CAIIA Status Report
DECEMBER 2011

Insurance Law Client Alert

Submitted by Haight, Brown & Bonesteel, LLP - Los Angeles, CA

Supplemental Payments Coverage Not Enforceable Via Direct Action by Judgment Creditor

In *Clark v. California Insurance Guarantee Assn.* (No. G044171, filed 9/30/11, ordered published 10/8/11), the Court of Appeal held that a judgment creditor has no right to bring a direct action under *Insurance Code* section 11580(b)(2) based on costs awarded against the insured.

The plaintiff in *Clark* had been injured in a construction accident. He sued the contractor and obtained a judgment consisting of special and general damages, along with an award of costs for the contractor's failure to accept a *Code of Civil Procedure* section 998 statutory offer to compromise, plus interest. The insurer, which was ultimately insolvent and replaced by CIGA, paid the damages portion of the award and part of the costs. However, after numerous appeals the plaintiff was still owed ordinary statutory costs; prejudgment interest; *Code of Civil Procedure* section 998 costs; and postjudgment interest on the damage award, all totaling approximately $145,000.

He sued CIGA as a judgment creditor under *Insurance Code* section 11580(b)(2), based on the insolvent insurer's supplemental payments coverage, which covered all costs taxed against the insured in a suit; prejudgment interest awarded against the insured on the part of the judgment paid; and all interest on the full amount of any judgment that accrues after entry of judgment. Thus, the plaintiff contended that the costs and interest attached to the judgment in the underlying action were obligations imposed by law, within coverage of the policy's supplemental payments provision and, therefore, could be recovered in a direct action against the insurer.

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NOTICE!

As of January 1, 2012, this newsletter will be delivered by e-mail only. If up until now you are only receiving the *Status Report* by regular mail, please send your e-mail address to barrettclaims@sbcglobal.net so that we can keep you on our circulation list. Your e-mail address will not be dessiminated or used for any other purpose. We value your readership and welcome any comments you may care to add when sending us your e-mail address.

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Inside This Issue

Status Report Now Available by E-mail

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PRESIDENT'S MESSAGE

This last week Phil Barrett and I attended the west coast PLRB conference in Sacramento California. We were at the conference to continue to provide our members exposure to the industry.

The main focus of the PLRB conference is not much different that our own association, that is to provide education and CE credits to the insurance industry. Although this spring and summer we will be continuing our SEED and Fair Claims Settlement classes, the PLRB's classes are much broader. As I was able to attend some of the classes I recognized that our own past president Peter Schifrin was also a presenter.

As we discussed his presentation, he related to me that one of the benefits of the CAIIA was preparing him to speak at that conference. Peter has taught many classes in regard to the Fair Claims and has continued to provide countless hours of volunteer work to the association. He is not alone. Many of our members also continue to provide hours in assisting others in the insurance industry.

As we prepare for this upcoming year I would encourage each and every member to consider assisting in one of our classes, manning the booth at either the Combined Claims Conference or the Claims Conference of Northern California. You will find that, as I have, it is a blessing to work alongside professional adjusters and that adjusting is a career not just a job. As you teach or present you learn and as you give you are encouraged and blessed.

JEFF S. CAULKINS, AMIM, AIC, RPA
President - CAIIA 2011-12

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The appeals court disagreed. Relying on *San Diego Housing Com. v. Industrial Indemnity Co.* (2002) 95 Cal.App.4th 669, the court held that costs and interest that are payable under the policy's supplemental payments provision are not recoverable by a third party judgment creditor in a direct action.The court stated that a judgment creditor is only an incidental beneficiary of the policy. However, the supplemental payments provision in the policy gives the right to recover costs taxed against the insured only to the insured who was directly owed the defense duty. Costs and interest are "clearly linked" to the insurer's obligation to defend and the obligation to defend "is a covenant in the policy that runs only to the insured." Thus, the supplemental payments provision in the policy gives the right to recover costs taxed against the insured "only to the insured who was directly owed the defense duty . . ."Unless the third party obtains an assignment by the insured of its rights under the insurance contract, the third party has no right to bring a claim upon a duty owed only to the insured.

Coverage Alert

Submitted by McCormick Barstow

Those handling Nevada claims please note that ambiguous earth movement exclusion must be interpreted against the insurance company

Powell v. Liberty Mutual Fire Ins. Co. (Nev. 2011) 127 Nev., Advance Opinion 14

BACKGOUND FACTS

Powell owned a home insured through Liberty Mutual. The policy included an earth movement exclusion which provided:

> "We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss. . . Earth movement, meaning earthquake including land shock waves or tremors before, during or after a volcanic eruption; landslide, mine subsidence; mudflow; earth sinking, rising or shifting."

In addition, the policy also included a settling clause which excluded losses caused by "settling, shrinking, bulging or expansion, including results of cracking of pavement, patios, foundations, walls, floors, roofs or ceilings."

A water pipe in Powell's house exploded flooding the dirt subbasement. Powell made a claim because her house suffered a shift in foundation and extensive cracking and separation, she attributed the damage to the burst water pipe. An expert chosen by Powell concluded that after many years of relative stability in the foundation, the house was currently being affected by the expansion of supporting clay soils which had been severely aggravated by the intrusion of the water as a result of the burst pipe. Liberty Mutual denied the claim citing the earth movement exclusion. Powell then hired two professors of civil engineering to inspect the house and they concluded that the structural cracking was caused by swelling of the foundation clay which was facilitated by the water damage. Powell requested that Liberty Mutual reconsider the denial, but Liberty Mutual refused. Therefore, Powell filed suit alleging bad faith, breach of contract and breach of the Nevada Unfair Claims Settlement Practices Act. Liberty Mutual and Powell both hired experts in preparation for trial. Based on their reports and conclusions, Liberty Mutual submitted a renewed motion for partial summary judgment which was granted. Powell appealed.

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Coverage Alert

Submitted by McCormick Barstow

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THE COURT'S RULING

Concluding that the earth movement exclusion was ambiguous and must be construed against Liberty Mutual, the Court of Appeal concluded that soil expansion caused by a water leak by from a pipe would not fall within the exclusion and therefore reversed the trial court. The court of appeal noted that the purpose of earth movement exclusions was originally to relieve insurers from occasional major disasters which are almost impossible to predict and which cause major catastrophe to more than a single individual. The court also noted that the exclusions have often been construed as referring to naturally-occurring events as opposed to man-caused events. The examples listed in the Liberty Mutual policy were not limited to natural events and the court concluded that this made the policy ambiguous as to what precisely earth movement is when not a widespread, calamitous event. The court also found that the ambiguity within the earth movement clause was not resolved by the settling clause. The court concluded that although anti-concurrent clauses are valid, they must be clear as to what specifically is excluded from the policy. Because the clause in Powell's policy was not clear, it had to be interpreted against Liberty Mutual and Liberty Mutual could not deny coverage if it was determined that the claim stemmed from damage caused by soil movement as a result of the ruptured pipe.

The court also determined that the trial court erred in relying on the case of *Schroeder v. State Farm Fire & Casualty Co.* (D.Nev.1991) 770 F.Supp. 558 noting that in that case, the policy language was different and that the lead-in clause of the policy clearly stated that it did not matter what caused the earth to moved. If there was earth movement, the damage was excluded

THE IMPACT OF THE COURT'S RULING

Unless anti-concurrent cause clause in earth movement exclusion unambiguously provides that it does not matter what causes the earth to move in order for the exclusion to apply, cause not specifically mentioned may in fact be covered.This opinion is not final. It may be withdrawn from publication, modified upon rehearing, or review may be granted by the California Supreme Court. These events would render the opinion unavailable for use as legal authority.

Weekly Law Resume

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

Negligence-Assumption of Risk

Robert Amezcua, et al. v Los Angeles Harley-Davidson, Court of Appeal, Second District, (October 27, 2011)

This case involves a claim against a Los Angeles Harley-Davidson dealership that organized a parade of motorcycle riders. Two injured riders did not sign a release form or register for the event. The Court of Appeal addressed whether such a negligence cause of action was barred by the primary assumption of risk doctrine.

The 2006 Pursuit for Kids Toy Drive ("Toy Ride") was a motorcycle parade ride that began at a Harley-Davidson dealership. The Los Angeles County Police Department provided escort services for the Toy Ride every year. No one from Harley-Davidson escorted the ride. Participants could pre-register or register immediately before the ride at the Harley-Davidson dealership where the Toy Ride began. Registration included signing a release form that Harley-Davidson used for all annual Toy Rides, where participants expressly agreed to assume the entire risk of any accident or personal injury (except willful neglect) suffered as a result of participating in the event.

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Weekly Law Resume

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

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Robert Amezcua was an experienced motorcyclist and participated in dozens of organized motorcycle rides, including several prior Toy Rides organized by Harley-Davidson. In the past, he had registered to participate in Harley-Davidson organized Toy Rides, including signing the release form. This time, however, he chose to ride in the Toy Ride without registering or signing the release.

There were fewer than 250 motorcycles in the procession. The motorcycles proceeded to Harbor UCLA Medical Center in Torrance, along a route that included the 105 and 110 Freeways. Robert Amezcua was driving, and Nancy Amezcua, his wife, was seated behind him when they left the dealership toward the rear of the procession. They remained in that position throughout the ride. All of the motorcycles in the procession stayed in one lane on the freeways. A van driver traveling in an adjacent lane was distracted by the roar of 15-20 motorcycles behind him. The van hit a vehicle in front of him and also collided with the Amezcuas. The Amezcuas sued Los Angeles Harley-Davidson for damages arising from their injuries.

Harley-Davidson sought summary judgment on various theories, including that the claims were barred by the assumption of risk doctrine. The trial court granted summary judgment in favor of Harley-Davidson on this theory, holding that Harley-Davidson owed no duty to the Amezcuas. The Amezcuas appealed.

The Amezcuas argued that (1) the doctrine applies only where there is a written exculpatory agreement between the parties; and (2) the doctrine applies only to sporting events, and the Toy Ride was not a sporting event. The Court of Appeal did not find either argument persuasive.

The Court of Appeal affirmed the trial court's grant of summary judgment. It concluded that the primary assumption of risk doctrine is a complete bar to the Amezcuas' claims.

The Court noted that an assumption of risk may be express or implied. The Court explained that implied primary assumption of risk is founded not on an express agreement, but on the nature of the activity and the relationship of the parties to that activity. Whether the Amezcuas signed the release agreement was not determinative of whether the implied primary assumption of risk doctrine applied.

In primary assumption of risk cases, the defendant has no duty to protect the plaintiff from a particular risk and the plaintiff's recovery against the defendant is completely barred. The Court found no case that considered primary assumption of risk in connection with organized, noncompetitive, recreational motorcycle riding. However, the Court concluded that such activity falls within those activities as to which the primary assumption of risk has been found to apply. It involves physical exertion and athletic risk, and is also more similar to an organized bicycle ride. The risk of being involved in a traffic collision while riding in a motorcycle procession on a Los Angeles freeway is apparent.

The Court also determined that Harley-Davidson did nothing to increase the risks inherent in the activity. Specifically, the Court concluded that traffic slowing and other drivers not paying attention are inherent risks of riding in an organized motorcycle ride on public highways. Nothing that Harley-Davidson did or did not do increased these risks. Nor was there evidence that anything less than closing the freeway to other traffic would have mitigated the inherent danger of riding in an organized motorcycle ride. But to close the freeways to other traffic during the ride would alter the parade-like nature of riding in a motorcycle procession on a public highway.

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COMMENT

This case is the Court of Appeals' first application of the implied primary assumption of risk doctrine to organized, noncompetitive, recreational motorcycle riding, and it expands the scope of the doctrine to recreational motorcycling.

Torts-Vicarious Liability-Joint Tortfeasors

PacifiCare of California, et al. v. Bright Medical Associates, Inc. Court of Appeals, Fourth District (September 2, 2011)

Code of Civil Procedure Section 877.6 provides that one defendant who is a "joint tortfeasor" may settle with a plaintiff and absolve itself of any equitable indemnity claims of other parties through a good faith settlement determination. This case considered whether a party can object to a settlement where there are allegations that the parties were joint tortfeasors, but where the trial ultimately confirmed that the defendants' liability to the plaintiff was several, rather than joint.

Jerry Martin and his family sued PacifiCare of California doing business as Secure Horizons and PacifiCare Health Systems, LLC (collectively "PacifiCare"). The Martins asserted claims for insurance bad faith based on delays their wife and mother, Elsie Martin (Elsie), experienced while seeking out-of-network treatment for a cerebral aneurysm. The aneurysm ruptured and Elsie died before receiving the necessary care. Elsie's primary care physician belonged to cross-defendant Bright Medical Associates, Inc. ("Bright"), the health care provider who contracted with PacifiCare. Although Bright made all the decisions that delayed Elsie's medical care, the Martins did not file a claim against Bright. Instead, they claimed that PacifiCare owed a non-delegable duty to ensure that Elsie timely received all necessary medical care and treatment. Plaintiffs also claimed that PacifiCare was directly liable for the design and implementation of its medical plan. PacifiCare filed a cross-complaint for indemnity against Bright. During jury selection, Bright settled with the Martins for $300,000, conditioned on the trial court finding Bright and the Martins settled in good faith.

The trial court granted the good faith settlement motion, and dismissed PacifiCare's cross-complaint against Bright. At trial, following the completion of plaintiff's case in chief, the court granted PacifiCare's non-suit motion. As to the non-delegable duty claims, the Court noted that Health and Safety Code Section 1371.25 barred holding a health care service plan vicariously liable for the acts and omissions of its health care providers. Hence, plaintiffs could not recover against PacifiCare for the actions of Bright. As to the direct claims against PacifiCare regarding the design and implementation of its medical plan, the evidence did not support any direct liability.

PacifiCare appealed the dismissal of its cross-complaint. PacifiCare contends the trial court lacked authority to make a good faith settlement determination because PacifiCare and Bright did not share joint liability for the Martins' damages. According to PacifiCare, Bright bore all liability because the Martins based their claims on Bright's acts or omissions only, and PacifiCare could not be held vicariously liable for Bright's conduct as a matter of law under Health and Safety Code Section 1371.25. The Court of Appeal noted that although this was correct, PacifiCare's argument ignored the fact that the complaint of the plaintiffs had pled that PacifiCare had direct liability based on its design and implementation of a health care service plan that allegedly contributed to the delays in Elsie's medical care.

The Court of Appeal noted that for purposes of the good faith settlement statutes, "joint tortfeasor" was

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broadly construed. It included not just those that "act in concert" to produce an injury, but generally to "joint, concurrent and successive tortfeasors," and even more generally to "all tortfeasors joined in a single actions whose acts or omissions "concurred to produce the sum total of the injuries to the plaintiff." Further, the first sentence of Code of Civil Procedure Section 877.6 uses the word "alleged" to describe the tortfeasors entitled to seek a good faith settlement determination. Hence, even where, as here, it is ultimately shown at trial that a party was not a joint tortfeasor, the allegation in the complaint at the time of settlement was sufficient to merit application of the process to determine good faith determination.

The order granting Bright's good faith settlement motion and dismissing PacifiCare's cross-complaint was affirmed.

COMMENT

This case points out that it is not necessary for a party to be proven to be jointly liable with another defendant to obtain a good faith settlement determination. Whether the facts ultimately support such a finding at trial or not, as long as plaintiff has alleged joint liability, the good faith statute applies.

California Department of Insurance Takes Action Against Insurer for Unfair Claims Handling Practices

Alleged mishandled claims include long term care, disability income and life insurance

The California Department of Insurance today announced the filing of an administrative enforcement action against RiverSource Life Insurance Company for unfair claims handling practices affecting claims under long term care, disability income and life insurance policies.

The enforcement action focuses primarily on long term care policies and alleges that RiverSource mishandled numerous long term care claims and failed to adopt practices to assure that long term care and other policy benefits were paid. The action also alleges that RiverSource adopted business practices that were specifically designed to deny long term care benefits. The long term care claims typically involved persons in their 70's, 80's and 90's, including persons suffering from Alzheimer's disease and other impairments.

In addition to numerous examples of deficient claims handling, the enforcement action alleges that RiverSource systematically delayed investigating claims and intentionally created impediments to receiving policy benefits. Among other practices, RiverSource would not reasonably assist long term care policyholders in locating care facilities, requiring them to guess which facilities RiverSource might pay for, and putting them at risk of either receiving no benefits or moving multiple times until they found a facility that RiverSource would approve.

The enforcement action also alleges that RiverSource systematically denied coverage in facilities by requiring strict compliance with antiquated policy language drafted decades ago that no longer reasonably applies to the long term care industry.

The action is based on a Department of Insurance market conduct examination of RiverSource's own claims handling files. The action seeks penalties based on the violations found in the examination, plus penalties based on a proportional extrapolation of the violations found in the examination to all California claims handled by RiverSource.

The Insurance Code provides for penalties of up to $10,000 for each willful claims handling violation, $10,000 for each willful violation of long term care laws in particular, and $500,000 for each long term care general business practice in violation of long term care statutes.

The Bridge

A man on his Harley motorcycle was riding along a California beach when the sky clouded above his head and, in a booming voice, God said, 'Because you have tried to be faithful to me in all ways, I will grant you one wish.'

The biker pulled over and said, 'Build a bridge to Hawaii so I can ride over anytime I want.'

God replied, 'Your request is materialistic; think of the enormous challenges for that kind of undertaking; the supports required reaching the bottom of the Pacific and the concrete and steel it would take!

I can do it, but it is hard for me to justify your desire for worldly things. Take a little more time and think of something that could possibly help mankind.'

The biker thought about it for a long time. Finally, he said, 'God, I wish that I, and all men, could understand women; I want to know how she feels inside, what she's thinking when she gives me the silent treatment, why she cries, what she means when she says nothing's wrong, why she snaps and complains when I try to help, and how I can make a woman truly happy.

God replied: 'You want two lanes or four lanes on that bridge?'