

California and Nevada

# Insurance Coverage UPDATE



## MESSAGE FROM THE EDITOR

In the last two quarters, California appellate courts issued a number of interesting decisions in the insurance coverage context. In *Century-National v. Garcia*, the Supreme Court concluded, in the first party context, that innocent insureds are entitled to coverage despite intentional acts of a co-insured. In the third party, construction context, *Clarendon v. General Security* gives insurers ammo with respect to the products-completed operations hazard, exclusions j(5) and j(6) and a "claims in progress" exclusion. We hope our brief summaries of these and all of the appellate coverage cases in this issue 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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## **Innocent Insured Cannot Be Denied Coverage Under Fire Insurance Policy Due to Intentional Act by Another Insured**

*Century-National Ins. Co. v. Garcia*

(California Supreme Court, February 17, 2011)

51 Cal.4th 564, 120 Cal.Rptr.3d 541

The Garcias sustained substantial property damage to their home after their adult son set fire to his bedroom. The home was covered by a Century-National fire insurance policy under which all three Garcias were insureds. The parents filed a claim, which Century-National denied, based on two provisions that precluded coverage for damage from an intentional or criminal act by any insured. The trial court upheld the exclusion and the Court of Appeal affirmed. A unanimous Supreme Court reversed. It held that the provisions were invalid as to other, innocent co-insureds. The Court stated that property insurance policies that insure against the risk of fire are required, by Insurance Code section 2070, to be at least equivalent to and no more restrictive than that prescribed in the standard form fire insurance policy codified in section 2071(a). Although section 2071(a) does not contain an "intentional acts" exclusion, the Court concluded that the intentional acts exclusion in Insurance Code section 533 is inherently part of the standard form, and that section precludes coverage only for the intentional acts of "the" insured. Accordingly, the Court found, homeowners policy exclusions that attempt to expand the effect of such conduct are invalid. ■

## **No Products-Completed Operations Coverage for Insured Fired from Project; Standard Exclusions and "Claims In Progress" Exclusion Also Applied**

*Clarendon America Insurance Company v.*

*General Security Indemnity Company*

(Second District Court of Appeal, March 30, 2011)

193 Cal.App.4th 1311, --- Cal.Rptr.3d ----

Clarendon's and General Security's insured, Hilmor Construction, was the general contractor for the construction of a home. Prior to completion of the project, and during Clarendon's policy period, the homeowners terminated Hilmor's contract. General Security's policy followed Clarendon's. A few years later, the homeowners filed a construction defect lawsuit against Hilmor and others. Clarendon defended Hilmor, settled the case and thereafter pursued General Security for contribution. The trial court granted General Security's summary judgment motion. The Second District Court of Appeal affirmed. It concluded that completed-operations coverage did not apply because Hilmor was fired from the project before it was completed or abandoned. The Court also found that exclusions j(5) and j(6) applied since Clarendon offered no evidence that the work of "others" was damaged. It also held that General Security's "claims in progress" exclusion, which deemed that all property damage to "units of or within a single project or development, and arising from the same general type of harm, shall be deemed to occur at the time of damage to the first unit..." also applied since the evidence showed that the homeowners were claiming "continuing and progressive property damage" that began prior to General Security's policy period. ■

## **Insurer Had No Duty to Defend Sexual Battery Claim**

*Shanahan v. State Farm Gen. Ins. Co.*

(Fourth District Court of Appeal, March 8, 2011)

193 Cal.App.4th 780, 122 Cal.Rptr.3d 572

The claimant sued the insured, her employer, for sexual battery. State Farm denied coverage under its renter's and personal liability (umbrella) policies. The insured settled the suit and sued State Farm, which brought a successful summary judgment motion in the coverage action. The Court of Appeal affirmed, explaining that the tort of sexual battery requires intent, that it was clear that the underlying action was based on the insured's intentional, rather than accidental, conduct, despite the insured's argument that a jury could have found he "negligently" touched the employee and that intentional conduct was excluded under both policies and by Insurance Code section 533. Additionally, the Court concluded, the underlying complaint did not allege a claim for slander or invasion of privacy so as to trigger coverage for "the commission of an offense, or series of similar related offenses, which results in personal injury..." under the umbrella policy. ■

## **Petition to Compel Arbitration of Cumis Fee Dispute Properly Denied Where Insurer Failed to Defend**

*The Housing Group v. PMA Capital Ins. Co.*

(First District Court of Appeal, March 25, 2011)

193 Cal.App.4th 1150, --- Cal.Rptr.3d ----

The plaintiff housing developers brought an action against their insurers based on the insurers' refusal to defend certain third party actions. The insurers filed a petition to compel arbitration of a *Cumis* fee dispute pursuant to Civil Code section 2860(c) which challenged the fees incurred by the insureds/plaintiffs' independent counsel. The plaintiffs successfully opposed the petition. The First District Court of Appeal affirmed, reasoning that although two reservation of rights letters the insurers issued did not explicitly disclaim coverage, the trial court could properly accept the plaintiffs' interpretation that the letters were merely an expression of a future intent to provide a defense, and not an actual acceptance or an agreement to provide a defense or to appoint plaintiffs' chosen counsel as *Cumis* counsel. Further, under *Haskel, Inc. v. Superior Court* (1995) 33 Cal.App.4th 963, the trial court could properly treat the insurers' minimal payment at the end of the litigation "as the equivalent of a defense denial." Because the insurers failed to provide a defense, the court found, they were precluded from invoking the arbitration remedy for *Cumis* fee disputes provided by section 2860(c). ■

## **Federal Administrative Adjudicative Proceeding is a “Suit” for Purposes of Insurer’s Duty to Defend and Indemnify**

*Ameron International Corporation v. Insurance Company of the State of Pennsylvania, et al.*  
(Supreme Court of California, November 18, 2010)  
50 Cal.4th 1370, 118 Cal.Rptr.3d 95

Ameron International Corporation (“Ameron”) brought suit for breach of contract and bad faith against its commercial general liability, umbrella, and excess insurers based on the insurers’ refusal to defend and indemnify an administrative proceeding before the Department of Interior Board of Contract Appeals (“IBCA”). The trial court granted insurers’ demurrer and dismissed Ameron’s complaint on the basis that the IBCA proceeding was not a “suit,” defined as “a court proceeding initiated by the filing of a complaint” by *Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 887. The Court of Appeal affirmed based on *Foster-Gardner*, reasoning that the ICBA administrative hearing was not before a court of law. The Supreme Court reversed, and found that *Foster-Gardner* did not apply because of the “trial-like” nature of the proceeding (filing of notice and complaint, presided over by a judge, governed by federal evidence rules, etc.). The Supreme Court ruled that the undefined term “suit” should be construed as a reasonable insured would understand the term, and that the IBCA proceeding therefore triggered the insurers’ duty to defend and indemnify. ■

## **Insurer Not Required to Make Payment Under Homeowner Policy’s Rebuilding Provision Immediately After Fire**

*Minich v. Allstate Ins. Co.*  
(Fourth District Court of Appeal, March 11, 2011)  
193 Cal.App.4th 477, 122 Cal.Rptr.3d 769

Minich’s home was destroyed by a fire. Allstate’s homeowners policy provided for payment of the actual cash value of the home up to policy limits, but an endorsement provided for payment in excess of the limit if the insured repaired, rebuilt, or replaced the home. Allstate paid the policy limits to Minich two weeks after the fire. Several months later, she submitted documentation showing that she was rebuilding. Allstate then made payment under the endorsement. Nonetheless, Minich filed suit against Allstate, alleging that Allstate was required to make payment under the endorsement immediately after the fire. The Fourth District Court of Appeal held that Allstate was not required to make payment under the endorsement without regard to whether Minich repaired, rebuilt, or replaced the house. It also concluded that the endorsement did not increase the policy limit, but rather provided for payment in excess of the limit in the event Minich repaired, rebuilt, or replaced the home. ■

## **Strict Compliance With Pilot Warranty Required for Aviation Insurance Coverage**

*Trishan Air, Inc. et al. v.  
Federal Insurance Company, et al.*  
(Ninth Circuit Court of Appeals, February 16, 2011)  
635 F.3d 422

Trishan filed suit for breach of contract and bad faith after Federal and other insurers denied coverage under an aviation insurance policy for an aircraft accident. The Federal policy included a pilot warranty requiring pilots to complete specific training for the make and model of the covered aircraft, and an exclusion that excluded coverage consistent with the pilot warranty provisions. Trishan argued that its pilot was sufficiently experienced and trained, despite never having attended any formal course relative to the covered aircraft. The district court granted summary judgment in favor of Federal, holding that under California law, Federal's denial of coverage was proper because Trishan did not strictly comply with the pilot warranty. On appeal, Trishan argued that the pilot warranty was a mere condition of the insurance policy, requiring only substantial compliance. Federal argued that the pilot warranty was an element of the fundamental risk insured, requiring strict compliance. The Court of Appeals affirmed, concluding that California law required strict compliance with the pilot warranty. ■

## **Court Refuses to Compel Appraisal Prior to Declaratory Judgment**

*Douglas Kirkwood v. California State  
Automobile Association Inter-Insurance Bureau*  
(First District Court of Appeal, February 28, 2011)  
49 Cal.App.4th 49, 122 Cal.Rptr.3d 480

The insured brought a declaratory relief action contending that the insurer's practice of depreciating personal property based solely on the age of the property violated Insurance Code Section 2051(b) and a regulation setting forth the method of determining actual cash value under fire insurance policies. The trial court denied, without prejudice, the insurer's motion to compel appraisal of the insured's property claim under a standard fire insurance policy. The Court of Appeal affirmed, finding that the insured had not violated the policy or his statutory duties by proceeding with the declaratory relief action prior to proceeding with the appraisal process. It further found that the issues of contractual and statutory interpretation raised by the insured's declaratory relief action were not encompassed in the appraisal process. Thus, the trial court would be permitted to decide the interpretation issue, after which the matter would proceed to appraisal in accordance with the trial court's interpretation of the statute and the insurance contract. ■

**Excess Insurer Not Entitled to Equitable Subrogation Against Broker Who Allegedly Breached a Duty to Obtain Another Excess Policy Covering the Same Loss**

*Dobbas v. Vitas*

(Third District Court of Appeal, January 7, 2011)  
191 Cal.App.4th 809, 119 Cal.Rptr.3d 798

Dobbas was the owner of a bull that escaped from a pasture and caused a car accident which resulted in multiple fatalities and injuries. Payments to victims exhausted his primary policy limits, leaving only excess coverage from American Guarantee and Liability Ins. Co. ("AGLIC"). Dobbas' insurance broker, Vitas, allegedly breached a duty to obtain another excess insurance policy from CalFarm. Dobbas assigned his claims against Vitas to the accident victims. AGLIC subsequently paid the victims and obtained their assigned rights against Vitas. The trial court subsequently rejected AGLIC's attempt to intervene in the suit that Dobbas had previously filed against Vitas. The Court of Appeal affirmed, holding that AGLIC did not have a right of equitable subrogation against Vitas since Vitas was not a "wrongdoer" who was responsible for causing the accident and AGLIC did not have "superior equities" to Vitas since AGLIC owed a duty to pay the loss regardless of whether another excess policy was procured.



**Auto Insurer Not Required to Pay Unauthorized Cost to Repair Where Policy Gave Insurer Repair or Pay Cost to Repair Option; However, Insurer's Prosecution of Subrogation Action May Have Prejudiced Insured**

*Hibbs v. Allstate Ins. Co.*

(Second District Court of Appeal,  
February 24, 2011)

193 Cal.App.4th 809, --- Cal.Rptr.3rd ---

Allstate's auto policy issued to Hibbs authorized it to repair or pay the cost to repair. After Hibbs' auto was damaged and he tendered a claim to Allstate, he did not consent to repair, but Allstate proceeded to pay for the repair. The trial court granted Allstate's motion for summary adjudication on Hibbs' claims for breach of contract and bad faith. The Court of Appeal ruled that Allstate's obligation to pay benefits under the policy was excused when Hibbs did not consent to repairs after Allstate elected to repair. However, the Court of Appeal reversed on the grounds that a triable issue of fact existed concerning whether Allstate prosecuted its subrogation claim in good faith. It rejected Allstate's argument that Hibbs implicitly authorized a repair by submitting a claim, and thus held that Allstate lacked subrogation rights since it made a "voluntary" payment to the body shop for unauthorized repairs. The Court of Appeal further found that Hibbs was potentially prejudiced by Allstate's subrogation action since the third party who caused the subject damage was entitled to an offset for the amounts paid to Allstate in subrogation, and therefore, the third party's right to an offset was a detriment to Hibbs' claims against the third party. ■

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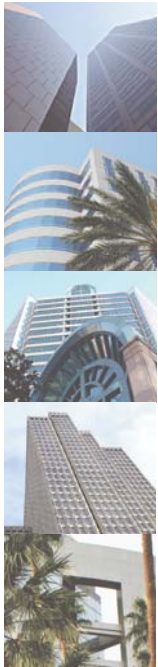
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