The Bottom Line

Case Title: Ghobrial, Karim vs. Wawanesa General Insurance Company

Case Number: GIC867533

Judge: Honorable Joan M. Lewis

Plaintiff's Counsel: Charles Woods, Esq.

Defendant's Counsel: Kenneth N. Greenfield, Esq. and Alexandra N. Selfridge, Esq., Law Offices of Kenneth N. Greenfield

Type of Incident/Causes of Action: Insurance-Alleged Breach of Contract, Insurance Bad Faith, Fraud

Settlement Demand: $280,000 (highest demand)

Settlement Offer: $15,000 (highest offer)

Trial Type: Jury

Trial Length: 8 days

Verdict: Defense (11-1)

Other: One of the tasks given to the jury was to determine whether or not "wind" was the efficient proximate cause of the loss. Having found that the efficient cause of the loss was NOT "wind," the jury was required under the Special Verdict Form to sign and date the form and return it to the Court.

Case Title: Breckenridge, William vs. Christopher Morales

Case Number: GIC866678

Judge: Honorable Richard E.L. Strauss

Plaintiff's Counsel: Robert W. Harrison, Esq. of Koeller, Nebeker, Carlson & Haluck

Defendant's Counsel: Scott D. Schabacker, Esq. of Law Offices of Scott D. Schabacker

Type of Incident/Causes of Action: Personal injury/negligence (automobile accident)

Settlement Demand: $50,000

Settlement Offer: $10,001

Trial Type: Jury

Trial Length: 4 days

Verdict: Defense

Case Title: Zurcher v. Saenz, M.D.

Case Number: GIC 846395

Judge: Honorable Ronald S. Prager

Plaintiffs' Counsel: Alan Geraci, Esq. and Stephen F. Lopez, Esq.

Defendant's Counsel: Daniel S. Belsky, Esq. of Belsky & Associates

Type of Incident/Causes of Action: Medical Malpractice / Wrongful Death

Settlement Demand: N/A

Settlement Offer: N/A

Trial Type: Jury

Trial Length: 8 days

Verdict: Defense (09/10/07)

INSURANCE LAW

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In this edition we review recent case law which affirms that there is no coverage when the loss is only economic, that automobile insurance policies obligating the carrier to repair the damaged vehicle to pre-accident condition does not require the auto carrier to provide repairs based on the insured's view of "industry standards," that an umbrella carrier has no duty to drop down and defend the insured in a construction defect suit when there is at least one primary carrier available to defend (even though the prior property damage was not covered under primary carrier's policy), and affirmation of the well established principle that an insurer must defend a suit which potentially seeks damages within the coverage of the insurance policy.

INSURER HAD NO DUTY TO INDEMNIFY INSURED COMMERCIAL LANDLORD UNDER CGL POLICY'S "OCCURRENCE" BASED COVERAGE, WITH REGARD TO LESSEE'S ACTION AGAINST INSURED FOR BREACH OF LEASE; COVERAGE DEPENDED ON THE EXISTENCE OF SOME PROPERTY DAMAGE, BUT ALLEGATIONS IN LESSEE'S COMPLAINT RESTED ENTIRELY ON INSURED'S ALLEGED BREACH OF THE LEASE AND THE RESULTING ECONOMIC DAMAGE. In Golden Eagle Insurance Corp. v. Cen-Fed, Ltd. (2007) 148 Cal.App.4th 976, 56 Cal.Rptr.3d 279, the Second District Court of Appeal, affirmed a trial court judgment finding the insurer had no duty to defend or indemnify its insured in an action brought by a lessee against the insured lessor. Cen-Fed, Ltd., the insured of Golden Eagle, leased commercial building property to Washington Mutual Bank ("WaMu" – is it just me or is that name kinda cool). The leased premises included the first floor and portions of the basement. In part, the lease required Cen-Fed, Ltd. to maintain the structural elements of the building in a first class condition, keep the leased premises and the common areas in a clean and sanitary condition, and maintain, for WaMu, a certain number and type of parking spaces. Under the lease, WaMu was entitled to cure or cause to be cured any failure by Cen-Fed, Ltd. to comply with its lease obligations, and deduct that cost from WaMu's rental obligation. Like all well drafted lease agreements, there was an attorney's fee clause. WaMu sued Cen-Fed, Ltd. for breach of the lease and declaratory relief, alleging that Cen-Fed, Ltd. had "failed to maintain and repair the [leased premises] in accordance with the terms and conditions of the lease" thereby depriving WaMu of a part of its leased space, which required WaMu to move its safe deposit boxes from the basement to the first floor, thereby decreasing the number of boxes WaMu was able to rent out, and further deprived WaMu of the use of that first floor space for other purposes. WaMu's complaint also alleged that the air conditioning, elevator service, and basement restrooms were not in good working order; the landscaping, common areas, interior walls and painting were not maintained to the extent required by the lease; and Cen-Fed, Ltd. did not meet its obligations regarding parking.

The Court of Appeal upheld the trial court's decision that Golden Eagle had no duty to indemnify Cen-Fed, Ltd. because WaMu's allegations against Cen-Fed, Ltd. did not claim "property damage" or "physical injury to tangible property." Rather, the entire claim rested on Cen-Fed, Ltd.'s alleged breach of lease and the resulting economic damages as evidenced by the jury's finding of diminution in the value of the lease. Additionally, the Court held that the acts of Cen-Fed, Ltd. which led to its failure to fulfill the lease were not the result of a fortuitous accident and thus could not have resulted in an "occurrence." The Court also upheld the trial court's finding that there was no "personal injury" coverage for wrongful eviction/entry into/invasion because it only applies to "persons" occupying the premises and not "persons and/or organizations." The Court reversed the trial court's finding that because Golden Eagle had defended Cen-Fed, Ltd., it had an obligation to pay those costs of suit despite its finding that there was no coverage under the policies and no duty to defend. The Court held that the trial court was incorrect because WaMu's pleadings in the underlying action did not raise a potential for coverage and no claims were asserted at any time except those for breach of lease and the resulting contract damages. Because Golden Eagle never had any duty as a matter of law to indemnify Cen-Fed, Ltd. for the claims by WaMu, it likewise never had any duty to defend the action.

INSURANCE LAW cont.

UNDER A CONTRACT OF PROPERTY INSURANCE, THERE MUST BE LOSS OF, OR DAMAGE TO, INSURED PROPERTY; DETRIMENTAL ECONOMIC IMPACT UNACCOMPANIED BY A DISTINCT, DEMONSTRABLE, PHYSICAL ALTERATION OF THE PROPERTY, IS NOT COMPENSABLE UNDER A CONTRACT OF PROPERTY INSURANCE. In Simon Marketing v. Gulf Insurance Company (2007) 149 Cal.App.4th 616, 57 Cal.Rptr.3d 49, the Second District Court of Appeal affirmed an order of the Los Angeles County Superior Court granting summary judgment in favor of the two insurers, holding the "covered property" provisions of the policies did not cover detrimental economic harm to the insured caused by the dishonest acts of an employee where such harm was unaccompanied by a distinct physical loss of property. Gulf Insurance Company (let's call them "Gulf") issued an insurance policy to Simon Marketing, Inc. and Simon Worldwide, Inc. (we'll call them both "Simon") providing that Gulf would "pay for loss of, and loss from damage to, Covered Property, resulting directly from the Covered Cause of Loss." Federal Insurance Company (we'll call these guys "Federal") issued a similar insurance policy to Simon providing that Federal would be liable for "direct losses of money, securities or other property caused by theft or forgery by any Employee of any Insured." Simon was in the marketing and promotional business, and did so for McDonald's Corporation including designing the games "Who Wants to Be a Millionaire" and "Monopoly." From 1988 to 2001, Simon's director of security, Jerome Jacobson, was responsible for placing throughout the U.S. McDonald's winning game tickets. Without Simon's knowledge, employee Jacobson organized a scheme to provide specific individuals with the winning tickets. (And we're to believe that nobody saw that coming.) Simon argued that Jacobson stole winning tickets valuing $21 million and received kickbacks from the winners. After Jacobson's conduct was exposed, Simon was involved in various lawsuits. Simon filed an action against Gulf and Federal seeking coverage under the policies for losses to property caused by theft or forgery committed by Simon's employees.

In affirming the trial court's decision, the Court of Appeal explained that the "threshold requirement for recovery under a contract of property insurance is that the insured property has sustained physical loss or damage." The Court clarified that the trial court's reference to "direct losses" meant "physical damage to insured property." The Court further explained that the requirement that loss by "physical damage" precluded claims for detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property. The Court held that the termination of Simon's business, its settlement payments, defense costs and the costs of winding up its business did not constitute "physical damage to property" and that most of Simon's claimed damages were excluded under both policies' loss of income exclusion.

AUTOMOBILE INSURANCE POLICY OBLIGATING INSURER TO REPAIR INSURED'S DAMAGED VEHICLE TO PRE-ACCIDENT CONDITION DID NOT REQUIRE INSURER TO PROVIDE REPAIRS BASED ON INSURED'S VIEW OF "INDUSTRY STANDARDS." In Levy v. State Farm Mutual Automobile Insurance Co. (2007) 150 Cal.App.4th 1, 58 Cal.Rptr.3d 54, the Fourth District, Division 3, of the Court of Appeal upheld a demurrer without leave to amend on an attempted class action lawsuit filed against State Farm Mutual Automobile Insurance Company (yep, we'll call them "State Farm") for omitting certain labor and material costs from its automobile repair estimates, and using its own contracted repair shops in its survey to determine prevailing competitive repair labor rates used in its estimates. Levy, a California resident, purchased a State Farm auto insurance policy that obligated State Farm to pay the cost of repair or replacement for covered vehicles if damaged. The policy provided that the cost of repair or replacement was based on one of the following: "1. the cost of repair or replacement agreed upon by [the insured] and [State Farm]; [¶] 2. a competitive bid approved by us; or [¶] 3. an estimate written based upon the prevailing competitive price. The prevailing competitive price means prices charged by a majority of the repair market in the area which the car is to be repaired as determined by a survey made by [State Farm]. If you ask, [State Farm] will identify some facilities that will perform the repairs at the prevailing competitive price...." Levy's car was involved in an accident and suffered damage to its right front wheel, right front fender, right front bumper, steering box, suspension, and lower body. Levy brought the damaged vehicle to a State Farm facility, where an employee estimated the cost of repair using State Farm's software. The estimator then offered to pay Levy $550.70, less the policy's $250 deductible, instead of having the vehicle repaired. Levy accepted the payment. Battle, the other named plaintiff, also purchased a State Farm auto insurance policy containing a repair or replacement provision similar to Levy's policy. When an accident damaged the left front end and left fender of Battle's car, Battle took her car to a State Farm estimating facility, and at State Farm's request, had her car repaired at a State Farm-contracted repair shop. Believing State Farm's repair estimates were inadequate, Levy and Battle sued State Farm on behalf of themselves and others similarly situated. After several State Farm demurrers were sustained with leave to amend, plaintiffs filed their fifth amended complaint, seeking damages, restitution, and declaratory and injunctive relief. The fifth amended complaint alleged in part that State Farm provided its policyholders repair estimates which did not meet industry standards as defined by automobile manufacturers, the Inter-Industry Conference on Auto Collision Repair (I-CAR), or the National Institute for Automotive Service Excellence (ASE). That complaint further alleged that State Farm contracted with repair shops to follow State Farm's estimate of necessary repairs, even if the shop's professionals might believe additional repairs were required. State Farm refused to pay for repairs not specified in State Farm's estimate.

The Court of Appeal first analyzed plaintiffs' complaint allegations and held that they failed to adequately allege that State Farm breached any insurance policy terms. The Court noted that the policy did not require State Farm to provide repairs based on plaintiffs' conception of industry standards. The Court further held that the relevant insurance policy language only required State Farm to "restore the vehicle to its pre-loss condition," and that this meant in an insurance contract the "preaccident safe, mechanical, and cosmetic condition." The Court then held that California Code of Regulations, title 16, section 3365 (relating to accepted trade standards for auto body and frame repairs) (1) did not purport to apply to insurers, (2) did not provide any minimum standard for repairs required to return a vehicle to its pre-collision condition, and (3) did not adopt any particular repair standard, whether set forth by manufacturers, I-CAR or ASE. The Court next held that nothing in the policy prevents State Farm from surveying only shops which agree to its rates, and that although some states prohibit insurers from including contracted repair shops in

The Bottom Line

Case Title: Santisi, Susan vs. Gregory Babikian, M.D.

Case Number: GIC833635

Judge: Hon. Lillian Lim

Plaintiff's Counsel: Craig Fuller, Esq. and Eric Jenkins, Esq.

Defendant's Counsel: Robert W. Frank, Esq. of Neil, Dymott, Frank, McFall & Trexler

Type of Incident/Causes of Action: Medical Malpractice/Wrongful Death (alleged failure to timely diagnose and treat bladder cancer); Plaintiff sought $2.5-5 million in lost income from her husband's successful intellectual property law practice.

Settlement Demand: $450,000

Settlement Offer: C.C.P. 998 offer of $250,000, withdrawn prior to trial

Trial Type: Jury

Trial Length: 7 days

Verdict: Defense verdict 12-0 (after 5 hours of deliberation)

Case Title: The Gifted School et al . v. Grahovac et al.

Case number: GIC 840032

Judge: Honorable Randa Trapp

Plaintiffs' Counsel: Steve McAvoy, Esq. & Richard L. Boyer, Esq.

Defendants' Counsel: Dave Molinari, Esq. of Bremer & Whyte for Grahovac Construction; Karen Holmes, Esq. of Balestreri Pendleton & Potocki for Urbon Architecture; Michael Sullivan, Esq. of Morris & Sullivan, and Steve Parker, Esq. of Brady Vorwerk, Ryder & Caspino for P. Texiera Construction.

Type of Incident/Causes of Action: Construction defect claim involving a private Pre-School in Encinitas, CA. Plaintiffs sued Grahovac for breach of contract, breach of warranty and negligence. Plaintiffs sued Urbon Architecture for professional negligence. Grahovac sued P. Texiera for indemnity.

Settlement demand: As against Grahovac $1,750,000.00; As against Urbon $250,000; Plaintiffs asked jury to award $2.8 million in cost to repair as well as $260,000 in Stearman fees.

Settlement offers: 998 offer by Grahovac for $605,000.00. 998 offer by Urbon for $50,001.00; P. Texiera offer not reported.

Trial Type: Jury

Trial Length: 6 ½ weeks

Verdict: $209,000 for costs to repair and $230,000 in Stearman as against Grahovac only; Defense verdict for Urbon; Defense verdict for Texiera.

INSURANCE LAW cont.

automobile repair labor rate surveys, California did not. As to the cause of action for breach of the implied covenant of good faith and fair dealing, the Court held that most of the allegations were duplicative and addressed already in connection with the dismissal of the breach of contract cause of action. The Court further held that plaintiffs' allegations relating to fraudulent non-disclosure, i.e., failing to tell insureds that it routinely omitted necessary repairs from repair estimates and failing to tell insureds that it used only data from shops that agreed to omit necessary repairs in determining the prevailing competitive prices for repairs – were not deceitful because plaintiffs failed to cite any law or policy provisions requiring State Farm to follow "industry standards." So no matter what you may think, I guess you're in good hands after all.

UMBRELLA LIABILITY INSURER DURING FIRST PERIOD OF CONTINUOUS PROPERTY DAMAGE OVER FOUR POLICY PERIODS WAS NOT REQUIRED TO DROP DOWN AND DEFEND UNDERLYING SUIT WHEN OTHER INSURANCE REMAINED AVAILABLE FOR INSURED'S DEFENSE. In Padilla Construction Company v. Transportation Insurance Company (2007) 150 Cal. App.4th 984, 58 Cal.Rptr.3d 807, the Fourth District, Division 3, of the Court of Appeal affirmed the trial court and held that an excess insurer does not have a duty to drop down and defend in an underlying action prior to exhaustion of the defending insurer's primary policy. The Court also held that as a matter of first impression, an excess insurer with an "other insurance" clause irrespective of whether it includes a specific reference to self-insurance has no duty to drop down until the self-insured retention ("SIR") is exhausted. An underlying continuous damage construction defect suit filed in June 2002 by two homeowners against the developer of their property alleged, in part, that foundation vents were blocked with stucco, which stucco work was done by the insured, Padilla Construction, in 1995. Padilla Construction was brought into the suit two months later by way of cross-complaint by the developer. Padilla Construction had four successive primary liability policies from January 1995 until March 1, 2003: from the beginning of 1995 to end of 1996 its carrier was Transcontinental Insurance; from the beginning of 1997 to end of 1997 its carrier was Reliance Insurance; from the beginning of 1998 to March 1, 2001 it carrier was Legion Indemnity; and from March 1, 2001 to March 1, 2003 it carrier was Steadfast Insurance. Additionally, concurrent with Transcontinental's primary policy (January 1995 through the end of 1997), Padilla Construction had two yearly commercial umbrella policies issued by Transportation Insurance. Of the four primary insurers, only two were available to defend Padilla Construction. Both Reliance and Legion became insolvent, and the parties assumed that nothing was available from either carrier by way of a defense. Padilla Construction initially requested only Transcontinental to provide it a defense of the underlying suit. However, after Transcontinental accepted the request for a defense under a reservation of rights, and hired a firm to defend the insured, the newly hired defense counsel then requested a defense from Steadfast. The request for a defense, however, was routed through Padilla Construction's third party claims administrator. In April 2003 the third party claims administrator took the position, on Padilla Construction's behalf, that it "elect[ed]" not to trigger Steadfast's policies, at least in part because Steadfast's policies had a $25,000 self-insured retention. However, in June 2003, just a few months after Padilla Construction's (at least putative) election not to trigger Steadfast's policies, Transcontinental notified Padilla Construction that, because of numerous other claims against Padilla Construction, its policies were nearing exhaustion. In response, Padilla Construction reiterated its position that it elected not to trigger Steadfast's policies, and requested its defense attorney to "tender the defense and indemnity" to Transportation. Transportation declined the tender on the ground that Steadfast's policies had not yet exhausted. Transcontinental's exhaustion formally occurred on December 30, 2003. Along with the exhaustion came a formal notification to Padilla Construction that Transcontinental's defense was being entirely withdrawn. Padilla Construction then assumed its own defense, and, at some point in 2005, reached a settlement with the developer. The settlement was presumably $60,000 or less, to which Steadfast contributed. Thereafter, the coverage litigation between Padilla Construction and Transportation ensued, Padilla Construction's theory being that Transportation had a duty to "drop down" and defend (and if necessary indemnify) Padilla Construction once Transcontinental's limits were exhausted.

INSURANCE LAW cont.

The Court of Appeal affirmed the trial court's decision. The Court first held that an excess insurer does not have a duty to drop down and defend an underlying action where primary coverage still exists, even if there are gaps in the primary coverage during the alleged continuous property damage. The Court relied upon the profound decisions of Buss v. Superior Court (1997) 16 Cal.4th 35 and Aerojet-General Corp. v. Transport Indemnity Co. (1997) 17 Cal.4th 38. By extending the Aerojet holding to apply to property damage occurring prior to inception of a primary policy, the Court held Steadfast was obligated to defend Padilla against all claims even though the prior property damage was not covered under the Steadfast policy. The Court also held Transportation was not obligated to drop down and defend Padilla until the SIR was exhausted even though the "other insurance" clause did not reference the SIR. The Court noted that the SIR cannot be meaningfully separated from the Steadfast policy, as this defeats the reasonable expectations of all parties, including Padilla Construction , and "obliterates the distinction between primary and excess insurance." To hold otherwise, stated the Court, would present the anomaly of requiring an earlier excess insurer to drop down and defend a claim "beneath" the coverage of a later primary policy. Further, the Court noted the substantial disparity in premiums charged under the Steadfast primary policy and the Transportation umbrella policy was reflective of the parties' expectations as to the obligations of each insurer.

ASSAULT VICTIM'S COMPLAINT AGAINST INSURED HOMEOWENER ALLEGED A CLAIM THAT WAS POTENTIALLY A COVERED "OCCURRENCE" UNDER THE HOMEOWNER'S INSURANCE POLICY, TRIGGERING INSURER'S DUTY TO DEFEND (INSURED HOMEOWNER ASSIGNED BAD FAITH INSURANCE CAUSE OF ACTION TO ASSAULT VICTIM AS PART OF SETTLEMENT). In Delgado v. Interinsurance Exchange of the Automobile Club of Southern California (2007) 152 Cal. App.4th 671, 61 Cal.Rptr.3d 826, the Second District Court of Appeal, after granting a petition of rehearing on its earlier opinion, reversed a trial court order sustaining a demurrer without leave to amend and dismissing a complaint for breach of contract, breach of the covenant of good faith and fair dealing and recovery of a stipulated judgment pursuant to Insurance Code §11580(b)(2). The Court of Appeal held that a complaint that alleged an intentional assault and, in the alternative, alleged the insured had negligently engaged in self-defense, gave rise, as a matter of law, to a potential for coverage. Reid, the insured homeowner, kicked Delgado and struck him in the nose while the two were standing on the sidewalk across the street from Reid's residence. Delgado sustained physical injury as a result. Through his guardian ad litem, Delgado filed the underlying action against Reid, alleging two causes of action. In the first, he alleged that Reid had "in an unprovoked fashion and without any justification physically struck, battered and kicked . . . Delgado repeatedly causing serious and permanent injuries." In the second, Delgado alleged that Reid had "negligently and unreasonably believed and [sic] that [Reid] was engaging in self defense and unreasonably acted in self defense when [Reid] negligently and unreasonably physically and violently struck and kicked ... Delgado repeatedly causing serious and permanent injuries." In addition, Delgado alleged that Reid had acted "intentionally [sic] and with malice and oppression, violently struck, battered and kicked ... Delgado in an unprovoked fashion and without justification...." That allegation was obviously included to trigger a claim for punitive damages which Delgado also sought in his pleading. Reid had a homeowner's policy providing $100,000 liability coverage with Automobile Club of Southern California (in a weak effort to save trees, we'll refer to them as "ACSC") and tendered Delgado's complaint to it for a defense. ACSC denied coverage and refused to provide a defense for two reasons: (1) there was no "occurrence," as that term was defined in the policy, since an intentional unprovoked attack could not be considered an accident; and (2) Reid's conduct, as alleged in the complaint, arose out of his intentional acts, triggering the policy's intentional acts exclusion or the statutory "willful acts" exclusion that is incorporated into every policy of liability insurance pursuant to Insurance Code § 533. Thereafter, Reid and Delgado reached a settlement of the underlying action. The parties stipulated on the record that Reid's use of force constituted a negligent use of excessive force in the exercise of his right of self-defense. The stipulation was accepted by the trial court. As part of the settlement, Delgado dismissed the intentional tort cause of action. Judgment in the amount of $150,000 on the negligence claim was then entered in the underlying action. Reid agreed to pay Delgado $25,000 and assigned to him all of his (i.e., Reid's) claims against ACSC arising out of ACSC's refusal to provide a defense under the policy. In return, Delgado gave Reid a partial satisfaction of judgment and a covenant not to execute on the remainder of the $150,000 judgment. Delgado then filed this action against ACSC seeking for declaratory relief, damages for bad faith, and recovery on his stipulated judgment under the provisions of Insurance Code § 11580, subdivision (b)(2). Delgado also sought a declaration that ACSC owed a duty to defend Reid in the underlying action and to indemnify Reid for the resulting judgment.

The Court of Appeal determined that ACSC had a duty to defend, particularly where there was no claim the carrier had any extrinsic facts that eliminated the potential for coverage. The Court noted that the central question was whether "the underlying complaint or other facts available to the insurer gave rise to a potential liability under the policy." The Court concluded that the case was similar to the landmark case of Gray v. Zurich Ins. Co. (1966) 65 Cal.2d 263, 275, in which the California Supreme Court held that where a complaint alleging intentional excluded conduct could have been amended to allege negligent conduct within the scope of coverage of the policy, there was a duty to defend. The Court thus concluded that the amended complaint alleged the potential for liability for "unintentional conduct." The Court reasoned that acts in self-defense are non-intentional tortuous conduct and a form of negligence. The Court also held the trial court erred in concluding, on demurrer, the stipulated judgment was "contrived." Citing Pruyn v. Agricultural Ins. Co. (1995) 36 Cal.App.4th 500, the Court noted that an insured that has been abandoned by its carrier is entitled to make the best settlement it can, including one that involves a stipulated judgment in exchange for a covenant not to execute. If the settlement is reasonable and free from collusion and fraud, the settlement operates as presumptive evidence of the insured's liability and the amount of that liability.