CAIIA Status Report

October 2013

Even When the Workday is Over, Employers Can Be Liable for Employees' Motor Vehicle Accidents

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

Many California employers would be shocked to learn that they can be liable for an accident involving an employee that occurs when the workday is over and the employee is running personal errands. However, that is exactly what the California Court of Appeal held in *Moradi v. Marsh USA, Inc.* (No. B239859, filed September 17, 2013.)

Shortly after 5:00 p.m. on April 15, 2010, defendant Judy Bamberger left her office at Marsh in downtown Los Angeles and drove towards her Woodland Hills home. Ms. Bamberger planned to stop for frozen yogurt and go to yoga class on her way home. While making a left turn into the yogurt shop parking lot, Ms. Bamberger collided with the plaintiff, Majid Moradi, who was riding his motorcycle in the opposite direction. Mr. Moradi sued both Ms. Bamberger and Marsh for his injuries. Marsh won a motion for summary judgment on the grounds that at the time of the accident Ms. Bamberger was "neither at work, nor working, nor pursuing any task on behalf of her employer, but was pursuing personal interests." Plaintiff appealed and the Second Appellate District ruled that the trip home - including the stops for yogurt and yoga - were within the course and scope of Ms. Bamberger's employment and that Marsh could be liable for the accident.

The court noted that while respondeat superior holds that an employer is liable for an employee's negligence occurring in the course and scope of employment because the organization is better able to insure or redistribute the risk, there is a long standing "going and coming rule" that employees are not within the course and scope during their daily commute (citing, *Lobo v. Tamco* (2010) 182 Cal.App.4th 297, 301). However, there is an exception to the "going and coming rule" that a commute is part of the course and scope when an employee uses the vehicle during business hours for the benefit of the employer, referred to as the "required vehicle exception."

As the *Moradi* court explained, Ms. Bamberger frequently used her car during the work day to drive to presentations and meetings with clients. On the day of the accident she had used her car to take coworkers to a company-sponsored program and she was planning to drive to another out of office meeting the next morning. As such, Marsh could be liable for incidents occurring during Ms. Bamberger's commute. The *Moradi* court held that the stops for yoga and yogurt were not an unforeseeable and substantial departure from the commute so as to extinguish Marsh's liability. In so holding, it extended the decision in *Lazar v. Thermal Equipment Corp.* (1983) 148 Cal.App.3d 458, which held that an employer is liable for an employee's conduct while driving a company car unless that conduct is so unusual and startling that it would seem unfair to attribute it to the employer, even while on a personal errand.

Although the *Moradi* decision extends the *Lazar* rational to personal vehicles, it is vague enough to leave several lingering questions. For instance, how often does an employee have to drive for the benefit of an employee for the required vehicle exception to apply? What sort of stop would be considered so unforeseeable as to extinguish liability for the commute? The *Lazar* case states that "a decision to stop at a party, or a bar, or to begin a vacation, might not have been foreseeable..." but *Moradi* also cites to a 1944 case in which the California Supreme Court held that an employee stopping at a bar for a sandwich and beer while making collections visits to customers did not constitute a substantial deviation from his employment activities. [*Loper v. Morrison* (1944) 23 Cal.2d 600.] While there has been a shift in the societal acceptance of drinking since the 1940s, it is unclear what the court would have done if Ms. Bamberger were leaving a session of martinis and dancing instead of proceeding to yogurt and yoga.

It is possible that the *Moradi* decision will be further appealed to the California Supreme Court, but until it is overturned or limited, employers should be mindful of their exposure.

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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

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California Association of Independent Insurance Adjusters, Inc.

President's Office
6151 Fairmount Ave., #215
San Diego, CA 92120-3439
Email: info@caiia.com

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

Immediate Past President
Jeff Caulkins
John S. Rickerby Company, Glendale, CA
jeff.c@johnsrickerby.com

President Elect
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tanya@casualtyclaimsconsultants.com

Vice President
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Malmgren & Strong, Fresno, CA
kearson@claimsconsultantgroup.com

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khickey@sgdinc.com

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johnbfranklin@att.net

Brian Schneider
Schneider & Associates, Burbank, CA
bschneider@schneiderclaims.com

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artstromer@hotmail.com

TWO YEAR DIRECTORS

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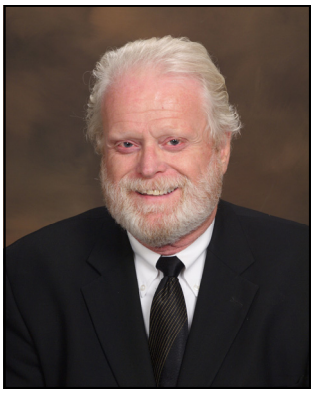
Buxbaum Loggia & Associates, Inc., Fullerton, CA
twaters@buxbaumloggia.com

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

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

OF COUNSEL
Steve Huchting
MORRIS,POLICH& PURDY, LLC
1055 W 7th St., 24th floor
Los Angeles, CA 90017
shuchting@mpplaw.com
213-417-5151

President's Message



W.L. (BILL) McKenzie
CAIIA President

When I was asked to become an Officer in the CAIIA, I was somewhat hesitant because in my discussions with several members, specifically Sterrett Harper and Peter Schiffrin, I was concerned about my ability to properly conduct the duties of the Secretary-Treasurer, and then when you become the President to write 12 monthly letters for the Status Report. It was a daunting task for me as the Secretary-Treasurer, more so the Treasurer because I was not familiar with the accounting system, but eventually I believe my Office Manager and I performed the task adequately and passed it on to Tanya Gonder, who became the Secretary-Treasurer. Tanya, Kearson Strong and Kim Hickey have all done an excellent job as the Secretary-Treasurer.

I look back now as I write my last letter as President of the CAIIA and with a smile I thank Peter and Sterrett for all of the advice they gave me concerning the writing of the 12 letters for the Status Report. For the most part, I found the task to be not nearly as frightening as I originally envisioned. I am reminded that at times how easy it was to write the letter. Occasionally it was more difficult as there are times when you want to make sure you don't as they say "beat a horse to death".

Tanya Gonder will be leading us into our 68th Year of providing our insurance partners with the very best of the independent insurance adjusters in the State of California and elsewhere. It seems hard to believe that we will be celebrating our **platinum anniversary** (70th) in a mere two years! I thank all of the members, the Board and Officers for giving me the opportunity to serve as President of this outstanding organization for the 2012-13 term.

We will all miss Kearson Strong, who has moved to Colorado, and again I want to thank her for everything she did to promote our organization and all of the work she has done on behalf of our organization.

In the September Status Report, the Nominating Committee proposed members for election to the various positions on the Executive Board for 2013-14. Tanya Gonder will become the President; Kim Hickey will be the In-Coming President; Tim Waters has been nominated for Vice President; and Paul Camacho has been nominated for the Secretary-Treasurer. Steve Weitzner is taking the place of Tim Waters as a 1 year Director; and Steve Einhaus will become a 2 year Director, as will Chris Harris and Harry Kazakian. I am not aware of any other nominations, and I want to thank the Nominating Committee and the members who have volunteered to serve this great organization.

Our annual Fall Convention will be held at the Claremont Hotel Club & Spa on the 17th & 18th of October 2013. Attached will be the Registration Form and I implore all members who have not yet sent in their Registration to please do so. Let's have a sell out!

I want to thank the members of our organization who helped man the booth at the Combined Claims Conference of Northern California – Kim Hickey, Steve Einhaus, Pete Vaughan, and Phil Barrett. There were other members of our organization at the meeting who dropped by to give us all support. I even referred an adjuster to our Membership Committee and hopefully he will be eligible and we can continue to add members.

As a parting comment, I want everyone to recognize the hours given by Sterrett Harper every month, year after year to our organization, who publishes the Status Report and volunteers his office as the organization's Executive Office. It involves a tremendous amount of work and Sterrett comes thru every month.

I want to thank all of the members who serve as Office & Directors, and on the various committees. As an all-volunteer organization we would not survive without that participation and dedication. It has contributed to making the CAIIA the great organization that it is today.

In a remark from Pete Vaughan, he indicated that he would miss the opportunity (or excuse) to pontificate. There are times I share that same sentiment. It is a great opportunity to express one's opinion and to editorialize about this great organization and the members who serve. Thank you for allowing me to be your President.

W.L. (Bill) McKenzie
W.L. (BILL) MCKENZIE, RPA
President – CAIIA 2012-13

Policy Language Does Not Require Existing Tenant In Order To Recover Under Lost Rents Coverage

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

In *Ventura Kester, LLC v. Folksamerica Reinsurance Co.* (No. B241889, filed 9/11/13), a California appeals court held that lost rents coverage may be payable even if the premises is not leased at the time of the loss, depending on policy wording.

In *Ventura Kester*, Folksamerica Reinsurance Company issued a commercial building owner's policy insuring a premises in Sherman Oaks, California, at a time when a tenant was in possession of the property. The tenant vacated the premises and the owner subsequently negotiated to lease the property to a fitness club or office supply chain, but neither led to an executed contract. Meanwhile, thieves entered the building, stole copper wire and pipes, and caused extensive damage to the property valued in excess of $1 million. All subsequent negotiations to rent the property failed, and contractors estimated it would take another year to repair.

The building owner's policy provided coverage for structures and for lost rents as a result of damage to a covered structure, stating: "[W]e insure you against financial loss resulting from: 1. direct physical loss of or damage to covered property caused by an accident; and. . . . 3. rents including accrued rents which become uncollectible, and extra expense incurred to prevent loss of rents, because of damage to or destruction of covered structures caused by an accident." The policy also stated: "[T]he amount we will pay is calculated as follows:... a. your net loss of rental income; and b. rents accrued but rendered uncollectible by reason of a covered loss at a location described on the Declarations Page...."

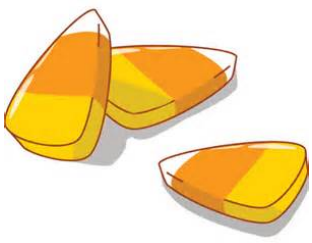
The insurer paid for property damage, but refused to pay for lost rents because the building was vacant at the time of the loss, contending that the owner could not show that it had lost rent as a result of the property damage.

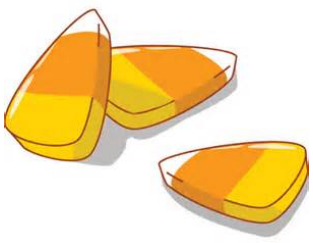
In the breach of contract and bad faith lawsuit that followed, the trial court ruled that the language of the policy did not provide coverage for lost rents when there was no tenant in the building, stating: "I just don't think you can insure against an opportunity cost, especially one as speculative [as] here, without writing it into the policy."

However, the appeals court disagreed, finding the policy ambiguous: "The [policy] provisions provide coverage for the loss of rents the owner would have collected, but for the property damage. Rental property is often vacant between tenants. Ventura's policy provided coverage for damage to the building regardless of whether the property was vacant. An owner of rental property often depends on income from rent payments to cover fixed costs, such as mortgage payments, utilities, and taxes. If the building would have been rented to a new tenant but for the property damage, the owner has lost the rents that would have been received from a new tenant. Since the owner's need for rental income and loss of rental income did not depend on having a tenant in place at the time of the covered incident, it was reasonable for the policyholder to expect the policy covered the owner's actual lost rent as a result of the damage and did not depend on the fortuity of having a tenant in place when the damage occurred."

The court distinguished other cases where policy language had been interpreted as conditioning lost rents coverage on occupancy. Citing *Whitney Estate Co. v. Northern Assurance Co. of London* (1909) 155 Cal. 521 and *Certain Underwriters at Lloyd's London v. Hogan* (2001) 147 N.C.App. 715, the *Ventura Kester* court stated that: "If the insurer had wanted to limit the recovery or calculate the rents based on existing tenants at the time of the building damage, it clearly could have written the policy to provide that."

However, the *Ventura Kester* court also found a triable issue of fact whether the vandalism damage had actually caused the loss of rents, noting evidence that the property damage did not prevent potential tenants from viewing the property, and questioning whether it was necessary to repair the damage to secure a tenant. Instead, the court pointed out that potential tenants had declined to lease the property due to the size of the building or other limitations unrelated to the vandalism damage, including unfavorable economic conditions. Thus, the court reversed summary judgment that had been granted to the insurer and remanded the case for further fact-finding on the cause of the owner's failure to secure a new tenant.





Switchgrass to Gas

Try as we might to write about innovations in producing clean electricity, there are just too many exciting developments in powering vehicles rather than turning our attention elsewhere at this time. After focusing on hybrids, electric and hydrogen cars, let's add to the mix -cellulosic powered vehicles.

The promise of cellulosic bio fuels may sound like a fable out of Brothers Grimm, turning straw into liquid gold. But, unlike corn ethanol, cellulosic does not rely on food crops, but rather can be made from switchgrass, miscanthus, sugar cane refuge, even wood and municipal waste. Amazing!

In 2005 the Congress adapted the Renewable Fuel Standard (RFS), which initially led to corn produced ethanol. This was a first step, but resulted in food shortages in many areas of the world. Then, in 2007 RFS included cellulosic bio fuels with the target of five hundred million gallons by 2012. However, due to massive start up costs and considerable time for construction of facilities, to date the production has been, well, zip. Yet, optimism reigns.

For one, the demand is there. A Pleasanton California-based Fulcrum BioEnergy, which converts municipal waste into biofuel, has signed contracts with the Air Force and the Navy. With conventional fuel costs rising airlines see carbon reduction adding to their bottom line and the industry has a 2020 goal of being carbon neutral with cellulosic a big part of the fuel mix.

The financial backing is now surfacing. For example a Southern California company, Cool Planet, has attracted high profile funding partners including Google, GE and ConocoPhillips. Instead of building huge expensive three hundred million dollar plus facilities, they are making smaller, far less expensive 20 to 50 million dollar facilities. Located 50 miles northwest of the City of Angels, Cool Planet has a simple formula: make fuel, make money, and change the world.

Hopefully, Cool Planet can join other cellulosic producers with production in 2014. We will stay tuned.

Question: What is your industry firm doing, or, better yet where does your firm, or you personally, intend to be Greener in say 2015 or five years from now?

Your comments and your thoughts are greatly appreciated at: steve.einhaus@gmail.com.

Imagination is more important than knowledge.

Albert Einstein

Never doubt that a small group of thoughtful, committed citizens can change the world; indeed, it is the only thing that ever has.

Margaret Mead

Coverage Alert:
Liberty Mutual Ins. Co. v. Brookfield Crystal Cove, LLC (2013) ___Cal.App.4th____

Credit to McCormick Barstow

A homeowners' insurer which subrogates to recover payment of policy benefits to its insured as indemnification for actual property damage may pursue other common law remedies even if the subrogating insurer is otherwise time-barred under California's Right to Repair Act (Calif. Civ. Code § 895 et seq.).

UNDERLYING CLAIM

In a construction defect case, the homeowner insured sustained damages to his newly-constructed home following a burst sprinkler system pipe. The homeowner's insurer, Liberty Mutual, paid for relocation expenses incurred by the homeowner while he was displaced from the home during repairs. Liberty Mutual then subrogated against the home's builder to recover the relocation expenses. The trial court dismissed Liberty Mutual's complaint as time-barred under the "Right to Repair Act" (Calif. Civ. Code § 895 et seq.). The Fourth District Court of Appeal reversed, holding that the Right to Repair Act does not eliminate a property owner's common law rights and remedies, otherwise recognized by law, when actual damage has occurred. The Right to Repair Act was enacted to regulate construction defect claims and provides remedies when construction defects negatively affect the economic value of a home even though no actual property damage or personal injuries have occurred as a result of the defects. The appellate court found nothing in the Act's legislative history that supported the conclusion that the Act bars common law claims for actual property damage, and, therefore, Liberty Mutual's subrogation claim was not time-barred by the Right to Repair Act.

EFFECTS OF THE RULING

When a property insurer subrogates to recover expenses paid to its insured incurred in connection with a claim for actual property damage, the Right to Repair Act is not the subrogating insurer's exclusive remedy and it may pursue other common law claims not otherwise time-barred.

Coverage Alert:
Federal Ins. Co. v. MBL, Inc. (2013) ___Cal.App.4th____

Credit to McCormick Barstow

An insurer which declines to provide independent counsel pursuant to Civil Code § 2860 has no duty to reimburse any other insurer that does provide such independent counsel, when there is no duty to provide independent counsel.

UNDERLYING CLAIM

In a groundwater contamination case, the insured, a supplier of dry cleaning products, refused appointed counsel and demanded its several insurers provide independent counsel (commonly known as "Cumis" counsel) pursuant to Calif. Civ. Code § 2860 to defend against third-party claims. The insured claimed its insurers' reservations of rights created a conflict of interest and demanded the insurers pay for counsel of the insured's choosing. Only one of several CGL insurers actually paid for Cumis counsel. All of the other insurers filed declaratory relief actions. The trial court granted summary judgment in favor of the insurers, finding there was no conflict of interest (and therefore no right to independent counsel). The Sixth District Court of Appeal affirmed, holding that there was no actual coverage conflict giving rise to a right to independent counsel. The appellate court found that the insurers' inclusion of a general reservation of rights in their respective position letters to the insured did not incorporate specific reservations of rights on their respective qualified pollution exclusions, and therefore did not give rise to a conflict of interest or create a duty to provide independent counsel. As to the insurer which paid for Cumis counsel, its appeal to preserve its right to equitable contribution from the other insurers for such payment was declared moot and dismissed by the appellate court. While the insurer providing Cumis counsel was still able to seek reimbursement from the insured pursuant to *Buss v. Superior Court* (1997) 16 Cal.4th 35, for payments made for independent counsel, it was not able to seek contribution from the other non-paying carriers for such payments on the basis that there was no shared responsibility with the other insurers to provide independent counsel.

EFFECTS OF THE RULING

When an insurer has a duty to defend, but no duty to provide Cumis counsel under Civil Code § 2860 because independent counsel is unnecessary, it has no duty to reimburse any other insurer that does provide independent counsel under such circumstances. The decision also means that not every reservation of rights gives rise to a conflict of interest.

Indirect Contact Bars Coverage Under Assault and Battery Exclusion

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

In *Mt. Vernon Fire Ins. v. Oxnard Hospitality, etc.* (No. B244569, filed 9/16/13), a California appeals court held that an assault and battery exclusion did not require actually body-on-body physical contact, but would bar coverage for a claimant's injuries suffered as a result of being doused with alcohol and set on fire.

In *Mt. Vernon*, the plaintiff was a nightclub dancer injured on her employer's premises when a patron threw flammable liquid on her and set her on fire. The assailant, another woman who had apparently been turned down for a job at the club, was convicted of mayhem and sentenced to life in prison. The dancer sued the employer for negligent failure to provide adequate security. The employer stipulated to a judgment of $10 million and assigned its rights against Mt. Vernon, the club's insurer.

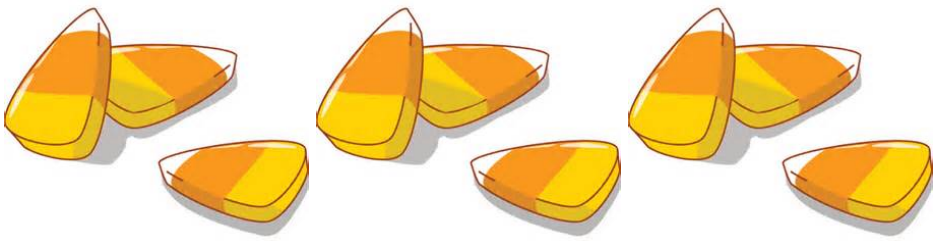
Mt. Vernon filed an action for declaratory relief, seeking a finding of non-coverage based on an assault and battery exclusion that barred coverage for "all 'bodily injury'... arising out of 'assault' or 'battery' ... including but not limited to 'assault' or 'battery' arising out of or caused in whole or in part by negligence.... [¶] 'Battery' means negligent or intentional wrongful physical contact with another without consent that results in physical or emotional injury."

The dancer argued that the exclusion's definition of battery required actual "body-to-body" physical contact. She also argued that "physical contact" means "actual physical touching between one person and another" and she cited a dictionary "definition of 'physical' [as] 'of or relating to the body[]'" and "'contact' [as] 'a touching or meeting of bodies.'"

In a footnote, the court stated that operation of the exclusion did not hinge on a claim of assault and battery, but would also encompass the negligence claim against the employer because the exclusion barred assault and battery "arising out of or caused in whole or in part by negligence." According to the court: "This language clearly defeats any argument that the exclusion has no application because Busby's theory of recovery is in negligence. '[A]ny claim based on assault and battery irrespective of the legal theory asserted against the insured' activates the exclusion." (Quoting *Century Transit Systems, Inc. v. American Empire Surplus Lines Ins. Co.* (1996) 42 Cal.App.4th 121, 127.)

The *Mt. Vernon* court then disagreed that body-on-body contact was required, noting that the tort of battery is generally not limited to direct body-to-body contact. The court cited commentary to the Restatement Second of Torts stating that the "[m]eaning of 'contact with another's person'" does not require that one "should bring any part of his own body in contact with another's person.... [One] is liable [for battery] in this Section if [one] throws a substance, such as water, upon the other." (Rest.2d Torts § 18, com. c.) The *Mt. Vernon* court also cited *Century Transit*, where the court had effectively applied the rule in finding coverage barred when the insured's employee struck demonstrators with a flashlight, and no direct body-to-body contact occurred.

The *Mt. Vernon* court went so far as to cite the physical contact rule applicable to uninsured motorist (UM) coverage for hit-and-run accidents, under which a chain reaction initiated by the hit-and-run driver qualifies as physical contact triggering UM coverage. The *Mt. Vernon* court also rejected an ambiguity argument and found its holding consistent with other jurisdictions considering application of assault and battery exclusions.



Plumbing Leakage That Continued For One To Two Months Was Not "Sudden" And, Therefore, Was Excluded

Credit to Smith, Smith and Feeley, Irvine, CA

Damage caused by plumbing leakage that continued for one to two months, even though hidden and unknown to the insureds, was not "sudden" and, therefore, was excluded. (*Brown v. Mid-Century Insurance Company* (2013) 215 Cal.App.4th 841)

Facts

Leroy and Terrie Brown began observing condensation forming on the windows of their three-story, split-level home. They also noticed moisture running from the windowsills down the walls. When they cleaned the windows, the condensation returned the next day. About a week later, the Browns began noticing mold forming around the inside of the windows and on the walls in the house.

About a month after the Browns first noticed the condensation, they discovered damp soil in the crawlspace. The Browns immediately shut off the water to the house, and they hired a plumber to find and fix the leak. After conducting an investigation, the plumber determined a copper hot water supply line, which was embedded in a concrete footing, was leaking. The pipe was heavily corroded, and had a hole that was approximately one-eighth of an inch in diameter.

After the plumber determined the source of the leak, the Browns contacted their insurer, Mid-Century Insurance Company. The policy insured the Browns' interest in certain items of property and stated "[c]overage is dependent upon both the (1) cause of the loss or damage and (2) type of loss or damage."

The policy listed certain types of loss or damage that were not covered under the policy, "however caused," including "loss or damage consisting of, composed of or which is water damage." The policy included an "extension of coverage" that provided "limited" water damage coverage "for direct physical loss or damage to covered property from direct contact with water, but only if the water results from ... (4) a sudden and accidental discharge, eruption, overflow or release of water ... (i) from within any portion of: (a) a plumbing system."

The policy further stated as follows: "A sudden and accidental discharge, eruption, overflow or release of water does not include a constant or repeating gradual, intermittent or slow release of water, or the infiltration or presence of water over a period of time. We do not cover any water, or the presence of water, over a period of time from any constant or repeating gradual, intermittent or slow discharge, seepage, leakage, trickle, collecting infiltration, or overflow of water from any source ... whether known or unknown to any insured."

With regard to mold, the policy stated: "We do not insure loss or damage consisting of, composed of, or which is fungi. Further, we do not insure any remediation." The policy also contained the following exclusion: "We do not insure loss or damage directly or indirectly caused by, arising out of or resulting from fungi or the discharge, dispersal, migration, release or escape of any fungi. Further, we do not insure any remediation ...." The policy defined fungi as "any part or form of fungus, fungi [or] mold ...."

Mid-Century denied the Browns' claim, and the Browns filed suit for breach of contract and bad faith. Ultimately, Mid-Century filed a motion for summary judgment (or in the alternative for summary adjudication) on the Browns' claims for breach of contract and bad faith.

In support of its motion, Mid-Century submitted the declaration of a plumbing expert, who concluded that the portion of the pipe that had been embedded in concrete had not been wrapped with a plastic protective sleeve, a violation of the building code. The plumber also concluded that the lack of the protective sleeve caused the corrosion, and that the corrosion initially caused a pinhole-sized opening that became progressively larger over time. Based on his observations and review of plumbing records, the Mid-Century's plumbing expert concluded that the leakage had continued for at least five months before the leak was discovered and the water was turned off.

The Browns opposed Mid-Century's motion and submitted a declaration from their own expert, who concluded that the initial leakage had occurred within a fraction of a second and, therefore, was "sudden." However, even the Browns' expert conceded that, after the leakage started, it continued for one to two months. The trial court granted Mid-Century's motion for summary judgment, and the Browns appealed.

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Holding

The Court of Appeal held that policy did not cover any of the damage, and thus affirmed the summary judgment in favor of Mid-Century. Irrespective of whether the initial leakage developed within a fraction of a second, and irrespective of whether the leakage was characterized as a "drip, spray, or stream," it was undisputed that the leakage continued for at least one to two months. The Court further held that leakage that gradually occurred over such a long period of time cannot be deemed "sudden," and that the term "a period of time" was not vague under these circumstances. Because the Browns' breach of contract claim failed, their bad faith claim also failed.

Comment

This holding of this case makes it clear that plumbing leakage that persists over a sufficiently long period time is not "sudden." In addition, the holding of this case elaborates upon the holding of *Finn v. Continental Ins. Co.* (1990) 218 Cal.App.3d 69, where the policy excluded damage caused by leakage and seepage that occurred over "weeks, months or years," and where it was undisputed that a sewer line under a house had leaked for at least six months. The *Finn* court held, among other things, that the rupture or incomplete joining of a plumbing pipe is not a peril that is separate from the peril of leakage. Since these perils are not separate, the predominant cause doctrine has no application.

This case generally is consistent with the holding in *Freedman v. State Farm Ins. Co.* (2009) 173 Cal.App.4th 957, in which the court upheld the validity of an exclusion for "continuous or repeated seepage or leakage of water or steam from a ... plumbing system...." In *Freedman*, the court rejected the insureds' argument that the exclusion was vague because it did not specify how long a leak must last in order to be "continuous" or how many times the leak must stop and start in order to be "repeated."

Lorena Alamo v. Practice Management Information Corporation

California Court of Appeal, Second Appellate District

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

Following the termination of her employment, Lorena Alamo ("Alamo"),a billing and collections clerk, filed a civil action against her former employer, Practice Management Information Corporation("PMIC"), alleging in relevant part: (1) pregnancy discrimination and retaliation in violation of the California Fair Employment and Housing Act, Gov. Code §12900 et seq. ("FEHA"); and (2) wrongful termination in violation of public policy. The case was tried before a jury, which rendered a verdict in Alamo's favor.

PMIC appealed the trial court decision, claiming that the trial court erroneously instructed the jury by requiring Alamo to show that her pregnancy or pregnancy-related leave was a "motivating reason" for her termination, rather than "a substantial motivating reason." PMIC further argued that the trial court should have instructed the jury that PMIC could avoid liability under a "mixed motive" defense by demonstrating that it would have terminated Alamo even in the absence of any discriminatory or retaliatory motive.

The Court of Appeal for the Second District affirmed the trial court decision, finding that the court had made no instructional error. Specifically, the Court of Appeal found that a plaintiff in a pregnancy discrimination action must only show that the plaintiff's pregnancy was "a motivating reason" in the employer's decision, and the "mixed motive" defense does not apply where the defendant denies hat discrimination played any role in the claimed adverse employment action.

PMIC appealed the Court of Appeal's decision. The California Supreme Court vacated the lower court's decision and directed it to reconsider the case in light of its recent decision in Harris v. City of Santa Monica (2013) 56 Cal.4th 203. Under the Court's Harris ruling, a plaintiff must produce evidence sufficient to show by a preponderance of the evidence that discrimination was a "substantial" motivating factor, rather than simply a motivating factor, behind an employment decision. Harris also held that employers may rely on the "mixed motive" defense in employment discrimination cases by showing that legitimate, nondiscriminatory reasons would have led to the same decision at the time the decision was made.

Upon reconsideration, the Court of Appeal has now ruled that the proper standard of causation in a discrimination or retaliation claim under the FEHA is "a substantial motivating reason" rather than "a motivating reason." However, the Court disagreed with PMIC in regard o the mixed motive defense. It found that PMIC offered a defective "mixed motive" instruction to the jury because it did not plead the defense in its answer to Alamo's complaint, nor did it assert it as an affirmative defense. The Appellate Court reversed the judgment and the award of attorneys' fees in favor of Alamo and remanded the matter for retrial. On retrial, the trial court will instruct the jury on the standard of causation set forth in Harris, but PMIC will not be allowed to assert the "mixed motive" defense.

COMMENT

In addition to affirming the adoption of "a substantial motivating reason" standard of causation in a discrimination or retaliation claim under FEHA, the Court of Appeal has also stressed the importance for employers to either include their "mixed motive" defense in their answer to a complaint or assert it as an affirmative defense that the employer had a lawful reason to discharge the employee. Otherwise, the employer will waive the defense.

CAIIA REGISTRATION FORM

California Association of Independent Insurance Adjusters

ANNUAL FALL CONVENTION & DANCE – October 17 & 18, 2013

Claremont Hotel Club & Spa
41 Tunnel Road, Berkeley, CA 94705
Phone: 510-843-3000

Mention California Association of Independent Insurance Adjusters
for room rate of $179/ night plus tax until August 16, 2013 ($189/night thereafter)***
Attendees must make their own hotel reservations

Your Name _____ Spouse/Guest _____

Company _____

Address _____

Phone _____ Fax _____

E-Mail _____

EVENT	COST	#TICKETS	TOTAL PRICE
MEMBER CONVENTION Package (*) (Includes reception, breakfast, CE Class/lunch/dinner)	$150.00	#_____	$_____
Non-Member (**) Convention Package (Includes reception, breakfast, CE Class/lunch/dinner)	$175.00	#_____	$_____
Spouse/Guest fee (***) ***Name***_____	$100.00	#_____	$_____
4 Hour CE Class (Includes, breakfast, presentation, lunch)	$100.00	#_____	$_____
President's Gala Dinner/Reception	$100.00	#_____	$_____
		Grand Total payable	$_____

SCHEDULED EVENTS

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

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

Casualty Claims Consultants
6114 LaSalle Ave., #266
Oakland, CA 94611

		You	Spouse/Guest
10/17 – 6:30 P.M.	Reception, Claremont Hotel & Spa	[ ]	[ ]
10/18 - 8:00 A.M.	Registration/Breakfast	[ ]	
10/18 – 9:00 A.M.	Seminar	[ ]	
10/18 – 12:00 P.M.	Lunch	[ ]	
10/18 – 1:30 P.M.	Business Meeting (*)	[ ]	
10/18 – 6:30 P.M.	Reception/cocktail Hour	[ ]	[ ]
10/18 – 7:30 P.M.	President's Inaugural Dinner Dance	[ ]	[ ]

Credit Card:	AMEX VISA M/C Circle one	3 Digit Security # (CV)	
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(*) Members only.
(**) 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, breakfast and dinner on Friday.
For details on Spouse/Guest activity, e-mail: tanya@casualtyclaimsconsultants.com

***These rates are reduced from $274/night for our group! ***

On the Lighter Side...

A Smile A Day....!
Punography (Cornography???)

I tried to catch some Fog. I mist.

When chemists die, they barium.

Jokes about German sausage are the wurst.

A soldier who survived mustard gas and pepper spray is now a seasoned veteran.

I know a guy who's addicted to brake fluid. He says he can stop any time.

How does Moses make his tea? Hebrews it.

I stayed up all night to see where the sun went. Then it dawned on me.

This girl said she recognized me from the vegetarian club, but I'd never met herbivore.

I'm reading a book about anti-gravity. I can't put it down.

They told me I had type A blood, but it was a Type- O.

Why were the Indians here first? They had reservations.

Class trip to the Coca-Cola factory. I hope there's no pop quiz.

Energizer bunny arrested. Charged with battery.

I didn't like my beard at first. Then it grew on me.

What does a clock do when it's hungry? It goes back four seconds.

I wondered why the baseball was getting bigger. Then it hit me!

Broken pencils are pointless.

What do you call a dinosaur with an extensive vocabulary? A thesaurus.

England has no kidney bank, but it does have a Liverpool .

I used to be a banker, but then I lost interest.

I got a job at a bakery because I kneaded dough.

Haunted French pancakes give me the crepes.

Velcro - what a rip off!

Cartoonist found dead in home. Details are sketchy.

Venison for dinner? Oh deer!

Earthquake in Washington obviously government's fault.

I used to think I was indecisive, but now I'm not so sure.