The Bottom Line

Case Title: Harbour Crossing, Ltd. V. Trango Systems, Inc.

Case Number: GIC830163

Judge: Honorable Joan M. Lewis

Plaintiff's Counsel: L.B. Chip Edleson, Esq. and Joann F. Rezzo, Esq. of Edleson & Rezzo

Defendant's Counsel: Harry W. Harrison, Esq. of Harrison Patterson & O'Connor, LLP

Type of Incident/Causes of Action: Business dispute/breach of contract; breach of covenant of good faith and fair dealing; unjust enrichment; fraud (punitive damages)

Settlement Demand: $350,000 written demand in December 2005; $225,000 oral demand before trial

Settlement Offer: $0 (dismissal in exchange for a waiver of costs)

Trial Type: Jury

Trial Length: 6 trial days; 2 deliberation days

Verdict: Defense

Insurance Law

By: James M. Roth, The Roth Law Firm

Three recent decisions create an unblemished victory for the folks issuing the insurance policies.

UNDER INSURER'S DUTY TO DEFEND ANY SUIT OR ACTION, THE PHRASE "ANY SUIT OR ACTION" UNAMBIGUOUSLY APPLIES TO PROCEEDINGS IN COURT AND DOES NOT ENCOMPASS ADMINISTRATIVE PROCEEDINGS THAT DO NOT INVOLVE A LAWSUIT. In Lockheed Corp. v. Continental Ins. Co. (2005)134 Cal. App.4th 187, the California Court of Appeal for the Sixth District affirmed and modified the trial court's entry of judgment for Lockheed Corporation's primary insurers on the ground there was no duty to defend "administrative proceedings" absent a lawsuit under policies that agreed to defend "any suit or action." The court also affirmed the trial court's rulings that Lockheed's policies were "accident-based," that the term "accident" included a sudden and unexpected temporal element, and that coverage is triggered when both the accident and damage occurs during the policy. Too, personal injury coverage did not apply to pollution related property damage, and Lockheed failed to make a prima facie case proving it sustained property damage caused by an accident over and above non-accidental pollution related property damage. Two components of the opinion are of interest. First, Lockheed contended the trial court erred when it ruled that if Lockheed contends pollution was caused by a sudden, unintended, and unexpected happening during the policy period, and other pollution resulted from gradual causes, it must prove a sudden, unintended and unexpected discharge caused an appreciable amount of contamination "over and above" the contamination caused otherwise. Lockheed argued applying the trial court's "over and above" requirement to policies not containing a pollution exclusion was error. The court disagreed, holding an insurer who contracts to cover pollution claims covers damage caused by pollution if the discharge is sudden and accidental. In a case where some damage has been caused by noncovered events, an insured must prove there is damage resulting from a covered event – damage over and above that which is not covered under the policy. Second, Lockheed unsuccessfully challenged the trial court's ruling [pursuant to Cottle v. Superior Court (1992) 3 Cal. App. 4th 1367 – a trial court may use its inherent powers to manage complex litigation by ordering the exclusion of evidence if the plaintiff is unable to establish a prima facie case prior to the start of trial] ordering the parties to produce pre-trial, sufficient evidence to make a prima facie showing for each issue upon which the party had the burden of proof at trial. The trial court ruled Lockheed's efforts to prove coverage for contamination at one of its contaminated sites, by submitting evidence of 14 accidents it claimed resulted in the release of pollutants, was insufficient as a matter of law and therefore excluded under Cottle. This opinion very literally applies the language of the policy.

INSURED WHO DEVELOPED CARPAL TUNNEL SYNDROME OVER TIME AS A RESULT OF ORDINARY WORK ACTIVITIES DID NOT SUFFER "ACCIDENTAL BODILY INJURY." In Kimberly Gin v. Pennsylvania Life Ins. Co. (2005)134 Cal. App.4th 939, the First District Court of Appeal affirmed the trial court's ruling granting Pennsylvania Life Insurance Company's motion for summary judgment holding that an injury resulting from the repetitive stress of typing did not constitute an "accidental bodily injury." In 1994, Kimberly Gin began working for United Parcel Service as a data entry clerk. In 1996, she purchased a disability insurance policy from Penn Life. The policy provided that Penn Life would pay a monthly disability benefit to Gin if she sustained an "accidental bodily injury" while the policy was in force. Shortly after Penn Life issued the policy, Gin filed a claim for disability benefits for injuries caused by the repetition of typing on a keyboard. Gin sued Penn Life after the insurer discontinued policy benefits. Penn Life moved for summary judgment, arguing Gin had no right to coverage because she did not suffer an "accidental bodily injury" as required by the policy. The trial court granted Penn Life's motion after it determined that Gin suffered from a "repetitive stress injury" which could not be considered accidental. The court of appeal affirmed, rejecting Gin's argument that an accident occurred because her disability was the unexpected, unforeseen consequence of a causative occurrence: her typing at work. The court of appeal found that Gin's interpretation of the term "accident" was too broad. So if repetitive stress injuries are not "acci-

dental," my typing of this tome is not injurious to any of you.

THE WRONGFUL SOLICITATION OF CUSTOMERS IS NOT COVERED AS AN "ADVERTISING INJURY." In Hayward v. Centennial Ins. Co. (9th Cir. 2005) 430 F.3d 989, the United States Court of Appeal for the Ninth Circuit applying California law affirmed summary judgment in favor of an insurer concluding the insurer did not owe a duty to defend an action alleging wrongful solicitation of customers, finding such allegations do not constitute "advertising injury" as required by the policy language. From 1996 to 1999, Hayward was employed by In Sync Media. During 1999, Hayward went to work for a competitor of In Sync's. In 2000, In Sync filed a complaint asserting causes of action for breach of contract and breach of fiduciary duty against Hayward, and alleging misappropriation of trade secrets and violation of the Business and Professions Code against Hayward, his new employer, and others. The complaint alleged Hayward breached his obligation to In Sync by "speaking with and soliciting customers of In Sync. . . in connection with his plan to move over to the [the competitor] Andresen and [that Hayward] misappropriated trade secrets by obtaining a book of business of plaintiff's customers" and "solicited customers or potential customers of . . .In Sync. . .for services to be performed by defendants." Hayward tendered the complaint to Centennial. Centennial denied coverage and Hayward sued. The federal district court granted summary judgment in favor of Centennial relying on the California Supreme Court's decision in Hameid v. National Fire Insurance of Hartford (2003) 71 P.3d 761. In Hameid, the Court found that the definition of "advertising injury" "require[d] widespread promotion to the public such that one-to-one solicitation of a few customers does not give rise to the insurer's duty to defend the underlying suit" and that solicitation of customers from a customer list cannot constitute advertising injury within the meaning of the policy because it does not involve "widespread distribution of promotional materials to the public at large." The Ninth Circuit affirmed the ruling for Centennial. It found that because In Sync's complaint alleged Hayward agreed to bring confidential information including trade secrets, marketing plans, data and customer and supplier identities to Andresen and that he would solicit customers, or potential customers of In Sync for Andresen, the allegations did not fall within the definition of "advertising injury" in accordance with Hameid.

Written Complaint to School Board Held Protected Under Anti-SLAPP Law

(Lee v. Fick (2005) 35 Cal. App. 4th 89 (Review denied Feb. 2006)

By Kelly T. Boruszewski of Lorber, Greenfield & Polito, LLP

Michael Lee, a high school baseball coach, sued a parent for, among others, libel, and slander. These causes of action were based upon that parent publishing a letter to the Conejo Valley Unified School District claiming Lee was manipulative to the players, the parents, and the other coaches; verbally abusive to the kids; emotionally abusing the kids with his outbursts of anger and favoritism to certain players; and threw a fit in the dugout and verbally attacked the parent's son for not respecting his authority. The slander case of action was based on the allegation that the parent stated to at least eight people Lee was a bad coach, was unethical, and had severe anger and emotional and anger problems. In both causes of action, Lee alleged the parents acted with malice and caused him to lose his job.

In response to the Complaint, the parent brought a special motion to strike (anti-SLAPP motion) pursuant to Section 425.16 of the Code Civil Procedure. Section 425.16, subdivision (b)(1) provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." Subdivision (e)(1) provides that an act in furtherance of a person's right of petition or free speech includes, "any written or oral statement . . . made before a . . . judicial proceeding, or any other official proceeding authorized by law . . . ."

Section 425.16 requires a two-step analysis: First, determination whether defendants had made a threshold showing that the challenged causes of action arise from a protected activity. If so, then, second, whether the plaintiff has demonstrated a probability of prevailing on the claim, i.e., the complaint is sufficient and is supported by facts sufficient to sustain a judgment in plaintiff's favor.

To that end, the parent filed a declaration stating Lee became angry as her son when the son "shook off" Lee's baseball signs, to which Lee verbally and physically threatened the son, poking a finger in his chest. As a result, the parent wrote a letter addressed "To Whom It May Concern," alleging libelous statements.

The libel cause of action arose from the letter the parent sent to the school board. Civil Code section 47, subdivision (b) provides that any publication made in any "judicial proceeding" or "in any other official proceeding authorized by law" is privileged. Thus, communications to an official agency intended to induce the agency to initiate action are part of an "official proceeding," including complaints to school authorities about a teacher or principal in the performance of his or her official duties.

Lee submitted an affidavit in opposition to the motion. He declared the parent's son was rude to the coaches and had a bad attitude, and denied that he physically or verbally abused the son. When Lee read the parent letter submitted to the school district, he could not believe what was alleged. School officials conducted a four-week investigation, and Lee continued as baseball coach for the next season. It was only after the parent then met with the principal of the school that Lee was terminated as head coach.

Lee argued the parents never intended to initiate any legally authorized proceedings because the letter was not addressed to a school official, but "To Whom It May Concern." The Court held that the address on the letter is not determinative and the parent's uncontradicted declaration that she wrote the letter to deliver to the school district and did not publish the letter to any other person.

Lee then argued that the letter did not request an investigation or hearing and did not ask for any action. But the Court held that it is obvious from the content of the letter the parents were requesting that Lee be removed as coach.

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