The Bottom Line

Case Title: Stevens v. Sessions

Case Number: GIC 866626

Judge: Honorable Ronald Prager

Plaintiff's Counsel: George John Ronis, Esq. and R. Scott Sims, Esq.

Defendant's Counsel: Clark Hudson of Neil Dymott Frank Harrison & McFall

Type of Incident/Causes of Action: Medical Malpractice. The plaintiff alleged she could not shut her eyes completely following a four lid blephroplasty.

Settlement Demand: $120,000

Settlement Offer: $30,000

Trial type: Jury

Trial Length: 6 days

Verdict: Defense

Case Title: FIDM Properties Inc. vs Red Point Builders Inc.

Case Number: 05CC07075

Judge: Honorable Andrew Banks

Plaintiff's Counsel: Plaintiff was represented by Segwick, Detert, Moran & Arnold, LLP. ("Segwick"). The handling attorney was David Eligator.

Defendant's Counsel: Mark Zimet and Jose Gonzales of Jampol, Zimet, Skane and Wilcox.

Type of Incident/Causes of Action: Construction Defect Breach of Contract and Negligence. This was a construction defect claim arising out of the conversion of a tilt-up concrete warehouse into the Orange County campus of The Fashion Institute of Design & Merchandising ("FIDM") located at 17590 Gillette Avenue, Irvine, California (the "Project"). Plaintiff FIDM alleged numerous construction defects with the Project.

Marc Zimet represented cross defendant Frith Smith Construction who was responsible for the concrete flooring installation via a subcontract with Red Point Builders.

Settlement Demand: $1.8 million was last global demand

Settlement Offer: $1.2 million was the last global offer, including $55K from Smith-Frith.

Trial Type: Jury/Judge : Jury

Trial Length: 3 months

Verdict: Defense

INSURANCE LAW

James R. Roth, Esq.
The Roth Law Firm

It appears that the Second District Court of Appeal (i.e., Los Angles) has been busy limiting coverage to directors' and officers' liability arising from errors committed in their official capacity; tightening the definition of an "occurrence" over multiply policy years; finding that an insurer's tort liability for failure to accept a reasonable settlement offer can only arise with respect to third party (liability), not first party coverage; and holding an insurer accountable for good faith mistakes when coverage is at issue.

D & O POLICY LIMITED COVERAGE TO DIRECTORS' AND OFFICERS' LIABILITY ARISING FROM ERRORS COMMITTED IN THEIR OFFICIAL CAPACITY. In August Entertainment, Inc. v. Philadelphia Indemnity Insurance Company (2007) 146 Cal.App.4th 565, 52 Cal.Rptr.3d 908, the Second District Court of Appeal affirmed an order of the Los Angeles County Superior Court sustaining an insurer's demurrer without leave to amend. The court held the insured corporation's Directors & Officers liability policy did not cover the corporation's or its officer's contractual liability because the claim was not due to a "wrongful act" within the meaning of the policy. Philadelphia Indemnity Insurance Company ("Philadelphia") had issued a D&O liability policy to InternetStudios.com, Inc. ("InternetStudios"). The policy agreed to pay on behalf of directors or officers defense and indemnity costs on claims made during the policy period for any "wrongful act," which was defined as any "actual or alleged error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed by an Insured . . . in [his or her] capacity as a director or officer of [InternetStudios]; or . . . claimed against an Insured solely in [his or her] capacity as such." Robert Maclean was an officer of InternetStudios, which produced, distributed and marketed films. Gregory Cascante was the president of August Entertainment, Inc. ("August"), an agent for entities that control the rights to several motion pictures. In March 2000, Maclean and Cascante entered into an agreement whereby InternetStudios would pay August a minimum of $2 million for the distribution rights to certain films. Thereafter, InternetStudios advised August it would not perform under the agreement. August sued InternetStudios and Maclean for breach of contract and anticipatory repudiation. InternetStudios tendered August's lawsuit to Philadelphia which denied coverage based on the exclusion for liabilities arising from express contracts or agreements. It also declined to cover Maclean because his potential liability was individual and not as an officer or director of InternetStudios. The Court of Appeal first held no coverage existed for a breach of contract because the policy expressly excluded actual or alleged liability of the company for breach of contract, and the policy limited reimbursement coverage for directors and officers to liability arising from errors committed in their official capacity. The Court of Appeal then rejected August's argument coverage existed because Maclean had committed a "wrongful act" within the meaning of the policy by signing the contract without stating he was an agent of InternetStudios. The court held the mere existence of a mistake or negligent act by an officer or director does not create coverage under the policy for breach of contract as a "wrongful act." The court further noted the term "wrongful act," as defined in policy did not include a breach of contract of any kind.

WHEN ALL INJURIES EMANATE FROM A COMMON SOURCE, THERE IS ONLY A SINGLE "OCCURRENCE" FOR PURPOSES OF LIABILITY INSURANCE POLICY COVERAGE IRRESPECTIVE OF MULTIPLE INJURIES OR INJURIES OF DIFFERENT MAGNITUDES OR THAT THE INJURIES EXTEND OVER A PERIOD OF TIME. In Safeco Insurance Company Of America v. Fireman's Fund Insurance Company (2007) 148 Cal.App.4th 620, 55 Cal.Rptr.3d 844, , the Second District Court of Appeal affirmed a trial court's grant of motion for summary judgment to a primary insurer, ruling there was a single occurrence where one landslide caused property damage extending over successive policy periods. Fireman's Fund Insurance Company ("FFIC") issued to Harold Lancer a homeowners policy that provided liability coverage with a limit of $500,000 per occurrence. Lancer also

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obtained an umbrella policy with a limit of $5 million per occurrence from Safeco Insurance Company ("Safeco") that same year. Both polices were in effect for more than one year. Lancer and next-door neighbors owned homes on top of a hill. During the first policy period for both policies, a portion of the uphill properties failed, causing a landslide that inundated the backyard of a downhill neighbor with dirt and debris. The downhill neighbor sued Lancer alleging nuisance, trespass, and negligence. As the primary carrier, FFIC defended Lancer. Lancer and another uphill neighbor filed cross complaints against each other for indemnity and comparative fault. They eventually settled the cross-complaints, agreeing to pay $1.1 million to repair the slope. FFIC paid a portion of the settlement and contended it had exhausted its policy limits of $500,000. FFIC agreed to continue defending Lancer against the downslope homeowner (for an additional $265,000) subject to a reservation of rights to seek reimbursement of defense costs from the excess carrier, Safeco. The court determined that the slope repairs would cost $3,795,448. Safeco paid $1.54 million of the judgment on Lancer's behalf and filed a declaratory relief action against FFIC, arguing FFIC was solely obligated to indemnify for the judgment because FFIC owed $500,000 in coverage for property damage and an additional $500,000 in coverage for personal injury during each of FFIC's four policy periods, for a total of $4 million. FFIC argued it owed Lancer only $500,000 in indemnity it had already paid and sought the $265,000 in defense costs incurred after it had paid the $500,000 limit. The trial court concluded there was a single occurrence resulting in $500,000 in coverage for the slope failure. Safeco appealed and the Second District Court of Appeal affirmed. On appeal Safeco contended a single event, such as a landslide, could result in two occurrences based on the distinct definitions of an occurrence in the FFIC policy. The court disagreed. It held Safeco could not rely on a provision limiting an insurer's liability per occurrence to argue for higher policy limits. The court also explained the purpose of the two occurrence definitions was to determine the existence of coverage, and not the amount of coverage. In determining the amount of coverage, the court focused on case law where an "occurrence" has generally been held to mean the underlying cause of the injury, regardless the number or nature of resulting injuries. Thus, where one proximate, uninterrupted, and continuing cause results in injuries, there is a single occurrence. Safeco's second argument was that damage resulting from the landslide continued into FFIC's three subsequent policy periods and therefore constituted a separate occurrence under each of those policies. The court rejected this argument stating that continuation of damage during successive policy periods, by itself, does not create a series of indefinitely ongoing occurrences.

AN INSURER'S TORT LIABILITY FOR FAILURE TO ACCEPT A REASONABLE SETTLEMENT OFFER CAN ONLY ARISE WITH RESPECT TO THIRD PARTY (LIABILITY), NOT FIRST PARTY, COVERAGE. In Rappaport-Scott v. Interinsurance Exchange of the Automobile Club (2007) 146 Cal.App.4th 831, 53 Cal.Rptr.3d 245, the Second District Court of Appeal affirmed an order of the Los Angeles County Superior Court holding that an insurer's tort liability for failure to accept a reasonable settlement offer can only arise with respect to third party (i.e., liability) coverage. Interinsurance Exchange of the Automobile Club ("Interinsurance") issued an automobile insurance policy to Laura Rappaport-Scott ("Rappaport-Scott") including coverage for bodily injury caused by uninsured and underinsured motorists. The coverage limit was $100,000 per person. Rappaport-Scott, while driving her automobile in January 1997, was rear-ended by another vehicle that had been struck by a vehicle driven by an underinsured motorist. Rappaport-Scott sued the underinsured motorist for her injuries and settled the action for $25,000, the policy limit available. Rappaport-Scott then submitted a claim to Interinsurance for benefits under her underinsured motorist coverage. She claimed the total value of her injuries and losses caused by the underinsured motorist was $346,732.34. She made what she characterized as a settlement demand to Interinsurance for payment of $75,000 and in response, Interinsurance offered her $7,000 on the claim. Following an arbitration hearing, Rappaport-Scott was awarded $33,000. Rappaport-Scott thereafter filed suit against Interinsurance breach of the implied covenant of good faith and fair dealing by failing to negotiate with her in good faith. Rappaport-Scott further alleged Interinsurance failed to present a reasonable counter-offer to her settlement demand of $75,000. In affirming the trial court granting Interinsurance's demurrer, the court found an insurer's tort liability for failure to accept a reasonable settlement offer can only arise with respect to third party (liability) coverage. An insurer's obligations under the implied covenant of good faith and fair dealing with respect to first party coverage only includes a duty not to unreasonably withhold benefits due under the policy.

INSURER'S REASONABLE, THOUGH ERRONEOUS, INTERPRETATION OF POLICY EXCLUSION DID NOT EXCUSE ITS FAILURE TO INVESTIGATE OTHER POSSIBLE BASES FOR INSURED'S CLAIM. In Jordan v. Allstate Insurance Company (2007) 148 Cal.App.4th 1062, 56 Cal.Rptr.3d 312, the Second District Court of Appeal reversed a trial court judgment dismissing an insured's complaint against her insurance company for breach of the implied covenant of good faith. Insured homeowner Mary Jordan ("Jordan") filed suit against her all-risk insurer, Allstate Insurance Company ("Allstate") for recovery for alleged "collapse" of a portion of her home under her policy that expressly provided "additional coverage" for any loss due to an "entire" collapse caused by "hidden decay," but with an exclusion for any loss caused by "wet or dry rot." In December 2000, Jordan discovered a window had fallen out of her living room wall and floorboards were giving way. Thereafter, Allstate denied Jordan's claim on the grounds coverage was precluded under the exclusion for losses caused by wet or dry rot. After summary judgment in favor of Allstate, which was reversed on appeal (at 116 Cal.App.4th 1206, 11 Cal. Rptr.3d 169), the Superior Court, Los Angeles County, granted Allstate summary adjudication upon the cause of action for breach of the covenant of good faith and fair dealing, resulting in instant appeal. The second appeal concluded that Allstate's reasonable, though erroneous, interpretation of the policy exclusion did not excuse its failure to investigate other possible bases for Jordan's claim, and a fact issue remained whether Allstate failed to investigate Jordan's alternate basis for coverage. The policy provided an exception to the collapse exclusion under a section entitled "additional coverage" which covered the "entire collapse" of a building structure and "entire collapse" of part of a covered building structure that was "a sudden and accidental direct physical loss caused by hidden decay."