

California and Nevada

Insurance Coverage UPDATE



MESSAGE FROM THE EDITOR

California appellate courts issued coverage decisions in the second quarter of 2010 in a number of different substantive areas. We hope our brief case summaries serve as an easy reference for you. As always, we welcome any comments, questions or the opportunity to elaborate on any coverage question you or your group may have.

Mark Hellenkamp

mhellenkamp@mpplaw.com

“Occurrence” in Endorsement Refers to Property Damage, Not the Causal Acts Which Cause Such Damage

*Pennsylvania General Insurance Company v.
American Safety Indemnity Company*
(Fourth District Court of Appeal, June 3, 2010)
185 Cal.App.4th 15, 111 Cal.Rptr.3d 403

A framing subcontractor’s first CGL insurer, Pennsylvania, which was on the risk during the period in which the framer entered into a contract and completed work, sought contribution for defense and settlement costs from American Safety, which was on the risk during the period after the work was completed and when the lawsuits were commenced. American Safety contended that its policy’s 1999 endorsement defining the term “occurrence” required that both the causal acts and the resulting property damage must happen during the policy for coverage to exist. The court of appeal disagreed, and held that the policy was susceptible to the interpretation that the trigger of coverage, i.e., the occurrence, was damage to property rather than the causal conduct (and that the modified occurrence definition was merely designed to obviate the application of the “progressive damage-continuous trigger” rule). ■

Stay Required in Insurer's Declaratory Relief Action Where Factual Issues Overlap with Those in Underlying Actions

*United Enterprises, Inc. v. Superior Court
(Royal Indemnity Company)*
(Fourth District Court of Appeal, March 24, 2010)
183 Cal.App.4th 1004, 108 Cal.Rptr.3d 25

Royal brought suit for declaratory relief against its insured, United Enterprises, Inc. ("United"). Royal had been defending United under a reservation of rights in federal and state actions for recovery of environmental response costs and other forms of relief arising from the operation of a shooting range on property owned by United. Royal alleged that it had no duty to defend United and moved for summary judgment. United moved to stay the declaratory relief action, arguing that responding to Royal's summary judgment motion would require it to offer evidence that established its liability in the underlying actions. The trial court denied United's stay request, but ordered that the record relating to the summary judgment motion be sealed. United filed a petition for writ of mandate challenging the trial court's ruling. The Court of Appeal granted United's petition and concluded that because of overlapping factual issues, a stay was required. ■

Exclusion for Intentional Acts of "An Insured" Does Not Bar Coverage for Claims That One Insured Negligently Failed to Prevent the Intentional Acts of Another Insured

Minkler v. Safeco Ins. Co. of America
(Supreme Court of California, June 17, 2010)
49 Cal.4th 315, 110 Cal.Rptr.3d 612

Plaintiff brought suit against his former coach for acts of sexual molestation. Plaintiff also sued the coach's mother for negligent supervision. The coach was an additional insured under homeowners policies issued by Safeco to the mother. Safeco declined the defense based on an "intentional acts" exclusion. On a certified question from the Ninth Circuit in the ensuing coverage action, the California Supreme Court found the

exclusion for intentional acts of "an insured" did not bar coverage for the negligent supervision claim against the mother. It held that the severability clauses which provided that the policies applied "separately to each insured" created an ambiguity as to whether the intentional acts of one insured would bar coverage for all insureds under the policies, and the mother's reasonable expectation was that she would be covered so long as she had not acted intentionally. ■

Umbrella Coverage is Primary and Not Dependent on Exhaustion of Underlying Insurance

Legacy Vulcan Corp. v. Superior Court
(Second District Court of Appeal, June 11, 2010)
185 Cal.App.4th 677, 110 Cal.Rptr.3d 795

Transport Insurance Company issued both excess and umbrella policies to Legacy Vulcan. The umbrella policy provided that Transport would indemnify the insured for "ultimate net loss" in excess of the "retained limit." "Retained limit" was defined in part as the greater of the "limit of liability of the underlying insurance in Schedule A plus the applicable limits of 'any other underlying insurance.'" As to the duty to defend, the umbrella policy required a defense for claims "not within the terms of the coverage of underlying insurance but within the terms of coverage of this insurance." The trial court ruled that this language required Transport to defend its insured only upon the exhaustion of all underlying insurance. The Court of Appeal reversed. It held that, when read together, the above clauses demonstrated that there was ambiguity as to whether "underlying insurance" referred only to the Schedule of Underlying Insurance or all underlying insurance that may be available to the insured whether referenced in the Schedule or not. Because of the ambiguity, the court interpreted "underlying insurance" in the insured's favor to encompass only the policies listed in the Schedule. The court also concluded that the phrase "not within the terms of the coverage of underlying insurance" within the duty to defend provisions did not require the insured to show that the claims were actually covered under the Transport policy in order to establish a duty to defend, and therefore, the Transport policy dropped down to provide primary coverage upon the showing of a potential for coverage. ■

Allegations That Insured Used Competitor’s Confidential Information to Solicit Customers Did Not Involve “Advertising” or “Advertising Injury” or Personal Injury Coverage and was Also Excluded by Broad Intellectual Property Exclusion

S.B.C.C. v. St. Paul Fire & Marine Insurance
(Sixth District Court of Appeal, June 11, 2010)
186 Cal.App.4th 383, 112 Cal.Rptr.3d 40

The insured construction company, S.B.C.C., was sued by its competitor, SJC, for numerous causes of action arising from S.B.C.C.’s employee, Foust (a former employee of SJC) having misappropriated various trade secrets and confidential information and using it, while employed by S.B.C.C., to solicit SJC’s customers. St. Paul refused to defend. S.B.C.C. filed suit for breach of contract and bad faith. The trial court granted St. Paul’s summary judgment motion. On appeal, the Sixth District affirmed. It held that Foust’s conduct as alleged did not constitute advertising as defined in the policy. “By personally soliciting [SJC’s] customers to move with him to S.B.C.C., Foust was not using either SJC’s advertising ideas or its advertising material.” The court also held that Foust’s conduct did not “violate a person’s right of privacy” as required by the personal injury coverage because an organization is not a “person.” Finally, the court also held that the policy’s exclusion for intellectual property applied since that exclusion included “any other injury or damage that’s alleged in any claim or suit which also alleges any such infringement or violation.” ■

No Coverage for Malpractice Claim Against Law Firm Where Partner in Law Firm Managed and Owned Majority Interest in Client Suing Firm

Carolina Casualty v. L.M. Ross Law Group
(Second District Court of Appeal, April 19, 2010)
184 Cal.App.4th 196, 108 Cal.Rptr. 701)

At issue in this case was an exclusionary clause that barred coverage for claims brought against the defendant law firm by

any business enterprise “in which the Insured owns more than a 10 percent interest, or in which any Insured is an owner, partner, or employee, or which is directly or indirectly controlled, operated, or managed by any Insured.” The Second District held that there was no duty to provide coverage to the law firm for the client’s malpractice claim where one of the partners in the firm managed the client when the malpractice claim was presented, and where that same partner was the settler and trustee of a revocable trust which owned a majority interest in the client that was suing the law firm. ■

Payments For UM Claim Can Be Offset by Medical Expense Payments

Hervey v. Mercury Casualty Co.
(Second District Court of Appeal, June 17, 2010)
185 Cal.App.4th 954, 110 Cal.Rptr.3d 890

Hervey purchased automobile insurance from Mercury. The policy contained medical expense coverage. The Declaration Page stated, “Medical Expense – No Excess, No Reimbursement.” Hervey was involved in an accident. Hervey made a claim under the medical expense coverage and Mercury made a payment under that claim. Hervey subsequently made an uninsured motorist claim. Mercury made a payment for the uninsured motorist claim, but the payment was offset by the amount paid for the medical expense claim based on a provision that payments made under UM coverage may be reduced by payments made under medical expense coverage. In a subsequent coverage action, the Court of Appeal held that the insurance policy was not ambiguous. In particular, it found that although when Hervey elected to purchase medical expense coverage, Mercury deleted a provision that would have entitled Mercury to reimbursement for amounts paid to Hervey by a third party responsible for the accident, the UM provisions remained unchanged. ■

If you would like to receive MPP’s Insurance Coverage Update electronically, please send your request by e-mail to: mhellenkamp@mpplaw.com



**Morris
Polich &
Purdy^{LLP}**

Newsletter Contributors

**Mark Hellenkamp, Scott Koppel, Wendi Frisch,
Pamela Palmer, Sharon Pak and Dan Endoso**

Los Angeles Office

1055 West Seventh Street
24th Floor
Los Angeles, CA 90017
T: 213.891.9100
F: 213.488.1178

Irvine Office

18111 Von Karman Avenue
Suite 825
Irvine, CA 92612
T: 949.769.6900
F: 949.769.6949

San Diego Office

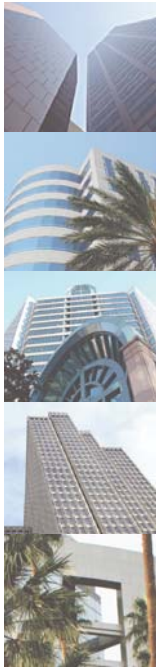
501 West Broadway
Suite 500
San Diego, CA 92101
T: 619.557.0404
F: 619.557.0460

San Francisco Office

One Embarcadero Center
Suite 400
San Francisco, CA 94111
T: 415.984.8500
F: 415.984.8599

Las Vegas Office

3883 Howard Hughes Parkway
Suite 560
Las Vegas, NV 89169
T: 702.862.8300
F: 702.862.8400



MPP Practice Areas

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Insurance Practice Group

Jeffrey S. Barron
Practice Group Leader
jbarron@mpplaw.com
Andrea Bednarova
abednarova@mpplaw.com
S. Don Bennion
dbennion@mpplaw.com
Dan D. Endoso
dendoso@mpplaw.com
Wendi J. Frisch
wfrisch@mpplaw.com
Gary A. Hamblet
ghamblet@mpplaw.com
Mark E. Hellenkamp
mhellenkamp@mpplaw.com
Stephen H. Huchting
shuchting@mpplaw.com
Beth A. Kahn
bkahn@mpplaw.com
William B. Kirshenbaum
wkirshenbaum@mpplaw.com
Scott M. Koppel
skoppel@mpplaw.com
Walter J. Lipsman
wlipsman@mpplaw.com
Sharon Pak
spak@mpplaw.com
Pamela A. Palmer
ppalmer@mpplaw.com
Douglas C. Purdy
dpurdy@mpplaw.com
David J. Vendler
dvendler@mpplaw.com
Nicholas M. Wieczorek
nwieczorek@mpplaw.com
Douglas K. Wood
dwood@mpplaw.com

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