CAIIA Status Report
OCTOBER 2010

Order Enforcing Settlement Is Appealable And Was Error Where Parties Reached An Impasse On Wording

By Scott Wm. Davenport - Manning & Marder, Kass, Ellrod, Ramirez

Code of Civil Procedure, section 664.6 provides parties in litigation a summary procedure for specifically enforcing a settlement contract without the need for a new lawsuit. Under the terms of this provision, a Court may receive evidence, determine disputed facts, and enter the terms of a settlement agreement as a judgment. However, the Court may not create the material terms of a settlement as opposed to deciding what terms the parties themselves have agreed upon.

In order to be enforceable, the proposed settlement must either be memorialized in writing and signed by all parties outside the presence of the Court or may be confirmed orally by the parties before the Court. Moreover, where a Court issues an order on such a motion, it is subject to only limited appellate review and will not be disturbed if supported by substantial evidence. (Williams v. Saunders (1997) 55 Cal.App.4th 1158, 1162.)

On August 30, 2010, the California Court of Appeal issued a published opinion in Critzer v. Enos (2010) _ Cal.App.4th _, 2010 Cal.App.LEXIS 1517, which attempts to clarify the law regarding motions to enforce settlement and a party's ability to appeal such a ruling. This case has the potential to greatly impact the rights of many of our clients given the all too common scenario of a proposed settlement which breaks down during the finalization of the settlement agreement and release.

Critzer involved multi-party litigation between feuding neighbors, their HOA, and the City of Cuppertino when one of the neighbors installed a second story window which allegedly afforded him an "eye-level direct view" of his neighbors' living room. The matter was taken off calendar after the terms of a purported settlement were recited on the record and affirmed by 3 of the 5 parties, affirmed by the counsel of a fourth litigant, and where the terms were actually recited by counsel for the fifth party (the HOA). However, sometime later, the parties reached an impasse regarding the specific terms of the final settlement.

After the HOA moved to enforce settlement pursuant to Sections 664.6, the trial court took evidence and concluded that the settlement language proposed by the HOA conformed to and accurately memorialized the terms of the settlement. Thereafter, the Court entered an order enforcing the settlement.

On appeal, the California Court of Appeal concluded that the trial court's order enforcing the settlement did constitute an appealable final order in that it was intended to constitute a final judgment which would finally dispose of all issues between the parties. (See CCP 904.1.)

However, the Court of Appeal ultimately concluded that the purported settlement agreement could not be enforced because it had not been set forth in writing and signed by all parties and because only 3 of the 5 defendants (as opposed to their counsel) orally confirmed the agreement. In so holding, the Court held that it was of

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PRESIDENT'S MESSAGE

TERM ENDING REPORT

Thanks to the members, board and officers for giving me the opportunity of serving as President for the 2009/2010 term!

With the participation and commitment of committee members, chairs and volunteer members, sponsors, industry service providers and our of counsel, CAIIA continues to be the clear premier claims adjusting association in California.

Due to new California Department of Insurance specific continuing education requirements for licensed independent adjusters, 2009 and 2010 reflected an explosion of continuing education classes offered by the CAIIA. Throughout the state, a proliferation of related claims entities offering CE classes. Classes ranged from mold remediation, soot claims, earthquake claim handling, fraud, liability, subrogation and ethics. CAIIA offered a broad spectrum of classes. And CAIIA facilitated the high demand from insurance companies, self-insured firms and our membership by offering classes statewide for certification of compliance with the California Fair Claims Practices Act.

As a result of the demand for education, other entities sought to partner with CAIIA as approved providers of CE classes. Those included contractors, restoration companies, law firms etc. In addition to our own seminars, we found offerings by related claims organization proved beneficial for the general membership. As often mentioned, Helene DalCin has been the key to assuring our CE instructors and classes were in full compliance with the Department of Insurance. They all were.

Most of our seminars were either sold out, or neared capacity. Witnessing large attendance, I attended the full day seminar in Pomona. The presenters included engineers, claims managers experienced in technical issues arising from earthquake claims, and views from the standpoint of a private investigator. A comprehensive presentation of the California Fair Claims Practices

Act including attendee certification was well attended.

We initially struggled with publishing the 2010 Membership Directory. To replace Scott Hannaford, Doug Jackson, Sterrett Harper and Peter Schifrin volunteered to step up to the plate for the purpose of preparing the most accurate directory. Currently at the publisher, our 2010/2011 will soon be distributed.

Sterrett Harper is currently serving out the unexpired term of Scott Hannaford on our Board of Directors.

While our membership numbers leveled out in 2010, we continue to receive requests from independent adjusters to join. Recently at the Claims Conference of Northern California, I was approached by several IA's inquiring about membership in CAIIA.

Showing a profit from the 2009 Convention and Golf Tournament in Rancho Las Palmas, the Mid-Term Convention in Los Angeles and our various 2010 educational seminars, CAIIA continued to stay in the black in 2010.

Again, thank you for me the opportunity to serve. We'll see you at the 2010 Fall Convention and Golf Tournament.

SAM HOOPER
President - CAIIA 2009-2010

Order Enforcing Settlement . . .

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no moment that the settlement was affirmed either through an agent or counsel.

Instead, the Court of Appeal held oral settlement consent must be given by the party, personally, and may not be done through counsel or an agent. The Court also noted that this obligation applied equally to the passive litigants like the HOA and that this fatal defect was not cured by the fact that an HOA representative later executed a release which was consistent with the settlement several months later.

Insurance Law News

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

No Coverage for Claimed Property Damage and Loss of Income Where Insured Failed to Show "Accidental Direct Physical Loss"

There was no coverage for claimed property damage and loss of income where the insured failed to meet its initial burden of showing that business equipment had sustained "direct physical loss" or that the claimed damage was "accidental." (*MRI Healthcare Center of Glendale, Inc. v. State Farm General Insurance Company* (2010) 2010 WL 3028128)

Facts

MRI Healthcare Center of Glendale, Inc. (MHC) provided magnetic resonance imaging (MRI) scanning services from a leased location. Years before the loss that was the subject of this claim, MHC had renovated and customized the leased building so that MHC could install and operate the MRI machine. Among other things, MHC had cut a hole in the roof of the building in order to bring the MRI machine into the building. MHC also had modified the roof by installing a skylight and copper barrier to keep electrical or radio wave interference out of the MRI room.

State Farm General Insurance Company (State Farm) issued to MHC a business policy that included coverage for business personal property and loss of income.

As a result of some storms, MHC's landlord was required to repair the roof over the room housing MHC's MRI machine. Initially, the landlord believed it would be possible to simply install another layer of roofing on top of the existing roofing. Eventually, however, the landlord discovered some rot due to long-term water intrusion, and determined that it would be necessary to remove and replace substantially all the existing roof.

The necessary roof replacement could not be undertaken unless the MRI machine was demagnetized, or "ramped down." MHC was aware that, if the machine was ramped down, there was a possibility it could not be "ramped up" without extensive and time-consuming repairs.

Once the machine was ramped down, it did in fact fail to ramp back up. MHC contended this failure constituted "damage" to the MRI machine and caused MHC to suffer a loss of business income. Because the chain of events was set in motion by the storms, MHC asserted that the storms were the predominant ("efficient proximate") cause of the loss; and, because storm damage was covered under the business policy issued to MHC by State Farm, MHC claimed it was entitled to recover both the amount it expended to return the MRI machine to working condition and the income loss sustained while the machine was inoperable.

The policy State Farm issued to MHC provided coverage for "*accidental direct physical loss* to business personal property … caused by an *insured loss*." The policy also provided coverage for loss of income caused when business operations were suspended due to "a*ccidental direct physical loss to property* … caused by an *insured loss* …."

The exclusions provided, in part, as follows:"We do not insure under any coverage for any loss caused by one or more of the items below: a. conduct, acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body whether intentional, wrongful, negligent or without fault; b. faulty, inadequate, unsound or defective: (1) planning, zoning, development, surveying, siting; (2) design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction; (3) materials used in repair, construction, renovation or remodeling; or (4) maintenance; of part or all of any property (including land, structures or improvements of any kind) on or off the described premises; c. weather conditions. But if *accidental direct physical loss* results from items 3.a., 3.b. or 3.c., we will pay for that resulting loss unless the resulting loss is itself one of the losses not insured in this Section.

State Farm denied MHC's claim, and MHC sued. The Court granted State Farm's motion for summary judgment, and MHC appealed.

Holding

The Court of Appeal held that State Farm's denial of coverage was correct.

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Insurance Law News

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

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First, the Court held that MHC had not met its burden, as the insured, of demonstrating "direct physical loss" to the MRI machine. The fact that the machine failed to ramp up did not, by itself, demonstrate a physical alteration of the MRI machine.

Second, the Court held that the loss was not "accidental." The Court concluded that the ramping down of the MRI machine was intentional, and the machine's subsequent failure to ramp back up was an expected, although unwelcome, result of the ramp down.

Third, the Court rejected MHC's contention that the storms (a covered risk) were the predominant (or "efficient proximate") cause of the loss. The Court held that even it the storms could be deemed to be the "trigger" (i.e., the cause that set the loss in motion), the storms were not the predominant cause of the loss. Instead, it ultimately was the ramping down itself that was the sole, and predominating, cause of MHC's loss. The Court also noted that the evidence established that the roof needed to be replaced not because of the storms, but because of long-term, pre-existing rot damage, which the policy excluded.

Comment

Almost every modern all-risk property policy contains an insuring agreement that requires the existence of "direct physical loss" (or "accidental direct physical loss"). It is the insured's burden to demonstrate the existence of physical damage, after which the burden shifts to the insurer to show the cause of the damage and that the policy excludes the cause of the damage.

In this particular case, the insured showed that the MRI machine stopped working after it was ramped down, but failed to show that the machine actually had undergone some kind of physical change. Moreover, since the insured was aware, before the machine was ramped down, that it later might not ramp up, any physical damage that might have occurred would not be deemed to be "accidental," i.e., unexpected.

Weekly Law Resume

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

Premises Liability - Duty To Protect Customers Does Not Extend To Criminal Conduct Occurring Outside of Owner's Property

Toomer v. United States of America United States Court of Appeals, Ninth Circuit (August 18, 2010)

California law imposes an affirmative duty on business owners to protect customers from foreseeable third-party criminal conduct. This obligation derives from the special relationship between a business owner and his or her customers. The question presented in this case is whether the duty extends to acts that occur beyond the owner's property.

Club Metro, a bar and dance club located inside the U.S. Naval Base in San Diego, hosted a weekly Hip Hop Night. Navy Seaman Roderick Little and his friends attended the party. Marine Lance Corporal Myron Thomas and his friends also visited the club that same evening. The two parties got into a fight on the dance floor. Security personnel intervened. The two groups got into a further fight in the parking lot of the club. Again, security personnel broke up the fight and instructed both groups to leave the Navy base.

As the Thomas car drove out the secured exit to the base, posted security officers heard someone in Thomas' vehicle say, "I'm going to do a 187." Both officers understood this to be a threat of murder. Neither of the officers could see who made the statement and the vehicle sped off before the officers could get a license plate number. One of the officers thought to report the threat to dispatch, but got tied up directing traffic.

Meanwhile, Thomas went to his apartment and took a supervisor's AK-47 automatic rifle. Later, Thomas and a friend located Little and his friends at a nearby Del Taco Restaurant, across the street from the Naval base. Thomas shot in the direction of Little and his friends. Little was killed.

Marie Toomer and Jaya Little, Little's wife and daughter, brought suit against the United States, claiming negligence pursuant to the Federal Tort Claims Act (FTCA). Under the FTCA, the United States can be held liable for injuries/death if a private individual, under like circumstances, could be held liable under California law. Plaintiffs contended that the U.S. owed Little a duty to protect him from third-party criminal conduct. Further, Plaintiffs alleged that the U.S. failed to provide

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reasonable security at Club Metro. The U.S. brought a motion for summary judgment arguing that it did not owe Little such a duty. The trial court granted the motion. Plaintiffs appealed. The Ninth Circuit Court of Appeals affirmed.

On appeal, Plaintiffs argued that the U.S., which operated Club Metro, had a duty to undertake minimally burdensome measures, such as calling 911, to protect Little from imminent or ongoing criminal activity. Plaintiffs also contended that Club Metro should have had a greater and more effective security presence. The Ninth Circuit held that while the Government might have had such a duty while Little was at Club Metro or on the Naval base, the duty did not extend to acts occurring off the base. The Court could find no California Supreme Court case directly on point. The Ninth Circuit, therefore, looked to California appellate decisions that held that if a proprietor is to be held liable in tort for third party criminal activity, the act must occur on the proprietor's property. Further, the Ninth Circuit reasoned that even if the U.S. had a duty to protect Little beyond the base, the U.S. still could not be held liable for Little's death, because it was not reasonably foreseeable that Thomas would go get a weapon and shoot Little. (The Dissent strongly disagreed with this point). As such, Plaintiffs could not establish a claim of negligence and the judgment was affirmed.

COMMENT

This decision places a limit on the duty of a business owner to protect patrons from third-party criminal activity. At some point, the California Supreme Court will need to provide clarity on whether such a duty extends beyond the owner's property.

Settlement - Rescission - Right to Sue

Village Northridge Homeowners Association v. State Farm Fire and Casualty Company Supreme Court of California (August 30, 2010)

An insured executed a full and complete release of a claim and kept the money the insurer paid in settlement without rescinding the release and then sued the same insurer for fraudulently inducing the insured to settle for less than the claim was worth under the policy. The Supreme Court examined this case to determine if this procedure was allowed.

This case arose out of the 1994 Northridge earthquake. State Farm paid Village Northridge $2,068,000 for damages arising from the earthquake. As time passed, additional claims were made and additional payments were made while a compromise settlement was attempted of the remainder. Finally, State Farm paid an additional $1.5 million, pursuant to a release of all known or unknown claims related to the earthquake. It included a Civil Code § 1542 waiver of all unknown claims.

In late 2000, Village Northridge asked State Farm to reopen the claim. State Farm refused. Village Northridge then sued State Farm for breach of contract and breach of the implied covenant. Village Northridge insisted it did not need to rescind the settlement agreement and did not intend to do so. It sought to affirm the release as a partial payment and seek additional damages. The trial court granted State Farm's motion for summary judgment. The Court of Appeal reversed, indicating there were triable issues of fact as to whether the release was enforceable. Village Northridge then filed a second amended complaint, substantially the same as the first. The trial court sustained a demurrer without leave to amend. The Court of Appeal again reversed. State Farm petitioned the Supreme Court for review, which was granted.

The Supreme Court reversed the Court of Appeal. Village Northridge alleged State Farm committed fraud in inducing it to settle by misrepresenting the policy limits. The Court stated the general rule is that if a party seeks to void a release, he must rescind the agreement. This requires prompt notice and an offer to restore consideration. The Court of Appeal held that Village Northridge could keep the settlement proceeds and sue for fraud as is allowed in general fraud actions. The Supreme Court held that procedure does not apply to a settlement and release of a disputed claim.

Here, the payment by State Farm was to settle and release all claims. Allowing Village Northridge to sue without rescinding the contract would defeat that purpose. It would further violate Civil Code § 1691, which provides for notice and restoration of consideration before rescission can be sought. In a rescission trial, the court can adopt a flexible approach and allow the rescission trial to proceed, even if there is no restoration of consideration, if it feels it is equitable to do so. This rule has now been adopted by § 1693 of the Civil Code. This allows plaintiffs who are unable to restore the consideration received in the original settlement and release to delay the restoration of consideration until final judgment, consistent with equitable principles. Village Northridge rejected that approach.

In adopting this rule, the Court saw no need to impose a new rule on insurers. It noted that an insurer is not a fiduciary. Settlements are to be favored. A settlement is considered presumptively valid and the parties to the agreement are bound by it

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until it is rescinded. For that reason, the Court of Appeal's judgment was reversed and the matter remanded to the trial court for further consideration.

COMMENT

The Supreme Court decision will allow insurers to continue the practice of using a release as a settlement device. For those who claim fraud against their insurers in the process of settlement, their relief will be by rescission under the rules set forth by California statutes.

Coverage - Genuine Dispute Doctrine - Third Party Actions

James Howard v. American National Fire Insurance Company , Court of Appeal, First District (August 11, 2010)

The genuine dispute doctrine protects an insurer against a bad faith claim where there is a genuine dispute as to the insurer's liability. This case considered whether that principle applies to a third party action where an insurer refused to defend and settle.

James Howard sued Father Oliver O'Grady and the Roman Catholic Bishop of Stockton for sexual molestation that occurred over many years. In his complaint, James alleged that he was molested between 1979 and 1988. A jury found the Bishop liable for negligent retention and entered judgment in the amount of $5.5 million, $3 million of which was punitive damages. The Bishop had several comprehensive general liability policies from different insurers and excess insurers. American insured the Bishop from November 1, 1978 to November 1, 1979. The policy amount was $500,000 per occurrence. American refused to defend on the basis that the molestation occurred after their policy expired. American relied on statements James made during his deposition that the abuse first began in 1984. American also refused to contribute toward any settlement.

While the case was on appeal, there was partial satisfaction of the judgment by the Bishop and some of the insurers. In exchange, the Bishop agreed to pursue any insurer who did not contribute. Following that settlement, Howard sued the Bishop insurers as a judgment creditor and the Bishop filed a separate complaint against the same insurers. The complaints were consolidated for trial. The claims against American proceeded to trial. The court found molestation occurred during American's policy period and that American acted in bad faith in refusing to defend, settle and indemnify the Bishop. American was ordered to pay almost $3 million for damages it caused. American appealed.

The Court of Appeal affirmed. It first found that there was proof that James was sexually molested during the American policy period. American argued the court could not consider evidence that was not presented in the personal injury action. The Court of Appeal rejected that argument and stated that the evidence in the underlying litigation did not dictate the scope of evidence in the coverage action.

The court found American breached its duty to defend the Bishop. American argued that there was no breach of the duty to defend because the insured was fully defended by other insurers. The court stated an insured refused a defense may be damaged even if the insured is defended by another carrier. Damages can be incurred apart from defense costs in the form of exposure to personal liability.

American also breached its duty to settle this case. The court stated that even though there was never a demand within the single policy limit, there were demands within the primary insurance policy limits of the multiple insurers on the risk. In that situation, each insurer's obligation was to cover the full extent of the insured's liability up to the policy limits. This was especially true where the settlement demand was less than the eventual judgment entered.

American argued there was no excess judgment. The court stated that was not necessary. An insured may recover for bad faith refusal to settle dispute the lack of an excess judgment where the insurer's misconduct goes beyond the simple failure to settle within policy limits or the insured suffers consequential damages apart from an excess judgment. Here, the Bishop paid money to help settle the case and incurred attorney's fees and accounting expenses.

American argued there was a good faith genuine dispute as to coverage in this matter and therefore there was no bad faith. The court stated that an insurer in a third party case could not rely on the genuine dispute doctrine in a refusal to settle the case. Finally, American acted in bad faith by refusing to indemnify the Bishop for the judgment.

The court found the damages properly awarded and that they contained no component of the punitive damage award. With slight modifications in the amount of damages awarded, the court affirmed the judgment.

COMMENT

This case casts doubt on the use of the genuine dispute doctrine in any third party case involving a failure to settle. The court's decision is also instructive for its analysis of a failure to settle case involving multiple insurers.

CAIIA REGISTRATION FORM
California Association of Independent Insurance Adjusters
ANNUAL CONVENTION & GOLF TOURNAMENT –October 21 & 22, 2010

Double Tree Hotel
One DoubleTree Drive
Rohnert Park, CA 94928

Mention California Association of Independent Insurance Adjusters or reference the reservation code "CAI" for special room rates of $120/Nt. Plus tax. Attendees must make their own hotel reservation.

Your Name _____ Spouse/Guest _____

Company _____

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EVENT	COST	#TICKETS	Total Price
Member Convention Package (Includes Golf Dinner, complete convention schedule)	$ 175.00	_____	$_____
Non-Member (**) Convention Package (Includes Breakfast, CE Class/ lunch/dinner)	$ 190.00	_____	$_____
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4 Hour CE Class (Includes breakfast,presentation, lunch)	$100.00	_____	$_____
President's Gala Dinner/Reception	$ 75.00	_____	$_____
	Grand Total Payable		$_____

Please specify which events you and/or your spouse/guest will by placing a check mark in the box next to the event. Complete a separate form for each registrant and additional guest.

SCHEDULED EVENTS

		You	Spouse/Guest
10/21 - 10A.M.	Golf Tournament (Registration Forms at www.caiiagolftournament.com)		
10/21 – 6:00 P.M	Golf Dinner (Foxtail Golf Club)	[ ]	[ ]
10/22– 7:00 A.M.	Registration/Breakfast	[ ]	
10/22 – 8:00 A.M.	Seminar	[ ]	
10/22 –12:00 P.M.	Lunch	[ ]	
10/22 – 1:30 P.M.	Business Meeting (*)	[ ]	
10/22 - 10:00 AM	Spouse/Guest. Lunch (***)	[ ]	[ ]
10/22 – 6:30 P.M.	Reception/Cocktail Hour	[ ]	[ ]
10/22 – 7:30 P.M.	President's Inaugural Dinner	[ ]	[ ]

Please make your checks payable to CAIIA or pay by credit card. Mail Registration Fm & payment to:

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(**) We welcome the attendance and participation of insurance company and risk management claims personnel and attorneys at the President's Gala Dinner Event, the Educational Seminars, and Luncheon following seminars.

(***) Spouse/guest fee includes alternative activity, lunch and dinner on Friday. For details on spouse activity: www.flyinghorse.com

Early registration is encouraged. Cut-off date for contracted room rate is September 20,2010.

CAIIA's 4th Annual Halloween Golf Tournament
October 21, 2010 (Rohnert Park, CA)

Thanks to the generosity of our committed team players in the claims business, CAIIA has now filled all sponsorships for this event. The companies who have made this tournament possible are as follows:

TEE SPONSORS (Not in Particular Order)

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3. Belfor
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13. Servpro of Citrus Heights, Roseville and Carmichael
14. Design-Build Specialists
15. Servpro of Rohnert Park/Petaluma
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Plenty of positions left on the players roster as of press time, but these are going fast so be sure to register yourself, or any number of golfers you like as soon as possible. If you have questions or need a registration form, contact Incoming President, Phil Barrett at (707) 462-5647 or visit www.caiiagolftournament.com for details. Halloween is the theme of the tournament, so don your best costume and come as you aren't!