Insurance Law Updates

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As we journey into this new year, the courts initially are strictly construing and interpreting insurance polices in favor of the issuing carriers.

Unambiguous Provisions in Subcontractors' Liability Policies Prohibiting Additional Insureds from Satisfying the Self-Insured Retention (SIR) and Thus Precluding Additional Insureds from Triggering the Insurer's Duty to Indemnify Were Not Contrary to Public Policy Where the Additional Insureds Were Developers That Provided Detailed Instructions to the Subcontractors on the Scope of Required Coverage, and the Developers Failed to Require the Subcontractors to Obtain Insurance Allowing Additional Insureds to Satisfy the SIR.

In *Forecast Homes, Inc. v. Steadfast Ins. Co.,* (Jan. 12, 2010) _ Cal.Rptr.3d _, 2010 WL 95091, the Court of Appeal, Fourth District, Division 3, held that the unambiguous provisions in subcontractors' liability policies prohibiting additional insureds from satisfying the self-insured retention (SIR) and thus precluding additional insureds from triggering the insurer's duty to indemnify were not contrary to public policy where the additional insureds were developers that provided detailed instructions to the subcontractors on the scope of required coverage, and the developers failed to require the subcontractors to obtain insurance allowing additional insureds to satisfy the SIR.

Factually, housing developers, Forecast Homes, Inc., and K. Hovnanian Forecast Homes, Inc. (collectively referred to as "Forecast"), appealed from the judgment entered in its declaratory relief action in favor of Steadfast Insurance Company ("Steadfast"). Forecast contractually required all its subcontractors to defend and hold it harmless against any liability arising out of the subcontractors' work. Subcontractors were required to add Forecast to their general liability insurance policies as an additional insured. Several subcontractors obtained their required insurance coverage from Steadfast, who later refused to indemnify Forecast when a lawsuit was filed by several homeowners against Forecast for construction defects. Steadfast maintained that pursuant to the policy language, only the subcontractor as a named insured, and not Foremost, as an additional insured, was authorized to incur the policy's self-insured retention (SIR), which was a precondition for coverage. The operative policy language at issue provided in pertinent part that: "The self-insured retention amounts stated in the Schedule of this endorsement apply as follows: ... If the [p]er [o]ccurrence self-insured retention amount is shown in the Schedule of this endorsement, **it is a condition precedent to our liability that you make actual payment of** all damages and defense costs for each occurrence or offense, until you have paid self-insured retention amounts and defense costs equal to the [p]er [o]ccurence amount shown in the Schedule, subject to the provisions ... below, if applicable. **Payments by others, including but not limited to additional insureds or insurers, do not serve to satisfy the self-insured retention. Satisfaction of the self-insured retention as a condition precedent to our liability applies regardless of insolvency or bankruptcy by you.** The [p]er [o]ccurrence amount is the most you will pay for self-insured retention amounts and defense costs arising out of any one occurrence or offense, regardless of the number of persons or organizations making claims or bringing suits because of the occurrence or offense." [Emphasis original.]

The trial court ruled that only the named insured subcontractors, not Forecast, had the right to satisfy the SIR per occurrence amounts and Steadfast's defense obligation had not been triggered because Forecast failed to require its subcontractors to obtain insurance allowing Forecast to satisfy the SIR. To hold otherwise, said the Court, would rewrite the provisions of the insurance policy and would compel the insurer to give more than it promised.

An Accident Does Not Occur When the Insured Performs a Deliberate Act Unless Some Additional, Unexpected, Independent, and Unforeseen Happening Occurs That Produces the Damage.

In *Fire Ins. Exchange v. Superior Court* (Jan. 26, 2010) _ Cal.Rptr.3d _, 181 Cal.App.4th 388, the Court of Appeal, Fourth District, Division 2, held that insured homeowners' act of a building house in a location where it encroached on a neighbors' property was not an "accident" under the homeowner insurance policy which triggered the insurer's duty to defend in the underlying quiet title action, regardless of whether homeowners believed they owned five and one-half foot strip of land and had the legal right to build on it, as the act of construction was intentional and not an accident, and there was no unexpected and unintended event between the intentional construction of the building and the encroachment.

Factually, Kenneth and Dorothy Bourguignon owned property adjoining the Leach property. In 1984, Louise Leach granted them an access easement over a five and one-half foot wide portion of her property that bordered theirs. After their property suffered earthquake damage, the Bourguignons wanted to renovate and rebuild their residence and obtained Leach's signature on a "Lot Line Adjustment" application submitted to the City for the five and one-half foot easement. The City approved the application and the Bourguignons completed construction. In 2002, the Parsons negotiated to purchase the Leach property and found that the Lot Line Adjustment was a cloud on title. They obtained an assignment of any rights possessed by Leach and her two sons to contest its validity. The Parsons then purchased the Leach property. The Parsons disputed the validity of the Lot Line Adjustment, asserting that Leach had conveyed a one-third interest in the property to her two sons in 1988 and the latter had not signed the Lot Line Adjustment application. The Bourguignons sued the Parsons for quiet title and adverse possession of this five and one-half foot strip. The Parsons cross-complained for quiet title, declaratory relief and fraud. The Bourguignons tendered their defense to Fire Insurance Exchange, which had issued a homeowner policy to them. Fire Insurance refused to defend the suit on the ground that it owed no duty to defend because it had no potential liability under the policy. The Bourguignons sued Fire Insurance for breach of the insurance contract and bad faith.

The Court articulated the parties' views: Fire Insurance contended that the Bourguignons' action in building a structure at a specified location was not an accident but an intentional act so that there was no coverage. The Bourguignons countered that they were mistaken that they owned the property where they built the house so that the encroachment on the Parsons' property was an accident. The Court then noted that the term "accident" referred to the nature of the act giving rise to liability; not to the insured's intent to cause harm. Consequently, where the insured intended all of the acts that resulted in the victim's injury, the event may not be deemed an "accident" merely because the insured did not intend to cause injury. Importantly, the Court observed that the insured's subjective intent is irrelevant.

The Court concluded that the Bourguignons intended to build the house where they built

it. Accepting their contention that they believed they owned the five and one-half foot strip of land and had the legal right to build on it, the act of construction was intentional and not an accident even though they acted under a mistaken belief that they had the right to do so. While the Bourguignons insisted that their engineer failed to obtain and include an executed grant deed in the Lot Line Adjustment application resulting in their failure to obtain the legal right to build where they did, the reasons for their failure to obtain title was irrelevant to the determination whether the act in locating the building where they did could be characterized as an accident. Consequently, there was no unexpected and unintended event between the intentional construction of the building and the encroachment.

"Fax Blasting" Was Not an "Accident" Within Meaning of Liability Policy's Accidental Property Damage Provision.

In *State Farm General Insurance Company v. JT's Frames, Inc.* (Jan. 27, 2010) _ Cal.Rptr.3d _, 181 Cal.App.4th 429, the Court of Appeal, Second District, Division 4, held that an insured's act of "fax blasting," or sending unsolicited advertising faxes, was not an "accident" and thus not an "occurrence," within the meaning of a liability policy providing coverage for "property damage caused by an occurrence," and defining "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions which result in bodily injury or property damage," absent evidence that insured believed that its tens of thousands of faxed transmissions were solicited.

Factually, State Farm issued several successive insurance policies to "[t]he Friedman Group." The policies covered "advertising injury caused by an occurrence committed in the coverage territory during the policy period." "[A]dvertising injury" was defined to include: "a. oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; b. oral or written publication of material that violates a person's right of privacy; c. misappropriation of advertising ideas or style of doing business; or d. infringement of copyright, title or slogan." The policies also covered "property damage caused by an occurrence." With respect to property damage, "occurrence" was defined to mean "an accident, including continuous or repeated exposure to substantially the same general harmful conditions which result in bodily injury or property damage." During the period the policies were in effect, a company identifying itself as "[t]he Friedman Group" transmitted tens of thousands of unsolicited advertisements via facsimile machine or "fax" to a number of parties, including appellant JT's Frames ("JT's"), which then filed a class action lawsuit against "[t]he Friedman Group International," alleging violation of the Telephone Consumer Protection Act. JT's also alleged conversion and violation of the Illinois Consumer Fraud and Deceptive Practices Act. The Friedman Group tendered the defense to State Farm, which denied coverage.

The Court concluded that absent credible evidence that the insured believed that its tens of thousands of faxed transmissions were solicited, the insured's act of "fax blasting," or sending unsolicited advertising faxes, was not an "accident" and thus not an "occurrence" within the meaning of the liability policy providing coverage for "property damage caused by an occurrence," and defining "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions which result in bodily injury or property damage."

A Subrogation Complaint, Based on its Insured's Contractual Indemnification Claim, Was Not Barred by its Insured's Good Faith Settlement in the Underlying Litigation Pursuant to C.C.P. § 877.6.

In *Interstate Fire and Casualty Insurance Company v. Cleveland Wrecking Company* (Feb. 22, 2010) _ Cal.Rptr.3d _, 2010 WL 598602, the Court of Appeal, First District, Division 5, held that a subrogation complaint, based on its insured's contractual indemnification claim, was not barred by its insured's good faith settlement in the underlying litigation pursuant to C.C.P. § 877.6.

Factually, Webcor Construction, Inc. ("Webcor") was the general contractor for a construction project. Cleveland Wrecking Company ("Cleveland") was a subcontractor responsible for certain demolition work. Delta Steel Erectors ("Delta") was a subcontractor engaged in the installation of steel stairways. Cleveland and Delta each entered into similar subcontracts with Webcor, by which they undertook to indemnify Webcor for liability arising out of their work and to procure general liability insurance with Webcor as an additional insured. Although both Cleveland and Delta had agreed to procure liability insurance with Webcor as an additional insured, only Delta complied with the obligation, obtaining coverage from Interstate in which Webcor was a named additional insured. Cleveland's employees were moving debris to an area where it could be loaded onto trucks. They had been warned that Delta's employees were working in areas below them, and that Delta's employees were being showered by debris dislodged by Cleveland's operations. One of Delta's employees, ironworker Thelbert Allen Frisby ("Frisby"), was working in a stairwell below an opening in the floor on which Cleveland's employees were moving the debris. To move the debris, Cleveland's Bobcat operator drove a loader bucket into the pile of debris, and then backed up with the load to move it. This repeated process moved the pile of debris closer to the opening and ultimately into a slab grabber, which became dislodged and fell into the opening where Frisby was working. The slab grabber struck Frisby and caused significant injury. Frisby filed a workers' compensation claim against his employer Delta. In addition, he filed a lawsuit against Webcor and Cleveland in San Francisco Superior Court. Webcor tendered its defense and indemnification to Cleveland pursuant to the terms of the Agreement. Cleveland rejected the tender. Webcor also tendered its defense and indemnification to Interstate pursuant to the terms of the Interstate-Delta Policy. Interstate accepted it and filed a complaint for subrogation against Cleveland, alleging that Cleveland had breached its contract with Webcor by failing to defend and indemnify Webcor. Frisby and Webcor entered into a settlement by which Webcor would pay Frisby $575,000 and Frisby would dismiss his claims against Webcor. The trial court approved their agreement as a good faith settlement under Code of Civil Procedure section 877.6. Interstate funded the $575,000 settlement payment and additionally paid over $152,000 for the attorney fees and costs incurred in defending Webcor against Frisby's claims. Cleveland also entered into a settlement with Frisby, which the court approved as a good faith settlement as well.

A determination that a settlement was made in good faith, noted the Court, bars the non-settling defendants from asserting claims against the settling tortfeasor for equitable comparative contribution and partial or comparative indemnity. Because an insurer stands in the shoes of its insured in a subrogation action, the insurer cannot pursue those types of indemnity claims against the settling tortfeasor. However, a good faith settlement order does not bar a non-settling tortfeasor from asserting an indemnification claim against the settling defendants based on an express contract. Because an insurer stands in the shoes of its insured, the insurer can pursue a cause of action against the settling tortfeasor for breach of an express contractual indemnification clause.