

Insurance Coverage

California and Nevada

2009 Vol.2

UPDATE



MESSAGE FROM THE EDITOR

Of particular interest in this issue are cases addressing the qualified pollution exclusion, insurers' duty of diligent inquiry upon notice of a claim, and a District Court opinion which concludes that under Nevada law there can be bad faith in the absence of coverage. We hope you find our case summaries informative and, as always, we welcome any comments, questions or the opportunity to elaborate on any coverage question you or your group may have.

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Relevant Discharge for Qualified Pollution Exclusion is From the Site; Mitigation Covered; and Indivisible Property Damage Covered

State of California v. Allstate Insurance Company
(Cal. Supreme Court, March 9, 2009)
45 Cal.4th 1008, 201 P.3d 1147

The State sought coverage from its excess insurers for liability resulting from contamination from the Stringfellow Acid Pits. The Court held that the focus of the "sudden and accidental" pollution exclusion should be on the release of contaminants from the ponds, not on the initial deposit of the waste into the ponds. It also held that the sudden and accidental exception did not apply with respect to a particular release of contaminants even though it was controlled and intentional because it was performed to prevent an accidental release. The Court, relying on *State Farm v. Partridge* (1973) 10 Cal.3d 94, also found that if the insured proves multiple acts or events have concurred in causing a single injury or an indivisible amount of property damage, the insured's inability to allocate the damages by cause does not preclude the duty to indemnify, but "only if the insured can identify particular sudden and accidental events and prove they contributed substantially to causing indivisible property damage for which the insured bore liability..." ■

Insurer’s Equitable Contribution Obligation for Defense Costs Arises Where, After Notice, a Diligent Inquiry by Insurer Would Reveal Potential Exposure

OneBeacon America Ins. Co. v. Fireman’s Fund Ins. Co.

(Second District Court of Appeal, June 24, 2009)
175 Cal.App.4th 183, 95 Cal.Rptr.3d 808

After defending several insureds in a lawsuit for environmental contamination beginning in 1999, OneBeacon brought a declaratory relief action against Fireman’s Fund and ICW for equitable contribution. The trial court found that OneBeacon was not entitled to equitable contribution until after various dates in 2002 even though counsel for certain of the insureds began sending notice letters and other correspondence to Fireman’s Fund and ICW about the lawsuit in 1999. Relying on prior case law, the Court of Appeal applied the rule that “an insurer’s obligation of equitable contribution for defense costs arises where, after notice of litigation, a diligent inquiry by the insurer would reveal the potential exposure to a claim for equitable contribution, thus providing the insurer the opportunity for investigation and participation in the defense in the underlying litigation.” Because the notice provided to both Fireman’s Fund and ICW was sufficient to trigger a duty of diligent inquiry so that they could have discovered the relevant policies, OneBeacon was entitled to contribution starting in 1999. ■

Claims-Made CGL Policy Does Not Cover Claims Made Prior to Policy Inception, Despite Insured’s “Subjective Belief”

Evanston Insurance Company v. OEA, Inc.
(Ninth Circuit Court of Appeals, May 21, 2009)
566 F.3d 915

Evanston issued a claims-made CGL policy to its insured, OEA, Inc., and, under reservation of rights, paid money towards OEA’s defense and indemnity in two lawsuits. Evanston then sought to rescind the policy and obtain reimbursement on the grounds that OEA had notice of the two lawsuits prior to inception of the policy. The district court granted Evanston’s motion for summary judgment and ordered OEA to reimburse Evanston. The Ninth Circuit affirmed. The policy only covered “claims” that were “first made against the insured during the policy period,” and a “claim” was defined as “notice.” Because OEA had first received copies of the complaints from its subsidiary prior to inception of the policy, they were not covered claims. Any subjective belief by OEA that the complaints solely contained claims against OEA’s subsidiary was unreasonable where the complaints named OEA as a defendant and specifically alleged that OEA was liable for the plaintiffs’ injuries. ■

In Nevada, Breach of Implied Duty of Good Faith and Fair Dealing Can Arise in the Absence of Coverage

Turk v. TIG Ins. Co.
(U.S. District Court, D. Nevada, April 17, 2009)
616 F.Supp.2d 1044

After TIG denied coverage for a discrimination lawsuit against him, the insured brought a state court action against it seeking coverage and alleging bad faith. The

District Court held that TIG correctly denied coverage. Rejecting TIG's reliance on California law, the Court also held that a claim for breach of the implied covenant of good faith and fair dealing does not necessarily fail merely because there is no coverage, because a duty of good faith is imposed in every contract regardless of whether a particular claim is covered. ■

Supplemental Payments Provision Extends Only to Costs Arising from Potentially Covered Claims

State Farm General Ins. Co. v. Mintarsih
(Second District Court of Appeal, June 25, 2009)
175 Cal.App.4th 274, 95 Cal.Rptr.3d 845

Mintarsih sued State Farm's insureds for false imprisonment arising from her employment as a domestic servant. She obtained a judgment for, among other things, attorneys' fees as costs and other costs related to wage and hour claims. In a later declaratory judgment action that sought coverage for the judgment under State Farm's homeowner and umbrella policies, she argued that State Farm was obligated to pay the costs award even if the award arose solely from claims for which there were no potential coverage. The Court of Appeal held that the supplemental payments provision extended only to costs arising from claims that were at least potentially covered under one of the policies. ■

Loss Caused by Excluded Peril Due to Third Party's Negligence Not Covered Under Homeowner's Policy

Bernard Freedman, et al., v. State Farm Insurance Company
(Second District Court of Appeal, May 5, 2009)
173 Cal.App.4th 957, 93 Cal.Rptr.3d 296

A contractor inadvertently damaged the insured's plumbing system during a remodel of the insured's home. The damage went unnoticed for almost five years, but caused extensive water damage to the interior of the home. The insureds made a claim to State Farm under their homeowner policy for the loss, but the claim was denied based on exclusions for corrosion and continuous or repeated seepage or leakage of water from plumbing system, and provisions stating that damage from such excluded causes was not covered regardless of whether it was caused by negligence in design or workmanship. The trial court granted summary judgment in favor of State Farm. The appellate court affirmed, stating that the trial court properly concluded there was no coverage for the third party negligence because there was no evidence that the third party negligence caused their loss in any way apart from triggering the excluded peril. ■

Commercial Vehicle Owner's Policy Was Excess to One Maintained by Lessee

Sentry Select Ins. Co. v. Fidelity & Guaranty Ins. Co.
(Supreme Court of California, May 4, 2009)
46 Cal.4th 204, 92 Cal.Rptr.3d 639

A truck driver driving a tractor that hauled two trailers was involved in an accident with another vehicle. The driver owned the tractor and maintained his own

insurance but leased the two trailers from the trailer owner. The trailer owner was in the business of hauling and moving, but also leased its trailers to independent contractors for hauling jobs. The trailer owner maintained insurance for the two trailers involved in the accident. The California Supreme Court held that the trailer owner's insurance was excess to the driver's insurance because the leasing of commercial vehicles was a regular part of the trailer owner's business. The Court disagreed that the leasing activities were merely incidental to the main business of hauling because the trailer owner realized a substantial income from the leasing activity – in the year of the accident, the trailer owner had leased 56 of the 80 trailers that it owned. ■

Flood Exclusion Precludes Coverage for Damage Caused by Rising Waters from Hurricane

*Northrop Grumman Corp. v.
Factory Mutual Ins. Co.*

(Ninth Circuit Court of Appeals, April 2, 2009)
563 F.3d 777

Factory Mutual denied coverage under an excess insurance policy for water damage to Northrup Grumman's Mississippi shipyards caused by Hurricane Katrina. The shipyards were covered in up to ten feet of water. At the time of the loss, the insured maintained a primary and excess policy with Factory Mutual. The primary policy covered all risks. The excess policy had a flood exclusion. The insurer paid the policy limits under the primary policy, but denied coverage under the excess. The Ninth Circuit held that the flood exclusion precluded coverage because the water damage fell within the ordinary and plain meaning of "flood," which is an inundation of water over normally dry land. ■

Nevada Supreme Court Limits UM Coverage to Insureds that Suffer Bodily Injury

Allstate Ins. Co. v. Fackett

(Nevada Supreme Court, April 30, 2009)
206 P.3d 572

The plaintiff's mother was killed in an auto accident with an underinsured motorist. The plaintiff sought UM benefits from her insurer, Allstate. She conceded that her mother was not an insured under the policy but argued that the policy and Nevada law entitled her to recover damages which she was legally entitled to recover from the other driver. The Nevada Supreme Court held that Allstate's UM policy provisions and the Nevada UM statute limited recovery to insureds who suffer bodily injury and that neither the policy nor statute could be read to provide coverage for legal claims that an insured may have regarding a noninsured third party who is injured by an underinsured driver. ■

Court Refuses to Allow Hospital Lien Pursuant to Civil Code, Section 3045.1, to be Enforced Against Uninsured Motorist Carrier

Weston Reid, LLC v.

American Insurance Group, Inc.

(Fourth District Court of Appeal, June 4, 2009)
174 Cal. App.4th 940, 93 Cal. Rptr.3d 748

The court held that the patient/insured's hospital lien (for services rendered by the hospital following the patient/insured's auto accident) could not be enforced against the patient's auto insurer, which had previously paid UM benefits to the patient/insured without regard

for the hospital's lien. The court concluded that the Hospital Lien Act, Civil Code Section 3045.1 et. seq., was only meant to apply to the insurance carriers of third party tortfeasors. As such, no lien was created on benefits due under the first party UM claim. ■

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