the duty to indemnify and the duty to defend subject to an SIR" (citing *Montgomery Ward, supra*).The court also concluded, "The significant point is that these cases, like all other insurance cases, look first to the terms of the policy." Thus, any purported general rule regarding application of a SIR must give way to careful analysis of the policy language.

Continued from page 1

She filed for bankruptcy and her rights were assigned to the plaintiff, who sued for bad faith failure to settle within limits. Mercury contended that it could not be liable for bad faith failure to settle, since there had never been a demand by the plaintiff, and the appeals court agreed, affirming summary judgment for Mercury.

Although the evidence showed no actual or specific demand, the plaintiff argued that Mercury's adjusters "understood, when a third party claimant makes a request for policy limits information, 'it is an attempt to determine what is available for settlement.'" She also argued that an insured may want the insurer to engage in piecemeal settlements to dispose of the more significant claims, but Mercury never considered it. However, the court held that bad faith liability cannot be founded solely upon an insurer's failure to initiate settlement discussions or offer its policy limit.

The *Reid* court distinguished several prior cases describing circumstances where no formal demand for settlement within policy limits was necessary for bad faith liability to attach, noting that all involved circumstances where the claimant had conveyed to the insurer an interest in settlement, and the insurer had rejected or ignored the opportunity to negotiate a settlement. The court found those inapposite, stating:"[W]hen a claimant offers to settle an excess claim within policy limits, an opportunity to settle exists and a conflict of interest arises, because a divergence exists between the insurer's interest in paying less than the policy limits and the insured's interest in avoiding liability beyond the policy limit.[] And a conflict may also arise, without a formal settlement offer, when a claimant clearly conveys to the insurer an interest in discussing settlement but the insurer ignores the opportunity to explore settlement possibilities to the insured's detriment, or when an insurer has an arbitrary rule or engages in other conduct that prevents settlement opportunities from arising. [] But nothing like that happened here."

"An 'opportunity to settle' does not arise simply because there is a significant risk of an excess judgment. And none of the evidence presented to the trial court, disputed or not, allows an inference that plaintiff at any time conveyed to defendant any interest in settlement, at policy limits or otherwise, at any time before defendant offered its policy limits. In short, there was no evidence of a bad faith failure to settle in this case. Accordingly, there was no foundation for a claim of breach of contract or breach of the insurer's covenant of good faith and fair dealing."

Insurance Law Alert: Negligent Supervision Claim for Driveway Accident Barred by Auto Exclusion in Homeowners Policy

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

In *Farmers*, the husband and wife were insured under homeowners and automobile liability policies issued by Farmers. Their young granddaughter got outside the house, where she was run over by the husband coming home from work. They were sued for negligence and negligent supervision, and Farmers provided a defense. Following entry of an adverse judgment, Farmers filed an action for declaratory relief contending that there was no coverage under the homeowners policy, which excluded bodily injury arising out of the ownership, maintenance or use of a motor vehicle.

The child's parents argued that the negligent supervision by the wife was an independent concurrent cause of the injury and, therefore, not barred by the auto exclusion. The court cited *State Farm v. Partridge* (1973) 10 Cal.3d 94 for the rule that when two independent risks constitute concurrent proximate causes of an accident, the insurer is liable so long as one of the causes is covered by the policy.

Continued on page 8

Statutory Violation Exclusions Relieve Insurers of Duty to Defend Insured Against Suits Based on Alleged Violation of Song-Beverly Act

Credit to Smith, Smith and Feeley, Irvine, CA

Statutory violation exclusions in two insurers' policies precluded coverage for lawsuits alleging claims for violation of the Song-Beverly Act arising from collection of customer zip codes during credit card transactions. (*Big 5 Sporting Goods Corp. v. Zurich American Ins. Co.* (2013) WL 3526039)

Facts

In 2011, the California Supreme Court held that requesting and recording a cardholder's zip code during a credit card transaction violates the Song-Beverly Act of 1991 (Cal. Civ. Code § 1747, et seq.). (See *Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524.) The Song-Beverly Act provides that violators will be subject to a civil penalty of $1,000 for each violation. However, a civil penalty will only be assessed if the violation was intentional.

Here, various plaintiffs filed eleven class action lawsuits against Big 5 Sporting Goods Corporation (Big 5), alleging that Big 5 had infringed the plaintiffs' privacy rights by requesting, recording, and publishing customer zip codes during credit card transactions in violation of the Song-Beverly Act. Some of the class action lawsuits also included causes of action labeled "negligence" and "invasion of privacy."

Big 5 was the named insured on three general liability policies issued by Zurich American Insurance Company (Zurich) and one general liability policy issued by Hartford Fire Insurance Company (Hartford). Big 5 thus tendered defense of the class action lawsuits to Zurich and Hartford.

The Zurich policies provided coverage for specified "personal and advertising injury" offenses, including "oral or written publication, in any manner, of material that violates a person's right of privacy." However, the first two Zurich policies included a statutory violation exclusion which precluded coverage for "personal and advertising injury" arising out of a violation of "[a]ny statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information." The third Zurich policy contained a similar exclusion which precluded coverage for "personal and advertising injury" arising out of a violation of "[a]ny federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA, that relates to, prohibits or limits the accessing, collection, recording, printing, dissemination, disposal, sending, transmitting, communicating or distribution of material or information."

The Hartford policy also provided coverage for various "personal and advertising injury" offenses, including "oral, written or electronic publication of material that violates a person's right of privacy." The Hartford policy contained a statutory violation exclusion which mirrored the exclusion in the first two Zurich policies. In addition, the Hartford policy contained a statutory violation exclusion for personal and advertising injury "arising out of the violation of a person's right of privacy created by any state or federal act."

Big 5 contended that, under the terms of the Zurich and Hartford policies, both Zurich and Hartford were obligated to defend Big 5 in the class action lawsuits. Zurich and Hartford argued that they did not have a duty to defend Big 5 against class action lawsuits because, among other things, the Zurich and Hartford policies contained statutory violation exclusions that eliminated any potential for coverage.

In order to resolve the coverage dispute, Big 5 filed a declaratory judgment action against Zurich and Hartford in the United States District Court for the Central District of California.

Continued on page 8

Continued from page 7

Holding

The federal district court, applying California law, held that Zurich and Hartford had no duty to defend Big 5 in the underlying class action lawsuits. According to the district court, the plaintiffs' claims against Big 5 in the underlying class action lawsuits fell within the statutory violation exclusions contained in the Zurich and Hartford policies, thus eliminating any potential for coverage. The district court concluded that, based on the legislative history of the Song-Beverly Act, it was clear that the Song-Beverly Act created a statutory right of privacy that did not previously exist at common law.

Further, the district court held that was irrelevant that some of the underlying class action lawsuits included causes of action labeled "negligence" and "invasion of privacy." The court reasoned that in determining whether an insurer has a duty to defend an insured, the proper focus is on the *facts* alleged, not on the *formal legal theory* which is pled. Here, even though some of the underlying class action complaints included causes of action labeled "negligence" and "invasion of privacy," those causes of action were actually based on a right of privacy *created by statute*. Thus, Zurich's and Hartford's statutory violation exclusions precluded coverage for all causes of action asserted in the class action lawsuits, including the causes of action labeled "negligence" and "invasion of privacy."

Comment

The federal district court also noted that the Song-Beverly Act only allows for the recovery of civil penalties, and then only if there was an intentional violation of the statute. Because civil penalties are not "damages" within the meaning of the policies, and because the policies themselves and Insurance Code section 533 bar coverage for intentional conduct, the Zurich and Hartford policies did not potentially apply.

It should be noted that insured, Big 5, has recently filed a notice of appeal to the Ninth Circuit Court of Appeals. That of course means that the litigation is not over yet. Also, keep in mind that this litigation is pending in the federal court system. Thus, no matter what the ultimate outcome of the case is, the decision will not necessarily be binding on California state courts.

Continued from page 6

The *Farmers* court then cited a long list of other California cases establishing a continuum of authority where a loss was either covered or excluded depending on whether multiple causes were deemed to be independent concurrent causes of the loss.

In *Partridge*, the insured's negligence in filing the firing mechanism of a gun to give it a hair trigger was deemed an independent concurrent cause, and thus not barred by an auto exclusion, because the resulting injury could have occurred anywhere, and not just inside the insured's auto when it struck a bump. By contrast, coverage was excluded in *National American v. Coburn* (1989) 209 Cal.App.3d 914, where a van being loaded for a trip rolled over a child in the insured's driveway. The *Coburn* court said that none of the alleged negligence, including the negligent supervision of the child, existed independently of the insured’s use and loading of the vehicle.

The *Farmers* court agreed with *Coburn* and distinguished *Partridge*, holding that the motor vehicle played an active role in causing the injury and involved no instrumentality other than the vehicle itself, so there would have been no accident without the use or operation of the vehicle. The court said that the supervision was negligent only because it exposed the child to the danger of negligent automobile use. The wife's negligence was sufficiently related to the use of the vehicle and part of a course of uninterrupted conduct that it fell within the auto exclusion of the homeowners policy.