

California and Nevada

# Insurance Coverage

## UPDATE



### MESSAGE FROM THE EDITOR

California appellate courts were relatively active in publishing coverage decisions in the first quarter of 2010. We hope you find our case summaries 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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### 3.8 to 1 Ratio of Punitive to Compensatory Damages Appropriate in First Party Bad Faith Case

*Amerigraphics, Inc. v. Mercury Ins. Co.*  
 (Second District Court of Appeal,  
 March 23, 2010)  
 182 Cal.App.4th 1538, --- Cal.Rptr.3d ---

The business property of Amerigraphics, a printing and graphics design company, was flooded. Mercury delayed paying certain benefits and refused certain benefits under the "Business Income" coverage. In the trial of the coverage and bad faith action, Amerigraphics prevailed and the jury awarded \$130,000 in compensatory damages (plus \$40 in prejudgment interest) and \$3 million in punitive damages, which the trial court reduced to \$1.7 million. The appellate court affirmed the trial court's ruling in regard to coverage (an insured is entitled to be paid under both subparts of the "Business Income" coverage without having to offset the two amounts in the event that operating expenses exceed net income) but reduced the punitive damage award to a 3.8 to 1 ratio of punitive damages to compensatory damages, rather than the 10 to 1 ratio the trial court had utilized. ■

## **Insurer Has No Duty to Indemnify Additional Insured Where Policies' SIRs Could Only be Satisfied by Named Insureds**

*Forecast Homes, Inc. v. Steadfast Insurance Company*  
(Fourth District Court of Appeal,  
January 12, 2010)

181 Cal.App.4th 1466, 105 Cal.Rptr.3d 200

Forecast, a housing developer, was named as additional insured on its subcontractors' liability policies issued by Steadfast. Forecast was sued in several actions by various homeowners who alleged construction defects. Forecast tendered to Steadfast, but Steadfast declined coverage on the grounds that the SIR provisions in the policies required the subcontractors, i.e., the named insureds, satisfy the SIRs, not additional insureds such as Forecast. In the coverage action, Steadfast prevailed in the trial court and, on appeal, the Fourth District held that the SIRs were unambiguous that only the named insured could satisfy the SIRs and that such provisions did not violate public policy. ■

## **Intentional Act of Building Home which Encroached on Neighbor's Home is Not an "Accident"**

*Fire Ins. Exchange v. Superior Court (Bourguignon)*  
(Fourth District Court of Appeal,  
January 26, 2010)

181 Cal.App.4th 388, 104 Cal.Rptr.3d 534

The Bourguignons built a house that encroached on their neighbors' property. When a dispute over the property

line arose, they filed suit against their neighbors for quiet title and adverse possession. The neighbors cross-complained alleging that the Bourguignons knew that their house encroached on the neighbor's property at the time they built it. The Bourguignons' homeowners' insurer, FIE, denied coverage on the basis that no "accident" had been alleged in the neighbor's cross-complaint. In the subsequent coverage action against FIE, the Court of Appeal found that FIE's position was justified because the act of building a structure that encroaches onto another's property is not an accident even if the owner acts in the mistaken belief, even if in good faith, that he was legally entitled to build on the property. ■

## **Insurer That Defends Under Reservation of Rights May Intervene in Underlying Action to Protect Its Interests**

*Gray v. Begley*  
(Second District Court of Appeal,  
March 22, 2010)

182 Cal.App.4th 1509, 106 Cal.Rptr.3d 729

CNA defended an insured driver under reservation of rights in a personal injury action brought by an injured motorist. The motorist prevailed at trial, and the driver brought a motion to vacate judgment, seeking to off-set a prior settlement between the motorist and the driver's employer. Thereafter, the driver, without CNA's participation, withdrew his motion to vacate in exchange for consideration from the motorist. CNA intervened and filed its own motion to vacate. The motion was denied as untimely. On appeal, the motorist and driver argued that CNA had no right to intervene since CNA's interest in the

action was contingent rather than direct. The Court of Appeal disagreed. It noted that the key factor in determining whether an insurer is bound by a settlement reached without the insurer's participation is whether the insurer provided a defense, not whether it denied coverage. It therefore followed that an insurer that defended under a reservation of rights could intervene when the insured attempted to settle the case to the potential detriment of the insurer. ■

### **Advertising Injury Does Not Cover Advertising Practices that do Not Identify Plaintiff or Refer to It by Implication**

*Total Call Intern., Inc. v. Peerless Ins. Co.*  
(Second District Court of Appeal,  
January 21, 2010)  
181 Cal.App.4th 161, 104 Cal.Rptr.3d 319

Peerless issued a commercial general policy to TCI. The policy defined "personal and advertising injury" as injury arising out of several enumerated offenses, including oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products, or services. IDT sued TCI, alleging that it had suffered damages as a result of TCI's advertising practices. The appellate court held that there was no coverage because IDT's lawsuit did not allege that TCI's advertising specifically identified IDT or referred to it by reasonable implication. ■

### **Coverage Denial Proper Where Policyholder Failed to Submit Complete Proof of Loss or Requested Documentation and Failed to Respond to Material Questions at EUO**

*Abdelhamid v. Fire Ins. Exchange*  
(Third District Court of Appeal,  
February 22, 2010)  
182 Cal.App.4th 990, 106 Cal.Rptr.3d 26

Abdelhamid submitted a claim to FIE for the complete loss of her home in a fire. FIE's investigation revealed that Abdelhamid was facing financial problems related to the purchase and remodel of the home and that the fire had been deliberately set. After she failed to provide a completed proof of loss or requested documentation and answer material questions in her EUO, FIE denied the claim based on failure to cooperate. In affirming the trial court's grant of FIE's summary judgment in the subsequent breach of contract and bad faith action, the Court of Appeal held that FIE was justified in its coverage denial because the contract expressly required cooperation, including submission of requested materials and an EUO, as a condition precedent to coverage. The Court also held that Abdelhamid's reliance on the advice of her attorney in not providing the requested information did not excuse her failure to comply with the policy conditions. ■

## **Insurer Seeking Equitable Contribution May Only Recover Fees and Costs Exceeding Its “Fair Share”**

*Scottsdale Ins. Co. v. Century Surety Co.*  
(Second District Court of Appeal, March 10, 2010)  
182 Cal.App.4th 1023, 105 Cal.Rptr.3d 896

Scottsdale sought equitable contribution against Century, based on Century’s failure to participate in the defense or indemnity of common insureds in hundreds of underlying actions in which Scottsdale had shared the costs of defense and indemnity with at least one other insurer. The trial court concluded that Scottsdale was entitled to equitable contribution from Century, and ordered Century to pay half of Scottsdale’s defense and indemnity payments with respect to approximately 80 of the underlying actions. The Court of Appeal reversed and remanded for further proceedings, concluding that an insurer can recover equitable contribution only when it has paid more than its fair share. Further, in determining its “fair share,” Scottsdale should be bound by the methods of allocation it had agreed to with the other insurers in the underlying actions. Scottsdale thus could not recover from Century an amount that would result in Scottsdale paying less than its fair share under those allocation agreements. ■

## **Insurer’s Defense Under Auto Policy Does Not Insulate It from Liability for Breach of Duty to Defend Under Separate Homeowner’s Policy**

*Risely v. Interinsurance Exchange of the Automobile Club*  
(Fourth District Court of Appeal, March 26, 2010)  
183 Cal.App.4th 196, --- Cal.Rptr.3d ---

Risely filed suit for personal injuries against Turner, who was insured under both auto and homeowner’s policies through Auto Club at the time of the underlying incident. Risely demanded policy limits under Turner’s homeowner’s policy, but Auto Club would defend Turner only under the auto policy and rejected the demand. A stipulated judgment was eventually entered against Turner, and Risely was assigned the rights to Turner’s claims against Auto Club in connection with the homeowner’s policy. Risely then filed suit against Auto Club for bad faith. The trial court granted Auto Club’s motion for summary judgment, finding that Auto Club’s failure to defend Turner under the homeowner’s policy was “of no consequence” since Turner had been provided a defense under the automobile policy. However, the Court of Appeal reversed, concluding that Auto Club’s defense of Turner under the auto policy did not insulate it from liability for its alleged breach of the duty to defend under the homeowner’s policy. ■

## **Insurer Cannot Compel Arbitration Where Dispute Involves Existence of Duty to Defend**

*Intergulf Development v. Superior Court*  
(Fourth District Court of Appeal, March 2, 2010  
183 Cal.App.4th 16, 107 Cal.Rptr.3d 162

A homeowners association sued Intergulf for construction defects. Intergulf tendered to Interstate Fire & Casualty ("Interstate"). Interstate accepted the tender under reservation of rights and retained a law firm to defend. Intergulf objected to the retention, claiming that it was entitled to independent counsel under Civil Code section 2860 ("Cumis counsel"). Interstate did not respond to the request for independent counsel, so Intergulf sued for breach of contract, bad faith and declaratory relief. Five weeks before trial, Interstate brought a petition to compel arbitration under section 2860, which the trial court granted. In writ proceedings, the appellate court agreed with Intergulf that the gravamen of the complaint was bad faith and breach of contract regarding Interstate's alleged failure to acknowledge its independent counsel obligation, not a fee dispute properly the subject of arbitration under section 2860, and reversed the trial court's order. ■

## **Subcontractors Not "Insureds" Under Contractor's Insurance Policy Where Contractor Lacked Possession or Control**

*American International Underwriters Insurance  
Company v. American Guarantee and Liability  
Insurance Company*  
(Court of Appeal, Sixth Circuit,  
January 28, 2010)  
181 Cal.App.4th 616, 105 Cal.Rptr.3d 64

An individual named a subcontractor, a sub-subcontractor, and a subhauler, among others, in a negligence action after he was injured by the subhauler who was hauling soil from a project construction site using the subhauler's own tractor and the sub-subcontractor's trailer. Upon settlement, the sub-subcontractor's insurer sought indemnity and subrogation for its contribution from the subcontractor's insurer. The trial court concluded that the sub-subcontractor was an insured under the policy issued by the subcontractor's insurer because it was the owner of the trailer "hired" by the subcontractor. The Court of Appeal reversed, concluding that the subcontractor did not "hire" the tractor and trailer within the meaning of the policy since the subcontractor did not assume possession or control of the tractor and trailer, and thus the sub-subcontractor and subhauler were not insureds under the subcontractor's policy. ■

## **Reduced Liability Coverage for Permissive Users Upheld**

*Dominguez v. Financial Indemnity Company*  
(First District Court of Appeal, March 30, 2010)  
183 Cal.App.4th 388, --- Cal.Rptr.3d ---

Dominguez was injured in an auto accident. The at-fault driver was a permissive user under an FIC auto policy. The policy stated that the limits of liability stated in the declarations are reduced for permissive users to the statutory minimum liability limits for permissive users. The trial court and the Court of Appeals agreed with FIC that these provisions were "sufficiently conspicuous, plain and clear" to be enforceable. ■

## **Misrepresentation on Application Invalidates Policy**

*Superior Dispatch, Inc. v. Ins. Corp. of New York*  
(Second District Court of Appeal,  
January 21, 2010)  
181 Cal.App.4th 175, 104 Cal.Rptr.3d 508

RSI, an insurance broker, submitted an insurance application on behalf of Superior with Inscorp. The application stated that Superior was a common carrier of produce, food goods and canned goods, beer/wine, textiles, and paper products only. Matson hired Superior to transport a dump truck on a flat rack trailer. During transit, the dump truck was damaged. Matson demanded payment from Superior for the full value of the dump truck. Superior subsequently made a claim with Inscorp. Inscorp denied coverage for the dump truck. The appellate court held that Superior's policy with Inscorp was invalid and Inscorp did not breach the contract by denying coverage because the insurance application submitted by RSI did not state that Superior was a

common carrier of vehicles. The Court held that it was immaterial that Superior may not have known of the misrepresentation because representations made in an insurance application by an insurance broker are attributed to the insured. ■

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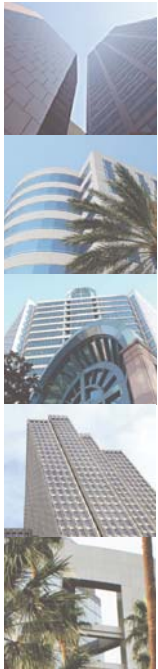
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