CAIIA Status Report

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November 2017

Assumption of Risk: Hot Air Ballooning

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

Erika Grotheer v. Escape Adventures, Inc., et al.

Court of Appeal, Fourth Appellate District, 14 Cal.App.5th 1283 (August 31, 2017)

Plaintiff Erika Grotheer (hereafter "Plaintiff") was injured when her hot air balloon ride ended in a crash landing. She sued the balloon tour company, the balloon pilot and the vineyard providing the balloon tour (hereafter "Defendants") for her personal injuries. Defendants successfully filed a motion for summary judgment in the trial court, contending that defendants did not owe a duty of care to plaintiff due to the primary assumption of risk doctrine, among other grounds. The trial court granted the motion for summary judgment, finding that plaintiff's negligence claim failed as a matter of law through the primary assumption of risk doctrine. Plaintiff appealed.

The Appellate Court affirmed the judgment. In its reported decision, the Appellate Court held that a hot air balloon operator could not be considered a common carrier and did not have a heightened duty to protect the safety of passengers. The Appellate Court held that the primary assumption of risk doctrine applied, and defendants did not owe a duty of care to plaintiff. The Appellate Court found that any lack of safety instructions by defendants was not a substantial factor in causing plaintiff's injury.

Before deciding whether the primary assumption of risk doctrine applied, the Appellate Court analyzed whether the balloon operator should be considered a common carrier who would owe his passengers a heightened duty of care to ensure their safety during a balloon tour. The Appellate Court performed an extensive analysis of the trend broadening the common carrier definition and application. Yet, the Court held that a hot air balloon differed from other types of recreational passenger carriers who are held to a common carrier's heightened duty of care, e.g., roller coasters, ski lifts and trains. The Appellate Court found that a hot air balloon could not be considered a common carrier due to the inability of a balloon pilot to maintain direct and precise control over the speed and direction of the balloon. A balloon pilot directly controls only the balloon's altitude. While engineering design and operators' skill can significantly reduce the danger of riding a roller coaster, a ski lift, an airplane or a train, these risks cannot be mitigated with a hot air balloon without altering the fundamental nature of a balloon.

The Appellate Court next determined that defendants did not owe a duty of care to plaintiff by relying upon the primary assumption of risk doctrine. The primary assumption of risk doctrine is merely another way of saying that defendants do not owe a duty of care to a plaintiff as a result of the risks inherent in a given sport or activity. Some activities are inherently dangerous, such that imposing a duty to mitigate those inherent dangers could alter the nature of the activity or inhibit vigorous participation. The primary assumption of risk doctrine has been developed to avoid such a chilling effect. If the primary assumption of risk doctrine were to be applied to hot air ballooning, defendants would not be obligated to protect its customers from the inherent risk of the activity.

Plaintiff was injured when the hot air balloon pilot could not control the speed of the descent, which caused the basket containing passengers to crash and bounce. This crash landing caused the passengers to be tossed about the basket which injured plaintiff. The Appellate

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President's Message

I have always enjoyed the movie Independence Day and the return of Russell Casse (Randy Quaid) stating, **"I'm baaaack".** Sometimes, things don't go as planned. We have to be resilient and have a backup plan to make sure we don't lose track of our goals, whether it is personal or professional.

Paul Camacho

CAIIA President

We welcome Richard "Rick" Kern and Pete Vaughan as our new two-year directors. It should be recognized that both Rick and Pete have sat on the board before and have agreed to step up to fill these positions. You may also recognize Rick's name as he has been instrumental as our education director for the CAIIA. Neil Thornhill and Eric Sieber have moved to the one-year director positions on the Board. John Ratto has moved up to Vice President and Gene Campbell has accepted the position of Secretary Treasurer.

The CAIIA owes a huge debt of gratitude to Mark Hall of the Hall Law Firm out of Laguna Hills. Mark has been "Of Counsel" through the terms of Kim Hickey, Paul Camacho and Steve Washington. He has been available to the board and has presented CE classes in coordination with the CAIIA. Thank you Mark for the three years of service!

We welcome Kevin Hansen, partner with McCormick Barstow LLP Attorneys At Law out of Fresno, as our new "Of Counsel". Kevin has also been active with the CAIIA and has also served this position in the past. You may also recognize him also as a CE presenter at the Claims Conference of Northern California. We are lucky and appreciate his involvement.

We just had our annual meeting in San Diego, where we extended our gratitude to Steve Washington, our outgoing President. The meeting was coordinated by Patricia Bobbs and Kim Hickey and it was a great venue. If you have not participated in the past, it is time for you to get back involved.

Changes are on the horizon as we all recognize the need to evolve our organization if we are going to be a presence in the insurance community. If you are not aware, we are very fortunate to participate in meetings with the Department of Insurance in Sacramento. Peter Schifrin is our CAIIA representative who volunteers his time on behalf of our organization.

A proposed change is to create a mechanism for ANY licensed CA adjuster to join our organization. We are going to be working on a Bylaw revision and when it is sent to the membership, we will need your votes. You may ask, what is the benefit or the downside? When you obtain your adjusting license in California, it is as an independent adjuster, not as a company adjuster. To maintain that license, you are required to participate in approved continuing education by the State of California. When the CAIIA meets, we offer an approved CE course. In addition to the actual class, we have members experienced in many different fields with varying degrees and years of expertise that attend. Questions generated and subsequent discussions are a learning lessons you do not get out of a book.

In closing, I am in the process of reaching out to our past CAIIA Presidents to write the monthly President's Message. This will allow them to tell us where they are, where they have been and reflect on changes in the insurance industry. Next month, Kimberley Hickey, past President 2014-2015, will be presenting the message. You may get a couple of lines from me.

Thank you to all I have not mentioned who are behind the scenes and will say yes as I establish our new committees. Happy and safe Thanksgiving!

Paul Camacho

CAIIA President 2017-2018

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NEWS FROM AND FOR OUR MEMBERS

SAVE THE DATE

The CAIIA is proud to be exhibiting at or sponsoring the following upcoming events:

March 6-7, 2018 **Combined Claims Conference, Garden Grove, CA**

DOI Curriculum Board Update

I attended the California Department of Insurance Curriculum Board Meeting on October 19th.

The meeting was uneventful, and there appears to be no upcoming legislation that will affect our industry.

We are seeing positive progress with the pass rates for the independent adjuster examination. The first six months of 2017 pass rates were 54% for first time test takers and 39% for repeat test takers. These are up from 43% first time and 30% repeat test takers in 2016. The CAIIA can take some credit for improving the test.

There was some discussion of the impact of the recent fires on future education, given the likelihood that property owners will be under-insured whether for structure and/or ordinance. We will see down the line how that shakes out.

Peter Schifrin CAIIA – Past President

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DOI Press Release

First available preliminary data release on deadly wildfires

Insurance Commissioner Dave Jones announces first data of residential and commercial losses

LOS ANGELES, Calif. - With more than 7,000 structures damaged or destroyed, residents in several counties across northern and southern California are leaving evacuation centers to access what they've lost and begin the long road to rebuild and recover.

Insurance Commissioner Dave Jones today announced preliminary data provided by eight California insurers processing claims for tens of thousands of policyholders. While the numbers are expected to climb, as more claims are filed and processed, the preliminary data reflects $1.045 billion in losses, commercial and residential structures, personal and commercial vehicles, and agricultural equipment.

"These numbers are just the beginning of the story as one of the deadliest and costliest wildfire catastrophes in California's history," said Insurance Commissioner Dave Jones. "The tragic death of 42 people and over a billion in property losses are numbers-behind these numbers are thousands of people who've been traumatized by unfathomable loss. We must do all we can to ease their pain and help them recover and rebuild."

Commissioner Jones took extraordinary steps to assist wildfire victims by dispatching his consumer services team to every local assistance center to personally meet with consumers and help them begin the claims process and answer questions about department resources.

Last week he issued a notice to insurers asking them to expedite claims, by cutting through red tape and doing all they can do to help policyholders who are likely to have little or no documentation that insurers normally require.

Jones also signed a declaration of an emergency, which allows the insurers to tap
out-of-state claims adjusters from their other offices, which effectively expands their claims adjuster workforce. Tens of thousands of claims, this is an important step in increasing the claims processing capacity for insurers and helping speed the recovery and rebuilding process. Continued on page 4

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Jones also has an important caution for wildfire victims. Be careful to check the license of contractors who solicit business-this is done quickly on the Contractors State License Board using a smart device.

Public adjusters are restricted from soliciting business from residents until seven days after evacuation orders are lifted. Consumers that have any difficulty with their insurer will find the department's consumer services team stands ready to assist at 800-927-4357. The department has recovered more than $300 million dollars for consumers since Jones took office in 2011.

The commissioner is also monitoring the Santa Cruz fire that broke on Monday and threatens more than 300 homes.

Media Note: Eight insurers have provided preliminary loss data and it includes the following:

4,177 partial residential losses
5,449 total residential losses
35 renters/condo losses
601 commercial property losses
Over 3,000 auto losses
83 commercial auto losses
150 farm or agriculture equipment losses
39 boats

Continued from page 1

Court found that a balloon's limited steer ability created a risk of crash landings, which could not be mitigated except by fundamentally altering the free-floating nature of a balloon ride. Therefore, the Appellate Court found that the primary assumption of risk doctrine applied to bar plaintiff's claim against defendants.

Plaintiff attempted to avoid the bar of the primary assumption of risk doctrine by claiming that the balloon pilot was grossly negligent, thereby increasing the inherent risk of a crash landing. If the balloon pilot is considered grossly negligent, the primary assumption of risk doctrine would not apply. The Appellate Court found that the pilot was not grossly negligent because his actions did not constitute a want of even scant care or an extreme departure from the ordinary standard of conduct.

Another exception to the bar of the primary assumption of risk doctrine is when the defendants fail to comply with their duty to take reasonable steps to minimize the inherent risks in the inherently risky activity, if providing the reasonable steps to minimize the risks would not fundamentally alter the activity. Plaintiff complained that defendants failed to properly instruct passengers on safe landing procedures, which would have minimized the risk of passenger injury in the event of a rough landing. Plaintiff submitted evidence in opposition to defendants' motion for summary judgment that defendants failed to provide any instructions concerning landing procedures. The Appellate Court held that any lack of safety instructions was not a substantial factor in causing plaintiff's injury. The witnesses' accounts of the landing indicated that this was a forceful and violent crash landing, which caused the passengers to be thrown about the basket. Plaintiff failed to show that any instructions concerning proper body positioning during landing would have created a different result.

DOI Announcements

Commissioner asks insurers to expedite claims handling to help wildfire victims

Also issues declaration of emergency required to allow insurers to use adjustors licensed in other states

SACRAMENTO, Calif. - Insurance Commissioner Dave Jones issued a notice to insurers asking them to agree to expedited claims handling procedures for wildfire damage claims in order to help fire victims more quickly. Several insurers immediately agreed to the Commissioner's request to follow expedited claimed handling procedures.

With thousands of homes damaged and destroyed by dozens of wildfires blazing across the state, thousands of residents face the long and painful task of recovery, which often includes trying to reconstruct destroyed or missing documents.

In an effort to speed recovery, Commissioner Jones asked home insurers with policyholders in the areas hit by fires to agree to claims handling procedures that will bring more timely payments and flexibility with some of the deadlines and documentation typically required by insurers.

"Victims of these devastating wildfires need all the help we can provide," said Insurance Commissioner Dave Jones. "I am asking California insurers to adopt these expedited claims handling procedures to get help to policyholders more quickly. I applaud the California insurers who, in response to our request, immediately agreed to adopt expedited their claims handling procedures and expect more insurers will also agree to these expedited procedures, so fire victims may begin to put their lives back together."

After destructive wildfires, policyholders often find many of the things the insurance company needs to process their claim are missing or were destroyed in the fire, such as home inventories, receipts, bills of sale, and vehicle ownership papers. Under these expedited claims handling procedures, policyholders may receive advance payment for up to four months of additional living expenses, 25 percent of policy limits for personal property, and an expedited process for debris removal-a first step in rebuilding.

These procedures speed payment for damaged or destroyed vehicles and provide at least 30 days billing leniency for lost renewal notices or those who do not have the ability to have mail forwarded.

Commissioner Jones also declared an emergency exists in California yesterday, which allows insurance companies to use out of state adjusters to respond more quickly to the losses arising out of these wildfires. Jones also mobilized the department's resources to make sure consumers had access to the consumer assistance and support the department provides to help consumers navigate the insurance claims process.

Commissioner Jones is visiting the Santa Rosa burn areas to survey the damage, meet with residents, make sure insurers are on-site taking claims, and to meet with California Department of Insurance staff who were deployed on-site to assist residents. CDI staff are participating in Local Assistance Centers established in fire areas throughout the state.

He also directed the department's law enforcement team to deploy to areas hit by fires to educate residents on how to avoid scam artists who prey on vulnerable victims. CDI Detectives were first deployed to Anaheim yesterday and will be deployed to other areas hit by fires.

Policyholders should contact their insurance company and insurance agent to begin the claims process. They may also contact the Department of Insurance Consumer hotline at 800-927-4357 to seek assistance or visit the Departments website for tips and advice.

Your Release May Not Be as Broad as You Think
Credit : Tyson & Mendes, San Diego, CA

In *Iqbal v Ziadeh* (2017) 10 Cal.App.5th 1, plaintiff was hired by a used car lot, Yosemite Auto, to determine why a car recently towed to the lot would not start. Unbeknownst to plaintiff, the tow truck operator had disconnected the transmission shift linkage to do so. The tow truck operator then failed to reconnect the shift linkage after towing the car. Plaintiff confirmed the car was in "park" and crawled underneath it to determine why it would not start. When he tested the electrical connection to the starter, the vehicle immediately ran over him and dragged him through the used car lot, crushing his spine.

Plaintiff sued Yosemite Auto and the tow truck operator. All defendants were dismissed with prejudice after the insurer for Yosemite Auto agreed to pay its $1 million policy limits. The settlement agreement released all defendants from liability "including, without limitation, any and all known or unknown claims . . . ." Significantly, the release included within its scope the defendants' "affiliates" and "all other persons, firms, or corporations, with whom any of the former have been, are now or may hereafter be affiliated."

Within a matter of months, plaintiff filed a second action against the owner of the property where the accident occurred. Plaintiff based this action on the same facts as his first action, and sued the property owner for negligence and premises liability. At the time of the accident, Yosemite Auto had leased the property from the owner who had previously operated the used car lot. Upon leasing the property, the property owner had left several vehicles on the lot for Yosemite Auto to sell on consignment. The car that injured plaintiff was one of those vehicles. Moreover, the property owner was the person who recommended plaintiff to Yosemite Auto to fix the car.

The property owner filed a motion a motion for summary judgment contending he was an "affiliate" and third party beneficiary of the settlement agreement and release resolving the first action. His evidence consisted of a declaration by defense counsel for Yosemite Auto who said he always intended the property owner to be included in the release. Plaintiff's counsel submitted a declaration stating, among other things, the property owner was never part of the settlement discussions or settlement. The trial court granted summary judgment. The Court of Appeal reversed.

The Court first found an "affiliate" generally is one who is dependent upon, subordinate to, an agent of, or part of a larger or more established organization or group. This is a closer association than that of the property owner who had only a contractual relationship with Yosemite Auto. There was no evidence those contracts, a lease and a consignment agreement, made the property owner dependent upon, under the control of, an agent of, or a part of Yosemite Auto.

Further, the Court found the release benefited the former defendants' "present and future officers, directors, stockholders, attorneys, agents, servants, representatives, employees, subsidiaries, affiliates, partners, predecessors and successors in interest, and assigns and all other persons, firms, or corporations, with whom any of the former have been, are now or may hereafter be affiliated." To interpret "affiliate" as meaning one who has only a contractual relationship with the former defendants would have been inconsistent with the intent demonstrated by the remainder of the release.

Finally, and perhaps the most compelling evidence, plaintiff and the former defendants agreed to keep the settlement terms confidential. They agreed neither they nor their attorneys or representatives would reveal "to anyone" any terms of the settlement agreement, including the release, unless otherwise mutually agreed in writing. The Court noted a party who was not supposed to know anything about an agreement (i.e. the property owner) could not reasonably expect to benefit from it.

Based on this extrinsic, objective evidence, the Court found the parties had no intention to include the property owner as part of the release and "immunize" him.

Take Away from the Decision:

First, in most commercial landlord-tenant leases, the lessee is typically obligated to defend, hold harmless and indemnify the lessor against any and all claims occurring on the property while under the control of the lessee. Further, the lessee is usually also required to name the lessor as an additional insured under the lessee's general liability policy. Now, this case arose out of a freak accident that did not necessarily have anything to do with the property and the property owner was not named as a defendant in the first action; thus, it may have never occurred to defense counsel to specifically name the property owner in the release. That said, if Yosemite Auto were required to defend, hold harmless, indemnify, and insure the property owner pursuant to their lease, then Yosemite Auto or its insurer may well be paying twice for this loss.

Second, the use of the term "affiliated" in the release was unfortunate. After paying $1 million to resolve the claim, defense counsel undoubtedly intended to cut off any and all future claims or lawsuits arising out of the incident and "immunize" anyone who could possibly be named. Counsel may have been better off using a release similar to the one used in *General Motors Corp. v. Superior Court* (1993) 12 Cal.App.4th 435.

In *General Motors*, plaintiff's wife died as a result of an accident with another driver. Plaintiff, represented by counsel who had earlier notified GM of a possible products liability claim, settled with the other driver involved for $25,000. The release signed by the plaintiff released the driver and "any and all persons, firms, and corporations" from liability for the accident. Plaintiff then sued GM. GM filed a motion for summary judgment contending the release signed by plaintiff released GM as well. Plaintiff's counsel submitted a declaration stating the intention of the parties was to release only the other driver, never GM. The trial court denied GM's motion. GM filed a writ. The Court of Appeal directed the trial court to set aside its denial of summary judgment for GM and to grant the motion for summary judgment. The Court held plaintiff presented no evidence raising a triable issue of fact the language of the release did not encompass all persons or entities, including GM.

Open and Obvious
Credit : Tyson & Mendes, San Diego, CA

In *Jacobs,* plaintiff was a prospective home buyer who wanted a better view over the backyard fence so he stepped up on the diving board. The diving board base collapsed, causing his fall into the empty pool. The Court of Appeal noted, "Generally, if a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty to remedy or warn of the condition." *Jacobs, supra*, 221 Cal.Rptr.3d at p. 708.

In *Christoff v. Union Pacific R. Co.* (2005) 134 Cal.App.4th 118, 126–27, 36 Cal.Rptr.3d 6, 13, the Court of Appeal affirmed summary judgment after plaintiff was struck by a train while walking on a railroad bridge. Plaintiff admitted he was aware generally of the hazard of walking on a railroad bridge but unsuccessfully attempted to avoid summary judgment by claiming he was not aware the walkway on the bridge was so narrow he did not know he could not avoid the train.

Similarly, in *Danieley v. Goldmine Ski Associates, Inc.* (1990) 218 Cal.App.3d 111, 121–22, 266 Cal.Rptr. 749, 755, the Court of Appeal affirmed summary judgment in favor of the defendant ski run operator where the plaintiff skier was injured after colliding with a tree, noting the danger was so obvious the landowner was not obligated to warn of the danger.

Open And Obvious As An Issue To Be Determined By The Jury

The issue of "open and obvious" will be submitted to the jury if the court concludes it is foreseeable the dangerous condition may still cause injury despite the fact it is open and obvious. In that case, the landowner may have a duty to remedy the dangerous condition. In *Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 121-122, 273 Cal.Rptr. 457, the plaintiff, who was making a delivery, was injured while walking through an area which consisted of dirt mixed with broken pieces of concrete. There was evidence plaintiff's job required he walk through the area. The Court of Appeal reversed the jury's verdict in favor of defendant, remanding the case for another trial, based on error in instructing the jury, as requested by the defendant, that defendant "cannot be held liable for an injury resulting from a danger which was obvious." *Osborn, Id.* at p. 115.

Open and obvious is not a complete defense when "it is foreseeable that the danger may cause injury despite the fact that it is obvious (e.g., when necessity requires persons to encounter it)." *Id.* at p. 122. In *Jacobs,* the Court of Appeal noted it "was not reasonably foreseeable that [plaintiff] would expose himself to the risks associated with the empty pool, as he was neither required nor invited to do so." *Jacobs, supra*, 221 Cal.Rptr.3d at p. 709.

Notably, the approved, standard jury instruction CACI 1004 on the issue states only that the landowner does not have a duty to warn of an obvious dangerous condition. The use note cites *Osborn* for the proposition the landowner may still have a duty to take precautions against the risk.

The Court of Appeal in *Krongos v. Pacific Gas & Electric Co.* (1992) 7 Cal.App.4th 387, 394, 9 Cal.Rptr.2d 124, 128, similarly reached the conclusion the injury was foreseeable when reversing summary judgment in favor of the landowner where a contractor working on a boom truck was electrocuted when he came into contact with overhead electrical lines. The Court noted the practical necessity of using the boom truck to move materials made it foreseeable a worker could reasonably choose to the encounter the risk.
It is important to note the Court of Appeal did not determine the landowner breached its duty to the deceased worker. The Court decided generally under the circumstances a duty existed but it was up to the jury to decide under the facts specific to the case whether the defendant breached its duty to the decedent by not taking precautions or providing additional warnings. *Id.* at p 395.

Conclusion

Foreseeability and reasonableness in the context of the case are the primary issues to consider in determining the probability of prevailing on a motion for summary judgment based on the argument defendant owed no duty of care to the plaintiff who chose to encounter a condition which was open and obvious. If the condition existed in a location where one would not expect a reasonable person to encounter the risk, summary judgment may be warranted. On the other hand, if the condition existed in a location where plaintiff would reasonably encounter the risk, is much more likely the court will allow a jury to determine whether the defendant was negligent, and if so, whether the plaintiff was comparatively negligent for encountering the risk.

Football Helmet Coverage Action

Credit to: McCormick Barstow LLP, Fresno, CA

When discovery sought by insurer in coverage dispute with insured is related to issues affecting the insured's liability in an underlying liability case, such discovery must be stayed.

Riddell, Inc. v. Superior Court **(2nd Dist. Ct. App. 2017) ___Cal. App. 5th ___, 2017 DJDAR 8152, Case No. B275482**

UNDERLYING CLAIM

Riddell was sued by numerous former professional football players in consolidated actions alleging negligence and products liability resulting in neurological damage allegedly suffered as a result of wearing Riddell helmets while playing football. Riddell filed a coverage action against various insurers alleging declaratory relief, breach of contract and bad faith. The insurers filed answers alleging that Riddell expected or intended the injuries, that it had prior notice of the injuries but failed to disclose this information when purchasing the policies, and that the alleged injuries did not occur during their respective policy periods. During the course of discovery, the insurers requested production of certain documents and answers to certain interrogatories to which Riddell refused to respond on the ground that the discovery was related to issues in the underlying third party action. The insurers moved to compel responses and for the production of a privilege log. Riddell moved for a protective order.

The trial court granted the insurers' motions to compel and denied Riddell's motion for a protective order, finding that the insurers were seeking to determine when the injuries occurred for policy period purposes and the question of when the underlying claims arose was unrelated to issues of consequence in the underlying action. The court also determined that a protective order already in place was sufficient to protect Riddell from any prejudice in the underlying action. The court ordered Riddell to produce privilege logs, excluding only communications with its coverage counsel in the coverage action or work product created in anticipation of the coverage action. Riddell filed a petition for writ of mandate and the court of appeal issued an alternative writ directing the trial court to vacate its order or show cause why the petition should not be granted. The trial court did not vacate the order.

APPELLATE COURT'S RULING

The appellate court first noted that, under California law, when the factual issues in an action for declaratory relief overlap with those to be decided in an underlying action, the trial court must stay the action for declaratory relief because of the risk of collateral estoppel. Similarly, when "discovery in the declaratory relief action is logically related to issues affecting liability in the underlying action," there is a similar risk of prejudice. In addition to the risk of collateral estoppel, the appellate court noted that "the insured will inevitably be prejudiced by having to pay the costs of discovery in the declaratory relief action that would, if it had taken place in the underlying action, have been paid by any insurers with a duty to defend." Simply put, "the insurer cannot use the discovery process in the declaratory relief action to investigate or develop those facts if they are logically related to issues affecting the insured's liability. Rather, that factual investigation and development must take place in the underlying litigation, where any insurer with a duty to defend should be paying the insured's defense, including discovery costs. (Citation.)"

In the present case the insurers sought documents related to prior claims against Riddell, the defense or settlement of certain claims and the dates when the plaintiffs played professional football wearing the helmets and the models worn. The appellate court found these issues were all related to the underlying action because the plaintiffs in those actions bore the burden of proving they played, when they played, that they wore Riddell helmets and the model worn. Furthermore, discovery related to prior claims would bear directly on Riddell's knowledge of the risks of playing football while wearing Riddell helmets, an issue in the underlying action. Since the discovery at issue in the coverage action was logically related to the issues affecting Riddell's liability in the underlying action, Riddell's request for a stay should have been granted.

The appellate court also agreed with Riddell's contention that the protective order currently in place did not adequately protect Riddell's interests nor could it be amended to do so. Once again, use of discovery in the coverage action could result in collateral estoppel in the underlying action and Riddell would be forced to pay fees and costs associated with discovery which would otherwise be paid for by insurers with a duty to defend the underlying action. No order of protection would resolve these problems.

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On the Lighter Side...

You lovers of the English language might enjoy this.
>
> There is a two-letter word that perhaps has more meanings than any other two-letter word, and that is 'UP.'
>
> It's easy to understand UP, meaning toward the sky or at the top of the list, but when we awaken in the morning, why do we wake UP?
>
> At a meeting, why does a topic come UP?
>
> Why do we speak UP and why are the officers UP for election and why is it UP to the secretary to write UP a report?
>
> And we use it to brighten UP a room, polish UP the silver; we warm UP the leftovers and clean UP the kitchen.
>
> We lock UP the house and some guys fix UP the old car.
>
> At other times the little word has real special meaning.
>
> People stir UP trouble, line UP for tickets, work UP an appetite, and think UP excuses.
>
> To be dressed is one thing, but to be dressed UP is special..
>
> A drain must be opened UP because it is stopped UP.
>
> We open UP a store in the morning but we close it UP at night.
>
> To be knowledgeable about the proper uses of UP, look the word UP in the dictionary.
>
> In a desk-sized dictionary, it takes UP almost 1/4th of the page and can add UP to about thirty definitions.
>

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Finally, the appellate court addressed the insurers' request for a privilege log identifying documents withheld from prior productions and concluded that the trial court had correctly compelled the production of such a log as to documents previously withheld, excluding privileged documents generated in connection with, and after the filing of, the third party actions.

Based on the foregoing, the court of appeal granted the petition and issued a peremptory writ ordering the trial court to vacate its order compelling Riddell to respond to the discovery requests, and to enter a new order (1)granting the motion to compel a privilege log as to previously produced documents (excluding documents generated in connection with and post-dating the filing of the third party actions), (2)otherwise denying the motions to compel and (3)staying the discovery at issue.

EFFECTS OF THE COURT'S RULING

The court of appeal's ruling in this case follows established California case law requiring a stay of action or of discovery in a coverage action where such action or discovery in the coverage case is related to and would affect the insured's liability in the underlying third party action. Interestingly, although prior decisions indicated that a stay of discovery must be issued unless a confidentiality order would adequately protect the insured's interests, the court of appeal in this case appears to effectively eviscerate this exception by concluding that the insured would be prejudiced any time it is forced to expend fees and costs on discovery in the coverage action that would otherwise be paid for by any insurer with a duty to defend the underlying action. This would likely always be the case and therefore it is difficult to conceive of a situation in which a confidentiality order would be sufficient to protect the insured's interests.