CAIIA Status Report

JUNE 2010

CAIIA's 4th Annual Golf Tournament is starting to take shape!

We wish to recognize the following firms who have taken an early leap by sponsoring this fine event.

Tee Sponsors (16 left)
All County Environmental & Restoration
Alliance Environmental

Dinner Sponsors (Sold Out)
Haag Engineering
Heritage Companies, Ron Oates

Beverage Cart Sponsors (Sold Out)
Continental Interpreting Services
Able Restoration, Inc.

Open Sponsorship Positions
Bar - (2)
Photo – (1)
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Secure your sponsorship while you can!
The player roster needs member registration now!
Don't forget the Raffle Prizes and Halloween Costumes!
Questions about the tournament or need registration forms?
Call President Elect Phil Barrett, (707) 462-5647

The Scope Of The Duty To Defend: An Issue Of Fairness

By Scott S. Blackstone Of Willis/Depasquale

In the recent case of Gray v. Begley (2010) 182 Cal.App.4th 1509, the Court of Appeal determined that an insurer has standing to intervene in a case where the plaintiff and insured enter into a stipulated judgment without the insurer's consent and the insurer provided a defense to the insured. In Gray, defendant Begley, while driving drunk, struck plaintiff Gray's vehicle, causing Gray to sustain injuries. Gray sued Begley and his employer. Prior to trial, the employer, the employer's primary insurer, CNA, and its excess insurer, Westchester, settled with plaintiff but did not obtain a release of the employee, Begley, as the insurer claimed that Begley was not working in the scope of his employment at the time of the incident. In light of plaintiff's settlement with the employer, the trial proceeded against Begley only with judgment entered against Begley. Thereafter, Begley and plaintiff entered into an agreement whereby plaintiff would not execute on the judgment against Begley in exchange for Begley's assignment to plaintiff of Begley's rights against CNA.

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An Employer Organization of Independent Insurance Adjusters

Inside This Issue

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If you would like to receive the *Status Report* via e-mail please send your e-mail address to *info@caiia.org*.

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PRESIDENT'S MESSAGE

SILENCE OF THE LAMB*

What a fantastic mid term meeting and seminar! First, I have to again congratulate Helene DalCin for organizing an informative DOI approved CE educational event: "Anatomy Of A Claim Investigation". The presentations by esteemed private investigator David Bunch, and attorneys Denis Moriarty and Michael Leahy provided specific claim situations, investigation techniques and protocols. Plus up to date legal case law impacting all claim lines.

The class cleverly intertwined extensive investigative resources, legal application of the information, coupled with actual and witty anecdotes. Because of this, we had an unusual level of class participation and questions from the attendees. Considering the amount of information provided, I left the seminar feeling like I got more than the 4 hours of continuation education. What an extraordinary member benefit.

After a great buffet lunch, the enthusiasm from the seminar apparently flowed over into the afternoon member business meeting. All committees reported. Key points included selection of educational institutions eligible to receive a CAIIA scholarship; funding for an electronic survey program for the purpose of allowing our members to easily provide feedback as part of our internal management processes; research on the possibility of implementing a CAIIA members health coverage plan; the extraordinary educational activity so far this year and events to come; membership retention and expansion plans; more openness toward developing a more diverse membership; and early progress on the fall 2010 Annual Convention and 4th Annual CAIIA Golf Tournament.

After the meeting, some attendees commented on the relatively high level of discussion the business meeting generated. There certainly was that; and an uncommon level of "volunteerism" during the new business portion.

*You're probably wondering: what does Sam mean by the topic, "silence of the lamb"? Speak with one of our CE class attendees; he or she will fill you in.

SAM HOOPER
President - CAIIA 2009-2010

The Scope Of Duty To Defend: . . .

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CNA attempted to intervene in order to vacate the judgment and set off the judgment against Begley based on the prior settlement. Holding that CNA did not have standing because CNA defended Begley under a reservation of rights and only provided a courtesy defense, the trial court denied CNA's motion to vacate the judgment against Begley and to set off that judgment. The Court of Appeals reversed the trial court's decision, holding that an insurer who defends under a reservation of rights has sufficient interest to intervene in the action and is not bound by a settlement reached without its participation since a defense was provided.

Conversely, in the recent decision of Risely v. Interinsurance Exchange Of Auto Club (2010) 183 Cal.App.4th 196 the Court held that an insurer may be sued for failing to defend or settle under one policy even where it defended under a smaller policy and paid out the limits on the smaller policy but refused to settle for the higher policy limits of the other insurance policy. Thereafter, Turner brought a bad faith action and action pursuant to California Insurance Code Section 11580. In Risely, the trial court granted the insurer's motion for summary judgment on the grounds that there was no judicial finding of liability and that the insurer was not bound by the stipulated judgment between plaintiff and the insured entered into without the insurer's consent. The Court of Appeals reversed, noting that an insurer has an independent duty to defend under each separate insurance policy and a defense under one policy does not eliminate the duty to defend under the other applicable policy. Accordingly, an insurer who has breached a duty to defend under an insurance policy may be bound by a stipulated judgment entered into between the insured and plaintiff.

The above cases highlight that the particular circumstances of each case will be considered in determining whether the insurer has satisfied its duty to defend and that the insured should not be permitted to unfairly benefit where the insurer has satisfied its duty, while at the same time, there may be adverse consequences to the insurer where the insurer has not fully satisfied its duty to defend.

Insurance Law News

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

Even If Insured Business Was Operating at Net Loss Greater than Operating Costs at Time of Loss, Business Interruption Benefits for Continuing Normal Operating Expenses Are Not Reduced by Net Loss

Interpreting a policy that provided business interruption coverage for net income "and" continuing normal operating expenses, the California Court of Appeal has held that even if the insured was operating at a net loss, the insured is still entitled to its operating expenses, which are not offset by the net loss. (*Amerigraphics, Inc. v. Mercury Cas. Co.* (2010) 182 Cal.App.4th 1538)

Facts

Amerigraphics, Inc. ("Amerigraphics") is a printing and graphics design company. Although it was financially successful until September 11, 2001, its business fell off sharply in 2002. In 2003, its premises were completely flooded, causing damage to all its equipment and forcing Amerigraphics to temporarily relocate.

Amerigraphics submitted a claim to its business personal property insurer, Mercury Casualty Company ("Mercury"). Amerigraphics' policy with Mercury included business interruption coverage, whereby Mercury agreed to pay for Amerigraphics' lost "business income" during the "period of restoration." The policy defined "business income" as "(i) Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred if no physical loss or damage had occurred …; and (ii) Continuing normal operating expenses incurred, including payroll." Mercury denied Amerigraphics' business interruption claim on the grounds that Amerigraphics' projected expenses exceeded its projected income, resulting in a projected net loss.

Amerigraphics sued Mercury for breach of contract and bad faith and sought a judicial interpretation of the policy's business interruption provision. The trial court held that Amerigraphics was entitled to recover both its net income and its continuing operating expenses, without having to offset one against the other. Mercury appealed.

Holding

The Court of Appeal affirmed. It first noted that the word "and" used between subparts (i) and (ii) of the policy's definition of "business income" indicates that Mercury must pay its insured for lost income in addition to continuing normal business expenses. Thus, to the extent there is no lost income (i.e., when there is a net loss), the amount paid under subpart (i) would

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be zero, but the insured would still be entitled to its operating expenses under subpart (ii).

Mercury argued that the word "and" is the equivalent of the mathematical operator "plus." Under Mercury's interpretation, if the insured was operating at net loss (i.e., a negative number) greater than its operating expenses, the insured would be paid nothing. The Court of Appeal rejected this interpretation because the policy does not use the words "plus," "offset," "subtract," "minus," or the like. According to the Court, the plain language of the policy does not support subtracting the net loss from the operating expenses. Instead, the insured is entitled to its operating expenses (a positive number), in addition to its net income (which would be zero if the insured was operating at a loss).

Mercury contended that this interpretation would read the "Net … Loss" language out of the policy's definition of "business income." The Court rejected this argument, noting that in the event of a net loss, the insured's entitlement to benefits of "net income" is zero, thus taking into account the phrase "Net … Loss."

The Court further noted that even if Mercury's interpretation were reasonable, an ambiguity would exist, and that ambiguity would have to be resolved in the sense the insurer believed the insured understood the policy when the contract was made. Given the language of the provision, it would be objectively reasonable for the insured to believe the policy covered both its lost income stream and the costs of ongoing expenses, since those problems are to be expected following a loss and are mentioned in the policy language. Thus, any ambiguity would be resolved in favor of the insured.

Finally, the Court noted that a business should not have to be concerned that poor performance for one or two years prior to a covered loss will eliminate coverage under a business interruption provision. Such would make it pointless for the business to purchase the additional coverage.

Comment

Considering that this case involved an issue of first impression in California, that it dealt with policy language common to most business interruption policies, and that a number of insured businesses are likely operating at net losses as a result of the economic recession, this decision could have significant pro-insured consequences for business interruption claims made in California over the months and years to come.

Subhaulers Are Not "Insureds" Under Trucker's Commercial Auto Policy Providing "Hired Auto" Coverage

Two sub-haulers were not "insureds" under a trucker's commercial auto policy which covered persons from whom the trucker had "hired" or "borrowed" a covered auto. (American International Underwriters Insurance Company, Inc. v. American Guarantee & Liability Insurance Company (2010) 181 Cal.App.4th 616)

Facts

American Guarantee & Liability Insurance Company ("American") issued a Commercial Auto Policy with a Truckers Coverage Form to Denbeste Transportation ("Denbeste"). The policy defined an "insured" so as to include "the owner or anyone else from whom you [Denbeste] hire or borrow a covered 'auto' that is a 'trailer' …."

Denbeste entered into a contract with Double D Transportation Company ("Double D") whereby Double D agreed to haul soil from a construction site. Double D had a separate subhaul agreement with James Camara. Both Double D and Camara were acting as independent contractors. Camara drove his own tractor connected to a Double D trailer from the construction site and ran over Christopher Torgerson, severely injuring him. Torgerson sued Camara, Double D, Denbeste and others for negligence.

Double D's insurer, American International Underwriters Insurance Company ("AIU"), and Denbeste's insurer, American, each contributed $1.45 million toward settlement of Torgerson's suit, and then sought indemnification from each other. American argued that it had no duty to contribute because Double D and Camara did not qualify as "insureds" on American's policy. AIU argued that Double D and Camara were "insureds" under the American policy, and that AIU's policy was excess to American's policy.

On cross-motions for summary judgment, the trial court granted AIU's motion and denied American's motion. The court found Double D and Camara were persons from whom Denbeste had "hired" a covered auto as a trailer; that Double D and Camara were thus "insureds" under Denbeste's policy through American; and that AIU's policy was excess to American's. Judgment was entered in favor of AIU. American appealed.

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Insurance Law News

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

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Holding

The Court of Appeal reversed. It held that Camara and Double D were not persons from whom Denbeste had "hired" or "borrowed" the vehicles involved in the accident. Therefore, neither Camara and Double D were "insureds" under Denbeste's policy through American.

The Court cited Civil Code § 1925, which defines "hiring" as synonymous with renting. The chief characteristic of a renting or leasing is the giving up of possession to the hirer so that the hirer and not the owner uses and controls the rented property. The Court held that the agreement between Denbeste and Double D provided for the hauling of property and not the renting of trucks and trailers. Denbeste engaged the transportation services of Double D as an independent contractor, without assuming possession or control over Double D's trailer or Camara's tractor. Denbeste therefore did not "hire" the tractor and trailer involved in the accident.

The Court also found that Denbeste did not "borrow" the trailer or tractor, as it held that the term "borrow" also connoted the right to exercise dominion and control.

The Court concluded that Camara and Double D were not persons "from whom [Denbeste] hired a covered auto that was a trailer," and thus Camara and Double D were not "insureds" on the American policy. The Court also held that its decision was dispositive as to American's cross-motion for summary judgment. Hence, it reversed the trial court ruling with directions to deny the AIU's motion and to grant the American motion.

Comment

This case suggests that absent specific policy language to the contrary, courts will interpret the terms "hire" and "borrow" in commercial auto or truckers policies to require possession or control. This could reduce the number of parties beyond the named insured that are entitled to coverage under such policies.

This case also highlights the need to review the insured's sub-haul agreement to fully evaluate coverage. The Court's ruling here turned on its evaluation of the subhaul agreement, which evidenced Denbeste's lack of control over the sub-haulers' vehicles.

Weekly Law Resume

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

Government Liability- School Has Duty To Exercise Reasonable Supervision of After-School Program

Agbeti v. Los Angeles Unified School District, Court of Appeal, Second District (March 25, 2010)

It is well established that schools have a duty to supervise the conduct of children on school grounds during school hours. This shocking case addresses the scope of such a duty.

The minor plaintiff in this case, a second grade girl attending a Los Angeles Unified School District elementary school, was enrolled in a voluntary after-school program. 200-300 children were supervised in the after-school program by two adults. During two afternoons after school, Plaintiff was sexually assaulted by fellow-students, who were members of the "kissing club." The incidents took place in areas beyond the portion of the campus devoted to the after-school program. The children, including Plaintiff, had ventured off on their own, to locations such as an unlocked storage shed, that was "off-limits" to children.

After the assaults had been reported to police, Plaintiff, by and through her mother and guardian ad litem, filed suit against the School District; individual employees of the elementary school; the minor children committing the assaults and their parents. Plaintiff asserted a negligence claim against the School Defendants, based on a failure to provide adequate supervision. The School District and the school employees filed a motion for summary judgment. The School Defendants contended that they owed no duty to Plaintiff, because Plaintiff had voluntarily left the por-

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tion of campus that was devoted to the after-school program, and to an area where the school children were not allowed. Further, the School Defendants argued that even if a duty existed, the acts in question were not foreseeable. The trial court granted the summary judgment. The trial court ruled that the School District owed no duty of care to children participating in a voluntary after- school program. The trial court also agreed that the incidents were not foreseeable. Plaintiff appealed. The Second District Court of Appeal reversed.

On appeal, Plaintiff contended that the School District had a duty to exercise due care in supervising children while they are on school grounds- not just when school is in session. The Court of Appeal agreed. The Court held that while the School District was not an insurer of its' pupils' safety, the School District did have a duty to exercise reasonable care for students in its care. The duty of care imposed arises from a special relationship between instructors and their pupils. For the court, it did not matter that the after school program was voluntary. Thus, a lack of supervision during the after-school program could constitute a lack of ordinary care.

While there was evidence that students had been told not to venture out beyond the boundaries of the after-school program area on campus, the court noted that elementary school children are known to act impulsively and disobey. With that information, the School District employed only two playground supervisors to supervise over 200 children. The Court held there was a triable issue as to whether supervision was sufficient.

As to the issue of foreseeability, the Court held that a Plaintiff need not establish that the precise act was foreseeable. Rather, foreseeability is determined in light of all the circumstances. Here, the Court held that a triable issue existed that some similar incident could occur if there was not adequate supervision. The summary judgment was therefore reversed and the case was remanded back to the trial court.

COMMENT

While some prior decisions have distinguished between mandatory and voluntary school activities in determining whether a duty exists, the Second District Court of Appeal held that schools have a duty to supervise at all times the conduct of children on school grounds and to enforce rules necessary for the students' protection.

Civil Procedure - Stay of Declaratory Relief Action

United Enterprises, Inc. v. Superior Court of San Diego, County Court of Appeal, Fourth District (April 9, 2010)

California court decisions have held that a declaratory relief action may not proceed while the underlying case is being prosecuted if coverage turns on the facts in that action. In this case, the insurer tried to get the court to allow the declaratory relief action to proceed by suggesting the sealing of the evidence in the declaratory relief action.

Otay Land Company and Flat Rock Land Company sued United Enterprises, Inc. in federal and state courts for recovery of environmental response costs, damages and other forms of relief arising out of the operation of a shooting range on property United owned. Royal Indemnity Company, United's insurer for three years, defended United under a reservation of rights. Royal then filed a complaint for declaratory relief, seeking to adjudicate its duty to defend. When it moved for summary judgment, United sought a stay of further proceedings. United argued that to defeat the summary judgment motion it would be required to use evidence that established its liability in the underlying action. The court denied United's request for a stay, but ordered that the record relating to the motion for summary judgment be sealed. United filed a petition for writ of mandate, challenging the court ruling. The Court of Appeal granted the writ and ordered a hearing.

The Court of Appeal ordered the trial court to reverse its ruling. The Court noted that factual issues to be resolved in the declaratory relief action overlapped with factual issues to be resolved in the underlying action. Under that situation, the Court was required to grant the stay. In this case, Royal argued in its motion that the complaint and evidence gleaned from discovery in the underlying federal action showed there was no potential for coverage under its policy. However, the Court noted that California law requires a stay to be granted where there is a factual overlap between the two cases. This is to prevent the insurer helping the underlying plaintiff prove its case, compel the insured to fight a two-front war, and eliminate the danger of collateral estoppel against the insured from litigating the issues in the coverage action. A sealing of the court record could not prevent these problems.

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Under these circumstances, the trial court erred in denying United's request for a stay. There was no authority for sealing the record as an alternative to a stay of the declaratory relief action. Once the Court found there were overlapping issues, the Court had no discretion but to grant the stay.

The Court indicated that a writ would issue directing the Superior Court to vacate its order denying the motion to stay, and to grant the motion forthwith.

COMMENT

The courts in California have established a fairly hard and fast rule requiring stay where there is a factual overlap between the declaratory relief action and the underlying case. Most courts nowadays are rather broadly interpreting this rule.

Commissioner Poizner Announces Two Santa Cruz Suspects Arrested, Face Charges For Filing False Auto Insurance Claim

Woman Allegedly Got Into Accident, Then Bought Insurance, Lied About Time of Accident

Insurance Commissioner Poizner today announced the arrests of two suspects for allegedly presenting a false insurance claim, making false statements in support of an insurance claim, and conspiracy. Carrie Berlogar, 31, self-surrendered on May 7, and Dan Bahcall, 38, self-surrendered on May 12. Both were booked into the Santa Cruz County jail. Bail was set at $10,000.

An investigation conducted by the California Department of Insurance, resulted in the arrest of Carrie Berlogar and Dan Bahcall on charges related to automobile insurance fraud. Esurance Property and Casualty Insurance Company (Esurance) reported this matter to the CDI in July 2009.

According to investigators, on June 18, 2009, Berlogar was backing out of her driveway in her 2001 Ford F150 when she collided into Bahcall's parked Toyota Camry at approximately 3 p.m. Bahcall arrived at the scene and discovered the damage to his vehicle at approximately 5 p.m. Berlogar allegedly told Bahcall that she collided with his vehicle and did not have insurance, but was working on purchasing it.

Berlogar allegedly returned home and purchased an insurance policy online through Esurance at approximately 5:51p.m. Berlogar and Bahcall purportedly agreed to report that the accident occurred after she purchased the insurance policy in order to obtain coverage for the damage to Bahcall's vehicle.

On June 19, 2009, Berlogar called Esurance and filed an insurance claim. Berlogar allegedly told Esurance that she backed into Bahcall's vehicle on June 18 at approximately 10:30 p.m. Bahcall also called Esurance and reported that he discovered the damage to his vehicle between 10 and 11 p.m.

Esurance became suspicious when they reviewed the claim and noticed the date and time of Berlogar's accident happened within hours of when she purchased the policy. Esurance referred the suspected fraud to CDI, which launched an investigation.

CDI investigators allege that Berlogar did not have insurance at the time of the accident. The potential loss for Esurance was $1,289.

Commissioner Poizner urges all Californians to obtain the automobile insurance that is required by law, so that they are adequately covered before accidents occur. The California Low Cost Auto Insurance program offers low-cost liability coverage to eligible Californians for under $400 per year.

The Santa Cruz County District Attorney's Office is prosecuting this case.

Commissioner Poizner oversees sixteen CDI Enforcement Branch regional offices throughout the state. Nearly 2,800 insurance fraud-related arrests have been made by CDI since Commissioner Poizner took office in 2007 - more arrests than have been made during any other three year period, under any previous insurance commissioner.

Grandchildren

Some truly funny and real situations. Enjoy!

continued from May issue

When my grandson Billy and I entered our vacation cabin, we kept the lights off until we were inside to keep from attracting pesky insects . . . Still, a few fireflies followed us in. Noticing them before I did, Billy whispered, “It's no use Grandpa, now the mosquitoes are coming after us with flashlights.”

When my grandson asked me how old I was, I teasingly replied,”I'm not sure.” “Look in your underwear, Grandpa,” he advised, “mine says I'm 4 to 6.”

A second grader came home from school and said to her grandmother, “Grandma, guess what? We learned how to make babies today.” The grandmother, more than a little surprised, tried to keep her cool. “That's interesting,” she said,”how do you make babies?” “It's simple,” replied the girl. “You just changed 'y' to 'i' and add 'es'.”

Children's Logic: “Give me a sentence about a public servant,” said a teacher. The small boy wrote: “The fireman came down the ladder pregnant.” The teacher took the lad aside to correct him. “Don't you know what pregnant means?” she asked. “Sure,” said the young boy confidently. “It means carrying a child.”

A Grandfather was delivering his grandchildren to their home one day when a fire truck zoomed past. Sitting in the front seat of the fire truck was a Dalmatian dog. The children started discussing the dog's duties. “They use him to keep crowds back,” said one child. “No,” said another. “He's just for good luck.” A third child brought the argument to a close. “They use the dogs,” she said firmly, “to find the fire hydrants.”

A 6-year-old was asked where his grandma lived. “Oh,” he said, “she lives at the airport, and when we want her, we just go get her. Then, when we're done having her visit, we take back to the airport.”

Grandpa is the smartest man on earth! He teaches me good things, but I don't get to see him enough to get as smart as him!

My Grandparents are funny, when they bend over you hear gas leaks, and they blame their dog.