

Insurance Coverage

California and Nevada

2008 Vol.4

UPDATE



MESSAGE FROM THE EDITOR

The third quarter of 2008 produced a modest number of published coverage decisions from the California appellate courts (and none from Nevada). Of particular interest is the Second District's decision in *Brehm v. Superior Court*, which held that an auto insurer can face bad faith liability if it fails to make reasonable efforts to settle before demanding uninsured motorist arbitration. We would not be surprised if, in the future, insureds attempt to invoke this holding in connection with first party property policies. 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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Insurer May Be in Bad Faith for Failing to Make Reasonable Efforts to Settle Before Demanding UM Arbitration

Brehm v. 21st Century Insurance Company
(Second District Court of Appeal, July 16, 2008)
166 Cal.App.4th 1225, 83 Cal.Rptr.3d 410

The Court of Appeal held that an insurer's duty of good faith and fair dealing requires that it make a reasonable attempt to reach agreement with the insured before electing arbitration of an uninsured motorist claim. The Court rejected 21st Century's contention that the statutory provision which states that "no cause of action shall exist...[for] exercising the right to request arbitration" immunizes the insurer for failing to conduct a thorough investigation or for failing to attempt to resolve the claim before resorting to the remedy of arbitration. As the Court explained, the statute does not grant the insurer the unfettered right to demand arbitration; rather, the insurer must "attempt to reach an agreement with its insured before its may invoke arbitration as a means of resolving any disagreement." ■

Reduction of Tortfeasor’s Policy Limits Due to Property Damage Payment Does Not Permit UIM Recovery Where Policies’ Limits are Otherwise Equal

Explorer Insurance Company v. Dwaine Gonzalez
(Third District Court of Appeal, July 16, 2008)
164 Cal.App.4th 1258, 79 Cal.Rptr.3d 893

The insured Gonzalez was injured in an accident. The tortfeasor’s policy had combined single limits of \$100,000 for all bodily injury and property damage caused by any single accident. Gonzalez had UIM coverage from Explorer with limits of \$100,000. Gonzalez received \$21,584 from the tortfeasor’s insurer in property damage benefits. Citing the rule that UIM benefits are not available where the amount of bodily injury coverage “potentially available” under the tortfeasor’s policy is equal to or greater than the insured’s own UIM limits, the Court of Appeal held that Gonzalez could not recover UIM benefits from Explorer, even though the property damage benefits he received from the tortfeasor reduced the amount available to him for his BI claim under that policy to \$78,416. ■

Insurer Estopped to Assert Procedural Defense in First Party Policy

City of Hollister v. Monterey Insurance Company
(Sixth District Court of Appeal, July 29, 2008)
165 Cal.App.4th 455, 81 Cal.Rptr.3d 72

The insured City brought a declaratory judgment action concerning its rights under a commercial lines policy issued by Monterey for the replacement value of a

building destroyed by fire. The trial court held that Monterey was estopped from relying on a policy provision requiring the City to enter into a contract to repair or replace the building within 180 days after the fire. The Court of Appeal affirmed. It stated that imposing estoppel in such a case merely “obligates the insurer to pay what it has agreed to pay when its only defense to payment is brought into being by its own inequitable conduct.” Cited in support of the finding was Monterey’s conduct in raising “spurious grounds” for its denial of coverage, failure to communicate basic determinations regarding coverage, ignoring communications from the City and refusing to confirm whether it would honor the City’s claim. ■

Language in Primary Policy Does Not Control Overlying Excess Policy

Northrup Grumman Corp. v. Factory Mutual Insurance Co.
(Ninth Circuit Court of Appeals, August 14, 2008) 538 F.3d 1090

Factory Mutual issued Northrup Grumman a primary All Risk policy that included flood coverage. It also issued an All Risk excess policy that excluded loss or damage caused by Flood as defined in that policy. When Hurricane Katrina caused flood damage to several Northrup shipbuilding yards, Factory Mutual paid the claim under the primary policy but denied coverage under the excess policy. In the coverage action the federal district court granted summary judgment for Northrup, finding the flood exclusion to be ambiguous as it contained language different than that in the primary policy and needed to be read in light of the primary policy. The Ninth Circuit disagreed and reversed. Under

California law, the Ninth Circuit held that the separate language in the excess policy must be read in its ordinary and popular sense and that the two policies were not one contract for purposes of construction. ■

Defective PlayStation 2 Claims Not Covered Under Media Policy or CGL

Sony Computer Entertainment America, Inc. v. American Home Assurance Company
(Ninth Circuit Court of Appeals, July 15, 2008)
532 F.3d 1007

Consumers sued Sony in two class actions which alleged the PlayStation 2 had a fundamental design defect that made it unable to play DVDs and certain game discs. AISLIC's "Multimedia Professional Liability Policy" insured Sony for "wrongful acts" which was defined to include, among other things, "defective advice, incitement, or negligent publication". The Ninth Circuit held that, although the phrase "negligent publication" was not defined, it had a narrow meaning in the context of the policy, limited to publication of material which leads the reader to commit a harmful act. The Court also held that no coverage existed for the lawsuits under an American Home CGL policy's property damage provision, primarily because the underlying lawsuits' allegations that DVDs and certain game discs could not be used on the PlayStation did not make the PlayStation itself unusable under the "loss of use" definition. ■

Auto Dealer's Garage Operations Liability Policy May Cover Damages Caused by Purchaser of Vehicle

Spangle v. Farmers Insurance Exchange
(Second District Court of Appeal, August 29, 2008) 166 Cal.App.4th 560, 82 Cal.Rptr.3d 763

Anthony purchased a vehicle for his 16-year-old son, Kevin, from Triple Crown Auto Sales. Approximately one week later, while driving the vehicle, Kevin collided with and seriously injured the plaintiff. The plaintiff obtained a judgment in excess of the insurance covering Kevin, then sought to recover against a "garage operations" liability policy issued to Triple Crown. The plaintiff asserted that Kevin was a "permissive user" under the policy because Triple Crown had not properly transferred legal title before the accident occurred. The Court of Appeal reversed summary judgment in favor of Triple Crown's insurer, finding that: (1) Kevin's use fell within the broad definition of "garage operations" which included the "ownership, maintenance, and use" of covered vehicles; (2) because Kevin's father purchased the vehicle and Kevin was a minor at the time of purchase, Kevin was not a "customer" so as to trigger the "customer" exclusion; and (3) there were triable issues of material fact regarding whether Kevin was "insured" as a permissive user. ■

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