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APLC (Counsel for Miller's Field). Radmore was in pro per and did not participate.

Type of Incident/Causes of Action: Bar Fight/Premises Liability with allegations of lack of security; underage serving and over-serving. The case involved an underage patron (Radmore) who threw and struck Plaintiff in the right eye with a pint glass causing physical injuries while at Miller's Field in Pacific Beach. Radmore, Plaintiff and Plaintiff's friend were involved in a verbal altercation immediately before the glass was thrown. Plaintiff and his friend, who both stood at 6'4 and 215 pounds, claimed they were scared and intimidated by Radmore, who was 5'8" and 165 pounds. Miller's contended the incident was provoked by Plaintiff and his friend and was spontaneous, unforeseeable and not preventable.

Plaintiff sustained a lacerated cornea and alleged lifetime future treatment, including multiple surgeries, as well as a 25% loss in future employability. Miller's conceded it was a permanent injury, however discredited the extent of Plaintiff's claims through more persuasive experts, video surveillance, social networking sites (Facebook) and direct impeachment.

Settlement Demand: Plaintiff 998 for $998,499 but asked for $1.8 million at trial

Settlement Offer: $425,000

Trial Type: Judge

Trial Length: 6 days

Verdict: Plaintiff awarded $42,294.07 for past medical expenses, $137,753.36 for future medical expenses, and $250,000 for general damages.

Apportionment: Radmore 75% at fault; Plaintiff's friend 25% at fault; Miller's Field 0% at fault (defense verdict for Miller's Field)

Judgment: Plaintiff to take nothing from Miller's Field and awarded $325,253.36 against Radmore (who counsel believes is effectively judgment proof)

Bottom line

Case Title: Kirklen v. Auto on the Mall, et al.,

Case Name/Number: RCSC Case No. INC089351

Judge: Harold W. Hopp

Plaintiff : Dennis Kirklen and survivors

Defendant: Auto on the Mall

Causes of Action: Products Liability, Wrongful Death, Breach of Warranty, Negligence

Plaintiff's Counsel: C. Tab Turner, Esq., of Turner & Associates, North Little Rock,

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Insurance Law Update

By James M. Roth, Esq.
The Roth Law Firm

A handful of important insurance-related cases have recently been published. This column addresses (1) whether the court retains its declaratory relief powers to first resolve the interpretation of an appraisal provision before then compelling the parties to appraisal; (2) whether the "intentional loss" exclusion prohibits recovery to an innocent insured when the loss was caused by the intentional acts of a co-insured; (3) whether a Commercial General Liability insurer has a duty to defend its insured in lawsuits alleging construction defects when the insuring clause for coverage contained within a Montrose endorsement is internally ambiguous; and (4) whether an action against an insured cash distribution machine servicer for cash stolen by the insured's employee from a client bank is "property damage" under a Commercial General Liability policy.

1. The Court Retains its Declaratory Relief Powers to First Resolve the Interpretation of an Appraisal Provision Before Then Compelling the Parties to Appraisal Because California Courts Have Consistently Held That an Appraisal Panel Exceeds its Authority When it Does Anything Beyond Deciding the Worth of the Property in Question. In *Kirkwood v. California State Auto. Ass'n Inter-Insurance Bureau* (2011) Cal.Rptr.3d, 2011 WL 680345, the Court of Appeal, First District, Division 4, held on February 28, 2011, that a court retains its declaratory relief powers to first resolve the interpretation of an appraisal provision before then compelling the parties to undertake an appraisal because California courts have consistently held that an appraisal panel exceeds its authority when it does anything beyond deciding the worth of the property in question.

Factually, Douglas Kirkwood was insured by California State Automobile Association ("CSAA") under a homeowner's policy. It was an "open" policy in which the value of the covered items was not agreed upon, but was left to be determined following a loss. The policy provided that CSAA would pay actual cash value or the replacement cost of lost or damaged personal property. On August 21, 2007, Mr. Kirkwood's home and personal property were destroyed as the result of a fire. He submitted his personal property claim to CSAA, setting forth a physical depreciation amount based on the actual condition of each item at the time of the loss. CSAA provided Kirkwood with a contents inventory summary, which showed that a blanket depreciation schedule was applied to certain categories of property based upon the age of the item without regard to its condition. Mr. Kirkwood challenged the settlement offer, in particular what he asserted was "excessive depreciation" that was nearly triple what he had calculated, and accused CSAA of violating Section Insurance Code Section 2051(b). In 2004, with the passage of Assembly Bill No. 2962 introduced as part of the Homeowners Bill of Rights following the 2003 wildfires in Southern California, section 2051 was amended to state exactly how the measure of actual cash value should be determined. Section 2051, subdivision (b) now reads, in part: "(b) Under an open policy that requires payment of the actual cash value, the measure of the actual cash value recovery, in whole or partial settlement of the claim, shall be determined as follows: [¶] ... [¶] (2) In case of a partial loss to the structure, or loss to its contents, the amount it would cost the insured to repair, rebuild, or replace the thing lost or injured less a fair and reasonable deduction for physical depreciation based upon its condition at the time of the injury or the policy limit, whichever is less."

CSAA responded to Mr. Kirkwood's arguement, arguing that it was aware of section 2051, had asked the Department of Insurance for guidelines on how to determine actual cash value using the language of fair and reasonable deduction for physical depreciation, but indicated the department had no guidelines. CSAA stated it did "not believe the code changes the language of the contract between an insured and their carrier."

Thereafter, Mr. Kirkwood sued CSAA for declaratory relief, breach of contract, bad faith, and violation of the unfair competition law. The complaint included Mr. Kirkwood's individual claims as well as class action allegations, all relating to the assertion that CSAA's use of standardized depreciation schedules to determine depreciation of personal property items ran afoul of California law as well as the parties' insurance contract. CSAA demanded that Mr. Kirkwood dismiss the lawsuit and proceed with an appraisal. Mr. Kirkwood rejected the demand for appraisal, responding that the appraisal provision had no effect on his action because the lawsuit presented questions of law and coverage, and appraisers have no authority to resolve such issues. Faced with this rejection, CSAA demurred and moved to strike. The court granted and denied in part the motions. CSAA also moved to compel an appraisal pursuant to the appraisal clause in the policy which essentially tracked the standard form provision detailed in section 2071. The trial court denied the motion to compel appraisal, without prejudice, so that CSAA could raise this issue again after the court resolved the

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issue of interpretation of section 2051(b). Subsequently, Mr. Kirkwood filed a first amended complaint; CSAA again demurred and moved to strike the class allegations. The court sustained (1) CSAA's demurrer to the breach of contract/specific performance claim on behalf of the class, without leave to amend; and (2) the UCL cause of action on behalf of the class, with leave to amend. It denied the motion to strike class allegations to the extent the demurrer rulings did not moot those concerns. Kirkwood submitted a second amended complaint realleging declaratory relief and UCL causes of action on behalf of the class, as well as individual breach of contract and breach of the implied covenant of good faith and fair dealing claims. Shortly thereafter this appeal followed.

CSAA argued that an appraisal was necessary to determine whether the insured had standing to pursue injunctive relief against the insurer, and if there was an actual controversy. In other words, CSAA posted that whether an insured proceeds with an action depends on whether the appraisal demonstrates that the insurer's offer was lower or higher than the actual cash value. This argument, noted the Court, "goes both ways." The result favored by CSAA bears the real, deleterious consequence of forcing insureds to pay for an appraisal prior to a definitive judicial declaration establishing the correct legal basis for determining actual cash value. A judicial declaration that CSAA's interpretation of section 2051(b) and its policy does not violate the statute would be the end of the line: no appraisal would be necessary, and insureds such as Mr. Kirkwood would not be forced to pay for an appraisal. On the other hand, "a contrary judicial declaration would inform the appraisal *[sic]* in this case and would have the meritorious effect of staving off future appraisals and litigation based on the same unlawful behavior." In the Court's view judicial economy favored resort to declaratory relief in this instance by heading off duplicative future actions challenging CSAA's statutory interpretation as reflected in its loss adjustment policy.

2. The "Intentional Loss" Exclusion Was Invalid Insofar as it Applied to Innocent Insureds' Recovery for Losses Caused by Other Insureds' Intentional Acts. In *Century-National Ins. Co. v. Garcia* (2011) Cal.Rptr.3d, 11 Cal. Daily Op. Serv. 2194, 2011 WL 537627, the Supreme Court of California held, on February 17, 2011, that a fire insurance policy's "intentional loss" exclusion was invalid insofar as it excluded recovery by innocent insureds for fire losses caused by other insureds who acted intentionally and criminally, since such insurance resulted in coverage not substantially equivalent to the minimum statutory level of protection, which excluded only losses caused by the wilful act of "the insured."

Factually, Jesus Garcia, Sr., and his wife Theodora Garcia (the Garcias) suffered substantial damage to their home when their adult son set fire to his bedroom. At the time of the fire, the home was covered under a homeowner's policy issued by Century-National Insurance Company (Century-National). Under that policy, Jesus Garcia, Sr. was the named insured, and his wife Theodora Garcia and their son also qualified as insureds. The Garcias filed a claim for the damage, which Century-National investigated and denied. Century-National filed a civil complaint seeking a declaration that it had no duty to pay for the Garcias' loss because the policy contained clauses excluding coverage for the intentional act or criminal conduct of "any insured" (collectively, the intentional acts exclusion).

The Garcias filed a cross-complaint alleging causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, and reformation. The trial court agreed with Century-National, determining that (1) the Century-National policy defined the term "any insured," as contained in the intentional acts exclusion, to include relatives of the insured who lived at the insured property, i.e., the Garcias' adult son, (2) courts generally interpret policy exclusions for intentional or criminal acts to exclude coverage for innocent co-insureds, and (3) Insurance Code section 533 expressly sets forth California's public policy of denying coverage for willful wrongs. The court sustained the demurrer without leave to amend and entered a judgment dismissing the cross-complaint. The Court of Appeal affirmed.

In reversing the trial and appellate courts, a unanimous Supreme Court explained that, in California, fire insurance policies are regulated by the Insurance Code. Section 2070 provides: "All fire polices ... shall be on the standard form, and, except as provided by this article shall not contain additions thereto. No part of the standard form shall be omitted therefrom except that any policy providing coverage against the peril of fire only, or in combination with coverage against other perils, need not comply with the provisions of the standard form of fire insurance policy ...; *provided, that coverage with respect to the peril of fire, when viewed in its entirety, is substantially equivalent to or more favorable to the insured than that contained in such standard form fire insurance policy.*" (Italics original to published opinion.) First, the Court noted "[t]hat this intentional acts exclusion uses the term 'any insured' is significant. As we recently explained, '[a]bsent contrary evidence, in a policy with multiple insureds, exclusions from coverage described with reference to the acts of 'an' or 'any,' as opposed to 'the,' insured are deemed under California law to apply collectively, so that if one insured has committed acts for which coverage is excluded, the exclusion applies to all insureds with respect to the same occurrence." "Consequently, under the policy as written, the Garcias may not recover against Century-National because, even if they were innocent of wrongdoing, their fire losses were caused by another insured, who acted intentionally and criminally." Importantly, "[a]lthough the Century-National policy purports to exclude coverage of the Garcias' losses, section 2070 requires a comparison of the policy with the standard form fire policy set forth in section 2071. The question is whether the Century-National policy provides coverage that is at least as favorable to the insureds as the coverage provided in the standard form. If application of the intentional acts exclusion in the former results in coverage that is not at least substantially equivalent to the level of protection available in the latter, the exclusion is to that extent invalid." In rendering a comparison, the Court found that "[n]otably, the statutory standard form contains no express exclusion for losses caused by intentional acts or criminal conduct."

In finding that the innocent Garcia parents should not be penalized for the intentional acts of their son, the Court recast the issue: "The question is whether the Century-National policy provides coverage that is at least as favorable to the insureds as the coverage provided in the standard form. Under the Century-National policy, the intentional acts exclusion bars coverage for property losses sustained by insureds who are innocent of wrongdoing. But under the standard form, which must be read as including section 533's exclusion for losses caused by 'the wilful act of *the* insured' (italics original), innocent insureds would not be barred from coverage. Thus, under section 2070, it cannot be said that the coverage provided by the Century-National policy, 'with respect to the peril of fire, when viewed in its entirety, is substantially equivalent to or more favorable to the insured than that contained in such standard form fire insurance policy.'"

3. Commercial General Liability Insurer Had Duty to Defend Insured Grading Contractor in Lawsuits Against it Alleging Construction Defects When Insuring Clause for Coverage Was Internally Ambiguous. In *American Safety Indem. Co. v. National Union Fire Ins. Co. of Pittsburgh* (2011) F.Supp.2d, 2011 WL 9514, writing for the United States District Court, Southern District of California, Judge Dana Sabraw held, on Januray 3, 2011,

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that a Commercial General Liability insurance policy was ambiguous as to whether the issuing insurer had a duty to defend its insured grading contractor in lawsuits against it alleging construction defects. Thus, under California law, the insurer had a duty to defend its insured when a Montrose endorsement concurrently provided that the carrier had the right but not the duty to defend any suit seeking damages for bodily injury or property damage. Further in the event of continuing or progressive bodily injury or property damage over any length of time, the insurer had no duty to defend unless such injury or damage first commenced during policy period.

Factually, American Safety Indemnity Company ("ASIC") issued two commercial general liability insurance policies to grading contractor Signs & Pinnick, which were effective November 1, 2001 through November 1, 2003. National Union Fire Insurance Company of Pittsburgh, PA ("NUFIC") issued a commercial general liability insurance policy to Signs & Pinnick, which was effective November 1, 2003 through November 1, 2004. In 1999 and 2000, Signs & Pinnick performed grading work on seven single family home building sites at the 4S Ranch residential development. On February 15, 2005, a lawsuit was filed in San Diego Superior Court against several defendants, including Signs & Pinnick, alleging construction defects at the 4S Ranch development. In 2001 and 2002, Signs & Pinnick performed grading work at an apartment project called Casoleil in San Diego. On March 13, 2006, a lawsuit was filed in San Diego Superior Court against the general contractor of the Casoleil project alleging various construction defects, and the general contractor filed a cross-complaint against various subcontractors, including Signs & Pinnick. ASIC defended Signs & Pinnick in both the 4S Ranch litigation and the Casoleil litigation, and incurred fees and costs in doing so. NUFIC refused to defend Signs & Pinnick in either litigation pursuant to a full reservation of rights. ASIC thereafter filed suit against NUFIC alleging claims for declaratory relief and equitable contribution.

The insuring clause of the NUFIC policy provided: "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages." However, a Montrose endorsement to the NUFIC policy for continuing or progressive injury or damage superceded the above insurance clause as follows:

We will pay on behalf of the Insured those sums in excess of the Retained Limit that the Insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right but not the duty to defend any "suit" seeking those damages. We may at our discretion and expense, participate with you in the investigation of any "occurrence" and the defense or settlement of any claim or "suit" that may exist. But:

(1) The amount we will pay for damage is limited as described in SECTION III-LIMITS OF INSURANCE; and

(2) Our right to defend, if we so exercise it, ends when we have exhausted the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

(3) In the event of continuing or progressive "bodily injury" or "property damage" over any length of time, we will have no duty to defend or investigate any "occurrence", claim or "suit" unless such "bodily injury" or "property damage" first commenced during the policy period.

In finding that NUFIC had a duty to defend Signs & Pinnick in the underlying state court actions, Judge Sabraw found that the introductory paragraph to the Montrose endorsement was ambiguous because it seemingly removed the duty to defend while subparagraph (3) of that same endorsement assumed the existence of a duty to defend. Given that ambiguity, Judge Sabraw concluded that because "doubts as to meaning must be resolved against the insurer, the Court finds [NUFIC] did have a duty to defend Signs & Pinnick under the policy.

4. An Action Against an Insured Cash Distribution Machine Servicer for Cash Stolen by the Insured's Employee from a Client Bank Was Not "Property Damage" under a Commercial General Liability Policy. In *Advanced Network, Inc. v. Peerless Ins. Co.* (2910) 190 Cal.App.4th 1054, 119 Cal.Rptr.3d 17, the Court of Appeal, Fourth District, Division 1, writing for a unanimous panel, P.J. McConnell held on December 10, 2010, that a credit union's action against an insured cash distribution machine servicer to recover cash which the servicer's employee stole from that credit union was not for the "loss of use" of the cash. Rather, it was for the permanent "loss" of the cash and its replacement value, and thus was not covered under a Commercial General Liability policy's "loss of use" provision of coverage for property damage.

Factually, in May 1997, ANI contracted with Mission Federal Credit Union (Mission Federal) to service cash distribution machines (CDMs) in its branch stores. ANI employee Jacob Johnson serviced Mission Federal's CDMs. In October 2004, it was discovered that Johnson had stolen approximately $2 million in cash from Mission Federal, which he concealed by submitting false records.

Mission Federal made a demand on its fidelity bond holder, Cumis Insurance Society, Inc. ("Cumis"), which paid the claim. In August 2005, Cumis sued ANI in the federal district court for equitable subrogation, breach of contract and negligence, and for *respondeat superior* liability for Johnson's torts. ANI had a CGL policy with Peerless, which covered third party "property damage" caused by an "occurrence" during the policy period. The policy defined "property damage" as (1) "Physical injury to tangible property, including all resulting loss of use of that property," and (2) "Loss of use of tangible property that is not physically injured." In rejecting the defense tender, Peerless took the position there was no "property damage" within the meaning of the CGL policy because money is not considered to be tangible property, and the theft of money was not a covered "occurrence" because it was not accidental. ANI then sued Peerless for breach of contract and breach of the implied duty of good faith and fair dealing.

The Court explained "the terms 'loss of use' and 'loss' are not interchangeable for insurance purposes. If we were to hold otherwise, we would have to ignore the words 'of use' in the term 'loss of use.'" As such, "[c]overage for 'loss of use' does not apply to an underlying action in which the claimant seeks only the replacement value of converted property. While the 'loss of use' provision in Peerless's CGL policy is not modified by the term 'temporary,' the impermanent nature of 'loss of use' damages is implicit. . . . Interpreting the term 'loss of use' to include a permanent loss would lead to absurd results."

Presiding Justice McConnell noted it was "undisputed that the cash ANI's employee stole from Mission Federal was irretrievable, and the Cumis action was for the replacement value of the cash. The Cumis action did not seek any 'loss of use' damages. Because neither the underlying complaint nor any extrinsic facts showed the potential for coverage under Peerless's CGL policy, it had no duty of defense or indemnity toward ANI."