Insurance Law Update

By James M. Roth
THE ROTH LAW FIRM, APC

A variety of insurance case law from both state and federal courts have addressed the issues of the rights of a subrogee in litigating a subrogation claim; an insured's subjective belief when seeking coverage relative to alleged intentional conduct; and whether a mortgagee who was not named under a homeowner's policy until after the insured premises was destroyed by fire, had any right to policy proceeds.

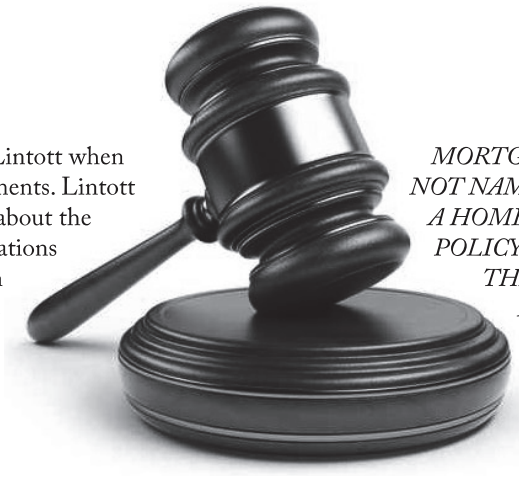
ALLEGEDLY DEFAMATORY STATEMENTS INTENTIONALLY MADE BY A CANDIDATE DURING THE COURSE OF A CAMPAIGN WERE NOT POTENTIALLY COVERED BY HER HOMEOWNERS INSURANCE POLICY.

In the case signed January 5, 2015 and styled *Grange Insurance Association v. Lintott* (2015) 77 F.Supp.3d 926, the United States District Court, N.D. California, held that under California law, statements made by an insured during the course of her re-election campaign for county district attorney, that an individual had made an improper campaign contribution to her challenger had a pending felony case against him, were not accidental and, thus, the insured's alleged defamation did not constitute "bodily injury" caused by an "occurrence," and was neither covered nor potentially covered by her homeowner's insurance policy.

In 2010, Lintott was running for re-election as the incumbent District Attorney for Mendocino County. During her campaign, she "prepared" and "approved" three radio advertisements. One of those radio advertisements accused her challenger, David Eyster, of accepting improper campaign contributions from Robert Forest and others with pending criminal cases. That advertisement said: "Eyster has also failed to tell you about the cash gifts to his campaign from men with pending felony cases.... The most alarming, $10,000, comes from a man who assaulted an unarmed man with a loaded gun. Seeking a concealed weapons permit he petitioned the court and was opposed by Lintott. The courts agreed with Lintott. Eyster has pocketed a $10,000 donation." Lintott also made comments about the man behind the $10,000 contribution during a debate. Although none of the statements reference Forest by name, the comment about the "most alarming" donation was about him and his identity was known to Lintott when she approved the advertisements. Lintott based all of the statements about the impropriety of Forest's donations to her opponent's campaign on her "personal knowledge and inquiry regarding Mr. Forest."

Grange issued a "Homeowners with HomePak Plus" insurance policy (the "Policy") to Lintott. The Policy provided coverage in the event of "bodily injury" or "property damage" caused by an "occurrence." The Policy defined an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in: a. 'Bodily injury'; or b. 'Property Damage.'" "Property Damage" was defined as "physical injury to, destruction of, or loss of use of tangible property" and "bodily injury" was defined as "bodily harm, sickness or disease, including required care, loss of services and death that results." The Policy further defined the phrase "bodily injury" to include "personal injury," which was defined as including, in part, "injury arising out of one or more of the following offenses: ... 2. Libel, slander or defamation of character; ...." Thus, the Policy required an "occurrence" resulting in bodily injury or property damages, as those phrases were defined by the Grange Policy.

The district court noted that the statements by Lintott were not accidental – they were neither unintentional nor unexpected acts – because Lintott made the allegedly defamatory statements on more than one occasion, that she approved their dissemination on the radio during her re-election campaign, and that she had researched and authored the statements. Indeed, Lintott's alleged subjective intent, that is, that she believed the statements to be true and did not intend to cause harm to the individual in question, was irrelevant for purposes of this insurance coverage analysis. Because the statements were under no interpretation an "accident" as required by Lintott's homeowner's insurance policy, her actions could not therefore constitute "bodily injury" caused by an "occurrence."



MORTGAGEE WHO WAS NOT NAMED UNDER A HOMEOWNER'S POLICY UNTIL AFTER THE INSURED PREMISES WAS DESTROYED BY FIRE HAD NO RIGHT TO POLICY PROCEEDS.

In the case signed January 9, 2015 and styled *Zaghi v. State Farm General Insurance Company* (2015) 77 F.Supp.3d 974, the United States District Court, N.D. California, held that under California law, a mortgagee who was named an additional insured under a homeowner's policy only after the insured premises was destroyed by fire was not covered by the policy and had no right to the policy proceeds and the policy's standard loss-payable clause did not render him a party to the policy.

This case arises out of the parties' dispute over insurance proceeds paid by State Farm to its insureds, Karapet Gayanya and Karine Osmanyen ("the insureds"), following the destruction of their house by fire on January 4, 2014. The insureds purchased the house by means of a hard money mortgage from plaintiff, Farhad Zaghi ("Zaghi"), secured by a deed of trust on the property. The house was insured by a policy issued by State Farm ("the Policy"). As of the date the fire occurred, Zaghi was not listed on the Policy, despite a contractual requirement in the deed of trust held by Zaghi that the insureds name Zaghi as an additional insured.

Zaghi alleged in his suit that on January 13, 2014 – 9 days after the fire occurred - following a conference call with Zaghi and the insureds, an agent for State Farm agreed to and issued an amended declaration page designating Zaghi as a mortgagee and an additional insured under the Policy. The complaint alleged that State Farm subsequently received a fire report stating that Zaghi was the first mortgagee on the property and made a written notation in their file confirming that Zaghi had been added as an additional insured and that Zaghi had a hard money loan secured by a deed of trust on the property. On March 10, 2014 State Farm issued a check in the amount of

continued on page 8

INSURANCE LAW UPDATE CONTINUED FROM PAGE 7:

$2,850,000.00 to the insureds alone, without including Zaghi's name.

The district court noted that under California law, a mortgagee such as Zaghi who was not named in a homeowner's policy at the time the insured premises was destroyed by fire did not have an equitable lien on the policy proceeds, even though a deed of trust that secured the mortgage required the mortgagors (*i.e.,* the insureds) to name the mortgagee (*i.e.,* Zaghi) as an additional insured and the insureds failed to do so. In California, recovery of proceeds under an insurance contract is generally limited to the named insureds, since insurance does not insure the property covered thereby, but is a personal contract indemnifying the insureds against loss resulting from the destruction of or damage to their interest in that property. Accordingly, any claim for entitlement to the loss proceeds must be brought directly against the insureds through contract claims, which are not a covered loss under the Policy.

TESTIMONY BY TIRE DEFECT EXPERT WITNESS REGARDING DEFECTS NOT IDENTIFIED IN UNDERLYING ACTION WAS ADMISSIBLE IN CONTRACTUAL SUBROGATION ACTION.

In the case filed February 4, 2015 (and as Modified on Denial of Rehearing March 5, 2015) and styled *National Union Fire Insurance Company of Pittsburgh, Pa. v. Tokio Marine and Nichido Fire Insurance Company* (2015) 185 Cal.Rpt.3d 1348 296; 233 Cal. App.4th 1348, the Court of Appeal, Second District, Division 5, held that a tire defect expert witness could testify in a contractual subrogation action as to defects in a tire which failed and caused a rollover accident, even though the defects were different than the defects identified in the tire buyer's underlying personal injury action against the seller and the manufacturer.

National Union Fire Insurance Company of Pittsburgh, Pa. (National Union), as excess insurer of Costco Wholesale Corporation (Costco), filed this lawsuit against Yokohama Tire Corporation (Yokohama) and its primary and excess insurers Tokio Marine & Nichido Fire Insurance Co., Ltd. (U.S. Branch) and Tokio Marine & Nichido Fire Insurance Co., Ltd., respectively (together, Tokio Marine) to recover sums it expended in settlement of a personal injury claim allegedly resulting from, among other things, material and design defects present in a tire manufactured by Yokohama and sold by Costco to Jack Daer, the plaintiff in the underlying case. Costco and Yokohama individually settled with Daer on the first day of trial, Costco for $5.5 million and Yokohama for $1.1 million. In this lawsuit, National Union sought to recover the $4,312,681.96 it paid on behalf of Costco to settle that lawsuit. National Union, as subrogee of Costco, sought recovery against Yokohama based on an express indemnity provision in the supplier agreement between the two companies, as well as an alleged breach of Yokohama's contractual insurance obligations. In addition, it sued Tokio Marine for indemnity (on its own behalf and as subrogee of Costco) and contribution (on its own behalf). The trial court ruled in limine that National Union's proof of a tire defect would be limited to the opinions of the expert designated by Daer in the underlying case. National Union's retained expert could not opine, based solely on the opinions of Daer's expert, that the tire contained a defect in design or manufacture which caused Daer's injuries. Consequently, after National Union made its opening statement in a bifurcated proceeding to determine whether a defect in the Yokohama tire was a cause of Daer's accident, the trial court entered a judgment of nonsuit on National Union's express indemnity claim. Having determined that the tire was not defective, the trial court, among other rulings, granted summary adjudication as to the causes of action based on Tokio Marine's refusal to defend Costco in the Daer action, as well as the claim that Yokohama breached its insurance obligations under its supplier agreement with Costco. The trial court then awarded Yokohama $863,706.75 in attorney fees as the prevailing party on the contractual indemnity claim.

The issue addressed by the appellate court was whether an indemnitee which settles a third party claim can present evidence acquired post-settlement, or instead is limited to the underlying plaintiff's evidence of liability. When a trial court erroneously denies all evidence relating to a claim, or essential expert testimony without which a claim cannot be proven, the error is reversible *per se* because it deprives the party offering the evidence of a fair hearing and of the opportunity to show actual prejudice. The appellate court found that "the error was undoubtedly prejudicial." Cottles was National Union's sole witness on tire defects. Both parties agreed that, based on the trial court's ruling, National Union could not prove that a defect in the tire caused it to fail, a requisite element of its contractual indemnity claim. Had the trial court permitted Cottles to testify to all of the defects he had identified in the tire, it is reasonably probable that the trial court would not have granted Yokohama's motion for nonsuit, a result more favorable than the one National Union obtained at trial.

ALLEGED INTENTIONAL TORTS RELATED TO A SEXUAL ASSAULT WERE POTENTIALLY AN "OCCURRENCE" COVERED UNDER AN UMBRELLA LIABILITY POLICY BECAUSE THE DEFINITION OF "OCCURRENCE" DID NOT REQUIRE AN "ACCIDENT."

In the case filed February 5, 2015 and styled *Gonzalez v. Fire Insurance Exchange* (2015) 184 Cal.Rptr.3d 394, 234 Cal.App.4th 1220, the Court of Appeal, Sixth District, held that a liability policy which did not include the term "accident" in the definition of an "occurrence," raised the potential for coverage to a suit alleging an insured's acts of failing to rescue an unconscious minor from a sexual assault when the insured was one of ten men in a room with the minor at a party, placing himself so as to prevent the minor's departure or rescue, cheering or photographing the assault, or falsely asserting after the assault that the minor had consented.

In 2007, plaintiff Jessica Gonzalez alleged she was sexually assaulted by Stephen Rebagliati and nine other members of the De Anza College baseball team. A year later, Gonzalez filed a civil lawsuit against her purported assailants. Rebagliati sought insurance coverage for his defense against Gonzalez's claims through his parents' homeowner's and personal umbrella policies, issued by respondents Fire Insurance Exchange ("Fire") and Truck Insurance Exchange ("Truck"), respectively. Both companies denied coverage. Eventually, Rebagliati settled with Gonzalez, assigning Gonzalez his rights against Fire and Truck. Gonzalez subsequently filed a complaint against the insurers for breach of the duty of good faith and fair dealing and breach of contract. She also sought recovery of judgment pursuant to Insurance Code section 11580. Fire and Truck both moved for summary judgment, arguing they had not owed Rebagliati a duty to defend. The trial court granted their motion for summary judgment.

The Fire homeowner's policy contained the following agreement: "We pay those damages which an insured becomes legally obligated to pay because of bodily injury, property damage or personal injury resulting from an occurrence to which this coverage applies. Personal injury means any injury arising from: [¶] (1) false arrest, imprisonment, malicious prosecution and detention. [¶] (2) wrongful eviction, entry, invasion of rights of privacy. [¶] (3) libel,

slander, defamation of character. [¶] (4) discrimination because of race, color, religion or national origin. Liability prohibited by law is excluded. Fines and penalties imposed by law are covered. [¶] At our expense and with attorneys of our choice, we will defend an insured against any covered claim or suit." As defined by that policy, "[o]ccurrence means an accident including exposure to conditions which results during the policy period in bodily injury or property damage. Repeated or continuous exposure to the same general conditions is considered to be one occurrence. [¶] Occurrence does not include accidents or events which take place during the policy period which do not result in bodily injury or property damage until after the policy period." The Fire policy set forth certain exclusions. It specifically provided coverage exclusions for "bodily injury, property damage or personal injury ... caused intentionally by or at the discretion of an insured" or resulted "from any occurrence caused by an intentional act of any insured where the results are reasonably foreseeable." The policy also stated it would not "cover actual or alleged injury or medical expenses caused by or arising out of the actual, alleged, or threatened molestation of a child by: [¶] 1. any insured; or [¶] 2. any employee of any insured; or [¶] 3. any volunteer, person for hire, or any other person who is acting or who appears to be acting on behalf of any insured." Additionally, the policy excluded coverage for personal injury "caused by a violation of penal law or ordinance committed by or with the knowledge or consent of any insured."

The Truck umbrella policy listed the Fire homeowner's policy on its schedule of underlying insurance. Truck's policy stated it would pay damages resulting from an "occurrence," and it would "defend any insured for any claim or suit that is covered by this insurance but not covered by other insurance." The Truck policy defined an "occurrence" as "a. with regard to bodily injury or property damage, an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results in bodily injury or property damage during the policy period; or [¶] b. with regard to personal injury, offenses committed during the policy period, even if the resulting injury takes place after the policy expires." Bodily injury was defined as "bodily harm to, sickness or disease of any person. This includes death, shock, mental anguish or mental injury that result from such bodily harm, sickness or disease." Personal injury was defined as injury arising out of several enumerated torts, including "a. false arrest, wrongful detention or imprisonment, or malicious prosecution; [¶] b. wrongful eviction, wrongful entry, or invasion of the right of private occupancy; or [¶] c. libel, slander, defamation of character or invasion of privacy." The Truck policy stated "[i]f a claim is made or suit is brought for damages excluded from coverage under this policy, we have no obligation to defend such claim or suit. If underlying insurance does not cover damages covered by this policy, we will: [¶] ... defend the insured against any covered claim or suit." The Truck policy included exclusions similar to those set forth in the Fire policy. The Truck policy excluded damages "[e]ither expected or intended from the standpoint of an insured." The policy also excluded damages "[a]rising out of corporal punishment, molestation or abuse of any person by any" insured individual. It also excluded coverage for "personal injury arising out of oral or written publication of material when a willful violation of a penal statute or ordinance has been committed by or with the consent of the insured."

In affirming that the trial court did not err in granting Fire's motion for summary judgment under the homeowner's liability policy, the appellate court concluded that the personal injury coverage under Fire's policy was limited to injuries resulting from "an accident including exposure to conditions which results during the policy period in … injury or … damage." An "accident," within the meaning of the Fire policy, is never present when an insured performs a deliberate act unless some additional, unexpected, independent, and unforeseen happening occurs that produces damage. Intentional acts are not "accidents" within the coverage under a liability policy, even if the acts cause unintended harms. Here, the insured's alleged injury or damage did not constitute an "accident" within the coverage of the Fire policy, where the minor's underlying complaint alleged intentional acts and did not allege accidental acts such as mistakenly blocking her exit.

In reversing the trial court's granting summary judgment in favor of Truck, the appellate court found that Truck failed to conclusively demonstrate that its policy exclusions eliminated all potential for coverage because that policy did not require an "accident" to "occur" resulting in losses covered under that policy. Examining the policy language, the appellate court found that the umbrella policy's exclusion from coverage for sexual molestation by the insured or by any "person who is acting or who appears to be acting on behalf of an insured" did not automatically negate Truck's duty to defend claims against its insured for the alleged false imprisonment, slander per se, and invasion of privacy to the acts or omissions claimed against the insured. Even an act which is intentional or willful within the meaning of traditional tort principles will not exonerate the insurer from liability under Ins. Code § 533 for damages that are either "expected or intended from the standpoint of the insured" unless it is done with a preconceived design to inflict injury. It is the insured's subjective belief as to whether his or her conduct would cause the type of damage claimed that excludes coverage under the statutory exclusion for damages that are either "expected or intended from the standpoint of the insured" unless it is done with a preconceived design to inflict injury. ◆

On the Move

◆ **Kevin C. Murphy**

Congratulations to Kevin C. Murphy of Murphy Jones LLP for being named one of San Diego County's Top Attorneys by the San Diego Daily Transcript for 2015 in the category of Municipal and Government Law. Mr. Murphy was recognized for his work defending professional licensees.

◆ **Kate Greenfield**

Kate Greenfield recently joined the Law Offices of Kenneth Greenfield. Ms. Greenfield practices civil litigation with an emphasis on insurance bad faith and insurance coverage matters. ◆