CAIIA Status Report

JANUARY 2009

Insurance Law Bulletin

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

Despite Uncertainty Concerning Who Actually Employed Worker Killed in Accident, Insured Is Not Entitled to Defense Under "Employers' Liability" Coverage

The California Court of Appeal has held that, despite uncertainty as to who actually employed a worker who was killed in an accident, a subsequent wrongful death action against an insured did not trigger a defense obligation under the insured's "employers' liability" coverage. (Power Fabricating, Inc. v. State Compensation Ins. Fund (2008) 167 Cal.App.4th 1446)

Facts

Power Fabricating, Inc. (Power) and a related entity, Temp Power Systems, Inc. (Temp), were in the business of providing temporary electrical power to construction sites. A developer requested that Temp re-route electrical power at a construction site. In performing this task, apprentice electrician Jonathon Kryzak (Kryzak) came into contact with an energized electrical line and was fatally electrocuted. A question existed as to whether, at the time of the accident, Kryzak worked for Power, for Temp, or for a "joint venture" comprised of the two entities.

Power and Temp were listed as "employer" under a workers' compensation / employers' liability policy issued by State Fund Insurance Company (State Fund). State Fund paid Kryzak's widow statutory death benefits under the workers compensation part of the State Fund policy.

Subsequently, Kryzak's widow brought a wrongful death action against Power. She alleged that Power negligently failed to confirm that the developer had de-energized the electrical system before Kryzak began work, failed to inspect Kryzak's work, failed to implement safety procedures, and failed to provide a safe workplace.

Power tendered the wrongful death action to State Fund under the employers' liability section of the State Fund policy. The employers' liability section of the policy provided that the insurer would indemnify and defend an insured against a claim for covered "bodily injury to your employee that arises out of and in the course of employment…." The employers' liability section of the policy specifically excluded coverage "any obligation imposed by a workers' compensation ... law....".

State Fund refused to defend Power in the wrongful death brought by

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An Employer Organization of Independent Insurance Adjusters

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PRESIDENT'S MESSAGE

Professionalism and Respect

I have always enjoyed the company of my fellow independent adjusters. It is a job requirement that we get along with everyone. In that sense, we are by habit some of the friendliest people there are. You could say the same thing about salesmen, except unlike salesmen, we wade neck deep into substantive issues ever day, with nearly everyone we deal with at every level of society. If there is a way to deal with a potentially devastating issue without getting people upset, chances are as experienced adjusters, we have developed and used that skill. We have recently noticed president elect Sam Hooper demonstrating that diplomatic skill in his email correspondence with people hopeful of joining our organization.

Anyway, back to why we are great people. People outside of our industry hear the word insurance, and they get a glazed look in their eye, and they ask us who should insure their car. They think insurance is all actuarial tables and annuities. The reality is that we are living the sexy life of an investigator, attorney, and forensic expert all at once. We all have great war stories. When there is trauma, fire and explosion, tragedy and pathos in our society, we are in the middle of it, trying to straighten it out and make it right. And most of the time we have the resources (indemnity) to make it right, so we have some job satisfaction.

With today's extreme specialization, most people in the larger society are bored with their work. In our business as adjusters, if we are busy, we definitely are not bored. Often, we would like some boredom as a rest. Consequently, I find that the successful independent adjuster is usually an actualized, effective, likable and interesting individual. The CAIIA, (and the RPA when they have meetings) are great places to meet great people.

I can not say the same about the PLRB. I recently attended the PLRB's Large Loss Conference in Tucson, to learn something, pick up some continuing education points, and hopefully enjoy the company of my fellow adjusters. However, I was badly disappointed with the social experience. Most of the adjusters there were claims employees of PLRB member firms, and I suspect that they saw the conference as a place to pursue status and maintain position with each other.

We as independents do not figure in their particular hierarchy, so we can not give or take status. It appeared that to them we do not count. I obviously have a different sense of value. My opinion is that when an adjuster has a position as a claims professional inside a company, the company has to give him work. On a daily basis, nobody making assignments within a company with staff has a choice as to whom they want to work on claims. They have to use the staff. By contrast, the only reason that you as an IA get the next claim is that somebody be-

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Insurance Law Bulletin

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

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Kryzak's widow. As a result, Power sued State Fund for breach of contract and bad faith. The trial court granted summary judgment in favor of State Fund. Power appealed.

Holding

On appeal, Power contended that there was a "triable issue of fact" as to whether Kryzak was an employee of Power, Temp, or a joint venture comprised of the two entities. Specifically, Power argued that the widow's claims against Power could fall within the employers' liability coverage, but outside the workers' compensation exclusion, if either: (1) Kryzak, as the employee of a Temp / Power joint venture, was injured by the negligent acts of Power; or (2) Kryzak, as an employee of Power, was injured by the negligent acts of the Temp / Power joint venture.

The Court of Appeal rejected this argument. According to the appellate court, if Kryzak was not Power's employee, then the employers' liability coverage would not be triggered in the first instance. Conversely, if Kryzak was Power's employee, then the workers' compensation exclusion would apply. In either scenario, there was no potential for coverage under the employers' liability section of the policy. Because there was no potential for coverage, State Fund had no duty to defend Power in the underlying wrongful death action.

Comment

Employers' liability insurance is traditionally written in conjunction with workers' compensation policies. It is intended to serve as a "gap-filler," providing protection to the employer in those relatively rare situations where either the employee is not subject to the workers' compensation law, or the employee has a right to bring a tort action against the employer despite the provisions of the workers' compensation statute. Here, neither situation was present.

Insurer Has Duty to Defend Insureds Against Taxpayer Suit Seeking Both Injunctive Relief and "Damages"

The United States District Court, applying California law, has ruled that a liability insurer had a duty to defend its insureds against a taxpayer lawsuit suit which sought both injunctive relief and monetary "damages." (The Los Osos Community Services Dist. v. American Alternative Ins. Corp. (C.D. Cal. 2008) — F.Supp.2d —, 2008 WL 4885680)

Facts

The Los Osos Community Services District ("District") is a public entity which undertook plans to build a wastewater treatment facility in Los Osos, California. A number of people who lived in the area tried to stop construc-

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PRESIDENT'S MESSAGE

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lieves that in the whole market, you are the best person to do this claim. If there is someone else that they think will do better, there is little stopping them from using that someone else. We are judged every day, and if the judgment is not very positive, the work goes elsewhere. Nobody has to be fired. It is way easy for our clients to go elsewhere. As a result, we IAs are a bunch of nervous people, but with that nervousness should come pride and status.

So, then if our work product and history are sufficient for company people to hire us for our expertise, why does our good service not give us a certain amount of status at the PLRB? When I face a company person, trying to give him some insight as to why he should respect my achievements, I want him to realize that I (for example), have been an independent adjuster for twenty nine years. This means for twenty-nine years, company people almost daily have chosen me to do their work. They had a choice on every assignment made, and they chose me often enough to fill my dance card year after year.

We learned during our last CAIIA convention from an internal survey that member firms have adjusters with 7 to 61 years in the business. We also learned that 81% of those adjusters have over 20 years experience. Members of the PLRB, and any other insurers should realize what a powerful tool and valuable asset our members are to the industry.

PETE VAUGHAN

President CAIIA 2008 2009

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tion of the treatment facility by placing a measure called "Measure B" on the ballot. In response, the District sued and obtained a court order declaring the measure illegal and barring it from the ballot.

Thereafter, a group of disgruntled residents succeeded in recalling three of the District's Board members. The "new Board" then immediately took steps to stop the construction of the treatment facility. Among other things, the new Board dismissed the lawsuit brought to stop Measure B, which by then had reached the state appellate court. In addition, the new Board allegedly used $600,000 in state money to enter into a settlement with Measure B's proponents, who were allied with the three new members of the Board.

In response, a group called Taxpayers Watch and two individual taxpayers (collectively "Taxpayers Watch plaintiffs") sued the District and several Board members, alleging that the settlement was "a sham settlement with the Board's cronies" and that ultimately District taxpayers "will be responsible for repaying those monies to the state of California." The Taxpayers Watch plaintiffs sought relief under California Code of Civil Procedure section 526a, which provides that "[a]n action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, [or] city … may be maintained against any officer thereof ... by a citizen resident therein … who is assessed for and is liable to pay… a tax therein." The Taxpayers Watch plaintiffs also sought "a judgment requiring and mandating that … the District's individual Board members be held personally liable to repay the monies wasted as a result of their thoughtless and wasteful decisions, including return of the $600,000 paid to Measure B proponents in a collusive settlement."

The District filed for bankruptcy protection. However, the District's individual Board members tendered the defense of the lawsuit to the District's liability insurer, American Alternative Insurance Company ("AAIC"). The AAIC policy provided that the insurer would indemnify an insured against "damages because of ... 'wrongful acts'," and that the insurer would defend an insured against any suit seeking covered damages. AAIC denied the tender, on the ground that the Taxpayers Watch plaintiffs were not seeking monetary "damages" against the Board members.

Following the denial of coverage, the Board members filed a bad faith action against AAIC, alleging that AAIC had wrongfully refused to defend the Board members in the underlying action brought by the Taxpayers Watch plaintiffs. The Board members then moved for partial summary that AAIC had a duty to defend them in the underlying action.

Holding

The United States District Court, applying California law, held that AAIC did have a duty to defend the Board members in the underlying action brought by the Taxpayer Watch plaintiffs. The district court acknowledged that the Taxpayer Watch plaintiffs had sued the Board members under CCP section 526a, and that the text of section 526a only allows for injunctive relief—not monetary damages. However, the district court noted that despite the text of the statute, California state courts "have extended section 526a to allow taxpayers to obtain an order requiring officials to repay wasted funds to the public entity" and "have characterized this remedy as one for 'damages.'" Under the circumstances, the Taxpayers Watch plaintiffs were seeking "damages" from the Board members, sufficient to trigger AAIC's duty to defend. It did not matter that any damages recovered from the Board members would ultimately go back into the District's coffers, as opposed to the Taxpayers Watch plaintiffs themselves.

COMMENT

The AAIC policy did not define the term "damages." As such, the district court applied the case law definition of "damages" i.e., "'compensation,' in 'money,' 'recovered' by a party for 'loss' or 'detriment' it has suffered through the acts of another."

Note that when a third-party claimant sues an insured under a statutory scheme that only allows for injunctive relief and does not allow for "damages," the insurer may not have a duty to defend. (See, e.g., Cutler-Orosi Unified School District v. Tulare County School Districts Liability / Property Self-Ins. Authority (1994) 31 Cal.App.4th 617, 629-630.) Here, however, the Taxpayer Watch plaintiffs sued the Board members under a statute that has been interpreted to allow for both injunctive relief and "damages," thus triggering AAIC's duty to defend.

Weekly Law Resume

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

Economic Damages – Construction Defect – Exception

Greystone Homes, Inc. v. Midtec, Inc., Court of Appeal, Fourth District (December 2, 2008)

The economic loss rule precludes recovery of damages for construction defects that have not yet caused property damage or personal injury. This case of first impression determined whether an indemnity action may be brought by a general contractor for economic loss it paid under the Right to Repair Act, Civil Code §895 et seq., against a supplier.

Greystone sued Midtec for negligence and indemnity, arising out of claims made against Greystone by homeowners for defective plumbing fittings that Midtec manufactured. Greystone incurred costs to replace the defective fittings. Midtec had manufactured a part which was used as a component in a plumbing fixture system that had been installed by plumbing subcontractors on the job. Only a small portion of the fittings had failed when Greystone decided to replace all of the fittings in the development.

Midtec moved for summary judgment, claiming Greystone could not recover for economic losses it incurred in replacing the fittings. Greystone relied upon the Right to Repair Act, as it required the expenditures on its behalf and as a result, claimed it should be allowed to seek indemnity. The trial court granted Midtec's motion for summary judgment. Greystone appealed.

The Court of Appeal reversed. The Court noted that under principles of tort law, a builder or product manufacturer is liable only for construction defects that cause physical damage or property damage. In such situations, there is a right of indemnity between tortfeasors. In the absence of physical injury or property damage, there is no liability for purely economic loss and no right to indemnity if payment is made for such loss.

The Right to Repair Act establishes standards for residential construction and tort liability for entities that fail to meet the standards. Product manufacturers are included within its scope. The law provides for the recovery of economic loss for the reasonable value of repairing any violation of the standards. A homeowner may recover economic losses from a product manufacturer for a violation of the Act's standards. Since an individual homeowner can bring such an action, the Court concluded a builder could bring an equitable indemnity action, seeking reimbursement for economic loss to homeowners caused by the manufacturer's negligence or breach of contract. The Court did note, however, that it was appropriate to grant summary judgment in favor of Midtec on Greystone's negligence claim.

The matter was therefore reversed and remanded to the trial court with directions to deny Midtec's motion for summary judgment.

COMMENT

This opinion is the first to interpret a right of indemnity under the Right to Repair Act. For that reason, it bears further watching to see whether the Supreme Court reviews this matter.

Government Liability - Civil Rights - Probable Cause For Arrest

Torres v. City of Los Angeles, Ninth Circuit Court of Appeals (November 13, 2008)

This civil rights action arises out of an arrest of Plaintiff Raymond Torres , without a warrant, on charges of murder and attempted murder. In 2004, members of the CPA gang, riding in a car, allegedly shot and killed a member of a rival gang, and wounded another person. The shooter and driver of the car were positively identified by another occupant, Diana. Los Angeles Police Department (LAPD) investigators then focused their attention on the fourth occupant in the car. Diana told police that she had never seen the young man before and did not remember him well. She did give police a general description of the male passenger. Investigators spoke with interested parties at schools in the area. Ultimately, police focused on 16 year old Torres. They learned that Torres had hung out with gang members at a local high school. There was conflicting information, however, as to whether Torres was a member of the CPA gang. Torres also had no prior criminal record. Police then met again with Diana and showed her a "6 pack" of photos of males who could be the fourth passenger. Diana was not positive - but eventually circled the picture of Torres, telling police that Torres looked most like the person in the car.

Police then arrested Torres outside of his home without a struggle. He was charged with murder and attempted murder. After 162 days of incarceration, Torres was released when the district attorney dismissed charges against him. Torres and his mother then filed suit against the City of Los Angeles; LAPD, and individual detectives, claiming deprivation of Torres' Fourth Amendment rights, in violation of 42 U.S.C. section 1983, as well as false arrest and negligent infliction of emotional distress, in violation of California law. The City and LAPD were granted summary judgment. The case then proceeded to trial against the individual officers. The trial judge ruled that the detectives had probable cause to arrest Torres, as well as qualified immunity, and granted judgment in favor of the defendants, pursuant to F.R.C.P. 50(a). Plain-

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tiffs appealed. The Ninth Circuit Court of Appeals affirmed and reversed in part.

On appeal, Torres argued that there was a triable issue of fact as to whether the officers had probable cause to arrest him and that the case should have gone to the jury. Probable cause to arrest exists when officers have knowledge or reasonably trustworthy information sufficient to lead a person of reasonable caution to believe that an offense has been committed by the person being arrested. Mere suspicion, common rumor or even strong reason to suspect are not enough. In this case, the issue was whether the detectives had probable cause to believe that Torres had participated in the murder and attempted murder.

The Ninth Circuit held that a reasonable jury could have concluded that the detectives lacked probable cause to arrest Torres. Significant to the court was the fact that the detectives had relied heavily on information received from Diana. Diana had given a very general description of the fourth occupant in the car. Mere resemblance to a general description is not enough to establish probable cause. The Court also rejected Diana's identification of Torres in the "6 pack" of photos, because the ID was not sufficiently reliable and there was evidence the police had suggested Torres' photo to Diana. Finally, the court held that detectives lacked evidence that Torres had acted in concert with the shooter and had the requisite mental state to be guilty of murder and attempted murder. The Court of Appeals therefore held that the trial court erred in finding probable cause as a matter of law and that certain detectives were entitled to qualified immunity.

COMMENT

This case provides an excellent analysis of the standard for probable cause for arrest, as well as qualified immunity for police officers.

Torts - Primary Assumption of Risk Doctrine Does Not Apply Where Plaintiff Jumped From Boat Onto Dock

Kindrich v. The Long Beach Yacht Club , Court of Appeal, Fourth District (October 28, 2008)

In 1992, the California Supreme Court defined the defense of primary assumption of the risk in the cases Knight v. Jewett (1992) 3 Cal. 4th 296 and Ford v. Gouin (1992) 3 Cal. 4th 339. Since 1992, there have been over 100 published opinions that have interpreted Knight and Ford. This case focuses on what constitutes an activity that would be subject to the primary assumption of the risk doctrine.

Plaintiff Carl Kindrich and his family gathered at Defendant Long Beach Yacht Club to dispose of Kindrich's father's ashes at sea. The Yacht Club arranged for attendees to be taken out on the water in a boat it owned, as well as a pilot for the boat. The Yacht Club also provided portable stairs on the dock to assist the attendees with boarding. Kindrich alleged that when the boat returned to dock, the portable steps were no longer in place. Kindrich's son jumped onto the dock to tie up the boat. Kindrich followed his son, jumped onto the dock, and injured his leg.

Plaintiff filed suit against the Yacht Club alleging it had been negligent in the use and maintenance of the boat and dock. The Yacht Club filed a motion for summary judgment contending that the primary assumption of the risk doctrine applied to Kindrich's decision to jump off the boat. The trial court granted the motion and Plaintiff appealed. The Fourth District Court of Appeal reversed.

On appeal, Kindrich contended that the act of jumping onto the dock could not be a sporting activity subject to the complete defense of primary assumption of the risk. The Court of Appeal took time to review the distinction between primary assumption of the risk and secondary assumption of the risk. In cases involving primary assumption of the risk, the defendant owes no legal duty to protect the plaintiff from a particular risk of harm which is inherent in the sport or activity. Primary assumption of the risk has been extended to sailing and water sports. The Court pointed out, however, that participating in a sporting activity is different than simply being a passenger on a boat.

Here, the Fourth District held that Plaintiff was simply disembarking from the boat as a passenger. The mere fact that he was "jumping" did not turn his activity into an active sport that would be subject to primary assumption of the risk. The Court, therefore, held that this was properly classified as a secondary assumption of the risk case, and that there was a triable issue of fact as to whether Kindrich was comparatively at fault. As a result, Kindrich's action was not barred, and the judgment was reversed.

COMMENT

This case offers an interesting fact pattern as to what constitutes a sport or activity that is subject to the primary assumption of the risk doctrine. A passenger on a boat, as opposed to a water skier or sailor, is not entitled to the absolute defense.

EDUCATION - YOUR ACE IN THE HOLE

Registration Form ♠ ♥ ♦ ♣

March 2-4, 2009 * Westin Long Beach * Long Beach, California

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Session Sign-Up:

For purposes of seating/handouts, please select the sessions and events you plan on attending.

Tuesday, March 3, 2009

9-10:15am

❑ GENERAL SESSION - Hire Right and Retain' Em

11-Noon

❑ Track 1 (Liability) Proper Investigation of Claims for Litigation
❑ Track 2 (Property) Fires, Explosions, Oh My (NPA Code 921)
❑ Track 3 (Auto) Insurance Industry and Modern Day Fraud

Noon-1:30pm

❑ Lunch - Rolling the Dice on Exotic Car Claims with Jeff Hyman
Dessert in the Exhibit Hall

1:30-2:30pm

❑ Track 1 (Liability) Hot Hands - 10 Hottest Coverage Issues for 2009
❑ Track 2 (Property) Is It Safe To Go In There?
❑ Track 3 (Auto) Why Do Cars Burn

3:15-4:15pm

❑ Track 1 (Liability) Mandatory Reporting and the MMSEA
❑ Track 2 (Property) The Mortgage Crisis and Its Impact
❑ Track 3 (Auto) DRP, Deal or no Deal?

Wednesday, March 4, 2009

9-10:00am

❑ Track 1 (Liability) Major Claims - Where does One Begin?
❑ Track 2 (Property) What Color is Your Water?
❑ Track 3 (Auto) Importance of a Good Examination Under Oath

10:45 - 11:45am

❑ Track 1 (Liability) Mediation - The Ultimate Wild Card for Settlements
❑ Track 2 (Property) Claims Case Laws Still Apply During Catastrophes
❑ Track 3 (Auto) Collision Repair Fraud & Exaggeration

11:45am - 1:30pm

❑ Lunch in the Exhibit Hall

1:30 - 2:30pm

❑ Track 1 (Liability) Biomechanics of Injury Causation
❑ Track 2 (Property) Playing Your Subrogation Hand in Property Losses
❑ Track 3 (Auto) Legislation—Help or Hindrance? Aid or Obstacle?

2:45 - 3:45pm

❑ CLOSING SESSION -Accelerant Detection/K-9 Standards and Uses of K-9s
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Yet again, the fabulous, much revered,

Priceless Observations Department

Sometimes, when I look at my children, I say to myself, 'Lillian, you should have remained a virgin'. - *Lillian Carter (mother of Jimmy Carter)*

I had a rose named after me and I was very flattered. But I was not pleased to read the description in the catalog: 'No good in a bed, but fine against a wall'. - *Eleanor Roosevelt*

Last week, I stated this woman was the ugliest woman I had ever seen. I have since been visited by her sister, and now wish to withdraw that statement. - *Mark Twain*

The secret of a good sermon is to have a good beginning and a good ending; and to have the two as close together as possible. - *George Burns*

Santa Claus has the right idea. Visit people only once a year. - *Victor Borga*

Be careful about reading health books. You may die of a misprint. - *Mark Twain*

By all means, marry. If you get a good wife, you'll become happy; if you get a bad one, you'll become a philosopher. - *Socrates*

I was married by a judge. I should have asked for a jury. - *Groucho Marx*

My wife has a slight impediment in her speech. Every now and then she stops to breathe. - *Jimmy Durante*

I have never hated a man enough to give his diamonds back. - *Zsa Zsa Gabor*

Only Irish Coffee provides in a single glass all four essential food groups: alcohol, caffeine, sugar and fat. - *Alex Levine*

My luck is so bad that if I bought a cemetery, people would stop dying. - *Rodney Dangerfield*

Money can't buy you happiness . . . But it does bring you a more pleasant form of misery. - *Spike Mulligan*

Until I was thirteen, I thought my name was SHUT UP. - *Joe Namath*

I don't feel old. I don't feel anything until noon. Then it's time for my nap. - *Bob Hope*

I never drink water because of the disgusting thing that fish do in it. - *W.C. Fields*

We could certainly slow the aging process down if it had to work its way through Congress. - *Will Rogers*

Don't worry about avoiding temptation. As you grow older, it will avoid you. - *Winston Churchill*

Maybe it's true that life begins a fifty . . . But everything else starts to wear out, fall out or spread out. - *Phyllis Diller*

By the time a man is wise enough to watch his step, he's too old to go anywhere. - *Billy Crystal*