INSURANCE LAW UPDATE

RECENT CALIFORNIA APPELLATE DECISIONS

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As 2012 wound to a close, and as 2013 began, the appellate courts in Southern California evaluated three cases of first impression.

INTERINSURED EXCLUSION IN LIABILITY POLICY DOES NOT PRECLUDE COVERAGE FOR NAMED INSURED TENANT'S LIABILITY TO ADDITIONAL INSURED LANDLORD.

In the case styled *Gemini Insurance Co. v. Delos Insurance Co.* (2012) 211 Cal.App.4th 719, 149 Cal.Rptr.3d 889, the Second District, Division 5, held on December 5, 2012, a liability policy's exclusion of coverage for any claim by one insured against another insured did not bar coverage for a claim by a landlord which was an additional insured under the policy, based on a fire caused by the insured tenant's negligence on the leased premises, where the policy provided that the landlord was an additional insured only when and where it faced liability arising from the tenant's acts undertaken in the course of the tenant's operations on the leased premises, and no one had ever sought to hold landlord liable for the fire.

Delos Insurance Company issued a liability policy to restaurateur, Bobby's Focsle (Bobby's). The policy's declarations page listed Bobby's landlord as an additional insured, and the policy's definition's section defined "insured" to include organizations designated on the declarations page. Additionally, the policy contained a "Managers or Lessors" Additional Insured endorsement, which modified the definition of "insured" to include organizations listed on the declarations page "but only with respect to such person or organization's liability which both (1) arises out of the ownership, maintenance or use of that part of the premises leased to you and shown in the Schedule, and (2) occurs on that part of the premises leased to you and shown in the Schedule, and (3) results from and by reason of your act or omission or an act or omission of your agent or employee in the course of your operations at that part of the premises leased to you and shown in the Schedule." The scope of Delos Insurance Company's coverage for the landlord was relevant within the meaning of the policy's "Interinsured Claims and Suits Exclusion" – which precluded coverage for any claims or suits brought against any insured by another insured under the policy. The coverage dispute arose out of a fire at Bobby's, damaging the landlord's property and the property of another nearby business, Arena Yacht. Gemini Insurance Company (Gemini), the property insurer for both the landlord and Arena Yacht, paid their claims – $65,088 to Arena Yacht and $288,259 to the landlord – and then brought a subrogation action against Bobby's, alleging that Bobby's negligence caused the fire. Delos defended Bobby's while contending that the Interinsured Exclusion precluded coverage for Bobby's liability to the landlord. Gemini and Bobby's eventually settled for the full amount of Gemini's claims with Delos's knowledge and consent. Under the terms of the settlement, Delos paid Gemini $65,088 for Arena Yacht's damage, and Gemini agreed not to enforce the remainder of the settlement against Bobby's. Delos and Gemini agreed to litigate Delos's obligations to Bobby's between them.

The trial court defined the issue to be resolved was the applicability of the Interinsured Exclusion, and ruled as a matter of law on stipulated facts that the landlord was not insured and thus the exclusion did not apply.

In affirming, the California Court of Appeal, Second District, explained that the Additional Insured Endorsement to Delos's policy extends coverage to the landlord only when and where it faces liability arising from Bobby's acts and undertaken in the course of Bobby's operations on the leased premises. No one ever sought to hold the landlord liable for damage resulting from the fire. To the contrary, the landlord sought to hold Bobby's liable. The court therefore ruled that the landlord was not an additional insured within the meaning of the Interinsured Exclusion.

UNDER THE PROPER CIRCUMSTANCES, SUBMISSION OF AN INSURANCE CLAIM CAN CONSTITUTE PRE-LITIGATION CONDUCT PROTECTED BY THE ANTI-SLAPP LAW.

In the case styled *People ex rel. Fire Insurance Exchange v. Anapol* (2012) 211 Cal.App.4th 809, 150 Cal.Rptr.3d 224, the Second District, Division 3, held on December 6, 2012, that the fact that some claims filed by counsel on behalf of clients matured into litigation did not bring carriers' action against attorneys, for their alleged submission of false claims for smoke and ash damage arising from several wildfires, and alleged use of "cappers" to obtain insureds willing to pursue such claims, within scope of the anti-SLAPP statute, insofar as the gravamen of the carriers' complaint was "capping" and the submission of false claims only.

Fire Insurance Exchange and Mid Century Insurance Company (collectively the carriers) alleged that an insurance fraud ring engaged in submission of false and/or inflated claims for smoke and ash damage arising from several California wildfires. The carriers brought a *qui tam* action against several members of the alleged fraud ring, including two attorneys who purportedly submitted false insurance claims on the part of the carriers' insureds. The complaint alleged that the attorneys submitted false claims and used cappers to obtain insureds willing to pursue such claims. The attorney defendants brought motions to

strike the complaint under California's anti-SLAPP statute, arguing that their pursuit of insurance claims and acts in obtaining clients constituted pre-litigation conduct protected by their First Amendment right to petition. The trial court denied the motions on the basis that the attorneys had failed to establish protected conduct, specifically relying on authority holding that the submission of insurance claims does not constitute protected conduct under the anti-SLAPP law. The attorneys appealed, arguing that the underlying insurance claims were submitted in expectation of litigation against the carriers for the anticipated bad faith denial of the claims.

In affirming, the California Court of Appeal, Second District, concluded that the defendant attorneys' "bald" assertions that the insurance claims were submitted with the subjective intent that litigation would follow were insufficient, without more, to constitute *prima facie* evidence that the claims constituted pre-litigation conduct. As the attorneys submitted no additional evidence in the case, they failed in their burden to show that the anti-SLAPP statute applied, and their motions were properly denied. The court explained that the anti-SLAPP law protected communications or conduct in furtherance of a person's right of speech or petition, including a statement made before a judicial proceeding or in connection with an issue under consideration or review by a judicial body. The court rejected the attorneys' argument that the submission of an insurance claim constituted protected petitioning conduct under the anti-SLAPP law as both a necessary prerequisite to litigation and a pre-litigation demand letter. Relying upon the case law cited by the trial court, the court noted that submission of documents to an insurer in support of a claim was not pre-litigation conduct when the reports were sent to the insurer to demand performance. Thus, submission of contractual claims in the regular course of business was not an act in furtherance of the right of petition. However, if a claim was instead submitted merely as a necessary prerequisite to expected litigation or was submitted as the equivalent of a pre-litigation demand letter, it could constitute protected petitioning activity. In rejecting the defendant attorneys' arguments, the court noted that the attorneys' subjective intent in submitting the claim did not transfer the claim from a simple claim for payment in the usual course of business into protected pre-litigation conduct. The court also rejected the attorneys' alternative arguments that the submission of the claims constituted protected petitioning activity. The alleged capping and submitting of false claims formed the basis of the carriers' complaint, based on the attorneys' acts, regardless of the motive for which the complaint may have been brought. Similarly, the attorneys' conduct in obtaining clients also did not constitute petitioning activity because, said the court, the attorneys failed to establish that the clients were contacted for anything other than filing claims.

A TRIPARTITE RELATIONSHIP EXISTS WHETHER THE CARRIER RETAINS COUNSEL TO DEFEND OR PROSECUTE AN ACTION ON BEHALF OF ITS INSURED AND COMMUNICATIONS BETWEEN EITHER THE CARRIER OR THE INSURED AND COUNSEL ARE PROTECTED BY BOTH THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE.

In a recent decision captioned *Bank of America, N.A. v. Superior Court (Pacific City Bank)* (2013) 212 Cal.App.4th 1076, 151 Cal.Rptr.3d 526, the Fourth District, Division 3, held on January 15, 2013, that when a carrier retains counsel to defend its insured, a tripartite attorney-client relationship arises among the carrier, the insured, and retained defense counsel and as a consequence, confidential communications between either the carrier or the insured and counsel are protected by the attorney-client privilege, and both the carrier and insured are holders of the privilege; additionally, counsel's work product does not lose its protection when it is transmitted to the carrier.

Fidelity National Financial (Fidelity) insured Bank of America (BofA) under a lender's title policy insuring the priority of a deed of trust against a borrower's home. The policy provided that Fidelity would defend BofA in any litigation involving a covered claim and that Fidelity had the right to prosecute any action to establish the title or the lien of the insured mortgage. Without BofA's knowledge, Pacific City Bank (PCB) had recorded a deed of trust on the same property five days before the recordation of BofA's deed of trust. When PCB sent a notice of trustee sale, BofA tendered the claim to Fidelity, which hired a law firm to prosecute an action by BofA against PCB to protect BofA's security interest. During the litigation, PCB served subpoenas on Fidelity seeking communications between the law firm (hired by Fidelity to defend its insured, BofA) and Fidelity. The trial court denied BofA's motion to quash the subpoenas to exclude communications between the law firm and Fidelity on the grounds of privilege. The trial court held that the tripartite attorney-client doctrine did not apply because the law firm was retained to prosecute the underlying action rather than defending litigation. According to the trial court, Fidelity did not have a "favored position" or "sacred role" in the litigation. BofA and Fidelity then petitioned for writ of mandate or prohibition to challenge the court's order.

Finding that the trial court had abused its discretion, the California Court of Appeal, Fourth District, Division 3, ordered the trial court to grant BofA's and Fidelity's motion to quash. The court disagreed with the trial court's distinction between defending and prosecuting a lawsuit, especially given the nature of a title carrier's duty to defend. The policy obligated Fidelity to defend lawsuits against BofA, but also gave Fidelity the right to prosecute actions to establish the title or lien of the insured mortgage. The court characterized defending actions against the insured and prosecuting actions on behalf of the insured as "kindred duties" addressing the "same

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these facts. As noted by the Court, Section 631 relates only to the manner in which a party can waive the right to demand a jury trial instead of a court trial; it does not prevent parties from avoiding a civil trial altogether by some other means, including settlement or by use of arbitration or other non-judicial forum.

Thus, so long as the parties' intent is clear, and their agreement sufficiently certain to enforce, California law now establishes there is no legal impediment to utilizing "binding mediation" if the parties choose to do so.

In Favor of Flexibility and Finality

The policy reasons in support of binding mediation are numerous.

The "mediation" part affords the parties an opportunity to first voluntarily resolve their disputes with the help of a mutually selected neutral. The "binding" part provides a cost-effective, timely, and efficient mechanism for finality if the voluntary route fails. Indeed, it may provide additional incentive for the parties to work hard to achieve a negotiated agreement to avoid the "finality" piece which is looming.

There is also much to be said for the flexibility of the process itself. Because binding mediation will be based entirely on the parties' agreement, it provides great latitude with regard to which issues will, and will not, be subject to the binding portion of the process. For example, after failed mediation in a contested liability matter, the issue of liability could be submitted for binding decision by the mediator, with the parties to reconvene after that decision to mediate further on the issue of damages. Or when the only issue submitted for binding determination is damages, the parties can choose whether to use a "baseball approach," tasking the mediator to choose either the final demand of the plaintiff or the last offer of the defendant, or instead empower the mediator to choose any number he or she believes is appropriate.

The parties also have the ability to make the process as relaxed or formal as they desire. A joint session can be convened to allow direct and cross examination of witnesses, or the parties can stay in separate session and allow the mediator to convey information. Medical and technical opinions can be submitted by way of report, or experts can be brought to the session for live testimony and questioning. Opening statements and closing arguments can be made or waived. The beauty of fashioning the process to fit a particular case is that the design is limited only by the participants' creativity and parties' informed consent.

On a touchier subject, binding mediation can be a useful tool when counsel and client are having a hard time seeing eye to eye on the relative merits and risks involved in a particular case. The client can often feel his attorney has "gone weak" and isn't doing a good enough job arguing his position. The attorney can become frustrated that the client is not following sound legal advice and recommendations. Having a neutral third party render the decision may redirect client disappointment about the result away from the attorney, and go a long way to restoring the client's trust in counsel's loyalty and skill.

Finally, and perhaps most relevant in the current political climate, binding mediation is a way to get a case resolved efficiently and cost-effectively. In the absence of an arbitration clause governing the dispute, there has been little hope of getting a claim into a binding, non-judicial dispute resolution process. Binding mediation may be just the ticket for parties looking to quickly and inexpensively get a case resolved, one way or the other.

Blasphemous Paradox or Creative Solution?

The answer just depends on who you ask. So long as the parties' intent is clear, and the agreement to submit to binding mediation sufficiently certain, such an agreement may be a useful tool. As long as the parties have given informed consent and the process is handled in a manner consistent with applicable law or court order, the resulting decision should withstand a legal challenge. From a practical standpoint, binding mediation may be the next great trend in the field of alternative dispute resolution, offering a way to help alleviate delays and overcrowding caused by budget woes and resulting courtroom closures. But as with all new ideas, it should not be embarked upon lightly or without a thorough investigation of the myriad issues involved. Because most importantly, those participating in the process should come away believing justice has been served. >

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fundamental concern"— protecting the integrity of the insured's title is the same. Accordingly, the court found "no logical reason why a tripartite attorney-client relationship should exist in one case but not the other." The court also rejected Pacific's contention that a tripartite attorney-client relationship did not exist because Fidelity agreed to provide counsel for BofA subject to a reservation of rights. The court explained that not every reservation of rights creates a conflict entitling an insured to independent counsel. For example, there is no right to independent counsel when the carrier reserves rights to contest coverage on grounds not at issue in the underlying case, such as the insured's failure to notify the carrier in a timely manner, which was the basis for Fidelity's reservation. The court therefore found that the reservation of rights did not create a conflict requiring independent counsel, and the law firm retained by the carrier was not acting as independent counsel. Moreover, even if the law firm served as independent counsel, the attorney-client privilege would still apply to communications among the law firm, BofA, and Fidelity pursuant to California Civil Code § 2860(d). >