

California and Nevada

# Insurance Coverage UPDATE



## MESSAGE FROM THE EDITOR

California appellate courts published relatively few coverage opinions in the last quarter of 2009. The Nevada Supreme Court published one. I hope you find our summaries of them informative. In other news, please note that MPP has now opened a San Francisco office with six attorneys and growing, so you can now find us in Los Angeles, Orange County, San Diego, San Francisco and Las Vegas. 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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## Prior Publication Exclusion in Advertising Injury Coverage Precludes Duty To Defend Where Prior Use of Infringing Material is Substantially Similar to Use During Policy Period

*Kim Seng Company v.*

*Great American Insurance Co. of New York et. al.*  
(Second District Court of Appeal, November 13, 2009)  
179 Cal.App.4th 1030, 101 Cal.Rptr.3d 537

Great River Food sued Kim Seng for trademark infringement, alleging that Kim Seng had improperly used Great River's "Que Huong" trademark in several iterations of its food packaging and advertising over several years. Kim Seng had used the offending phrase both before and after its insurer, Great American's, commercial liability policy inception, but its use after policy inception was in combination with other words that it had not used previously. Great American denied coverage, relying on the policy's prior publication exclusion. In the coverage action, the trial court entered summary judgment for Great American. The Second District affirmed. It held that the prior publication exclusion applies where the insured's prior use of infringing material is substantially similar to its use during the policy period, rejecting Kim Seng's arguments that: (1) the exclusion applied only to libel, slander and invasion of privacy (not trademark infringement); (2) the word "material" in the exclusion refers only to "the same packaging or label" (rather than use of the same offending trademark); and (3) the exclusion applies only where the prior use is "exactly" the same or that the "likelihood of confusion" standard should apply. ■

## **Liability Policy Exclusion for Land Subsidence Not Subject to Efficient Proximate Cause Doctrine**

*City of Carlsbad, et al., v.*

*Ins. Co. of the State of Pennsylvania*

(Fourth District Court of Appeal, November 20, 2009)

180 Cal.App.4th 176, 102 Cal.Rptr.3d 535

Lawsuits were filed against the City after a landslide damaged several condominiums, allegedly due to the City's negligent maintenance of its water system. After the lawsuits were settled, the City sought indemnification from its liability insurer, ISOP. The policy contained a land subsidence exclusion that applied to property damage "arising out of land subsidence for any reason whatsoever" and defined "land subsidence" as including landslides. The trial court granted ISOP's summary judgment motion. The Fourth District affirmed. It rejected the City's contention that the efficient proximate cause doctrine, applicable to first party policies, applied. Based on the plain language of the exclusion, it also rejected the City's contention that concurrent causation principles limited application of the exclusion in this case. The fact that the landslide was caused by the City's negligence was immaterial to application of the exclusion because this was not a situation where two negligent acts by the City, one of which, independent of the exclusion, resulted in the City's liability. ■

## **Party Appraisers Not Held To the Same Disqualification Standards as Umpires**

*Mahnke, et al. v. Superior Court*

(Second District Court of Appeal, December 21, 2009)

180 Cal.App.4th 565, 103 Cal.Rptr.3d 197

The Mahnkes brought a fire damage claim against their insurer, California Fair Plan Association (CFPA). CFPA moved to disqualify the Mahnkes' selected appraiser on grounds of bias because he had served as an expert witness in an

unrelated case for the Mahnkes' attorney. The trial court granted CFPA's motion. The Second District reversed. It held that the Mahnkes' appraiser was not disqualified because party-selected appraisers under fire insurance policies are not subject to the same disqualification or disclosure rules as umpires and, in this case, the appraiser's service as an expert witness for the Mahnkes' attorney would not cause a reasonable person to doubt his impartiality. ■

## **Third Party Intervenor Not Precluded by Default Judgment Against Insured from Proceeding Against Insurer in Declaratory Relief Action**

*Westchester Fire Insurance Company v. Phil Mendez*

(Ninth Circuit Court of Appeals, October 28, 2009)

585 F.3d 1183

Westchester brought an action against its insured, Mendez, seeking a declaration that it had no duty to defend or indemnify Mendez under a CGL policy with respect to damage Mendez caused to Northwest Airlines ("Northwest"). Northwest intervened in the action. Upon Mendez's repeated failure to appear at his deposition, the district court entered a default judgment against Mendez and in favor of Westchester. The district court also held that Northwest was bound by the default judgment. Northwest appealed. The Court of Appeals vacated the default judgment on the grounds that Northwest was not responsible for Mendez's failure to appear at deposition and there was no basis for precluding Northwest from defending against Westchester's claim. ■

## **Policy with Omnibus Clause May Provide Coverage to Those Who are Potentially Vicariously Liable Under the Peculiar Risk Doctrine**

*American States Ins. Co. v. Progressive Cas. Ins. Co.*  
(Third District Court of Appeal, December 14, 2009)  
180 Cal.App.4th 18, 102 Cal.Rptr.3d 591

While hauling a trailer insured by Wilshire Insurance, a trucker insured by Progressive Casualty injured a pedestrian at a jobsite. The pedestrian filed a lawsuit, and the jobsite subcontractor, general contractor and developer brought a summary judgment motion, which the trial court denied, in part on the basis that triable issues of fact existed as to their liability for the trucker's negligence based on the peculiar risk doctrine. American States provided the defense of the subcontractor, general contractor and developer but also tendered to Progressive and Wilshire. Both the Progressive and Wilshire policies contained "omnibus" clauses which defined an insured as anyone who was vicariously liable for the conduct of a named insured. In American States' subsequent coverage action, the trial court granted Progressive's and Wilshire's motions for summary judgment. The Court of Appeal reversed, finding that because the peculiar risk doctrine potentially applied, and thus the subcontractor, general contractor and developer were potentially vicariously liable for the trucker's negligence under the omnibus clauses, a duty to defend was triggered under the Progressive and Wilshire policies. ■

## **Under Nevada Law, Exception to Anti-Stacking Rules is Applicable to UIM Claims**

*Delgado v. American Family Insurance Group*  
(Nevada Supreme Court, October 1, 2009)  
217 P.3d 563

Prior Nevada case law had held that a passenger who claimed that his driver was the sole proximate cause of the passenger's injuries could not concurrently make a liability claim against the insured driver and a UIM claim under the

driver's policy. In this case, the claimant was a passenger in a two-vehicle accident and alleged that the negligence of the drivers of both vehicles proximately caused her injuries. The Nevada Supreme Court held that, if *both* drivers were held jointly liable for the claimant's injuries, the claimant could concurrently recover on her liability claim against her own driver and pursue a UIM claim with respect to the same driver's policy, where the other driver's liability limits did not exceed the first driver's UIM limits. ■

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