

California and Nevada

Insurance Coverage UPDATE



MESSAGE FROM THE EDITOR

This past quarter, the Nevada Supreme Court adopted the “notice-prejudice” rule that prevails in many other jurisdictions and the California Courts of Appeal issued coverage decisions affecting a range of first and third party coverages. We hope our short case summaries are an easy reference for you and, as always, welcome any comments, questions or the opportunity to elaborate on any coverage question you or your group may have.

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Nevada Adopts Prejudice Rule for Late Notice of Claims Defense

*Las Vegas Metropolitan Police Department v.
Coregis Insurance Company*
(Nevada Supreme Court, August 4, 2011)
127 Nev. Adv. Op. 47, 256 P.3d 958

Las Vegas Metropolitan Police Department (“LVMPD”) was named as a defendant in a federal court action alleging civil rights violations. It was self-insured up to \$1 million but had an excess liability policy with Coregis which covered police officer actions. Coregis denied coverage because LVMPD did not notify it of the claim/potential liability until several years after the incident that led to the lawsuit. LVMPD thereafter sued Coregis seeking a judicial determination that Coregis was required to defend and indemnify it with respect to the underlying action. Based on existing Nevada case law, the trial court granted Coregis’ summary judgment motion on the grounds that LVMPD’s notice was late and Coregis did not need to establish it was prejudiced thereby (although, according to the trial court, Coregis did make such a showing nonetheless). The Nevada Supreme Court reversed and adopted a notice-prejudice rule in Nevada consistent with many other jurisdictions, stating explicitly that when an insurer denies coverage of a claim because notice of the claim was late, the insurer must show that it was prejudiced by the late notice. It then concluded that Coregis’ prejudice showing in the trial court was not conclusive and thus that a triable issue of fact existed. ■

Condo Exclusion Precludes Coverage Even When Free-Standing Residential Units Do Not Appear to be Condos

California Traditions, Inc. v. Claremont Liability Ins. Co.
(Fourth District Court of Appeal, June 21, 2011)
197 Cal.App.4th 410, 127 Cal.Rptr.3d 451

A framing subcontractor performed work on thirty residential units. Its CGL policy issued by Claremont excluded coverage for work on condominium projects. A homeowner filed a construction defect suit against the developer who cross-complained against the framer. After Claremont withdrew the framer's defense based on the condo exclusion, the developer obtained a default judgment. The developer then filed a direct action against Claremont under Insurance Code section 11580 to satisfy the judgment. Claremont brought a summary judgment motion and presented evidence that the pertinent CC&R's, the entitlements from the city and the purchase and grant deed documents all referred to the unit as a condominium. The developer argued that "condominium project" was not defined in the policy and that the units were free-standing and did not share a common wall and thus lacked the outward appearance of a condominium project. The trial court granted Claremont's motion and the Court of Appeal affirmed, concluding that because the project was developed, marketed and sold as a condominium project, the exclusion applied. It also rejected the rationale of *Scottsdale Ins. Co. v. Essex Ins. Co.* (2002) 98 Cal.App.4th 86, which had invalidated an exclusion because it had "no significant actuarial basis." ■

"Interrelated Wrongful Acts" Provision in Claims-Made Policy Bars Coverage for Claim Against Officer that Arose out of the Same Facts as Earlier Claim Against the Corporation

Feldman v. Illinois Union Ins. Co.
(Sixth District Court of Appeal, September 6, 2011)
198 Cal. App.4th 1495, 130 Cal.Rptr. 3d 770

ZF Solutions ("ZF") brought an action against National Semiconductor Corp. ("NSC") after NSC failed to provide certain devices as required by the parties' contract. NSC cross-complained, alleging that ZF failed to pay for computer chips under the same contract. A year later, NSC filed an amended cross-complaint adding Feldman (the president of ZF) as a defendant and adding new facts and causes of action including breach of fiduciary duty and fraudulent transfer of assets. Illinois Union's ("IU") claims-made D&O policy insured ZF and its directors and officers, and was in effect when the amended cross-complaint was filed but not earlier, when the original cross-complaint was filed. IU denied coverage to Feldman on the ground that the amended cross-complaint raised

allegations arising out of the original cross-complaint and an "Interrelated Wrongful Acts" provision in the policy dictated that the NSC claim was made before policy inception. Feldman sued IU. The trial court granted summary judgment for IU. The Sixth District affirmed, concluding, based on an examination of the pleadings, that the original and amended counter-claims came within the "Interrelated Wrongful Acts" provision because they had a "common nexus any fact, circumstance, situation, event or transaction or series of acts, circumstances, situations, events or transactions." ■

Under Nevada Law, Liability Insurer May Not Exhaust Policy and Terminate Duty to Defend by Depositing Policy Limits With the Court

Benchmark Insurance Company v. Robert M. Sparks, et al.
(Nevada Supreme Court, July 7, 2011)
127 Nev. Adv. Op. 33, 254 P.3d 617

An auto accident allegedly caused by Benchmark's insured, Sparks, killed one person and injured another. The victims and their families brought suit against Sparks. Benchmark determined that Sparks' liability could significantly exceed the \$30,000 liability limit on his auto policy. It sought permission to deposit the limits with the district court, and then filed a summary judgment motion seeking a determination that it would have no further duty to defend pursuant to a policy provision which limited its liability once coverage had been exhausted. The district court granted Benchmark permission to deposit the limits but denied its motion, concluding that Benchmark's duty to defend Sparks extended beyond its tender of policy limits. On appeal, the Nevada Supreme Court affirmed, concluding that the exhaustion provision did not unambiguously convey to Sparks that Benchmark could terminate its duty to defend by depositing the limits with the Court. ■

Coverage for Misappropriation of Likeness Claim Barred by Policy's Intellectual Property Rights Exclusion

Aroa Marketing, Inc. v. Hartford Insurance Company of the Midwest
(Second District Court of Appeal, August 23, 2011)
198 Cal.App.4th 781, 130 Cal.Rptr.3d 466

A model sued Aroa for misappropriation of likeness after Aroa allegedly used her image without authorization. After Hartford denied coverage, Aroa brought suit and the trial court sustained Hartford's demurrer without leave to amend. The Court of Appeal affirmed, finding that although the claims potentially fell within the CGL policy's coverage for "personal and advertising injury" arising

out of violations of the “right of privacy,” the policy’s “intellectual property rights” exclusion barred coverage. As recognized by the Court, under *Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 235 Cal.4th 387, 399, “The right of publicity, like copyright, protects a form of intellectual property that society deems to have some social utility.” Thus, the Court found the right of publicity was an intellectual property right, and the policy’s intellectual property rights exclusion barred coverage. The Court further found it immaterial that the “right of publicity” was not specifically listed in the exclusion since “[t]he exclusion applies when the injury arises out of ‘any violation of any intellectual property rights.’” Even if interpreted narrowly, the exclusion clearly applied “to bar claims based on the right of publicity” since that right had been held to be an intellectual property right. ■

Homeowner Policy’s Earth Movement and Land Settling Exclusions are Ambiguous Under Nevada Law

Mildred Powell v. Liberty Mutual Fire Insurance Company
(Supreme Court of Nevada, May 5, 2011)
127 Nev. 14, 252 P.3d 668

Powell’s home was damaged after a ruptured water pipe caused a shift in the foundation and extensive cracking and separation. Her homeowners insurer, Liberty Mutual, denied her claim, citing earth movement and land settling exclusions, so Powell filed suit. The trial court granted Liberty Mutual’s summary judgment motion, finding that the policy explicitly excluded coverage for any damage caused directly or indirectly by soil movement. The Nevada Supreme Court reversed. It held that the earth movement exclusion did not clearly exclude damage caused by soil movement from a ruptured pipe and focused on the fact that the examples provided within the exclusion all involved “natural catastrophic” events rather than “human-caused events.” It also noted that the verbiage used the word “including,” rather than “including, but not limited to,” before listing examples of excluded events. The Court also stated that the land settling clause did not clarify the ambiguity in the earth movement exclusion. ■

First Party Pollution Exclusion Applies to Release of Asbestos By Contractor Scraping Acoustical Ceilings

Villa Los Alamos Homeowners Assn. v. State Farm Gen. Ins. Co
(First District Court of Appeal, August 17, 2011)
198 Cal.App.4th 522, 130 Cal.Rptr.3d 374

Villa Los Alamos HOA hired a contractor to scrape acoustic ceilings. The contractor performed the work improperly and released

asbestos into the air, hallways, stairwells, individual units, common areas and public spaces. State Farm’s “open peril” policy issued to the HOA included a total pollution exclusion and State Farm denied the HOA’s claim to pay for the clean-up. In the HOA’s suit against State Farm, the trial court granted summary adjudication in favor of State Farm, ruling that the test for whether the pollution exclusion applies is based upon the type of pollutant and whether it is released in a way that constitutes environmental pollution, following the rationale of *Mackinnon*, a CGL case involving the pollution exclusion. The appellate court affirmed, concluding that a reasonable insured purchasing one policy containing first and third party coverage would not expect that the two exclusions would be interpreted differently, that asbestos is a pollutant, that the scraping of the ceiling resulted in a release of the asbestos, that the improper scraping of an asbestos ceiling is not an “ordinary act of negligence” and that the release of asbestos comports with the common understanding of the word “pollute.” ■

Insurer Had No Duty to Defend Proposition 65 Action Seeking Only Statutory Damages Rather than Personal Injury or Property Damage

Ulta Salon, Cosmetic & Fragrance, Inc. v. Travelers Property Casualty Co.
(Second District Court of Appeal, June 10, 2011)
197 Cal.App.4th 424, 127 Cal.Rptr.3d 444

Ulta, the insured cosmetics manufacturer, was named in an underlying suit alleging a single cause of action for violation of Proposition 65, based on allegations that Ulta’s nail products contain a reproductive toxin and that Ulta had failed to warn consumers about the effects of exposure to the toxin. Travelers declined Ulta’s tender on the ground that the complaint did not allege bodily injury or property damage. Ulta settled the suit and then sued Travelers for breach of contract and bad faith. Travelers successfully demurred. On appeal, Ulta argued that a potential for coverage existed because the underlying plaintiff could have amended the pleading to allege a covered bodily injury claim because the pleading repeatedly emphasized the toxic nature of Ulta’s products, the plaintiff’s discovery responses show that she was exposed to the alleged toxins and could have suffered bodily injury as a result, and the settlement agreement included a release of all current and future bodily injury claims against Ulta. The appellate court affirmed the ruling on demurrer, noting that the purpose of Proposition 65 is to deter misconduct and harm rather than to compensate plaintiffs for injuries. ■

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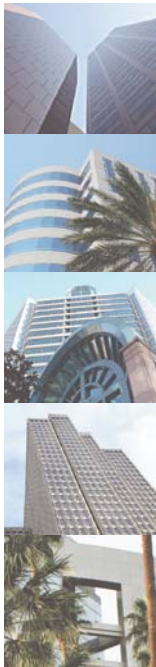
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