

California and Nevada

# Insurance Coverage UPDATE



## MESSAGE FROM THE EDITOR

For those who handle claims involving occurrence based policies, you will probably find the California Supreme Court's decision in *Delgado v. Interinsurance Exchange* the most notable coverage case of this past quarter. In *Delgado*, the Court distinguished the landmark duty to defend case of *Gray v. Zurich* based on the fact that *Gray* did not involve an "accident"-based occurrence definition. While *Delgado* is not a duty to defend case, it gives insurers clarification in cases where clearly intentional acts are cast as "negligence" to trigger insurance coverage. We hope you find our summaries of *Delgado* and other notable coverage cases informative. 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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## No Duty to Defend Intentional Battery Even if Based on Insured's Unreasonable Belief in Need for Self-Defense

*Delgado v. Interinsurance Exchange of the  
Automobile Club of Southern California*,  
(California Supreme Court, August 9, 2009)  
47 Cal.4th 302

Delgado sued Reid for battery. The first cause of action alleged an intentional tort. The second cause of action alleged that Reid "negligently and unreasonably believed" he was engaging in self-defense "and unreasonably acted in self defense...and "negligently...physically struck" Delgado. ACSC denied coverage on the grounds of no accident and thus no "occurrence." Delgado later dismissed the intentional tort cause of action and settled with Reid by stipulating to a judgment which stated that Reid's use of force occurred because he negligently believed he was acting in self-defense. Delgado then brought a direct action against ACSC. The California Supreme Court held there was no coverage for the judgment. It stated that an insured's unreasonable belief in the need for self-defense does not turn a resulting purposeful and intentional act of assault into an "accident" within a policy's coverage clause; an "accident" refers "to the conduct of the insured for which liability is sought to be imposed on the insured." ■

## **In Contribution Action, Trial Court Correctly Determined When Time on Risk Began and that Contractor's Warranty Endorsement Applied**

*North American Capacity Insurance Company v. Claremont Liability Insurance Company*  
(Second District Court of Appeal, August 4, 2009)  
177 Cal.App.4th 272, 99 Cal.Rptr.3d 225

After NAC and Claremont participated in settling an underlying home construction defect action on behalf of their mutual insured general contractor, NAC sought contribution from Claremont, contending that Claremont did not pay its equitable share. After a bench trial, the trial court determined that a substantial portion of the settlement amount was attributable to the negligence of subcontractors as to whom the insured had failed to obtain a hold harmless agreement and certificates of insurance in violation of Claremont's "contractors warranty endorsement." Based also on the conclusion that the "time on risk" began not when the homeowner was able to move in to the home (because work was still ongoing) but rather a later date when the notice of completion was issued, the trial court denied NAC any recovery. The Second District affirmed, finding that the contractors warranty endorsement was enforceable and substantial evidence supported the contract completion date for purposes of the "time on risk" calculation. ■

## **No Bad Faith Where Insurer Reasonably Denies Coverage Based on Existing Precedent and Policy Language, Even Though Precedent is Subsequently Reversed**

*Griffin Dewatering Corp. v. N. Ins. Co. of New York*  
(Fourth District Court of Appeal, July 31, 2009)  
176 Cal.App.4th 172, 97 Cal.Rptr.3d 568

Northern Insurance Company of New York (NICNY) denied coverage for a claim arising out of sewage overflow based

on a CGL policy's total pollution exclusion. The insured obtained an \$11 million judgment against NICNY, including \$10 million in punitive damages, and NICNY appealed. The Court of Appeal reversed the judgment. Based on *Morris v. Paul Revere Life Ins. Co.* (2003) 109 Cal.App.4th 966, the court said, there was no bad faith since NICNY had acted reasonably: first, NICNY had relied on existing case law which supported its position, even though such case law was unsettled; second, the literal language of the exclusion, which defined pollution to include "waste," supported NICNY's position. The reasonableness of NICNY's original position was not changed by the fact that the subsequent opinion of *MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635 resolved the unsettled law adversely to NICNY. Moreover, NICNY had changed its position in favor of the insured six months prior to issuance of *MacKinnon*. ■

## **"Notice-Prejudice" Rule Inapplicable to Late Reported Claims under Special Pollution Coverage**

*Venoco, Inc. v. Gulf Underwriters Ins. Co.*,  
(Second District Court of Appeal, July 1, 2009)  
175 Cal.App.4th 750, 96 Cal.Rptr.3d 409

A 60-day notice condition in a "seepage and pollution buy-back" policy provision was found to be conspicuous and enforceable despite California's "notice-prejudice" rule, thus eliminating any requirement that the insurer show actual prejudice for late reported claims. The court found that because the policy provided special coverage for the very type of pollution claims at issue and was a negotiated special coverage, the 60-day notice provision was enforceable and requiring the insurer to show prejudice would "impermissibly alter" the contract of insurance. ■

## **Insurer Not Liable for Attorney Fees Under “Made-Whole” Rule in Med-Pay Insurance Context**

*21st Century Company v. Superior Court (Quintana)*  
(Supreme Court of California, August 24, 2009)  
47 Cal.4th 511, 213 P.3d 972, 98 Cal.Rptr.3d 516

21st Century’s insured was injured in an auto accident and received medical payment benefits under the terms of her auto insurance policy. The insured then sued the third party tortfeasor and eventually settled her case, incurring attorney fees in the process. Upon the insured’s settlement of the third party action, 21st Century requested and received reimbursement for disbursed med-pay benefits, less 21st Century’s pro rata share of attorney fees. The insured asserted that 21st Century could not require reimbursement for med-pay benefits because the insured had not been “made whole” by the third party damages settlement when her attorney fees were taken into account, and subsequently filed a class action lawsuit against 21st Century for violation of Unfair Competition Law and other causes of action. The trial court overruled 21st Century’s demurrer, but the Court of Appeal subsequently ordered the trial court to sustain the demurrer. The Supreme Court affirmed the Court of Appeal’s decision, holding that although the insured must be “made whole” as to all damages proximately caused by the accident, liability for attorney fees is not included under the “made-whole” rule. ■

## **Policy Providing Partial Reimbursement for Auto Repairs at Unapproved Repair Facilities is Upheld**

*Eugene Maystruk v. Infinity Insurance Company*  
(Second District Court of Appeals, July 9, 2009)  
175 Cal App.4th 881, 96 Cal. Rptr.3d 494)

Plaintiff Maystruk, on behalf of himself and others similarly situated, challenged a provision in his automobile insurance

policy which provided that policyholders would be reimbursed for one-hundred percent (100%) of their auto repairs if they had their car repaired at one of the facilities designated by Infinity, and would be paid for eighty percent (80%) of their auto repairs at any other facility. Plaintiff claimed that this violated Insurance Code Section 758.5 (d)(2), which prohibits an insurance carrier from limiting or discounting the insured’s repair costs based on the charges that would have been incurred had the vehicle been repaired by the insurer’s chosen shop. The court found that the predetermined reduction for repairs at designated facilities was not related to the “charges that would have been incurred had the vehicle been repaired by the insurer’s chosen shop,” and upheld the policy provision limiting reimbursement. ■

## **Mortgage Purchaser is Not Covered by Title Insurance Issued to Lender**

*First American Title Ins. Co. v. XWarehouse Lending Corp.*  
(First District Court of Appeal, August 28, 2009)  
177 Cal.App.4th 106, 98 Cal.Rptr.3d 801

A lender issued loans to borrowers for the purchase of real property. Promissory notes between the borrowers and the lender were secured by deeds of trusts on the real property. The notes and deeds of trust were later determined to be forgeries. Access Lending Corporation (“Access”) purchased the notes and deeds of trust from the lender. The lender never paid any funds to the borrowers and did not pay off the loans. The borrowers failed to make payments to Access. Access attempted to foreclose the mortgage, but a lawsuit was filed challenging Access’ right to any money from the foreclosure sale. The insurer denied coverage to Access under a title insurance policy issued to the lender. The appellate court held that Access was not an insured under the policy. The policy expressly named the lender as the insured and under the policy, an insured would also include the owner of the indebtedness secured by the insured mortgage. The court found that the owner of the indebtedness was the lender, as the indebtedness was between the borrowers and the lender. ■



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