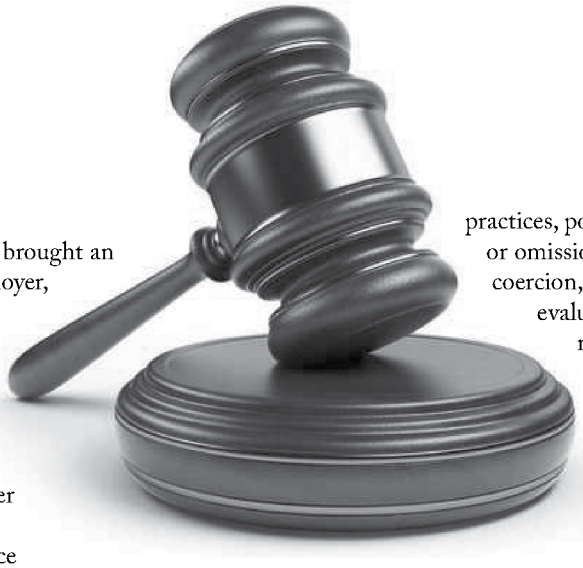
Insurance Law Update



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The past few months have seen a flurry of declaratory relief actions brought by insurance carriers. As will be seen below, bad facts tend to result in bad law. In other words, be careful for what you ask.

A CGL insurance policy's Employment-Related Practices exclusion in a general liability policy was sufficiently plain and clear so as to be enforceable

On August 25, 2014 (and as modified September 15, 2014), the Second District, Division 7, held in *Jon Davler, Inc. v. Arch Insurance Company*, (2014) 229 Cal. App.4th 1025, --- Cal.Rptr.3d ---, that employees' injuries caused by their alleged false imprisonment "arose out of" their employment within the meaning of the Employment-Related Practices coverage exclusion in their employer's commercial general liability insurance policy, where the employees were forced into a bathroom for inspection only because they were employees, were following a directive from a supervisor at their place of employment, and would lose their jobs if they did not comply with their supervisor's inspection demand and there was no relationship between the employer and the employees other than the employer-employee relationship.

A group of employees brought an action against their employer, Jon Davler, Inc., for various employment claims, including sexual harassment, invasion of privacy, and false imprisonment. Jon Davler tendered the action to its insurer, Arch Insurance Company, which denied coverage based on an Employment-Related Practices exclusion (the "ERP"). After Jon Davler filed suit against Arch, the trial court sustained Arch's demurrer to the complaint without leave to amend. In the appeal that followed, Jon Davler, Inc. raised two arguments relative to the ERP: (1) the use of the phrase "such as" was inherently ambiguous; and (2) the use of the phrase "arising out of" created an ambiguity because it appeared both in the coverage clause and in the ERP.

The Court of Appeal affirmed, holding that the ERP was sufficiently plain and clear so as to be enforceable. The ERP stated that the coverage for personal and advertising injury did not apply to "[e]mployment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination or malicious prosecution directed at that person...." In rejecting Jon Davler, Inc.'s challenges to the ERP, the Court found that use of the term "such as" in the CGL insurance policy was not intended to be exhaustive and was illustrative and not limitative. Responding to the second ambiguity argument, the Court found that even though the exclusion did not specifically exclude false imprisonment and the insuring provision specifically provided coverage for injury arising out of false imprisonment, the language of the ERP was clear that injuries arising out of all kinds of employment-related practices, including those listed as examples, were subject to the exclusion, and there was no dispute that the false imprisonment of the

employees occurred at work in the company restroom, was at the direction of a supervisor, and was employment-related.

A liability insurance policy that specifically describes a vehicle involved in an accident is primary to a separate policy concurrently in effect that does not describe any vehicle

On August 20, 2014, the Third District held in *Scottsdale Indemnity Company v. National Continental Insurance Company*, (2014) 229 Cal.App.4th 1166, 177 Cal.Rptr.3d 648, that a commercial truck driver's second automobile liability insurance policy, which did not describe or rate any vehicle, was excess to his primary policy which specifically described and rated his tractor and specifically covered any trailer attached to the power unit.

In this insurance coverage action, two carriers whose commercial policies were concurrently in effect, Scottsdale Indemnity Company ("Scottsdale") and National Continental Insurance Company ("NCI), sought the trial court's determination whether they were co-primary insurers or whether NCI was an excess insurer for an underlying fatality involving a tractor/trailer rig operated by Manuel S. Lainez. The trial court granted NCI's motion for summary judgment, concluding that Scottsdale was the primary insurer pursuant to California Insurance Code section 11580.9(d) and (h). Subdivision (d) provides in relevant part that: "[W]here two or more policies affording valid and collectible liability insurance apply to the same motor vehicle or vehicles in an occurrence out of which a liability loss shall arise, it shall be conclusively presumed that the insurance afforded by that policy in which the motor vehicle is described or rated as an owned automobile shall be primary and the insurance afforded by any other policy or policies shall be excess." Subdivision (h) provides in relevant part that: "Notwithstanding subdivision (b), when two or more policies affording valid and collectible automobile liability insurance apply to a power unit and an attached trailer or trailers in an occurrence out of which a liability loss shall arise, and one policy affords coverage to a named insured in the business of a trucker, defined as any person or organization engaged in the business of transporting property by auto for hire, then the following shall be conclusively presumed: If at the time of loss, the power unit is being operated by any person in the business of a trucker, the insurance afforded by the policy to the person engaged in the business of a trucker shall be primary for both power unit and trailer or trailers, and the insurance afforded by the other policy shall be excess."

In affirming the trial court, the Court noted that to minimize insurance coverage litigation when more than one insurance policy provides coverage, the Legislature has created a series of conclusive presumptions: "Section 11580.9 contains a number of subdivisions designed to cover many common coverage dispute situations; each addresses a different set of factual circumstances and identifies which policies will be deemed primary and which policies will be deemed excess."

The Court explained its rationale as follows:

> We accept Scottsdale's premise that two insurance policies can be equally ranked or coprimary *[sic]* under section 11580.9. And we certainly subscribe to the basic tenets of statutory construction, including our adherence to the plain meaning of the words of the statute and the elementary principle that a court cannot add or subtract words to or from the statute. But we disagree with Scottsdale that we should force application of subdivision (h) to a situation, as here, that was not intended or contemplated by the Legislature rather than to apply subdivision (d), which clearly and unequivocally applies to the facts and establishes the priority of coverage as explained by the trial court at some length. Scottsdale's coverage is primary because Lainez's truck was particularized on the policy, whereas NCI is secondary because his rig was not identified at all on its policy.

The Court concluded by explaining that "The language of subdivision (h) does not address a situation where, as here, there are two trucker policies covering both the tractor and the trailer. Rather, the statute differentiates between the operation of the power unit and the operation of the trailer."

As a matter of first impression, one appellate court declined to expand the "relative resident" exclusion in an automobile insurance policy to a non-relative roommate of an insured

On September 24, 2014, the Fourth District, Division 3, held in Mercury Casualty Company v. Chu, (2014) 229 Cal.App.4th 1432, 178 Cal.Rptr.3d 144, that as a matter of first impression, an insured driver's non-relative roommate, who was a passenger in the driver's vehicle at the time of an accident, could not be included as "an insured" under the driver's automobile liability policy for purposes of excluding coverage for bodily injury caused to the roommate by use of the insured vehicle by the insured driver.

Mercury Casualty Company ("Mercury") filed an action seeking declaratory relief regarding its insurance obligation towards Hung Chu ("Chu") and his roommate Tu Pham ("Pham"). Mercury issued an automobile policy to Chu insuring his vehicle. Chu was driving, and Pham was a passenger, when Chu collided with another vehicle. Pham filed a personal injury action against Chu and the other driver, obtaining a $333,300 judgment against Chu. Mercury sought a judicial determination confirming Mercury's decision that Chu's policy excluded coverage for Pham's judgment under the "resident exclusion."

Chu filed a cross-complaint against Mercury for breach of contract, bad faith, and general negligence. Mercury prevailed in its motion for summary adjudication on the issue of whether the policy provided coverage for Pham's judgment. The trial court determined Mercury had no duty to indemnify Chu with respect to the judgment.

In reversing and remanding, the Court began its analysis with a lengthy historical overview:

> *After years of judicial straining to reconcile the oftentimes competing interests of automobile liability insurers, their insureds and the state's interest by way of a general public policy making owners of motor vehicles financially responsible to those injured by them in the operation of such vehicles, the Legislature announced the public policy in regard to provisions authorized or required to be included in policies affording automobile liability insurance . . . [by] carefully delineating the minimum required coverages of, and the extent of permitted exclusions to coverage in, policies of automobile liability insurance issued in this state.*
>
> [Citations omitted.]

Insurance Code Section 11580.1, subdivision (c), lists the only permissible exclusions from coverage allowed under California law for an automobile liability insurance policy. "Any exclusion not expressly authorized by section 11580.1 is therefore impermissible and invalid." Relevant to this case, section 11580.1(c)(5) authorizes the carriers of automobile liability insurance to provide for exclusion of claims of liability coverage for bodily injury brought by "an insured." Specifically, the exclusion permits exclusion of liability to either "an insured" or "an insured whenever the ultimate benefits of that indemnification accrue directly or indirectly to an insured." The latter exclusion would typically apply to a resident relative of

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knowledgeable and actively involved in their own investment decisions. So they put a larger portion of their assets into more aggressive, higher-risk investments.

Bob and Mary, on the other hand, are in their mid-50s and are mapping out their retirement plans. By their own admission, they are not financially sophisticated and they do not want to be actively involved in monitoring their investments. They are fairly conservative in their investment approach. Therefore, with the help of their financial advisor, they allocate more of their assets into bonds, money market accounts, fixed annuities, and certificates of deposit.

Here is one possible "mix" of assets for Jack & Kris (a young couple) and Bob & Mary, (a couple approaching retirement).

Assets	Jack & Kris (More Aggressive)	Bob & Mary (More Conservative)
Large Cap Blend	35%	20%
Small Cap Blend	20%	5%
International Stock	25%	15%
Domestic Bonds	10%	45%
International Bonds	8%	10%
Cash	2%	5%

This example is for illustration purposes only. It is not indicative of any particular investment. Each individual's asset mix should reflect his or her specific strategy and objectives.

Four keys to effective asset allocation:

1. Know your goals and risk tolerance. This will help guide your investment decisions.
2. Choose your asset mix with care. The number of choices is staggering. Do your homework. Know why you make every selection based on a well-thought-out strategy. No impulse buys!
3. Review your asset mix at least annually. Not only do goals and risk tolerances tend to evolve over time, but the economy also changes. An asset mix that works this year may be all wrong in 12 months.
4. Get good advice. Asset allocation can be tricky. Fortunately, there is no need to go it alone. Work with an experienced, knowledgeable professional advisor.

This information should not be considered as tax or legal advice. Please consult a tax or legal professional for advice regarding your specific situation. ◆

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the insured.

The Court then shifted its analysis to the definition of "resident relative," noting that:

> *[O]ver the past 33 years various iterations of the definition of "resident relative" have been the subject of judicial interpretation, with the terms being broadly construed when the result is to find coverage and narrowly construed when the result is to preclude it. What most courts appear to agree upon is "the term 'residence' connotes any factual place of abode of some permanency, more than a mere temporary sojourn. This understanding is consistent with dictionary definitions of the term "resident" as one "who dwells in a place for a period of some duration" and "residence" as "a temporary or permanent dwelling place, abode, or habitation to which one intends to return as distinguished from a place of temporary sojourn or transient visit."* [Citations omitted.]

Noting the efforts to judicially extend the definition of a "non-relative resident" under the automobile policy exclusion was a matter of first impression, the Court characterized Mercury's efforts as "new" because "we [the Court] found no case authority, law review article, or treatise examining [that exclusion's] application to any class of persons other than "relative residents." Dismissing the argument *in toto*, the Court observed that "Mercury cites to no authority permitting an insurance company to achieve liability immunity from a significantly larger class of people based on their residency status alone and presumably without their knowledge or consent." The Court's analysis then shifted to discussing how the public policy behind the limited statutory exclusions would be undermined if the Mercury extension were to be adopted.

Massage therapist was not performing duties related to the conduct of his employer's massage therapy business, within the meaning of employer's comprehensive general liability insurance policy, when a therapist allegedly sexually assaulted client

On October 6, 2014, the Second District, Division 4, held in *Baek v. Continental Casualty Company*, (2014) --- Cal.App.4th ---, --- Cal.Rptr.3d ---, 14 Cal. Daily Op. Serv. 11,642, that no potential for coverage under a massage center's comprehensive general liability insurance policy was available to a massage therapist alleged to have sexually assaulted a client because the alleged assault was not within the course or scope of the therapist's "employment" as that term was defined by the CGL policy.

Luiz Baek, a massage therapist employed by Heaven Massage and Wellness Center ("HMWC"), was accused in an underlying action of sexually assaulting a client during a massage. Baek alleged that Continental Casualty Company ("Continental"), HMWC's comprehensive general liability insurer, had a duty to defend and indemnify him in that action, and that its failure to do so constituted breach of contract, breach of the implied covenant of good faith and fair dealing, and fraud. The trial court sustained Continental's demurrer to all causes of action, concluding as a matter of law that Baek was not entitled to a defense under the Continental policy.

The Court of Appeal affirmed, holding that to demonstrate that he was insured under the policy, Baek had to allege that the acts on which liability was based were, as required by the policy's language, "with respect to the conduct of [HMWC's] business," "within the scope of ... employment," or committed "while performing duties related to the conduct of [HMWC's] business." Because the intentional sexual assault alleged in the underlying case cannot properly be characterized as within the scope of Baek's employment or having occurred while performing duties related to the conduct of HMWC's business, Baek was not insured under the policy, and Continental had no duty of defense or indemnity. ◆