

California and Nevada

Insurance Coverage UPDATE



MESSAGE FROM THE EDITOR

In the second quarter of 2011, California appellate courts again issued a relatively few number of insurance coverage decisions. We hope our brief summaries of them 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.

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Horizontal Exhaustion of Primary Limits Required But No Stacking of Multiple Primary Policies Issued By Single Insurer

*Kaiser Cement & Gypsum Corp. v.
Insurance Company of the State of Pennsylvania*
(Second District Court of Appeal, June 3, 2011)
196 Cal.App.4th 140, 126 Cal.Rptr.3d 602

Kaiser manufactured asbestos-containing products over several decades and faced thousands of personal injury suits. Kaiser selected a primary policy issued by Truck Insurance Exchange in 1974, which had a per occurrence limit but no annual liability limit, to respond to all suits that alleged asbestos exposure in that year. At issue in the case was whether an excess insurer over Truck's policies (ICSOP) was required to respond when only the 1974 Truck limit of \$500,000 had been exhausted, as opposed to when all Truck (and other) policies in effect during the years of continuing exposure had been exhausted. The appellate court held that, while all collectible primary policies must be exhausted before ICSOP's excess coverage was triggered, Truck's primary policies could not be stacked (only one Truck per occurrence policy limit was available to Kaiser for each bodily injury claim) based on its policy language and therefore ICSOP's excess coverage could apply upon exhaustion of only one of Truck's policies per claim. However, the Court also suggested that other primary insurance issued to Kaiser by other companies might also need to be exhausted and that insufficient evidence was before the Court to make that determination. ■

Only Five Days for Insured to Respond to Blue Ridge Letter Does Not Preclude Insurer From Reimbursement

American Modern Home Ins. Co. v. Fahmian
(Fourth District Court of Appeal, April 8, 2011)
194 Cal.App.4th 162, 124 Cal.Rptr.3d 456

Fahmian was sued in a personal injury action, and tendered the matter to American, which accepted the defense subject to a reservation of rights. The plaintiff made a policy limit demand and American advised Fahmian in writing, pursuant to *Blue Ridge v. Jacobsen* (2001) 25 Cal.4th 489, that it intended to accept the offer and seek reimbursement unless Fahmian would either take over his own defense or waive any bad faith claim against American for failure to settle. After Fahmian did not respond by American's stated deadline, American paid the demand and sued Fahmian for reimbursement, claiming the suit was not covered. The jury found the suit was not covered but that American was not entitled to reimbursement because it had not given Fahmian sufficient time to respond to its letter. The appellate court reversed the judgment, finding no appreciable difference between the time the *Blue Ridge* insureds had to respond to their advisement letter (six days) and the time Fahmian had to respond to American's (five days). Noting the often short deadlines imposed by settlement demands, the Court held that so long as an insurer reserves its rights under *Blue Ridge*, there is no additional requirement to allow an insured time to respond to its advisement letter beyond what is reasonable under the circumstances. ■

Insureds Suffered No Damages Where Insurer Did Not Immediately Assume Defense But Reimbursed Defense Costs and Settled Underlying Suit Against Insureds

Richards v. Sequoia Insurance Company
(First District Court of Appeal, April 28, 2011)
195 Cal.App.4th 431, 124 Cal.Rptr.3d 637

The Richards owned a lodge, insured by Sequoia, and were sued for wrongful death. They tendered the defense and Sequoia

responded by letter stating that coverage counsel was being retained, that a decision regarding coverage was expected within 45 days and that the Richards should retain their own counsel to protect the complaint's response date. Sequoia accepted the defense within approximately three weeks of the tender, reimbursed the Richards for the costs of their defense attorney and defended the case and later settled it. Nonetheless, the Richards filed a breach of contract and bad faith suit against Sequoia claiming that it had wrongfully denied a defense and caused the Richards, who were attorneys, to incur time assisting their first attorney with the defense before Sequoia accepted the tender, and suffered emotional distress. The trial court granted Sequoia's summary judgment motion finding that Sequoia's actions were reasonable, and the appellate court affirmed on the ground that the Richards had sustained no damages because its duty to defend required it to pay defense costs and Sequoia had paid all defense costs. ■

Court Finds Suit Based on Unfair Competition Law Doesn't Violate Moradi-Shalal

Chris Hughes v. Progressive Direct Insurance Company
(Second District Court of Appeal, June 15, 2011)
196 Cal. App.4th 754, 126 Cal. Rptr. 3d 480

Hughes brought an individual and class action against his auto insurer, Progressive, under California's Unfair Competition Law. He alleged that Progressive violated Insurance Code section 758.5 by failing to give him notice, after his car was damaged, of his right to use a repair shop of his choosing. Progressive instead told him that if he did not use a "Direct Repair Facility" the repairs would take longer and Progressive would not guarantee them. Hughes used the Direct Repair Facility and was dissatisfied with the repairs. The trial court sustained Progressive's demurrer to Hughes' complaint without leave to amend. The Court of Appeal reversed, finding *Moradi-Shalal* does not bar all private actions against insurers for unfair or anti-competitive behavior. It held that an Unfair Competition Law claim can be maintained against an insurer when the alleged conduct violates section 758.5 even though such an action could not have been brought based on violation of the Unfair Insurance Practices Act. ■

Court Has Discretion to Allow Claim for Declaratory Relief Before Requiring Insured to Submit to Appraisal

The Doan v. State Farm General Insurance Company
(Court of Appeal, Sixth District, May 24, 2011)
195 Cal.App.4th 1082, 125 Cal.Rptr.3d 793

The Doan was insured under a property insurance policy issued by State Farm, which provided that State Farm would pay costs to repair or replace personal property less "depreciation," which was not defined. Doan submitted a claim following a fire loss for approximately \$174,000, which was his calculation of the value of his property less depreciation based on the actual condition of his property at the time of the loss. However, State Farm claimed that the value of the property less depreciation was only \$130,000.00. Doan filed suit, alleging that State Farm arbitrarily calculated depreciation percentage based on age and type of the items, rather than the actual condition of each item. The trial court sustained State Farm's demurrer on the ground that Doan failed to plead sufficient facts showing that he satisfied the appraisal requirement. The Court of Appeal reversed, holding that the trial court has discretion to stay appraisal pending resolution of Doan's declaratory relief action and that declaratory relief was a proper procedure to challenge State Farm's method of calculating depreciation. ■

Communications Between Attorneys in the Same Firm and Between Attorneys and Their Investigator are Protected by the Attorney Client and Work Product Privileges

Fireman's Fund Ins. Co. v. Superior Court
(Second District Court of Appeal, June 28, 2011)
196 Cal.App.4th 1263, 127 Cal.Rptr.3d 768

Front Gate filed an action against Fireman's Fund for bad faith in the handling of property damage claims. During the litigation, Front Gate deposed an associate at the law firm that represented Fireman's Fund and asked her questions concerning communications she had with other attorneys in her office and with an investigator regarding a Front Gate whistleblower. The

Court of Appeal held that the communications with other attorneys in the law firm and with the investigator were protected by attorney client and attorney work product privileges. It stated that the attorney client privilege applies to communications between attorneys and individuals who are necessary for the accomplishment of the purpose for which the lawyer was consulted and that the work product privilege is not limited to writings. ■

Self-Insured Risk Pool's Subrogation Claim against Insured of Insolvent Carrier is Barred by Insurance Code But It Could Recover Against Surety Bond

Fort Bragg Unified School District v. Solano County Roofing, Inc.
(First District Court of Appeal, April 27, 2011)
194 Cal.App.4th 891, 124 Cal.Rptr.3d 144

A school building within the Fort Bragg Unified School District ("District") sustained damage as a result of a rain storm. The repair costs were paid by two public agency self-insured risk pools for the District. The pools subsequently filed a subrogation action in the name of the District against the roofing contractor ("Roofer"), the surety for the Roofer ("Surety"), and an asbestos remediation contractor. The Roofer's insurer was insolvent and CIGA therefore administered the claim against the Roofer. The Court of Appeal ruled that subrogation claims against the Roofer were barred pursuant to Ins. Code section 1063.1, subd. (c)(9)(B) since that section only allowed the "original claimant," i.e. the District, to recover against the insured of an insolvent carrier. However, the Court of Appeal also held that the District could recover against the Surety, in part because the Surety could not benefit from the Roofer's CIGA defenses since they were "personal" to the Roofer. ■

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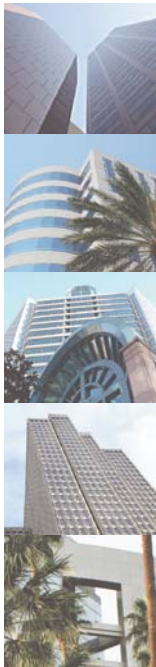
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